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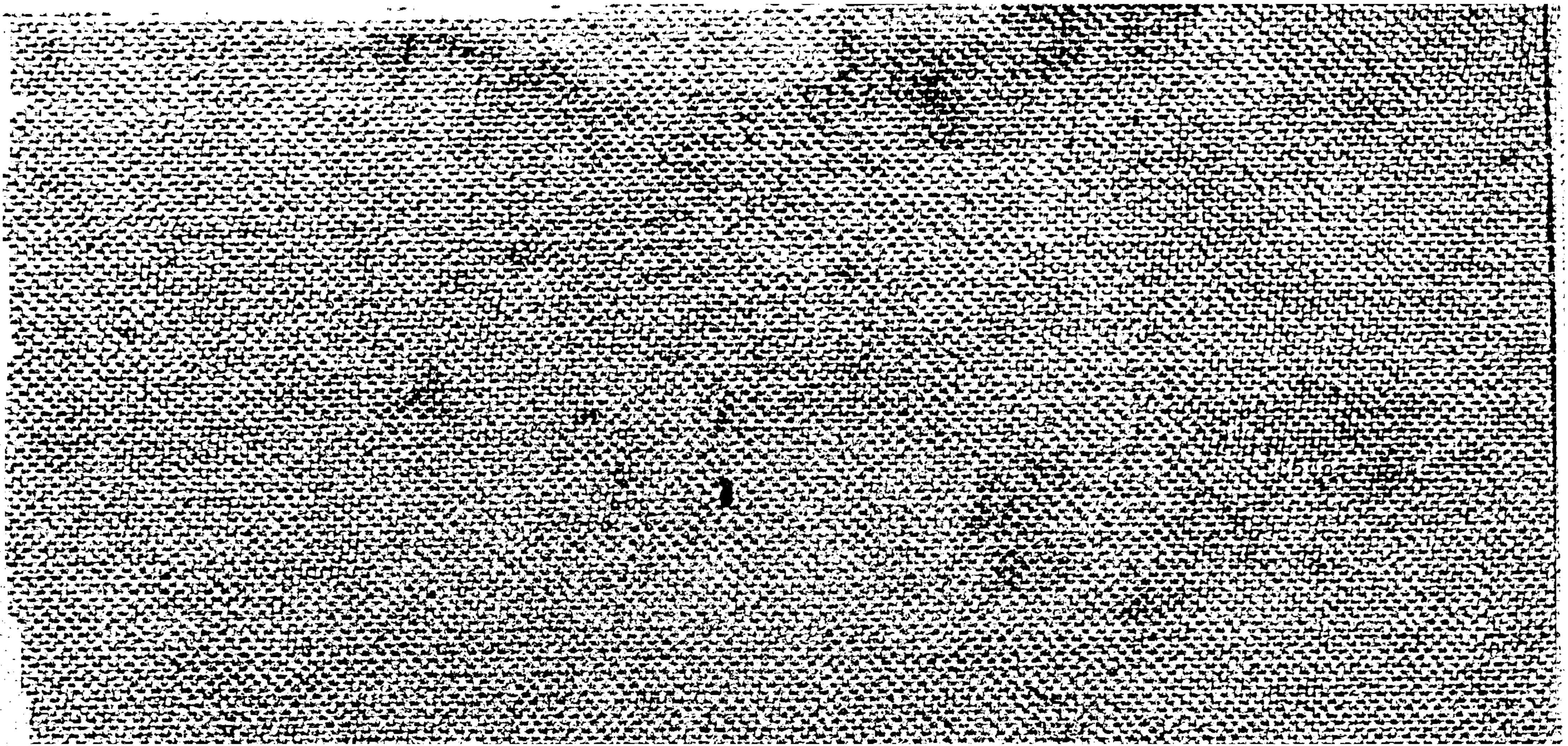

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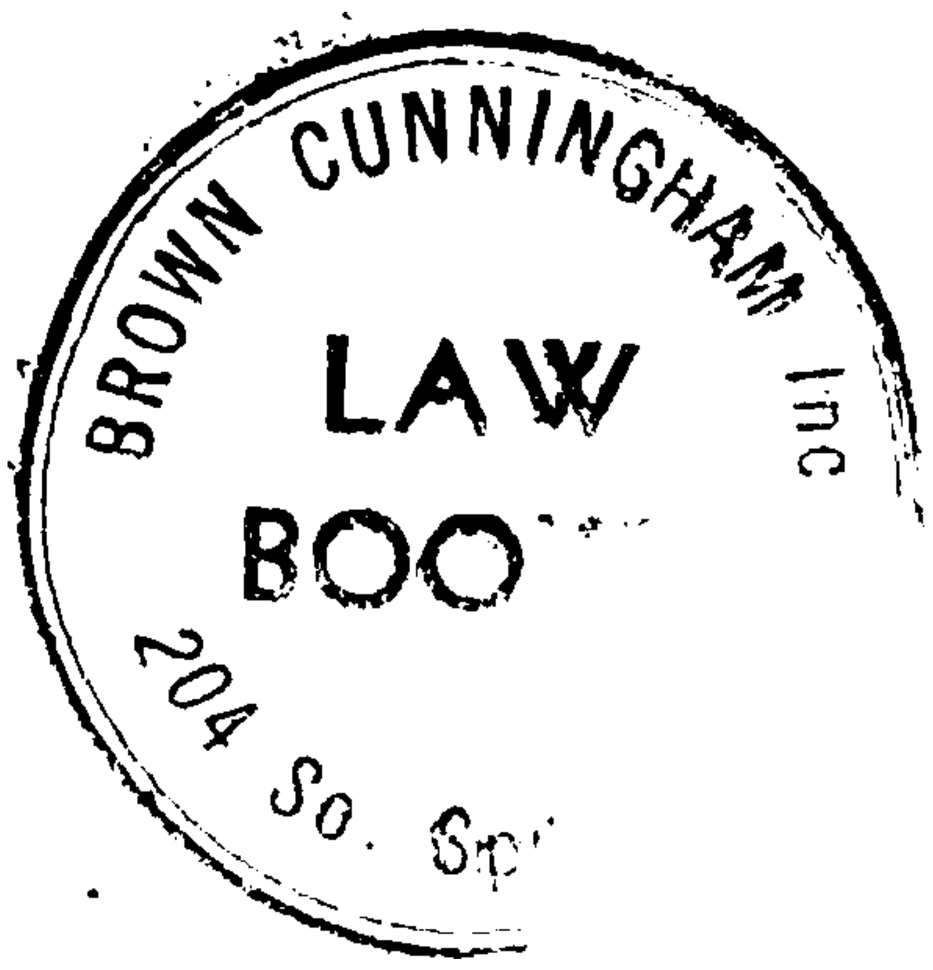
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THE ELEMENTS OF THE LAW

OF

NEGOTIABLE INSTRUMENTS,

BY

JOHN W. DANIEL,
OF THE LYNCHBURG (VA.) BAR, AND
AUTHOR OF "DANIEL ON NEGOTIABLE INSTRUMENTS."

AND

CHAS. A. DOUGLASS,
OF THE BAR OF THE DISTRICT OF COLUMBIA, AND
PROFESSOR OF THE LAW OF NEGOTIABLE INSTRUMENTS IN
GEORGETOWN UNIVERSITY, OF WASHINGTON, D. C.

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TO

JOSEPH J. DARLINGTON, LL. D.,

OF THE BAR OF THE DISTRICT OF COLUMBIA,

ROFESSOR, AUTHOR, AND LAWYER, WHOSE GREAT ABILITY AND EXALTED CHARAC
TER HAVE GIVEN ADDED SPLENDOR TO THE PROFESSION OF THE LAW,
AND WHOSE GENEROUS AID TO STRUGGLING YOUNG LAWYERS
HAS MADE HIM AN INSPIRATION,

THIS WORK

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PREFACE.

The work which follows is designed exclusively for the use of students and instructors in law schools, and it has, therefore, been styled "The Elements of the Law of Negotiable Instruments."

It is based upon the treatise known as "Daniel on Negotiable Instruments," and upon the lectures of Mr. Douglass on that subject in the Law Department of Georgetown (D. C.) University. To the student should be vouchsafed the substantial benefits, on the one hand, of the point of view and professional experience of the lawyer-author, and on the other, of the lecturer's practical appreciation of the usual difficulties attendant upon the study of the law. These were the considerations in mind in determining upon the combined sources of information and material for a student's text-book on this important subject.

Wherever it has been practicable, free use has been made of the text of "Daniel on Negotiable Instruments," including both language and arrangement, but pains have been taken to regulate and apportion the space devoted to the many sub-subjects, as their relative importance, from the standpoint of the student, requires. In addition, the subject-matter has been rearranged and transposed and new matter added; in fine, everything has been done that seemed to the authors necessary to make the subject both intelligible and attractive. The volume contains no notes except the bare citation of the cases, and they have been principally confined to, and carefully selected from, well-considered cases cited in "Daniel on Negotiable Instruments." While it is a radical departure from prevailing methods, it has been esteemed wise to omit in the notes themselves all comments upon, and reference to, the scope and effect of the decisions,

whether in harmony, or in conflict, with the text, preferring to include in the body of the work itself all that is thought necessary for the student's use. The experience, both of teacher and pupil, amply establishes the fact that comments and statements in the notes, especially when in conflict with, or in modification of, the law as announced in the text, are well-springs of confusion, doubt, and difficulty to the student, however faithfully and diligently he may seek to master the subject in hand.

The "New Negotiable Instruments Law," first enacted by the Legislature of New York on May 19, 1897, has become law in nineteen States, and also in the Territory of Arizona and the District of Columbia, and it is destined in the near future to be the uniform law throughout the United States. The full text of this important statute will be found in an appendix to this work.

We are indebted to Mr. E. B. Sherrill, of the Bar of the District of Columbia, for the carefully prepared index and table of cases, and also for valuable assistance given in the preparation of the text.

JNO. W. DANIEL.
CHAS. A. DOUGLASS.

WASHINGTON, D. C., *December* 1, 1902.

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Wyatt *v.* Hodson, 482.
Wyllie *v.* Pollen, 255.
Wynne *v.* Raikes, 285, 286.

Yale *v.* Wood, 9.
Yeager *v.* Falwell, 389.
York *v.* Jones, 434.
Young *v.* Bryan, 347.
v. Durgin, 375.
v. Grote, 280.
v. Harris, 490.
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v. Ward, 400.

Zellner *v.* Cleveland, 120.
Zimmerman *v.* Rote, 439.

THE ELEMENTS OF THE LAW

OF

NEGOTIABLE INSTRUMENTS.

(xxxiii)

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be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth." [1] The first relaxation of this rule was made in respect to bills of exchange, and was gradually extended to notes and other securities, until the rule itself disappeared.

But while all choses in action are now transferable, the negotiable instrument is the only species which carries, by transfer, a clear title and a full measure; and like an instrument under seal, imports a consideration. It has, therefore, three peculiar and distinguishing characteristics:

First. **Respecting the title.**— If a horse, or other personal chattel, or a nonnegotiable instrument, be stolen, no purchaser, however innocent or ignorant of the theft, can acquire title against the true owner, who may at any place, and at any time, identify his property and reclaim it. But if a negotiable instrument, payable to bearer, be stolen, and transferred by the thief to a third person in the usual course of business, before maturity and for a valuable consideration, the person so acquiring it may hold it against the world.

Second. **Respecting the amount.**— If a nonnegotiable note be assigned, the assignee steps into the shoes of the assignor, and if the instrument has been paid, or is subject to any defense or equity against the original maker, they attach to and encumber it into whosesoever hands it may fall. But a negotiable paper carries the right to the whole amount it secures on its face, and is subject to none of the defenses which might have been made between the original or intervening parties, against anyone who acquired it for value, with notice, in the usual course of business and before maturity. It is a circulating credit like the currency of the country, and, before maturity, the genuineness and solvency of the parties are alone to be considered in determining its value. It has been fitly termed "a courier without luggage." [2]

Third. **Respecting the consideration.**—By the common law, an instrument under seal imports a consideration, by virtue

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1 Coke, Litt. 214*a*; Chitty on Bills [*7], 9; Edwards on Bills, 55.

2 Overton v. Tyler, 3 Barr, 346, Gibson, C. J.

of the solemn ceremony of its execution; and no other non-negotiable instrument does. A negotiable instrument, however, by the usages of merchants, *prima facie* imports a consideration. As between immediate parties, the true state of the case may be shown, and the presumption of consideration rebutted. But when the instrument has passed to a *bona fide* holder for value, and before maturity, no want or failure of consideration can be shown.

§ 2. Bills of exchange were probably the first instruments for the payment of money that were accorded a negotiable quality, though promissory notes, being simpler in form, were doubtless used as evidences of debt before bills of exchange came in vogue amongst merchants. Certainly these two securities were recognized as negotiable instruments before any other paper representatives of money or property passed currently from hand to hand in like manner as money; and from them, as fruitful parents, have sprung all the varieties of negotiable instruments now known.

§ 3. **Origin and history of bills.**— In respect to bills of exchange, it is said by Pothier that there is no vestige of them among the Romans, or of any contract of exchange; for though it appears that Cicero directed one of his friends at Rome, who had money to receive at Athens, to cause it to be paid to his son at that place, and that friend accordingly wrote to one of his debtors at Athens, and ordered him to pay a sum of money to Cicero's son, although it is doubtful whether this amounted technically to a bill of exchange.[3]

Chancellor Kent finds warrant for the opinion that bills were used among the Greeks, while Story adheres to a contrary view.[4]

Blackstone says: "This method is said to have been brought into general use by the Jews and Lombards when banished for their usury and other vices, in order the more easily to draw their effects out of France and England into those countries in which they had chosen to reside. But

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3 *Pothier de Change*, note 6.

4 3 Kent Comm., Lect. 44; Story on Bills, § 6, note 4.

the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mogul Empire in China." [5] There is no certainty on the subject, though it seems clear foreign bills were in use in the fourteenth century, as appears from a Venetian law of that period; and an inference drawn from the statute 5 Rich. II, stat. 1, chap. 2, warrants the conclusion that foreign bills were introduced into this country previously to the year 1381." [6] And there is reason to believe that bills of exchange were known in England as early as 1307, since in that year King Edward I ordered certain money collected in England for the Pope, not to be remitted to him in coin or bullion, but by way of exchange (*per viam Cambii*).[7]

§ 4. **Origin and history of promissory notes.**— Promissory notes have as obscure an origin as bills of exchange. There is no doubt that they were in use among the Romans, but they seem never to have acquired those negotiable qualities which now import to them their chief value as instruments of commerce. They were in use upon the continent of Europe before their introduction into England, where they first came in vogue about the middle of the seventeenth century, although it has been thought that they have a more recent origin.

It has been a much debated question whether or not the common law of England recognized the negotiability of promissory notes; and most vigorously was the negative advocated by Lord Holt, who declared that the effort to place them on the same footing as bills of exchange "proceeded from the obstinacy and opinionativeness of the merchants who were endeavoring to set the law of Lombard street above the law of Westminster Hall." This controversy was terminated by the passage of the statute 3 and 4 Anne, chap. 9 [1705] (made perpetual by the statute 7 Anne, chap. 25), which made promissory notes "assignable or indorsable over

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5 2 Bl. Comm. 467.

6 Chitty on Bills [*11], 16.

7 Anderson's History of Commerce, vol. I, 361.

in the same manner as inland bills of exchange are, or may be according to the custom of merchants."

This statute has been adopted in some of the States of the United States, or in its lieu, other statutes prescribing the criteria and conditions of negotiability. By some authorities it is contended that the statute of Anne was only declaratory of their then existing status, while by others the result of Lord Holt's reasoning is concurred in.[8]

SECTION II.

FOREIGN AND INLAND BILLS.

§ **5. Bills of exchange are either foreign or inland,**— foreign, when drawn in one State or country, and made payable in another State or country; inland, when drawn, and made payable, in the same State or country. Inland bills are of later origin than foreign bills, not having been in use in England at a much earlier period than the reign of Charles II. Inland bills, like them, were at first more restricted in their operation than at present, for it was deemed essential to their validity that a special custom for the drawing and accepting them should exist between the towns in which the drawer and acceptor lived; or if they lived in the same town, that such a custom should exist therein.[9] At first, also, effect was only given to the custom when the parties were merchants, though afterward extended, as in the case of foreign bills, to all persons whether traders or not.[10]

§ **6. The chief difference between foreign and inland bills** is this: that the former must be protested in order to charge the drawer, while the latter need not be.[11] But there are other important differences which will be hereafter considered.

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[8] Caton v. Lenox, 5 Rand. 31; Davis v. Miller, 14 Gratt. 18; First Nat. Bank v. Hunt, 25 Mo. App. 170.

[9] Pinkney v. Hall, Ld. Raym. 175; Chitty on Bills [*11, 12]. 16.

[10] Bromwick v. Lloyd, 2 Lutw. 1585.

[11] Daniel on Negotiable Instruments. § 926 *et seq.*

§ 7. **When bills are deemed foreign in England and in this country.**— In England, a bill drawn in Ireland and payable in England is deemed a foreign bill,[12] but one drawn and payable in Great Britain is an inland bill.[13] For the purposes of the law of negotiable instruments, the several States of the United States are foreign to each other.[14]

Thus a bill drawn in New York city, N. Y., and payable in Chicago, Ill., is a foreign bill, while one drawn in Philadelphia, Pa., and payable in Pittsburg, in the same State, is an inland bill of exchange.

§ 8. **Rules of decision of Federal courts.**— In the courts of the United States, the decisions are sometimes in conformity with those of the State courts of last resort in respect to the liabilities of parties to bills and notes, but not uniformly. Where any controversy arises as to the liability of a party to a bill of exchange, promissory note, or other negotiable paper, in one of the Federal courts of the United States, which is not determined by the positive words of a State statute, or by its meaning as construed by the State courts, the Federal courts will apply to its solution the general principles of the law merchant, regardless of any local decision.[15]

§ 9. **The face of the bill does not always disclose its character.**— If the bill does not disclose, on its face, the place where drawn, the omission may be supplied by evidence, but the court will not take judicial cognizance of political divisions of foreign States, and therefore will not conclude from the fact that a given city is named, that the place named is situated in a certain country or State. For example: it has been held that a bill dated "Dublin," the court, without proof, will not presume was dated at Dublin, Ireland, or that a note dated "Philadelphia," was made in

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[12] Mahoney v. Ashlin, 2 B. & Ad. 478.

[13] Amner v. Clark, 2 Cromp., M. & R. 468.

[14] Buckner v. Finley, 2 Pet. 586; Armstrong v. American Exch. Nat. Bank, 133 U. S. 433.

[15] Swift v. Tyson, 16 Pet. 1; Railroad Co. v. Nat. Bank, 102 U. S. 14.

Pennsylvania, or that a bill dated "New Orleans," was drawn in Louisiana.[16]

If the instrument, upon its face, purports to be a foreign bill (although actually drawn and payable in the same country), and innocent third parties take it in the belief that it is what it appears to be, the presumption that it is foreign will be conclusive.[17] As between the original parties and others having notice of the circumstances under which it was drawn, the question would be doubtful, although the better view seems to be that it would be even then held to be a foreign bill.[18]

If a bill be on its face an inland bill, the fact that it was actually drawn and delivered in a foreign State will not divest it of its inland character. The principle is that it is competent for the parties to provide, by agreement, that it shall be governed by the laws of any particular State or country.[19]

SECTION III.

THE EFFECT OF A BILL OF EXCHANGE — WHEN IT IS AN ASSIGNMENT, AND WHEN NOT.

§ 10. Bills of exchange and promissory notes have long been exceptions to the rule of the common law that interdicted assignments of things in action. Courts of equity have for many years discredited the common law rule, and held valid the assignments of a naked possibility,[20] and courts of law, following in the footsteps of equity, now recognize and enforce such assignments brought in the name of the assignor for the benefit of the assignee.[21]

The effect of the drawing of a bill of exchange, upon the

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[16] Kearney v. King, 18 Eng. C. L. 28; Yale v. Wood, 30 Tex. 17; Riggin v. Collier, 6 Mo. 568.

[17] Daniel on Negotiable Instruments, § 12; Lennig v. Ralston, 23 Pa. St. 137.

[18] Daniel on Negotiable Instruments, § 12; Parsons on Notes and Bills, 57.

[19] Strawbridge v. Robinson, 5 Gilman, 472.

[20] 3 Leading Cases in Equity [*652], 307.

[21] Mandeville v. Welch, 5 Wheat. 277; Wheatley v. Strobe, 12 Cal. 98.

rights and interests of the parties in the fund in the hands of the drawee — whether or not it operates as an assignment of the funds — is always a practical, pertinent question.

§ **11. What is the effect, if drawn for the whole amount of the fund in the hands of the drawee.**— If the bill is accepted, it is generally held to constitute an assignment,[22] but the doctrine that an unaccepted bill for the entire debt or fund operates as an equitable assignment thereof is opposed to the current of authority in the United States, and in England as well, it being considered, that the bill of exchange is an independent security resting on the commercial responsibility of the parties thereto.[23] But it is conceded that the bill, whether for the whole of the fund or debt, or only a part, may be evidence to show an assignment; and that with other circumstances indicating that such was the intention, will vest in the holder an exclusive claim to the debt or fund, and bind it in the hands of the drawee after notice.[24] Very slight circumstances in addition to the bill ought to effectuate an equitable assignment; and while the current of authority is undoubtedly otherwise, the better opinion, as it seems to us, is that a bill for the entire amount of a debt or fund should operate as an equitable assignment thereof. The doctrine of equitable assignment is the creature of courts of equity, and the phrase "equitable assignment" is used because, by the technicalities of pleadings at law, no legal assignment can be effectuated.[25]

§ **12. What is the effect of a nonnegotiable order for the whole of the fund.**— It may be regarded as a settled doctrine, that an order founded upon a good consideration, given for a specific debt or fund owing by or in the hands

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[22] Daniel on Negotiable Instruments, § 18; Mandeville v. Welch, 5 Wheat. 277; Buckner v. Sayre, 17 B. Monroe, 754.

[23] Bank of Commerce v. Bogy, 44 Mo. 15; Gramnel v. Carmer, 55 Mich. 201.

[24] First Nat. Bank v. Dubuque S. R. Co., 52 Iowa, 378; Bank of Commerce v. Bogy, 44 Mo. 17.

[25] Daniel on Negotiable Instruments, § 20; First Nat. Bank v. Coates, 8 Fed. 540.

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it has not been accepted, our own view is this: that a non-negotiable order for part of a fund does operate as an equitable assignment *pro tanto* as between the drawer and payee, because obviously so intended. And if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment from the drawer, or by legal process served upon the drawee.[33]

§ 14. In New York there have been numerous cases involving the questions under consideration, and there the doctrine obtains that a bill or check payable generally, does not operate as an assignment of the part of the fund for which it is drawn, unless assented to by the drawee;[34] but that an order for part of a specified fund then due or to become due operates as an assignment, and that the drawee may be compelled by action to apply the fund as directed, after notice of the assignment.[35] In that State the rules of practice are such that the same effect is given to the partial order at law as in equity; and hence we do not observe in the decisions of its courts the distinctions generally taken between legal and equitable assignments.[36]

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[33] Daniel on Negotiable Instruments, § 23; 3 Leading Cases in Equity, 356; Pease v. Landauer, 63 Wis. 20.

[34] Attorney-General v. Continental Life Ins. Co., 71 N. Y. 325; Throop Grain Cleaner Co. v. Smith, 110 N. Y. 90.

[35] Ehrichs v. De Mill, 75 N. Y. 370; Brill v. Tuttle, 81 N. Y. 457.

[36] Morton v. Naylor, 1 Hill, 583.

CHAPTER II.

DIFFERENT KINDS OF NEGOTIABLE INSTRUMENTS.

SECTION I.

DEFINITIONS OF BILLS OF EXCHANGE AND PROMISSORY NOTES, AND THE DIFFERENCES BETWEEN THEM.

§ **15. Bills of exchange.**— A bill of exchange is an open letter addressed by one person to a second, directing him, in effect, to pay absolutely, and at all events, a certain sum of money therein named, to a third person or to any other to whom that third person may order it to be paid; or it may be payable to bearer or to the drawer himself.[1]

The person who draws is called the drawer, the one on whom drawn, the drawee, and to whom payable, the payee.

§ **16. Promissory notes.**— A promissory note is an open promise in writing by one person to pay to the order of another therein named, or to bearer, a specified sum of money absolutely and at all events.[2] The person who makes the note is called the maker, and the one to whom the promise is made, the payee.

The term "holder" is a general word applied to anyone in actual or constructive possession of the bill or note, and entitled in law to recover or receive its contents from the parties to it.

§ **17. Difference between bills and notes.**— In their original structure, a bill of exchange and a promissory note do not strongly resemble each other. In a bill, there are three original parties: drawer, drawee, and payee; in a note only two: maker and payee. In a bill the acceptor is the primary

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[1] For various definitions of a bill of exchange and a promissory note, see Daniel on Negotiable Instruments, § 27, note.

[2] Dobbins v. Oberman, 17 Neb. 165; Daniel on Negotiable Instruments, § 28.

debtor. In a note the maker is the only debtor. But if the note be transferred to a third party by the payee, it becomes strikingly similar to a bill. The indorser becomes then, as it were, the drawer; the maker, the acceptor; and the indorsee, the payee.[3]

SECTION II.

COUPON BONDS.

§ **18.** Coupon bonds are issued by the Federal Government, by the States, by territorial governments or local divisions thereof, by municipalities, by railroad, canal, and steamboat companies, and all manner of trading corporations. A vast portion of the wealth of the country is represented in "coupon bonds," and the subject is one of growing importance.

§ **19. Description of coupon bonds.**— A coupon bond is an instrument complete in itself, and yet composed of several distinct instruments, each of which is in itself as complete as the whole together. As originally issued, the "coupon bond" consists of (1) an obligation to pay a certain amount of money at a future day; and (2) annexed to it is a series of coupons, each one of which is a promise for the payment of a periodical instalment of interest. The contract between the payor and the holder is contained in the bond, but the coupons are furnished as convenient instruments to enable the holder to collect interest without presenting the bond, by separating and presenting the proper coupon; and it also enables him to anticipate his interest by negotiating the coupon which represents it, to another person, at any time before its maturity.[4]

§ **20.** The term "coupon" is derived from the French "*couper*," meaning "to cut," and has been well defined to be "one of the interest certificates attached to transferable bonds, and of which there are usually as many as there are payments to be made — so called, because it is *cut off* when

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[3] Daniel on Negotiable Instruments, § 29.

[4] Daniel on Negotiable Instruments, § 1488.

it is presented for payment. They may be severed and negotiated before maturity of the interest they represent, and thus pass as separate and independent negotiable instruments." Coupons are substantially a minute repetition of what is contained in more elaborate terms in the bond itself. They are more closely assimilated to promissory notes than to bank notes, bills of exchange, or checks, although in their formal wording they may sometimes less resemble them.[5]

§ **21. Negotiability of coupon bonds.**— Since the seal does not affect the negotiability of such securities issued by corporations and States, there is no reason why the same principle should not be extended to them when issued by individuals. As a general rule a bond is a sealed instrument, but it does not follow that it always is or must be. While it is usual that such instruments are authenticated by a corporate seal, the old idea that States and corporations can only bind themselves under seal is utterly obsolete.

There no longer remains a shadow of doubt that the coupon bonds of the United States, of the several States, and of municipal and other corporations, when expressed in negotiable words, are as negotiable to all intents and purposes as bills of exchange or promissory notes.[6]

§ **22. Municipal bonds.**— If the bonds are issued by a municipal or public corporation, the purpose must be a public one. In the United States the following propositions are sustained by the weight of authority:

1. That whenever a municipal corporation has power conferred to contract a debt, borrow money, or issue a negotiable security, it is to be regarded *quoad hoc* as a private corporation.

2. That a municipal corporation has implied power to contract a debt whenever necessary to carry out any power conferred upon it.

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[5] Daniel on Negotiable Instruments, §§ 1489, 1490.

[6] Daniel on Negotiable Instruments, § 1500; Morgan v. United States, 113 U. S. 491.

3. That whenever it may contract a debt, it may borrow money to pay it.

4. That whenever it may contract a debt or borrow money, it may issue its negotiable coupon bonds for its payment.[7]

§ 23. As to what purposes are public.— The construction and grading of streets;[8] the construction of waterworks;[9] of a bridge;[10] of a town hall;[11] gas works;[12] markets;[13] the providing of fire engines;[14] the laying out of cemeteries,[15] are proper objects of municipal care, and undoubtedly the Legislature may authorize the municipality to contract with reference to them, to borrow money for the purpose of effecting those objects, and to issue its negotiable securities therefor.[16] But the loaning of money to enable citizens to rebuild their burned houses,[17] to equip and furnish manufacturing establishments of individuals,[18] to construct saw or grist mills[19] (unless such mills be made public institutions, in which case it would be different[20]), to improve a water privilege and manufacture lumber,[21] to establish a citizen in business,[22] to provide destitute citizens with provisions and grain for seed and feed,[23] would not be within the scope of public purposes, and the Legislature could confer no authority to subscribe to such objects.

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7 Daniel on Negotiable Instruments, § 1527*a*.

8 Rogers v. Burlington, 3 Wall. 362.

9 Hale v. Houghton, 8 Mich. 458.

10 Commissioners v. Chandler, 96 U. S. 205; United States v. Dodge County, 110 U. S. 156.

11 Greeley v. People, 60 Ill. 19.

12 City of Aurora v. West, 9 Ind. 74.

13 State v. Madison, 7 Wis. 688.

14 Robinson v. St. Louis, 28 Mo. 488.

15 Mills v. Gleason, 11 Wis. 470; Robinson v. St. Louis, 28 Mo. 488.

16 1 Dillon on Municipal Corporations, § 66.

17 Lowell v. Boston, 111 Mass. 454.

18 Loan Assn. v. Topeka, 20 Wall. 655.

19 Osborne v. Adams County, 109 U. S. 1.

20 Township of Burlington v. Beasley, 94 U. S. 314.

21 Weismer v. Village of Douglass, 4 Hun, 211.

22 Cooley on Constitutional Limitations, 494.

23 State *ex rel.* Griffith v. Osawkee Township, 14 Kan. 418.

Whether or not the construction of a railroad or other highway is a public purpose to which a municipal corporation may be authorized to contribute is a much debated question. The Supreme Court of the United States, in numerous decisions, has affirmed that it is, and so likewise have many of the State courts of last resort.[24]

SECTION III.

BANK NOTES.

§ 24. Bank notes or bank bills (as they are equally as often called) are the promissory notes of incorporated banks, designed to circulate like money, and payable to bearer on demand.

The terms "bank notes" and "bank bills" are of the like signification, and for the purposes of interpretation, both in criminal and civil jurisprudence, are equivalent and interchangeable.

In form and substance they are promissory notes, and they are governed by very many of the principles which apply to the negotiable notes of individuals given in the course of trade. But they are designed to constitute a circulating medium, and this circumstance imparts to them peculiar characteristics, and essentially varies the rules which govern promissory notes in general. They have been held not securities for money, but money itself.[25]

§ 25. Chief characteristics of.— Bank bills are (1) always payable on demand;[26] (2) usually payable to bearer, though sometimes expressed to be payable to a person named or bearer;[27] (3) a lawful tender in payment of debts, unless objected to because they are not money.[28]

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[24] Railroad Co. v. County of Otoe, 16 Wall. 667; Harter v. Kernochan, 103 U. S. 568; Knox County v. Aspinwall, 21 How. 539; Daniel on Negotiable Instruments, § 1523 and cases cited in note.

[25] Southcot v. Watson, 3 Atk. 226; Daniel on Negotiable Instruments, § 1664.

[26] Daniel on Negotiable Instruments, § 1666.

[27] Daniel on Negotiable Instruments, § 1665.

[28] Daniel on Negotiable Instruments, § 1672*a*.

Bank notes are not, legally speaking, money, but in a popular sense are often spoken of as money, and are conventionally used in its stead with the like effect.[29]

SECTION IV.

CERTIFICATES OF DEPOSIT.

§ 26. Definition.— A certificate of deposit is a receipt of a bank or banker for a certain sum of money received upon deposit, and it is generally framed in such a form as to constitute a promissory note, payable to the depositor, or to the depositor or order, or to bearer.

It appears to have been at an early day the practice of the goldsmiths in England, who generally engaged in the business of banking, to give receipts to their customers for moneys deposited with them, in the form of promissory notes payable to the bearer on demand, or to the depositor or order.[30] And the statute of Anne placed them, as other promissory notes, on the same footing as bills of exchange.[31] Thus originated the instrument now so commonly used, and called a certificate of deposit, which is, in short, generally a promissory note for the payment of an amount which it certifies to be deposited in bank.

§ 27. Negotiability of.— It was once questioned whether or not certificates of deposit are negotiable, but there is now no doubt that they are, where expressed in negotiable words. This view has been adopted by the Supreme Court of the United States.[32]

In order, however, to be negotiable, a certificate of deposit must possess the requisite features of certainty in respect to parties, and time and mode of payment; and the same causes which deprive bills and notes of negotiability would affect it in like manner. Thus, if payable "in cur-

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[29] Daniel on Negotiable Instruments, § 1672.

[30] Nicholson v. Sedgwick, 1 Ld. Raymond, 180; Chitty on Bills [*522], 591.

[31] 3 and 4 Anne, chap. 9.

[32] Miller v. Austin, 13 How. 218.

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bill should have funds in the hands of the drawee — a check in such case would be a fraud." [37]

§ **29. (1) A check is a draft or order.**— A bill is also a draft or order; and it is often said that a check is, in legal effect, a bill of exchange drawn on a bank or banking house, with some peculiarities.[38] In some cases it is called a bill payable on demand,[39] and in others an inland bill, or in the nature of an inland bill, payable on demand;[40] and the expression that a check is "like a bill" has been criticized on the ground that "*nihil simile est idem*," whereas "checks are bills, or rather bill is the genus, and check is a species." [41] In form a check is a bill on a banking house, and it is perfectly correct to say that it is a bill with some peculiarities, or in other words, a species of bill of exchange.

§ **30. (2) It is absolutely necessary that the draft, in order to be a check, should be drawn upon a bank or banker.**— Upon this point the authorities are agreed.[42] A bill may also be drawn upon a banker; and, therefore, while it is necessary that a check should be so drawn, that alone does not distinguish it. It does not seem necessary that the drawee, when an individual, should be described as a banker; and an order addressed simply to "Messrs. A. & B.," has been held a check, it being proved that they were bankers,[43] although on sound principle it would seem that the instrument should not be so considered unless its face showed that it was drawn on a banking house.

§ **31. (3) A check purports to be drawn upon a deposit.**— It is frequently said a check is drawn upon a deposit

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[37] Merchants' Bank v. State Bank, 10 Wall. 647.

[38] Billgerry v. Branch, 19 Gratt. 418; Cruger v. Armstrong, 3 Johns. Cas. 5; State v. Crawford, 13 La. Ann. 301.

[39] Harker v. Anderson, 21 Wend. 372; Edwards on Bills, 396.

[40] Merchants' Bank v. Spicer, 6 Wend. 445; Purcell v. Allemong, 22 Gratt. 742.

[41] Matter of Brown, 2 Story, 502.

[42] Espy v. Bank of Cincinnati, 18 Wall. 620; Bowen v. Newell, 8 N. Y. 195; Northwestern Coal Co. v. Bowman, 69 Iowa, 152.

[43] Planters' Bank v. Kesee, 7 Heisk. 200.

in the banker's hands;[44] and the fact that it is so drawn has been held necessary to constitute the draft a check.[45] But this cannot be the true criterion. It is not the fact that the order is actually drawn on a deposit, but the fact that it purports to be so drawn, which constitutes it a check; and it is more accurate to say that it is upon its face a draft upon a deposit.[46] To hold otherwise would authorize the construction of a written contract by the light of an extraneous fact of which the holder had no notice. If there were no deposit, it would be a fraudulent check — but a check, nevertheless — and we cannot conceive of a wider departure from principle than to hold that the fraud varied the nature of the instrument itself.[47]

In the case of Merchants' Bank v. State Bank, to which reference has already been made, a contrary principle was announced, but, for the reasons herein assigned, the decision in this particular does not seem to be consonant with correct principle.

§ 32. **(4) A** check **must be for the payment at all events of a certain sum of money.**— In this respect it does not differ from other negotiable instruments; and though, perhaps, it might still be termed a check, although not payable in money, by which is meant the legal tender currency of the country, it would certainly not be negotiable if expressed to be payable "in bank bills" or "in currency,"[48] or if it lacked words of negotiability,[49] or were deficient in any of the characteristics in respect to certainty in fact and time of payment and party to whom payment is to be made.[50]

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[44] Morrison v. Bailey, 5 Ohio St. 13; Espy v. Bank of Cincinnati, 18 Wall. 620.

[45] Planters' Bank v. Kesee, 7 Heisk. 200.

[46] Champion v. Gordon, 70 Pa. St. 476; Deener v. Brown, 1 MacArthur, 350.

[47] Merchants' Bank v. State Bank, 10 Wall. 647.

[48] Bank of Mobile v. Brunn, 42 Ala. 108; Little v. Phœnix Bank, 2 Hill (N. Y.) 425.

[49] Partridge v. Bank of England, 9 Q. B. 396.

[50] Daniel on Negotiable Instruments, § 1570.

§ 33. **(5) A check is payable to a certain person therein named, or to him or his order, or to bearer.**—There is no common law obligation, according to the English authorities, upon a bank to pay checks other than those payable to bearer, it being considered that the bank has a right to require that it should not run the risk of mistaking the signature of the party to whose order it is payable, and thus becoming responsible in the event of its turning out to be a forgery;[51] and this has led some text writers and judges to declare that a check must be payable to bearer.[52] But the custom of banks for years (and it prevails everywhere, certainly in this country) is to pay checks drawn payable to order, and as to the law in the United States, it has been properly said that the opposite doctrine "is unsupported either by reason or authority." [53]

§ 34. **(6) A check is payable instantly on demand.**—This is, as we conceive, the touchstone by which a check is tested.[54] Usually, no time of payment is expressed upon its face, but all commercial instruments in which no time of payment is expressed are understood to be, and impliedly are, payable on demand; and when so payable by implication, or in express terms, they are payable instantly, without the allowance of grace, which pertains to those payable on a particular day.[55] The whole theory and use of a check points to its immediate payability as its distinguishing feature, and its name imports it. A person deposits money with his bank or banker, where it is subject at any time to his order. By an order he appropriates so much of it to another person, and the bank or banker, in consideration of its temporary

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[51] Bellamy v. Majoribanks, 8 Eng. L. & Eq. 519.

[52] Byles on Bills [*13], 84 (Sharswood's ed.); Chitty on Bills [*511], 578; Woodruff v. Merchants' Bank, 25 Wend. 672.

[53] Dodge v. National Exch. Bank, 30 Ohio St. 8.

[54] Harrison v. Nicollet Nat. Bank, 41 Minn. 488; Merchants' Nat. Bank v. Ritzinger, 118 Ill. 486; Georgia Nat. Bank v. Henderson, 46 Ga. 496; Northwestern Coal Co. v. Bowman, 69 Iowa, 152; Daniel on Negotiable Instruments, § 1572.

[55] Daniel on Negotiable Instruments, § 617; Merchants' Bank v. State Bank, 10 Wall. 647.

use of the money, agrees to pay it in whole, or in parcels, to the depositor's order when demanded.[56] But he does not agree to contract to pay at a future day by acceptance, and the depositor cannot require it. It follows that a check is not entitled to grace.[57] And the preponderance of authority sustains the view that if the instrument is not immediately payable, it is classed as a bill of exchange.[58]

§ **35. Certification of** checks.— The holder has no right to demand from the bank anything but payment of the check. And the bank has no right, as against the drawer, to do anything else but pay it. Consequently there is no such thing as acceptance of checks in the ordinary sense of the term. For acceptance ordinarily implies that the drawer requests the drawee to pay the amount at a future day, and the drawee "accepts" to do so, thereby becoming the principal debtor, and the drawer being his surety. But still, by consent of the holder, the bank may enter into an engagement quite similar to that of acceptance, by certifying the check to be "good" instead of paying it.[59]

§ **36. Effect of certification.**— By certifying a check (1) the bank becomes the principal and only debtor; (2) the holder by taking a certificate of the check from the bank, instead of requiring payment, discharges the drawer;[60] (3) and the check then circulates as the representative of so much cash in bank, payable on demand to the holder. Such in brief is the effect of the certification of a check. It has been said to be, and obviously is, "equivalent to acceptance"[61] in respect to the obligation it creates upon a bank;

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[56] Goodwin v. American Nat. Bank, 48 Conn. 550; Daniel on Negotiable Instruments, § 1572.

[57] Morse on Banking, 243; 2 Parsons on Notes and Bills, 68, 69; Daniel on Negotiable Instruments, § 1575.

[58] Harrison v. Nicollet Nat. Bank, 41 Minn. 488; Bowen v. Newell, 5 Sandf. (N. Y.) 326; Daniel on Negotiable Instruments, § 1574.

[59] Daniel on Negotiable Instruments, § 1601.

[60] Boyd v. Nasmith, 17 Ont. 42, citing Daniel on Negotiable Instruments, § 1601*a*.

[61] Merchants' Bank v. State Bank, 10 Wall. 647.

but it would be confounding terms to regard it as altogether the same thing in its effect upon the relations of the parties.

The certification by a bank of an acceptance made payable at its counter by one of its customers, has the same effect and imports the same obligation on the part of the bank as the like certification of a check drawn upon it.[62] It is a short-hand certificate of deposit.[63]

§ 37. **Holder taking certified check discharges drawer.**— The holder, by taking a certificate of the check instead of payment, discharges the drawer. This results from what has been already said. If the bank refuses payment, the drawer should be notified. But if the holder receives something else in lieu of payment, it is the same as payment; and as the drawer cannot legally withdraw the funds after checking on them, it would be unjust that they should be held at his risk or his liability on the check extended.[64] The indorser of a check who is a new drawer would also ordinarily be discharged if the holder had it certified instead of requiring payment; but if the indorser request or consent to the certification, this rule would not apply;[65] and if the holder of a certified check indorse it, his indorsee may hold him liable as well as the bank.[66]

§ 38. **Form of certification, and by whom made.**— No particular words are essential to a legal certification of a check — it is usual to use the word "good"[67] — it is sufficient if the names or initials of the proper officer is written on, or across, the face of the check.[68] In England, by statute, a distinct promise, written and signed, is requisite. In the United States, some authorities hold that a verbal statement

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[62] Flour City Nat. Bank v. Traders' Nat. Bank, 42 Hun, 244.

[63] Thomas v. Bank of British North America, 82 N. Y. 1; Farmers' Bank v. Bank of Allen County (Tenn.), 12 S. W. 545.

[64] First Nat. Bank v. Leach, 52 N. Y. 350; Morse on Banking, 382; Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 197.

[65] Mutual Nat. Bank v. Rotge, 28 La. Ann. 933.

[66] Mutual Nat. Bank v. Rotge, 28 La. Ann. 933; Daniel on Negotiable Instruments, § 1604.

[67] Barnet v. Smith, 10 Fost. 256.

[68] Morse on. Banking, 284.

(if communicated) that the check is good is tantamount to certification,[69] while the Supreme Court of the United States announces the proposition that such verbal certification, even when communicated, would not bind the bank further than as to the genuineness of the drawer's signature and the state of his account.[70] The cashier has implied authority to certify checks, and likewise the board of directors, or any other officer specifically authorized.[71]

§ 39. Stale checks.— A check is payable instantly on demand; and should be presented within a day when the payee receives it in the place where drawn, and forwarded by the next day, when forwarding is necessary, in order to preserve the payee's recourse against the drawer, in the event of a failure of the bank.[72] But if the bank remains solvent the holder may retain the check as long as he pleases, and hold the drawer liable until the time for suit is ended by the statute of limitations.[73] But while age cannot invalidate a good check (unless the limitation has applied), and the fact that it was dishonored when transferred, and that presentment was delayed, does not lessen the drawer's liability,[74] unless he has suffered loss;[75] yet the lapse of a long period from its date before its payment, is a circumstance so out of the ordinary course of business that it ought to arouse suspicions and excite inquiry. And the bank paying, or the party receiving such a check, acts at his peril.[76]

§ 40. Right of holder of uncertified check to sue bank.— This is an unsettled question, but the weight of authority

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[69] Bank v. Pettel, 41 Ill. 492; Carr v. National Secy. Bank, 107 Mass. 48.

[70] Espy v. Bank of Cincinnati, 18 Wall. 621.

[71] Merchants' Bank v. State Bank, 10 Wall. 648; Claflin v. Farmers' Bank, 25 N. Y. 293; Clarke Nat. Bank v. Bank of Albion, 52 Barb. 592; Cooke v. State Nat. Bank, 52 N. Y. 115; Farmers & Mechanics' Bank v. Butchers, etc., Bank, 14 N. Y. 624; Daniel on Negotiable Instruments, §§ 1609–1611.

[72] Daniel on Negotiable Instruments, § 1590 *et seq.*

[73] Thompson on Bills, 118; Daniel on Negotiable Instruments, § 1632.

[74] Cowing v. Altman, 79 N. Y. 168.

[75] Daniel on Negotiable Instruments, § 1590.

[76] Daniel on Negotiable Instruments, § 1632.

in this country and in England supports the view that such suit cannot be maintained. The courts of last resort in South Carolina, Louisiana, Illinois, Missouri, and Kentucky, and possibly other States, in well considered cases adhere to the view that the check holder can maintain such a suit,[77] while the courts of very many States have taken the contrary view. The Supreme Court of the United States has, in a number of decisions, adopted the latter, but it has qualified its opinion by remarking: "It may be if it could be shown that the bank had charged the check on its books against the drawer and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex aequo et bono* would be applicable, as the bank having assented to the order, and communicated its assent to the paymaster (the drawer), would be considered as holding the money to the plaintiff's use; and therefore under an implied promise to pay it on demand."[78] And in Pennsylvania the exception thus suggested is established.[79] The general doctrine, as announced by the United States Supreme Court, is supported by the English cases.[80]

§ 41. Damages for improper dishonor of check.— Of course the check holder may sue the drawer of the check on its dishonor. The depositor may always recover nominal damages from the bank improperly dishonoring his check, and a trader may recover substantial damages. If not a trader, the depositor would have to allege and prove special injury.[81] An agent who has put to his private account funds

[77] Fogarties v. State Bank, 12 Rich. Law (S. C.), 518; Gordon v. Mulcher, 34 La. Ann. 608; Bank of America v. Indiana Bkg. Co., 114 Ill. 483; Roberts v. Austin, 26 Iowa, 316; Coates v. Doran, 83 Mo. 337; Lester v. Given, 8 Bush. 358.

[78] Bank of Republic v. Millard, 10 Wall. 152; First Nat. Bank v. Whitman, 94 U. S. 343.

[79] Seventh Nat. Bank v. Cook, 73 Pa. St. 485; Saylor v. Bushong, 100 Pa. St. 23.

[80] Hopkinson v. Forster, 18 Eq. Cas. L. R. 74. For full discussion of the cases *pro* and *con*, see Daniel on Negotiable Instruments, § 1635 *et seq.*

[81] Rolin v. Stewart, 14 C. B. 607.

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ereign power of one of the United States, and designed to pass as currency and circulate as money.

The nature of this class of negotiable instruments, and the object and spirit of the constitutional restriction, first received a judicial exposition in the case of Craig v. State of Missouri.[84] In that case it appeared that the State of Missouri, with a view to relieve the necessities of the times, established loan offices to loan certain sums to citizens, taking security by mortgage redeemable in instalments.

SECTION VII.

QUASI-NEGOTIABLE INSTRUMENTS.

§ **44.** The phrase *quasi*-negotiable has been termed an unhappy one; and certainly it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still it describes better than any other short-hand expression the nature of those instruments which, while not negotiable in the sense of the law merchant, are so framed and so dealt with, as frequently to convey as good a title to the transferee as if they were negotiable.

Very frequently by application of the principles of estoppel, and to effectuate the ends of justice and the intention of the parties, the courts decree a better title to the transferee than actually existed in his transferrer; and the result reached in many cases is the same as would be reached if the instrument were negotiable.[85]

§ **45. Nature of certificates of stock.**— A share in the capital stock of a corporation is not a debt, nor money, nor a security for money, but it is a species of incorporeal personal property.[86] The capital stock of the corporation is so much money, or property assessed at money valuation, which is divided into a number of shares, which shares are the holder's interest in the corporate estate. The stock of the corporation is generally raised by mutual subscription of

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84 Craig v. State of Missouri, 4 Pet. 411.

85 Railroad Co. v. Howard, 7 Wall. 415.

86 Allen v. Pegram, 16 Iowa, 173.

the members in the first instance, and its amount is regulated by the statutory provisions by or under which the corporation is chartered. The persons interested in the corporation are termed shareholders, or stockholders; and certificates of stock are generally issued to them by the corporate authorities of the muniments of their title to a proportionate part of the profits of the corporation, and as evidence of their right to participate in its concerns. Unless otherwise provided by statute, the shares in the corporation are generally deemed personal estate.[87]

The certificate of stock is the customary and convenient evidence of the holder's interest in the corporation which issues it, but in the absence of legal provisions requiring it, no certificate of stock is necessary to attest the rights of the shareholder.[88]

§ 46. Transfer of certificates of stock.— As between transferrer and transferee of a stock certificate,— It is very well settled that, in the absence of statutory restrictions, the beneficial interest passes by assignment, and delivery of the certificate, as in the case of any other species of personal property, or chose in action, no particular formality being necessary to invest the transferee with the right and title of the transferrer, as between the parties to the transfer.[89] The equitable title passes as between the immediate parties, whatever may be the rights of others in the premises.[90] And, as a general rule, statutory restrictions do not affect the immediate parties to the transfer, being designed for other purposes.

§ 47. As between transferee of certificate and creditor of transferrer.— It would seem that any *bona fide* assignment of the stock for value would effectually pass the transfer-

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[87] Hutchins v. State Bank, 12 Metc. (Mass.) 421; Payne v. Eliott, 54 Cal. 339; Daniel on Negotiable Instruments, § 1708*a*.

[88] Chester Glass Co. v. Dewey, 16 Mass. 94; Agricultural Bank v. Burr, 24 Me. 256.

[89] Daniel on Negotiable Instruments, § 1708*b*.

[90] Johnson v. Underhill, 52 N. Y. 203; Johnston v. Laflin, 103 U. S. 804; Gilbert v. Iron Mfg. Co., 11 Wend. 628.

rer's interest therein, so far as to supersede the right of an attachment or execution creditor to levy upon it for a debt due by the transferrer. For whether such assignment vest the legal or equitable interest of the assignor in the assignee, no property right of the assignor remains that is subject to legal process; and the provisions of corporate charters that no transfer of stock shall be valid or effectual until entered or registered upon the books of the corporation, are manifestly designed for the security of the corporation itself, and of third persons taking transfers of stock without notice of any prior equitable transfer, and are not made with reference to the rights of creditors of a stockholder.[91] This is in accordance with the general principles applicable to all manner of equitable assignments of personal property.

§ 48. **As between the transferee of a certificate of stock, and a third party** who has purchased the shares, the better opinion is that a *bona fide* transfer of the certificate carries with it the transferrer's interest in the stock, and that a subsequent purchaser who simply relies on the books of the corporation for information as to who are stockholders, and who buys the shares without taking the certificate, does so at his peril. The certificate is the muniment of title. It is generally dealt with as the representative of the proportionate interest it assures; and if not in possession of the party offering to sell the shares, a purchaser would be put upon inquiry to ascertain the true condition of things. And on the other hand, a purchaser of the certificate from one whom it testifies to be a shareholder, would have a right to suppose that no one would have bought the shares without taking the customary evidence of title.[92] If the corporation should actually transfer the shares upon its books to a subsequent purchaser without surrender of the certificate, it would act wrongfully and would be bound to

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[91] Black v. Zacharie, 3 How. 483; Newberry v. Detroit Iron Co., 17 Mich. 141; Daniel on Negotiable Instruments, § 1708*e*.

[92] People's Bank v. Gridley, 91 Ill. 457; Sabin v. Bank of Worcester, 21 Me. 353; Pinkerton v. Manchester R. Co., 42 N. H. 424.

issue certificates to the prior purchaser, who had acquired the stock by transfer of the certificate in due course.[93]

§ 49. Usual methods of transfer of stock.— On the back of the certificates there is generally a printed form of sale and assignment, with an irrevocable power of attorney in blank, authorizing the unnamed person to do all things requisite to perfect the transfer on the books of the corporation. When such formal assignment, and power of attorney in blank, is signed by the shareholder, and the certificate is delivered therewith, an apparent ownership in the shares represented is created in the holder. And the general principle sustained by the great weight of authority, as well as of reason, is that when the owner of a certificate of stock with such a power of attorney in blank thereon written, or thereunto attached, intrusts it to an agent with power to deal therewith, a *bona fide* purchaser for value without notice will be protected in his acquisition of the certificate, although the agent to whom it has been intrusted has diverted it from the purposes for which it was put in his charge, or has been guilty of a fraud or breach of trust in reference thereto. This doctrine does not rest upon the idea that the certificate of stock is a negotiable instrument; but upon the equitable principle that where a person confers upon another all the *indicia* of ownership of property, with comprehensive and apparently unlimited powers in reference thereto, he is estopped to assert title as against a third person, who, acting in good faith, acquires it for value from the apparent owner.[94]

§ 50. Bills of lading, their nature.— A bill of lading may be defined to be a written acknowledgment by the master of a ship, or the representative of any common carrier, that he has received the goods therein described for the voyage or journey stated, to be carried upon the terms and delivered to the persons therein specified. It is at once a

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[93] Cushman v. Thayer Mfg. Co., 76 N. Y. 267; Daniel on Negotiable Instruments, § 1708*f*.

[94] Johnston v. Laflin, 103 U. S. 800, and cases cited in note to Daniel on Negotiable Instruments, § 1708*g*.

receipt for the goods which renders the carrier responsible as their custodian, and an express written contract for their transportation and delivery. And to facilitate commercial transactions, it has grown to be regarded as the symbolical representative of the goods which it describes; and its transfer carries with it such rights as the party in possession of the goods could transmit by actual corporeal transfer of the goods themselves.[95]

§ **51. Analogous to negotiable instruments.**— The idea that bills of lading are negotiable arose from the use to which they were appropriated in the transfer of goods purchased, before they were delivered to the purchaser, or before they were paid for; but it will be seen that their peculiar properties are attributable rather to a liberal application of the doctrine of equitable estoppel for the benefit of trade, than to any custom or statute which placed them upon the footing of negotiable instruments,[96] for both of these sources of negotiability are wanting. The consignor of goods shipped takes from the master of the ship a bill of lading, and sending it to the consignee who has ordered the goods, draws upon him by bill of exchange for the purchase money. Before the goods reach their destination the consignor, who in the case instanced is the vendor of the goods, learns that the vendee is insolvent; and to prevent the injustice which would be done, if, in consequence of the vendee's insolvency, and while the price is yet unpaid, they were to be seized upon in satisfaction of his liabilities, the law confers upon the vendor the right to stop the goods *in transitu*, and to retain them until the whole purchase money is paid.[97]

But suppose the consignee has received the bill of lading of the goods, deliverable to him or his assigns, or indorsed to him or his assigns, by the consignor, and has assigned the bill by indorsement to a *bona fide* third party, then the vendor's right to stop the goods *in transitu* and hold them as security for the purchase money is defeated, and the as-

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95 Daniel on Negotiable Instruments, § 1728.

96 Security Bank v. Luttgen, 29 Minn. 366.

97 Gibson v. Carruthers, 8 M. & W. 336.

signee of the bill acquires as perfect a title to the goods, although they have not reached the buyer's hands, as if they had actually passed through his hands and been delivered bodily to him. This was decided in the leading case of Lickbarrow v. Mason,[98] and may now be regarded as the settled law of England and of the United States.[99] But this capacity of the bill of lading for transferring the right of property, under these circumstances, does not imply that it is a negotiable instrument to all intents and purposes. The assignee of the bill of lading is protected because the vendor of the goods has placed in the hands of his assignor a muniment of title, clothing him with apparent ownership of the goods, and it is inequitable that a secret trust should be enforced in favor of the vendor, who has issued such muniment of title against a person who has taken an assignment of it for valuable consideration, and without notice of such circumstances as render it not fairly and honestly assignable.[1]

§ 52. Transfer of bill of lading.— Thus the bill of lading passes the property, when it is indorsed and intended so to operate, in the same manner as a direct delivery of the goods would do if so intended, and it operates no further. It constitutes a symbolic and constructive delivery of the goods,[2] being the proper substitute for the actual delivery of goods at the time at sea *en route* to the consignee, and the arrival and delivery of which the consignor has placed it in his power by the bill of lading to anticipate.[3]

Delivery of the bill without indorsement, has been held sufficient to pass the title where the person to whom it was

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98 1 Smith's Lead. Cas. 895.

99 Newhall v. Central P. R. Co., 51 Cal. 345; Daniel on Negotiable Instruments, § 1729.

1 Shaw v. Railroad Co., 101 U. S. 564; Brewster v. Sime, 42 Cal. 130.

2 Mechanics', etc., Bank v. Farmers', etc., Bank, 60 N. Y. 47; Forbes v. Boston & Lowell R. Co., 133 Mass. 154; Daniel on Negotiable Instruments, § 1731.

3 Pratt v. Parkman, 24 Pick. 42.

delivered, was recognized upon the face of the bill, as the person entitled to the ultimate possession of the goods.[4]

§ **53. Warehouse, or dock, receipts.**— This species of contracts is, independent of statute law, of modern invention, and does not rest like bills of lading upon ancient mercantile custom imparting to them a *quasi*-negotiability. "These documents," says Blackburn, J., "are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order, or dock warrant, should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore.[5]

§ **54. Their nature.**— Warehouse receipts, pure and simple, with only the incidents annexed to them by law, and none superadded by special contract, conduct, or representation, are no more obligatory in the hands of *bona fide* holders for value, than in the hands of the bailor of the property stored; but, if warehouse receipts of a special form and character be adopted and issued in due course of business, for the express purpose of being pledged as security to obtain money, and if, as a part of the regular system of using them the warehouseman acknowledge in writing on each receipt notice of assignment by the pledgor to the

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[4] Campbell v. Alford, 57 Tex. 161.

[5] Blackburn on Sales, 297; Benjamin on Sales, 613; Fairina v. Home, 16 M. & W. 119.

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CHAPTER III.

FORMAL REQUISITES OF NEGOTIABLE INSTRUMENTS.

SECTION I.

DIFFERENCE IN STRUCTURE BETWEEN BILLS OF EXCHANGE AND PROMISSORY NOTES.

§ **56. Difference between bills and notes.**—In their original structure, a bill of exchange and a promissory note do not strongly resemble each other. In a bill, there are three original parties: drawer, drawee, and payee; in a note only two: maker and payee. In a bill, the acceptor is the primary debtor. In a note, the maker is the only debtor. But if the note be transferred to a third party by the payee, it becomes strikingly similar to a bill. The indorser becomes then, as it were, the drawer, the maker the acceptor, and the indorsee the payee.

SECTION II.

FORMALITY IN RESPECT TO STYLE AND MATERIAL.

§ **57.** The law does not require any particular form, either as to a bill of exchange or promissory note, or other negotiable instrument, and while it would be unwise to depart from the approved forms in vogue amongst merchants, yet the law respects substance more than form; and where the intention appears to assume the obligations which devolve upon drawers and makers of negotiable instruments, it will be enforced, although not evidenced in the usual commercial form. Thus, an order written under a note, "Please pay the above note, and hold it against me in our settlement," signed by the drawer and accepted by the drawee, has been held a good bill;[1] and so, also, it has been held that a like order written under an account is a

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[1] Leonard v. Mason, 1 Wend. 252.

bill of exchange.[2] And where an indorsement was made on a bond, ordering the contents to be paid to order for value received, it was held a good bill.[3]

§ 58. Signature and material.— It does not matter upon what portion of the instrument, the maker or drawer affixes his name, so that he signs as drawer or maker.[4] It is not material whether the writing is in pencil or ink,[5] although as matter of permanence and security, ink is, of course, preferable. And the name may be printed as well as written, though, in such cases, it cannot prove itself, and must be shown to have been adopted and used by the party as his signature.[6] If another sign the name of the party in his presence and at his request, it is the same as if he did it himself;[7] and if another sign the party's name by verbal or other authority, it is sufficient.[8] The full name may be written; and at least the surname should appear, and generally does. But this is not indispensable — the initials are sufficient,[9] and any mark which the party uses to indicate his intention to bind himself will be as effectual as his signature,[10] whether there be a certificate of witnesses on the instrument or not.[11] But, of course, a mark does not prove itself like a signature, although it is an adminicle of proof.[12] Any peculiarity in it may be shown as evidence of its genuineness;[13] but, unless there be an attesting witness, or one who saw it written, or is familiar with its character-

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2 Hoyt v. Lynch, 2 Sandt. 328.

3 Bay v. Frazer, 1 Bay, 66.

4 Clason v. Bailey, 14 Johns. 484; Schmidt v. Schmaeller, 45 Mo. 502.

5 Reed v. Roark, 14 Tex. 329; Closson v. Stearns, 4 Vt. 11.

6 Brown v. Butchers' Bank, 6 Hill, 443; Schneider v. Norris, 2 Maule & S. 286.

7 Sager v. Tupper, 42 Mich. 605.

8 Daniel on Negotiable Instruments, §§ 274, 299.

9 Merchants' Bank v. Spicer, 6 Wend. 443; 1 Parsons on Notes and Bills, 36.

10 Lyons v. Holmes, 11 S. C. 429.

11 Willoughby v. Moulton, 47 N. H. 205; Shank v. Butsch, 28 Ind. 19.

12 Hilborn v. Alford, 22 Cal. 482; Flowers v. Billing, 45 Ala. 488.

13 George v. Surrey, 1 Moody & M. 516; 2 Parsons on Notes and Bills, 480.

istics, the plaintiff cannot recover.[14] Nor is it necessary that the substance upon which the instrument is written should be paper — parchment, cloth, leather or any other substitute for paper will suffice.[15]

§ **59. Whole instrument must be in writing.**— The whole of the bill or note must be expressed in writing. But all of it need not be in the body of the instrument;[16] and a contemporaneous memorandum or indorsement on any part of it may qualify its terms by making it payable upon a contingency,[17] or at a particular place,[18] or providing that it may be renewed.[19] And there may be a written stipulation on a detached paper affecting the instrument, which would be admissible as between the original parties and their representatives;[20] but such stipulation would not affect a *bona fide* holder for value, who acquired it without notice.[21] But a party having notice would stand on no better footing than the original parties.[22] Whether the instrument be a bill of exchange or a promissory note, or otherwise, and whether or not it be negotiable, must be determined by its face, without reference to any other source.[23]

§ **60. Parol evidence.**— It is a general principle of law that parol evidence is inadmissible to vary or contradict a written contract. Therefore, if a negotiable contract be absolute and complete upon its face, no evidence of a verbal agreement made at the time, qualifying its terms, can be admitted.[24] This principle applies to every element of the

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[14] Thompson on Bills, 30, 31, 33.

[15] Daniel on Negotiable Instruments, § 77.

[16] Daniel on Negotiable Instruments, § 79; Goldman v. Blum, 58 Tex. 636.

[17] Hughes v. Fisher, 10 Colo. 385; Wheelock v. Freeman, 13 Pick. 168.

[18] Hughes v. Fisher, 10 Colo. 385; Wheelock v. Freeman, 13 Pick. 168.

[19] Hartley v. Wilkinson, 4 Maule & S. 25.

[20] Bowerbank v. Monteiro, 4 Taunt. 844.

[21] Hoare v. Graham, 3 Camph. 57.

[22] Gibbon v. Scott, 2 Stark, 286.

[23] Strachan v. Muxton, 24 Wis. 21.

[24] Burnes v. Scott, 117 U. S. 582; Whitwell v. Winslow, 133 Mass. 343.

instrument, and it follows that no condition can be engrafted in the instrument by verbal testimony — as that it should be void unless others interested agreed to the settlement in which it was given;[25] or was to be void if certain bills should be paid at maturity;[26] or was to be void or surrendered up in the event the case in which it was given for a fee was compromised,[27] or in any other contingency.[28] Nor can it be shown that it was only to be paid out of a particular fund or estate.[29] The Supreme Court of the United States, in the case of Brown v. Spofford, thus comprehensively and tersely states the law: "Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence; and that proposition is universally true where the promissory note is in the hands of an innocent holder." [30]

§ 61. Contemporaneous written agreements.— But contemporaneous written agreements are admissible for the purpose of controlling the effect of a negotiable instrument, as between immediate parties and those having notice;[31] and a purchaser after maturity, of a negotiable instrument, would be bound by such agreement, when established.[32] Parol evidence is generally admissible, as between the parties, to show their real relations to each other;[33] and if there be a latent ambiguity, to explain it.[34] And if by mistake the instrument were given for too large an amount, the better opinion is that it may be shown, for as to the mistaken

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[25] Ely v. Kilborn, 5 Den. 514.

[26] Penny v. Graves, 12 Ill. 187.

[27] Dale v. Pope, 4 Litt. 166.

[28] Potter v. Earnest, 45 Ind. 418; Wayland Univ. v. Boorman, 56 Wis. 660.

[29] Brown v. Spofford, 95 U. S. 482; Adams v. Wilson, 12 Metc. (Mass.) 138.

[30] Brown v. Spofford, 95 U. S. 482.

[31] Goodwin v. Nickerson, 51 Cal. 166; Lebanon Sav. Bank v. Penney, 46 N. W. 331.

[32] Munro v. King, 3 Colo. 238.

[33] Houck v. Graham, 106 Ind. 195.

[34] Wharton on Evidence, § 956.

excess there is partial want of consideration.[35] And, in general, parol evidence is admissible between the original parties to show fraud, accident, or mistake in the creation of the instrument.[36] Also to set up a verbal agreement by performance of which the written contract has been discharged.[37]

§ 62. **The date.**— The date is usually written in the right-hand corner of the instrument; but a date is not essential to the validity of the instrument;[38] and it is of no consequence on what portion of the paper it is written.[39] If there be no date, it will be considered as dated at the time it was made,[40] and parol evidence is admissible to show from what time an undated instrument was intended to operate,[41] or to show that there was a mistake in the date.[42] If dated, it will be presumed to have been executed on the day it bears date.[43] If undated, but containing a reference to date, it will date from delivery.[44] When a note without date is made for another's accommodation, the maker authorizes him to fill up the date as he sees fit.[45]

§ 63. **Words of negotiability.**— No precise form of words is necessary to impart negotiability. As has been said in Pennsylvania,[46] "'order' or 'bearer' are convenient and ex-

[35] Claxon v. Demaree, 14 Bush, 173; Daniel on Negotiable Instruments, §§ 81*b*, 179, 201. But see Downs v. Webster, Brayt. 79; 2 Parsons on Notes and Bills, 505.

[36] Phillips v. Meily, 106 Pa. St. 536.

[37] Howard v. Stratton, 64 Cal. 487.

[38] Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Drake v. Rogers, 32 Me. 524.

[39] Shepherd v. Graves, 14 How. 505.

[40] Cowing v. Altman, 71 N. Y. 441; First Nat. Bank v. Hunt, 25 Mo. App. 174.

[41] Richardson v. Ellet, 10 Tex. 190; Lean v. Lozardi, 27 Mich. 424.

[42] Biggs v. Piper, 86 Tenn. 589; Paige v. Carter, 64 Cal. 489.

[43] Kinsely v. Sampson, 100 Ill. 574.

[44] Armitt v. Breame, 2 Ld. Raym. 1076; Styles v. Wardle, 4 B. & C. 908.

[45] Androscoggin Bank v. Kimball, 10 Cush. 373; Shultz v. Payne, 7 La. Ann. 222.

[46] Daniel on Negotiable Instruments, § 106; Raymond v. Middleton, 29 Pa. St. 530.

pressive, but clearly not the only words which will communicate the quality of negotiability. Some equivalent words may be used. Words in a bill, from which it can be inferred that the person making it, or any other party to it, intended it to be negotiable, will give it a transferable quality against that person. It may be stated, therefore, that if the maker of a note, having omitted the usual words of negotiability, had said, 'this is and shall be negotiable,' it would have been negotiable."

SECTION III.

THE SEVERAL PARTS OF A FOREIGN BILL CALLED A SET.

§ 64. In order to avoid delay and inconvenience which may result from the loss or miscarriage of a foreign bill, and to facilitate and expedite its transmission for acceptance or payment, the custom has prevailed from an early period for the drawer to draw and deliver to the payee several parts of the same bill of exchange, which may be forwarded by different conveyances, and any one of them being paid, the others are to be void. These several parts are called a set, and constitute in law one and the same bill.[47] Sometimes there are four, but usually three parts.[48] And if any person undertakes to draw or deliver a foreign bill to another person, it seems that he is bound to deliver the usual number of parts,[49] and it has been thought that the promisee may, in such a case, demand as many parts as he pleases,[50] but this is questionable.[51]

§ 65. Condition in each part of set.— It is usual for the drawer, and to his protection it is essential, to incorporate in each part of the set a condition that it shall only be payable provided the other remains unpaid. This operates

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47 Daniel on Negotiable Instruments, § 113; Story on Bills, § 66.

48 Daniel on Negotiable Instruments, § 113; Story on Bills, § 66.

49 Kearney v. West Granada Mining Co., 1 H. & N. 412.

50 Chitty on Bills [*154], 178; Byles on Bills [*376], 556.

51 Daniel on Negotiable Instruments, § 113; Story on Bills, § 66.

as notice to the world that all the parts constitute one bill, and if drawee pay any part, the whole is extinguished.[52]

§ **66. Only one part of set should be accepted.**— The drawee should accept but one part of the set. And having accepted one part, he should not pay another part, for he would still be liable on the accepted part.[53] When, however, he pays the part he accepts, the whole bill is extinguished.[54] The party entitled to the bill should claim and hold all the parts, for the payment of any one part to another person might defeat him.[55] But he to whom any one part of the set is first transferred acquires a property in all the other parts, and may maintain trover even against a *bona fide* holder, who subsequently, by transfer or otherwise, gets possession of another part of the set.[56] For it is the duty of the person taking one part to inquire after the others; and he is advertised by their absence that they, or one of them, may be outstanding in the hands of a prior *bona fide* holder.[57] There is some contrariety of opinion as to whether the plaintiff, in a suit against drawer or indorser, must produce all of the set or satisfactorily account for their nonproduction, but the Supreme Court of the United States has held that it is sufficient if the part protested is produced.[58]

SECTION IV.

STAMPS UPON NEGOTIABLE INSTRUMENTS.

§ **67.** It seems that stamp duties were first levied on the continent of Europe, in Holland, in the year 1624, being employed to raise revenues for the prosecution of war

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52 Daniel on Negotiable Instruments, § 114; Ingraham v. Gibbs, 2 Dall. 134.

53 Holdsworth v. Hunter, 10 B. & C. 449; Chitty on Bills [*155], 178.

54 Holdsworth v. Hunter, 10 B. & C. 449; Chitty on Bills [*155], 178.

55 Holdsworth v. Hunter, 10 B. & C. 449.

56 Holdsworth v. Hunter, 10 B. & C. 449; Byles on Bills [*376], 556.

57 Lang v. Smyth, 7 Bing. 284, 294; 5 M. & P. 73.

58 Downes v. Church, 13 Pet. 205.

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SECTION V.

DELIVERY.

§ 69. Delivery is the final step necessary to perfect the existence of any written contract; and, therefore, as long as a bill or note remains in the hands of the drawer or maker, it is a nullity.[61]

So essential is delivery that it has been held that where a promissory note, the existence of which was unknown to the grantee, lay in the grantor's possession, and was found amongst his papers after death, the payee could not claim or sue upon it;[62] and though such a note should be found, accompanied with written directions to deliver it to the payee, the payee will still have no right of action, unless the directions be valid as a testament.[63]

Delivery may be constructive as well as actual.

A direction to a third person, who is in actual custody of the instrument, to hold it subject to the payee's or transferee's order, or an order to the depositary to deliver it, or a delivery to a third person for the payee without condition is sufficient in legal contemplation. In either of the cases suggested the delivery would be constructive.[64]

§ 70. Presumption of delivery.— Whenever a bill or note is found in the hands of the payee, it will be presumed that it was delivered to him,[65] and that the delivery took place on the day of its date, if it be dated,[66] and, at any rate, before the day of its maturity.[67] But the presumption both as to the fact and the time of delivery may be rebutted.[68] As a bill or note takes effect only by delivery, so it takes

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[61] Devries v. Shumate, 53 Md. 216; Purviance v. Jones, 120 Ind. 164.

[62] Disher v. Disher, 1 P. Wms. 204.

[63] Gough v. Findon, 7 Exch. 48.

[64] Gordon v. Adams, 127 Ill. 225; Howe v. Ould, 28 Gratt. 7.

[65] Griswold v. Davis, 31 Vt. 390.

[66] Cranston v. Goss, 107 Mass. 439; Emery v. Vinall, 26 Me. 295.

[67] Smith v. McClure, 5 East, 477; Dinney v. Plumley, 5 Vt. 500.

[68] Woodford v. Dorwin, 3 Vt. 82; Scaife v. Byrd, 39 Ark. 568.

effect only on delivery; and if this be subsequent to its date, it will be binding only from the day of actual delivery.[69]

If the bill or note bear no date, the time must be computed from its delivery; and if the day of actual delivery cannot be proved, it will be computed from the earliest day on which it appears to have been in the hands of the payee or any holder.[70]

§ 71. Intention essential.— It is essential to delivery that the minds of both parties should assent, in order to bind them; and if, through inattention, infirmity, or otherwise, one does not assent, the act of the other is nugatory.[71] Therefore, leaving a check on the desk of a clerk of a bank, and without the knowledge of such clerk or of an officer of the bank, does not constitute delivery.[72] Where papers were taken up in the presence of the party sought to be charged, and placed in the safe of a third person, it was held no delivery on his part, as between the immediate parties, when he had done or said nothing to indicate an intention to deliver.[73] A bill or note, as well as a deed, may be delivered in escrow — that is, delivered to a third party to hold until a certain event happens or certain conditions are complied with — and then the liability commences as soon as the event happens or the condition is fulfilled, without actual delivery of the instrument.[74] But there is this distinction between negotiable and sealed instruments: If the custodian of the former betrays his trust, and passes off the negotiable instrument to a *bona fide* holder before maturity, and without notice, all parties are bound; but if the instrument be sealed, the rule is otherwise.[75]

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[69] Lovejoy v. Whipple, 18 Vt. 379.

[70] Clark v. Sigourney, 17 Conn. 511; Richardson v. Lincoln, 5 Metc. (Mass.) 201.

[71] Daniel on Negotiable Instruments, § 67.

[72] Chicopee Bank v. Philadelphia Bank, 8 Wall. 641; Kinney v. Ford, 52 Barb. 194.

[73] Stokes v. Anderson, 118 Ind. 533.

[74] Daniel on Negotiable Instruments, § 68; Taylor v. Thomas, 13 Kan. 217.

[75] Daniel on Negotiable Instruments, § 68.

CHAPTER IV.

THE ESSENTIAL REQUISITES OF NEGOTIABLE INSTRUMENTS.

§ 72. A negotiable instrument must carry its full history upon its face and embrace the following requisites: First. It must be open, that is, unsealed. Second. The engagement to pay must be certain. Third. The fact of payment must be certain. Fourth. The amount to be paid must be certain. Fifth. The medium of payment must be money.[1]

SECTION I.

THE PAPER MUST BE OPEN — THAT IS UNSEALED.

§ 73. **What is an unsealed obligation; effect of seal on negotiability.**— By the term "open" is meant "unsealed;" and though the instrument possesses all the other requisites of a bill or note, its character as a commercial instrument is destroyed, and it becomes a covenant, governed by the rules affecting common-law securities, if it be sealed.[2] It is to be observed, however, that merely attaching a seal to the signature does not make it a specialty contract, unless there be a recognition of the seal in the body of the instrument by some such phrase as "witness my signature and seal," or "signed and sealed," for otherwise the door would be thrown open to frauds and forgeries, by the facility with which seals could be superadded.[3] And it seems to be established by well considered cases that corporations cannot use the seal without destroying the negotiable character of the instrument, although the decisions are not uniform.[4]

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[1] Daniel on Negotiable Instruments, § 30.

[2] Daniel on Negotiable Instruments, § 31; Story on Bills, § 62.

[3] Anderson v. Bullock, 4 Munf. 442; Humphries v. Nix, 77 Ga. 98.

[4] Daniel on Negotiable Instruments, § 32. See also § 146, *post*, and authorities there cited.

§ **74. Statutes as to sealed instruments.**— In some of the States of the United States, sealed instruments for the payment of money are placed by statute upon the same footing as bills and notes in respect to their negotiability; and the addition of a seal to a bill or note payable to order or bearer in no way impairs its negotiability.

In others, bonds are made transferable, and may be sued upon in the name of the assignee, but the latter takes them subject to all defenses that were available to the original obligee.[5]

SECTION II.

CERTAINTY AS TO ENGAGEMENT TO PAY.

§ **75. Meaning of the requirement.**— If a bill, it must contain a certain direction to pay — if a note, a certain promise to pay. A bill is, in its nature, the demanding of a right, not the mere asking of a favor, and therefore a supplication made or authority given to pay an amount is not a bill. The language, "Mr. Little, please let the bearer have £7, and place it to my account, and you will much oblige your humble servant," was held not a bill;[6] and so "Please to send £10 by bearer, as I am so ill I cannot wait upon you;"[7] but on the other hand where the language was: "Mr. Nelson will much oblige Mr. Webb by paying I. Ruff, or order, on his account, twenty guineas," it was held to import an order, and therefore a good bill.[8] The usual and appropriate expression used in bills is, "Please pay," and it has been well said by Justice Story that the language should not be too nicely scanned nor be regarded because of its politeness as asking a favor rather than demanding a right.[9] It is a perfectly valid phrase, being a mere form of civility.[10] "Please let the bearer have $50; I will ar-

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5 Daniel on Negotiable Instruments, § 33.

6 Little v. Slackford, 1 Moody & M. 371.

7 King v. Ellor, 1 Leach Cr. Law, 323.

8 Ruff v. Webb, 1 Esp. 129.

9 Story on Bills, § 33.

10 Wheatley v. Strobe, 12 Cal. 92; Jarvis v. Wilson, 46 Conn. 90.

range it with you this forenoon," and signed, "yours, most obedient," was held sufficient in Kentucky.[11]

§ 76. Certainty of promise in a note.— A promissory note must contain a certain promise to pay. "I promise to pay, or cause to be paid," would suffice, because the undertaking that the payment be made is definite and certain.[12] It is said by Story, that "it seems that to constitute a good promissory note, there must be an express promise upon the face of the instrument to pay the money; for a mere promise implied by law, founded upon an acknowledged indebtedness, will not be sufficient."[13] But we think the better language is used by Byles, who says: "No precise words of contract are necessary, provided they amount, in legal effect, to a promise to pay."[14] In other words, if over and above the mere acknowledgment of debt, there may be collected from the words used a promise to pay it, the instrument may be regarded as a promissory note.[15]

In England, it seems to be well settled that an ordinary due-bill does not amount to a promissory note, while in the United States the decisions are conflicting.[16] When negotiable words, however, are inserted in the due-bill, or it contains the words "on demand," the instrument is generally held to be a promissory note.[17]

SECTION III.

CERTAINTY AS TO FACT OF PAYMENT.

§ 77. Fact of payment must be certain.— The instrument must be payable unconditionally and at all events in order to be negotiable.

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[11] Bresenthal v. Williams, 1 Duv. 329.

[12] Lovell v. Hill, 6 Car. & P. 238; Caviness v. Rushton, 101 Ind. 500.

[13] Story on Promissory Notes, § 14.

[14] Byles on Bills, 8.

[15] Daniel on Negotiable Instruments, § 36; Cowan v. Hallack, 9 Colo. 578.

[16] Daniel on Negotiable Instruments, § 36*a*.

[17] Johnson School Township v. Citizens' Bank, 81 Ind. 515; Smith v. Allen, 5 Day, 337.

If the order or promise be payable provided terms mentioned are complied with; as, for instance, that a railroad be built to a certain point by a certain time, it is not a bill or note;[18] and likewise if payable provided a certain act be not done;[19] or that a certain receipt be produced;[20] or another person shall not previously pay;[21] or provided a certain ship shall arrive;[22] or provided the maker shall be able;[23] or provided the maker shall live a certain time;[24] or "On account of contract when completed and satisfactory;" [25] or provided one person shall first pay another a certain sum,[26] or upon any contingency.[27]

The form or language used to give expression to the conditions is immaterial, *i. e.*— "When A. shall marry," [28] or "after arrival and discharge of coal by Brig A." [29] In all these cases the contingency implied deprives the instrument of its negotiable character, as the events named may never happen. If payable in instalments, no time for the payment of the instalments being mentioned, it is not a promissory note.[30] In Illinois, where the promise was to pay a railroad company or order a certain sum, in such instalments and at such times as the directors of the payee company might assess or require, it was held negotiable, and in effect payable on demand, or in instalments on demand.[31]

§ 78. **Time need not be definitely ascertainable, if sure to come.**— If the time must certainly come, although the particular day is not mentioned, the instrument is regarded as

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18 Blackman v. Lehman, 63 Ala. 547; Eldred v. Malloy, 2 Colo. 320.
19 Appleby v. Beddolph, 8 Mod. 363.
20 Mason v. Metcalf, 8 Baxt. 440.
21 Roberts v. Peake, 1 Burr. 323.
22 Coolidge v. Ruggles, 15 Mass. 387.
23 Salinas v. Wright, 11 Tex. 572.
24 Braham v. Bubb, Chitty on Bills [*135], 136.
25 Home Bank v. Drumgolle, 15 N. E. Rep. 747.
26 Chapman v. Wright, 79 Me. 595.
27 Sloan v. McCarty, 134 Mass. 245.
28 Pearson v. Garrett, 4 Mod. 242.
29 Grant v. Wood, 12 Gray, 220.
30 Moffatt v. Edwards, Car. & M. 16.
31 White v. Smith, 77 Ill. 351.

negotiable, as the fact of payment is certain.[32] If the instrument is payable at, or within a certain time after, a man's death, it is sufficient, because the event must occur;[33] and a promise to pay "on demand, after my decease, $850," signed by the promisor, is a good note, negotiable as any other, and binding on the promisor's estate at his death.[34] So a note payable "one day after date or at my death," [35] and if the day of payment must come at the same time, it has been said that the distance is immaterial.[36] The English courts have gone so far as to hold that if payable at a certain time after a government ship is paid off, it would be good, because government is sure to pay;[37] but this decision has been justly criticized and distrusted.[38]

In Massachusetts, held that a note payable "as soon as realized, to be paid in the course of the season now coming," is negotiable, for, whatever time may be understood by the "coming season," whether harvest time or the coming year, it must come by mere lapse of time and that must be the ultimate limit of the time of payment.[39]

§ 79. **Rule liberally interpreted in favor of negotiability.**—The tendency of the courts is to liberally construe language used, in favor of upholding the negotiability of the instrument, and hence in many cases, especially in the United States, apparent uncertainty of time has been rendered certain by giving to the debtor a reasonable time thereafter (the time prescribed) to make the payment. Illustrations:

A note payable on demand after date, "when convenient," has been held payable absolutely in a reasonable time;[40]

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[32] Daniel on Negotiable Instruments, § 43.

[33] Cooke v. Colehan, 2 Stra. 1217; Conn v. Thornton, 46 Ala. 587; Price v. Jones, 105 Ind. 544.

[34] Bristol v. Warner, 19 Conn. 7.

[35] Conn v. Thornton, 46 Ala. 588.

[36] Worth v. Case, 42 N. Y. 362.

[37] Andrews v. Franklin, 1 Stra. 24; Evans v. Underwood, 1 Wils. 262.

[38] 1 Parsons on Notes and Bills, 40; Edwards on Bills, 142.

[39] Cota v. Buck, 7 Metc. (Mass.) 588.

[40] Works v. Hershey, 35 Iowa, 340.

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on a formal point.[50] In North Carolina, this view has been adopted and applied,[51] and certainly is not without force. Only the United States Senate can ratify a peace, and a peace ratified between two countries implies the independence of each. And further, it may be said that until the condition precedent is fulfilled, no liability accrues. We think the better view is that "six months after peace" would fulfill the meaning of the terms as they were used in the country, though they are the very words of Confederate treasury notes; and it has been so decided in a number of cases, the courts construing the language according to its popular import, and the probable intention of the parties, rather than in its strict technical sense.[52]

§ 81. **Where payable out of a particular fund, not negotiable.**— In accordance with these principles the negotiable character of the instrument is destroyed if it be made payable expressly or impliedly out of a particular fund. Illustrations: The insertion in an order to pay a certain sum "on account of brick work done on a certain building" [53] or "out of rents," [54] or "out of my growing substance," [55] or "out of a certain claim," [56] or "out of my part of the estate of A.," [57] or "out of amount due on contract." [58] On the same principle, receivers' certificates are not regarded as negotiable, although framed with the negotiable words usual in promissory notes.[59]

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[50] Harris v. Lewis, 5 W. Va. 576.

[51] McNinch v. Ramsey, 66 N. C. 229.

[52] Knight v. McReynolds, 37 Tex. 204; Mortee v. Edwards, 20 La. Ann. 236; Nelson v. Manning, 53 Ala. 549.

[53] Pitman v. Crawford, 3 Gratt. 127.

[54] 1 Parsons on Notes and Bills, 43.

[55] Josselyn v. Lacier, 10 Mod. 294.

[56] Richardson v. Carpenter, 46 N. Y. 661.

[57] Mills v. Kuykendale, 2 Blackf. 47.

[58] Hoagland v. Erck, 11 Neb. 580.

[59] Staunton v. Railroad Co., 31 Fed. 587; McCurdy v. Bowes, 88 Ind. 583.

SECTION IV.

CERTAINTY AS TO AMOUNT TO BE PAID.

§ 82. Amount must be in figures or written out or ascertainable from the instrument.— The amount which the debtor promises or engages to pay must either be stated in the instrument itself, in figures or words, or must be ascertainable from data somewhere on the paper. Illustrations: A note to pay a certain sum, "and all other sums which may be due" is not negotiable, as the aggregate amount is not capable of definite ascertainment.[60] So, if it be for a certain sum "and whatever sum you may collect of me for C.;"[61] or if it be for "the proceeds of a shipment of goods, value about £2,000, consigned by me to you;"[62] or "the demands of the sick club in part of interest;"[63] or "a certain sum, the same to go as a set-off;"[64] or if it be expressed, "deducting all advances and expenses;"[65] or if it be for "$800 and such additional premium as may be due on policy No. 218,171."[66] But a promise to pay bearer a certain sum per acre for so many acres as a certain tract contained was held to be negotiable as soon as the number of acres was indorsed upon it.[67]

§ 83. Payable with exchange does not destroy negotiability. — While the authorities are not uniform, it may be safely stated to be fairly well settled that if there be added to the amount, "with exchange," or "with current exchange on another place," the commercial character of the paper is

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[60] Smith v. Nightingale, 2 Stark. 375.

[61] Legro v. Staples, 16 Me. 252; Lime Rock F. & M. Ins. Co. v. Hewitt, 60 Me. 407.

[62] Jones v. Simpson, 2 B. & C. 318.

[63] Bolton v. Dugdale, 4 B. & Ad. 619.

[64] Clarke v. Percival, 2 B. & Ad. 660.

[65] Cashman v. Haynes, 20 Pick. 132.

[66] Marret v. Equitable Ins. Co., 54 Me. 537.

[67] Smith v. Clopton, 4 Tex. 109.

not impaired, as that is capable of definite ascertainment.[68] Exchange is an incident to the use of negotiable instruments for the transmission of money from place to place, and its nature and effect are well understood in the commercial world. Exchange preserves the equivalence of amounts in value, and does not introduce such an element of uncertainty as destroys the negotiability of the instrument which embodies it in its terms.[69]

§ **84. Stipulation to pay attorney's fees.**— Quite frequently in recent years bills and notes are met with framed in other respects in the usual negotiable forms, but containing the additional stipulation on the part of the drawer or maker to pay collection or attorney's fees, and they have elicited from the courts various and conflicting decisions. The cases may be divided into four classes.

First. Those which sustain both the validity of the stipulation and the negotiability of the instrument.[70]

Second. Those which enforce the stipulation, but deny the negotiability of the instrument.[71]

Third. The class that upholds the negotiability of the instrument, but regards the stipulation as penal and void.[72]

Fourth. Those which adhere to the view that the stipulation to pay the additional amount renders the transaction usurious, and subjects the instrument to the operation of the statutes against usury.[73]

§ **85. Correct view.**— Such instruments should, we think, be upheld as negotiable. They are not like contracts to pay money and do some other thing. They are simply for the payment of a certain sum of money at a certain time, and the additional stipulations as to attorney's fees can

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[68] Daniel on Negotiable Instruments, § 54; Grutacup v. Woulloise, 2 McLean, 581; Johnson v. Frisbie, 15 Mich. 286.

[69] Smith v. Kendall, 9 Mich. 242.

[70] Schlesinger v. Arline, 31 Fed. 648; Sperry v. Horr, 32 Iowa, 184.

[71] Woods v. North, 84 Pa. St. 410; First Nat. Bank v. Gay, 71 Mo. 627.

[72] Wright v. Travers, 73 Mich. 494; Gaar v. Louisville Banking Co., 11 Bush, 182.

[73] State v. Taylor, 10 Ohio, 378; Dow v. Updike, 11 Nebr. 95.

never go into effect if the terms of the bill or note are complied with. They are, therefore, incidental and ancillary to the main engagement, intended to assure its performance, or to compensate for trouble and expense entailed by its breach. At maturity, negotiable paper ceases to be negotiable in the full commercial sense of the term, though it still passes from hand to hand by the negotiable forms of transfer; and it seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency because when they cease to be current they contain a stipulation to defray the expenses of collection.[74] But whatever may be said for and against the negotiability of an instrument containing a provision "with reasonable attorney's fees," it would seem that if the amount is fixed by a certain percentage or a certain sum, the objection either to the negotiability or validity of the paper would be extremely technical, if not untenable.

SECTION V.

CERTAINTY AS TO THE MEDIUM OF PAYMENT, WHICH MUST BE ONLY IN MONEY.

§ 86. Medium of payment must be money.—It is indispensably requisite, in order to constitute a bill of exchange or negotiable promissory note, that the direction or promise be to pay in money.[75] And if the instrument be expressed to be payable "in cash or specific articles," in the alternative,[76] or in merchandise, as, for instance, "in good merchantable whisky at trade price,"[77] or "in ginned cotton at eight cents per pound,"[78] or "in work,"[79] or in any other article than money,[80] as, for instance, "an ounce of

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[74] Daniel on Negotiable Instruments, § 62*a*; Benjamin's Chalmers' Digest, 17.

[75] Chitty on Bills [*132], 153.

[76] Matthews v. Houghton, 2 Fairfax, 377.

[77] Rhodes v. Lindley, Ohio Cond. 465; Chitty on Bills [*132].

[78] Lawrence v. Dougherty, 5 Yerg. 435.

[79] Quimby v. Merritt, 11 Humphr. 439.

[80] Auerbach v. Prichett, 58 Ala. 451; McClellan v. Coffin, 93 Ind. 456.

gold,"[81] it becomes a special contract, and by the law merchant loses its character as commercial paper.

§ 87. Legal tender.— Strictly speaking, the instrument must be payable in legal tender, and hence a note payable in "current bank bills or notes,"[82] or "office notes of a bank,"[83] or "in currency,"[84] is not negotiable.

If payable in "good current money" or "current money," the words thus employed have been construed to mean legal tender money.[85]

§ 88. It is not necessary, however, that the money should be that current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever.[86] But it has been held that it is necessary that the instrument should express the specific denomination of money when it is payable in the money of a foreign country, in order that the courts may be able to ascertain its equivalent value; otherise it is not negotiable,[87] but such a requirement does not seem to be consonant with sound principle.

Intention, to be gathered from the face of the paper, according to fixed rules, is the test of negotiability, and we do not see how the idea of its possessing a negotiable quality is excluded by the mere fact that the denomination of foreign money is not set out. A case, remarkable for its learning and ability, decided by the Supreme Court of Michigan, adopts this view; and there it has been held that a note payable "in Canada currency" is negotiable, the terms being equivalent to Canada money.[88]

§ 89. Contract must be only for the payment of money.— It is essential to the negotiability of the bill or note that

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[81] Roberts v. Smith, 58 Vt. 494.

[82] McCormick v. Trotter, 10 Serg. & R. 94.

[83] Irvine v. Lowry, 14 Pet. 293.

[84] Haddock v. Woods, 46 Iowa, 433; Johnson v. Henderson, 76 N. C. 227.

[85] Wharton v. Morris, 1 Dall. 124; Daniel on Negotiable Instruments, § 56.

[86] King v. Hamilton, 12 Fed. 478; Thompson v. Sloan, 23 Wend. 71.

[87] Thompson v. Sloan, 23 Wend. 71.

[88] Black v. Ward, 27 Mich. 193.

it purport to be only for the payment of money. Such at least may be stated to be the general rule, for if any other agreement of a different character be engrafted upon it, it becomes a special contract clogged and involved with other matters, and has been deemed to lose thereby its character as a commercial instrument.[89] In accordance with this general rule it has been held that a note or a certain amount given for the hire of a negro, to which is added, "said negro to be furnished with the usual quantity of clothing," was not a negotiable promissory note, but a special contract for the hiring and clothing of the negro.[90] And this would seem to be the correct doctrine, though the view has been taken that such a paper is negotiable, the obligation to pay the money only passing to an indorsee.[91] So it has been held that if the instrument be to pay money, and also "to deliver up horses and a wharf;"[92] or to pay money "and take up a certain outstanding note,"[93] it is not a negotiable note.

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[89] Fletcher v. Thompson, 55 N. H. 308; Ingham v. Dudley, 60 Iowa, 16.

[90] Barnes v. Gorman, 9 Rich. 297.

[91] Baxter v. Stewart, 4 Sneed, 213; Gaines v. Shelton, 47 Ala. 413.

[92] Martin v. Chauntry, 2 Stra. 1271.

[93] Cook v. Satterlee, 6 Cow. 108.

CHAPTER V.

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

§ 90. By consideration, is meant a benefit or gain of some kind to the party making the promise, or a loss or injury of some kind to the party to whom it is made. By the common law a promise made without consideration was invalid, and in order to enforce any contract it was necessary to aver and prove a consideration.

The most ancient exception to this rule was made in reference to promises under seal, the solemn act of the party in attaching a seal to the evidence of his contract being regarded as importing a consideration and estopping him from denying it. The necessities of trade soon produced another relaxation of the rule; and by the usage and custom of merchants, bills of exchange and promissory notes came to be regarded as *prima facie* evidences of consideration; and peculiar qualities were accorded to them which were possessed by no other securities for debt. These qualities, so far as they relate to the consideration of such instruments, we propose now to discuss.[1]

SECTION I.

CONSIDERATION PRESUMED.

§ 91. **Difference between negotiable and nonnegotiable contracts.**— There is no doubt that if the instrument sued on be negotiable, it is unnecessary to aver or prove consideration, for it is imported and presumed from the fact that it is a negotiable instrument.[2] But if the paper does not possess the quality of negotiability, it does not, *per se*, import a consideration and it must be averred and proved, unless it be stated on its face that it was given for "value

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[1] Daniel on Negotiable Instruments, § 160.

[2] Daniel on Negotiable Instruments, § 161; Averett's Admr. v. Booker, 15 Gratt. 169; Louisville R. Co. v. Caldwell, 98 Ind. 251.

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ties, the consideration may be shown to be wanting,[8] but when the instrument has passed into the hands of a third party for value, and in the usual course of business, it cannot be; for as between remote parties, as we have already seen, the consideration which the plaintiff gave for his title, as well as that for which the defendant contracted the liability, must be impeached in order to defeat a recovery.[9] And the circumstance that the accommodation maker was assured that the payee would protect it being known to the holder, does not weaken in any degree his title to recover.

§ 94. An accommodation indorser, who has paid the amount of the note to a subsequent indorsee, may recover of the maker without being subject to an offset of the maker against the payee, although he knew when he indorsed it that the maker was a creditor of the payee for an amount greater than the amount of the note.[10] And the payee may recover against the acceptor, although he knew when he took the bill that the acceptance was for accommodation of another party.[11] And it has been held that the accommodation payee and indorser may recover the full amount of the note, although he took it up by paying only a part.[12] But this is, we think, erroneous.

If one member of a firm obtains an accommodation note payable to himself, and afterward indorses it to a third person, who reindorses it to the same firm, before maturity, and for good consideration, such firm cannot recover against the maker, both parties being affected with the notice of a want of consideration.[13]

§ 95. An accommodation bill or note is not considered a real security, but a mere blank, until it has been negotiated,

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[8] Evansville Nat. Bank v. Kaufman, 93 N. Y. 273; Bank of British North America v. Ellis, 6 Sawy. 98.

[9] Violett v. Patton, 5 Cranch, 142; Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157.

[10] Barker v. Barker, 10 Gray, 339.

[11] Spurgeon v. McPheeters, 42 Ind. 527.

[12] Daniel on Negotiable Instruments, §§ 190, 1353.

[13] Quinn v. Tuller, 7 Cush. 244.

and it then becomes binding upon all of the accommodation indorsers in like manner and to the like effect as if they were successive indorsers,[14] but until it has been negotiated any party may withdraw his indorsement, acceptance, or other liability upon it, and rescind his engagement;[15] and that right is not impaired by the circumstance that he may be indemnified by an assignment, or other security.[16]

§ **96.** A person who indorses a note as an accommodation indorser for the payee, such note having been made by an accommodation maker, is subject to all the obligations and acquires all the rights of a party to negotiable paper.[17]

If obliged to take up such note, the accommodation maker cannot set up fraud on the part of the payee, in the inception of the note, as a defense to his suit.[18]

§ **97. Valuable considerations.**— Not only will money paid, or advances made, or credit given, or work and labor done, constitute a sufficient consideration for a bill or note, but receiving a bill or note as security for a debt or forbearance to sue upon a present claim or debt, or the dismissal of a pending suit, or the surrender of a prior valid note, or the compromise of a supposed cause of action, or becoming a surety or giving an extension of time to an imputed debtor, or doing any other act at the request of the drawer, indorser, or acceptor, will be equally sufficient to enforce his engagement.[19] A note on condition that the payee abstain for a certain time from intoxicating drink would be valid.[20] So, also, a note in consideration of a release of an inchoate right of dower.[21]

§ **98.** Bankers receiving the bills or notes of their customers for collection are considered holders for sufficient

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[14] Whitworth v. Adams, 5 Rand. 342; May v. Boisseau, 8 Leigh, 164.
[15] Second Nat. Bank v. Howe, 40 Minn. 390.
[16] May v. Boisseau, 8 Leigh, 164.
[17] Daniel on Negotiable Instruments, § 192.
[18] Laubach v. Pursell, 35 N. J. L. 434.
[19] Daniel on Negotiable Instruments, § 183.
[20] Lindell v. Rokes, 60 Mo. 249.
[21] Nichols v. Nichols, 136 Mass. 256.

consideration, not only to the extent of advances already made by them either specifically or upon account, but also for future responsibilities incurred upon the faith of them.[22] The balances upon an account are a shifting consideration for bills and notes deposited as security with the banker.[23] Thus, where one bank, which we may call A., sent an accommodation bill accepted by C., to another bank, which we may call B., to secure an indebtedness upon account; and when the bill became due, the latter bank had become indebted to the former, but the bill was not withdrawn, and subsequently the indebtedness shifted back, and the original debtor, bank A., became bankrupt, owing to the correspondent, B., a sum upon account, it was held that the latter could recover against C. upon the accommodation bill accepted by him.[24] Where a bank discounts a bill before maturity, paying part of the proceeds in money and applies the residue in payment of a past due note of the payee which is surrendered, it is a holder for valuable consideration.[25] Where a note was delivered by the maker to the payee to be discounted for the maker's benefit, and the payee left it at the bank with the understanding that he, the payee, might draw against it, it was held in a suit against the maker, of whose interest in the note the bank had no notice, that the maker was liable for the sums drawn against the note by the payee, the payment of which sums was in effect a discount of the note to the amount so paid; also that the result would be the same if it should be considered that the note was simply pledged for the sums paid upon the draft.[26]

§ **99. Services.**— Professional services, whether of a physician, attorney, or other person, in the learned or skilled

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22 Byles on Bills (Sharswood's ed.), 230; Bosanquet v. Dudman, 1 Stark. 1; Percival v. Frampton, 2 Cromp., M. & R. 180.

23 Bank of Metropolis v. New England Bank, 1 How. 239, 17 Pet. 174; Swift v. Tyson, 16 Pet. 21.

24 Atwood v. Crowdie, 1 Stark. 483 (2 Eng. C. L.).

25 Mechanics', etc., Bank v. Crow, 60 N. Y. 85.

26 Platt v. Beebe, 57 N. Y. 339.

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curity for, his debt, as entitled to the full protection of a *bona fide* holder for value, free from all equities which might have been pleaded between the original parties.[35] But there is much controversy on this subject, and it is hereinafter more fully treated.[36]

SECTION III.

WHAT ARE ILLEGAL CONSIDERATIONS.

§ 101. As to illegal considerations generally.— A negotiable contract which is founded upon an illegal consideration, in whole or in part, is void;[37] for the law will not aid one who seeks, or has consented to, its violation. Sometimes the consideration is illegal, because opposed to the general principles of the common law; and sometimes because it is specially interdicted by statute. The considerations which are illegal at common law are: 1. Such as violate the rules of religion, morals, or public decency; and, 2. Such as contravene public policy.[38]

§ 102. Illegal considerations by the common law; wagers, futures, etc.— As a general rule, wagers were not illegal by the common law.[39] But wagers upon the sex of a person;[40] that an unmarried female would bear a child;[41] upon the result of a prize fight;[42] or the result of a criminal trial;[43] or the result of an election;[44] or upon the question of war or peace,[45] would be illegal as opposing public policy and

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35 Daniel on Negotiable Instruments, § 832; Devendorf v. W. Va. O. & O. L. Co., 17 W. Va. 176.

36 Daniel on Negotiable Instruments, §§ 820, 826, 827, 831.

37 Frick v. Moore, 82 Ga. 163; Daniel on Negotiable Instruments, § 204.

38 Daniel on Negotiable Instruments, § 195.

39 Good v. Elliott, 3 T. R. 693.

40 Da Costa v. Jones, Cowp. 729.

41 Ditchburn v. Goldsmith, 4 Campb. 152.

42 Hunt v. Bell, 1 Bing. 1, 7 Moore, 212.

43 Allen v. Hearn, 1 T. R. 57; Rust v. Gott, 9 Cow. 169.

44 Lockhart v. Hullinger, 2 Ill. App. 465; Attwood v. Weeden, 12 R. I. 293.

45 Thompson v. Harrison, S. C., Tex., Dallam's Dec., 466.

sound morals. And, as a general rule, in the United States all manner of wagers are declared illegal by statutory enactments; and even where not prohibited by statute, they are regarded as opposed to public policy and sound morality.[46] Putting up margins in stock speculations is regarded as a species of gambling, and notes given for such margins are void as upon illegal consideration.[47] In Massachusetts one who pays a gambling debt for another cannot recover the amount.[48] And also, as a general rule, in the United States, contracts for the sale or purchase of commodities, such as cotton or grain, when no actual delivery of the same is contemplated or intended, such transactions being commonly known as "futures," are held contrary to public policy and void. A *bona fide* contract for the future delivery of any article is valid, but if the contract amount to a mere staking of margins to cover the difference between the price of the article at the time of purchase and the time of delivery, it is void.[49]

§ 103. As to considerations which oppose public policy.—Considerations which oppose public policy are never respected by the law, and contracts founded upon them are universally condemned. Contracts in general restraint of trade;[50] or restraining or preventing marriage even for a time;[51] or to assist another in furthering a marriage where the promisor has no right to interfere;[52] champertous contracts between attorney and client,[53] to procure or sell a public office[54] or votes; or to induce a candidate to withdraw;[55] to suppress evidence or interfere with the course

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[46] Boughner v. Mayer, 5 Colo. 75.

[47] Pareira v. Gabell, 89 Pa. St. 89.

[48] Scolluns v. Flyn, 120 Mass. 271.

[49] Bigelow v. Benedict, 70 N. Y. 202; Gregory v. Wendell, 30 Mich. 337; Irwin v. Williar, 110 U. S. 499.

[50] Chitty on Bills [*83], 99.

[51] Hartley v. Rice, 10 East, 22; Lowe v. Peers, 4 Burr. 2225.

[52] Roberts v. Roberts, 3 P. Wms. 66; 1 Parsons on Contracts, 555, 556.

[53] Million v. Ohmsberg, 10 Mo. App. 432.

[54] Richardson v. Mellish, 2 Bing. 229; Martin v. Wade, 37 Cal. 168.

[55] Ham v. Smith, 87 Pa. St. 63.

of justice by dropping a criminal prosecution;[56] and contracts to indemnify a person in doing an act of known illegality as inducement thereto;[57] or to do anything reprehensible for its injurious effects upon the feelings of third persons, or in fraud of the rights and interests of third persons,[58] are instances of the kind of contracts which the law will not recognize.

Abandonment of the prosecution of an offense against the public of which the law requires prosecution is not a good consideration.[59] It is not necessary to stamp the transaction with illegality that a felony should have been committed;[60] but a note given to a prosecutor after trial and conviction for the expenses of the prosecution would be valid;[61] other instances of a similar character might be multiplied. The true question in such cases seems to be, was the note given for the money, or to settle the prosecution. In the first event, it would be valid; in the latter, illegal and void.[62]

§ 104. As to considerations illegal by statute.— The *bona fide* holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in crime, involving moral turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trades to the consequences of having the bill or note passed to him impeached for some covert defect.[63] There is, however, one

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[56] Commonwealth v. Johnson, 3 Cush. 454; Soule v. Bonney, 37 Me. 128.

[57] Chitty on Bills [*85], 102; Goodale v. Holdridge, 2 Johns. 193.

[58] Sullivan v. Bonesteel, 79 N. Y. 631; Ward v. Doane, 43 N. W. 980.

[59] Haynes v. Rudd, 102 N. Y. 372; National Bank v. Kirk, 90 Pa. St. 49.

[60] Rogers v. Blythe, 51 Ark. 523; Chandler v. Johnson, 39 Ga. 85.

[61] Kirk v. Strickwood, 4 B. & Ad. 421.

[62] Godwin v. Crowell, 56 Ga. 566.

[63] New v. Walker, 108 Ind. 365; Thompson v. Samuels, 14 S. W. 143.

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law prohibiting the sale of spirituous liquors has been repealed, it does not thereby validate a note given in violation of the statute when it was in force.[69] And accordingly it has been held by the Supreme Court of the United States that a note dated March 26, 1861, and given for a slave, could be recovered on, notwithstanding that slavery was abolished on the 1st day of January, 1862, and the contract of sale contained the warranty, "the said negro to be a slave for life,"[70] and also notwithstanding the thirteenth amendment to the constitution, made in 1865, by which it is ordained that "neither slavery nor involuntary servitude shall exist in the United States nor in any place subject to their jurisdiction."

In the State tribunals of the Southern States, where this question has been of much consequence, conflicting views have been taken, but many of the cases concur in judgment with the Supreme Court of the United States,[71] and in other States of the Union, both before and since the war, the principles of these decisions have been asserted.[72]

SECTION V.

PARTIAL WANT, FAILURE, OR ILLEGALITY OF CONSIDERATION.

§ 107. Partial want of consideration.— Whenever the defendant is entitled to go into the question of consideration, he may set up the partial as well as the total want of consideration.[73]

So, where a father gives his son a note partly for services and partly as a gratuity, the partial want of consideration

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[69] Daniel on Negotiable Instruments, § 168; Holden v. Cosgrove, 12 Gray, 216.

[70] Osborn v. Nicholson, 13 Wall. 655; Boyce v. Tabb, 18 Wall. 548.

[71] McElvain v. Mudd, 44 Ala. 48; Thompson v. Warren, 5 Coldw. 644; Dowdy v. McClellan, 52 Ga. 408; Calhoun v. Calhoun, 2 S. C. 283. *Contra*, Laprice v. Bowman, 20 La. Ann. 234; Lytle v. Wheeler, 21 La. Ann. 192.

[72] Roundtree v. Baker, 53 Ill. 241.

[73] McGregor v. Bishop, 14 Ont. 10; Daniel on Negotiable Instruments, § 201.

might be pleaded as to such portion of the amount as was gratuitous; and it would be no objection that no distinct amount was fixed upon as compensation for the services, but it would be for the jury to settle what amount was founded on the one consideration, and what on the other.[74] If a note be given by mistake on settlement of accounts for an amount greater than that actually due, there is want of consideration as to the excess, and between the parties it may be pleaded.[75]

§ 108. Total and partial failure of consideration.— The total failure of consideration is as good a defense to a suit upon a bill or note as the original want of it, and is confined to the like parties. If the contract is rescinded, the consideration of the bill or note totally fails, and payment of it cannot be enforced.[76]

And a partial failure of the consideration is a good defense *pro tanto*.[77] But such part as is alleged to have failed must be distinct and definite, for only a total failure, or the failure of a specific and ascertained part, can be availed of by way of defense; and if it be an unliquidated claim the defendant must resort to his cross-action.[78] Thus, where bills have been accepted in consideration of the payee giving the acceptor the lease of a house, and he let him into possession, but gave no lease, it was held no defense to an action on the bill, but that there was merely a counter-claim for damages.[79] So where the bill was given for work to be done, and the work when done was bungled in part, and not worth the amount of the bill.[80] It may be observed, however, that in most of the States the common-law rule restricting the defense of set-off to liquidated claims, is so far modified as to admit equitable defenses in the nature of

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[74] Parish v. Stone, 14 Pick. 198.

[75] Seeley v. Engell, 13 N. Y. 542; Claxon v. Demaree, 14 Bush. 173.

[76] Hacker v. Brown, 81 Mo. 68; Maltz v. Fletcher, 52 Mich. 484.

[77] Agnew v. Alden, 84 Ala. 502; Torinus v. Buckham, 29 Minn. 128.

[78] Elminger v. Drew, 4 McLean, 388; Stone v. Peake, 16 Vt. 213; Pulsifer v. Hotchkiss, 12 Conn. 234.

[79] Moggridge v. Jones, 14 East. 485.

[80] Trickey v. Larne, 6 M. & W. 278.

set-off, as fraud or mistake in the procurement of a contract, or any other matter entitling the party to relief in equity against the obligation of the contract.[81]

§ 109. Partial illegality of consideration.— When the defense is founded on illegality of consideration, it is to be distinguished from a defense on the ground of a want or failure of consideration by this peculiarity — that a partial illegality vitiates the bill or note *in toto*, while the partial want or failure of consideration only vitiates it *pro tanto*.[82]

And a mortgage to secure a bill or note of which the consideration is in part illegal is also wholly void.[83] The reason of the distinction is based mainly upon the ground of public policy, the courts not undertaking to unravel a web of fraud for the benefit of the party who has woven it.[84] If, however, the legal portion of the consideration were distinctly severable, the party could still recover by the proper action to its proportionate extent,[85] though not upon the bill or note.[86] There is authority, however, to the effect that there may be a recovery on the bill or note to the extent of the distinctly severable and valid consideration.[87] Where the legal part of the consideration exceeds the amount of the note, though another part of the consideration be illegal, the note will be valid.[88] And it has been held that where a bill is given in renewal of other bills, one of which was upon an illegal consideration, it would be valid as to the amount which the legal bills evidenced and void as to the rest for want of consideration.[89]

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[81] Applegarth v. Robinson, 65 Md. 493.

[82] Hanauer v. Doane, 12 Wall. 342; Hyslop v. Clark, 14 Johns. 465; McNamara v. Gargett, 68 Mich. 454.

[83] Brigham v. Potter, 14 Gray, 522; Denny v. Dana, 2 Cush. 160.

[84] Byles on Bills [*140], 256.

[85] Carlton v. Woods, 8 Fost. 290; Widoe v. Webb, 20 Ohio St. 431.

[86] Robinson v. Bland, 2 Burr. 1077; Hanauer v. Doane, 12 Wall. 342.

[87] Clopton v. Elkin, 46 Miss. 95.

[88] Warren v. Chapman, 105 Mass. 87.

[89] Doty v. Knox County Bank, 16 Ohio (N. S.), 133.

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prior, but not his immediate indorser;[96] (3) By the indorsee against the acceptor of a bill,[97] nor by the payee against the acceptor of a bill, as a general rule.[98] They are regarded as remote parties to each other, and between such parties two distinct considerations must be inquired into in order to perfect a defense against the holder: (1) The consideration which the defendant received for his liability; and (2) That which the plaintiff gave for his title.[99] And if any intermediate holder gave value for the instrument, that intervening consideration will sustain the plaintiff's title.[1]

§ **112. Want, failure, or fraudulency of consideration.**— If the original consideration were tainted with fraud or illegality, or has failed in whole or in part, and the bill or note has passed into the hands of a *bona fide* holder for value without notice, yet if it be returned for a valuable consideration to the payee who is a privy to the original consideration, he could stand upon no better footing than if the instrument had remained in his hands.[2]

§ **113. Defenses between privy parties.**— That the bill or note has been lost or stolen,[3] or was executed under duress,[4] or under fraudulent misrepresentations,[5] or for fraudulent consideration,[6] or for illegal consideration,[7] or has been fraudulently obtained from an intermediate holder,[8] or

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[96] Etheridge v. Gallagher, 55 Miss. 464; 1 Parsons on Notes and Bills, 176.

[97] Flower v. Sadler, 10 Q. B. Div. 572.

[98] Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411; Hoffman & Co. v. Bank of Milwaukee, 12 Wall. 181.

[99] United States v. Bank of Metropolis, 15 Pet. 393; Swift v. Tyson, 16 Pet. 1; Goetz v. Bank of Kansas City, 119 U. S. 556.

[1] Boyd v. McCann, 10 Md. 118; Watson v. Flannagan, 14 Tex. 354.

[2] Sawyer v. Wiswell, 9 Allen, 42; Kost v. Bender, 25 Mich. 516; Cline v. Templeton, 78 Ky. 550.

[3] Mills v. Barber, 1 M. & W. 425.

[4] Clark v. Peace, 41 N. H. 414; Griffith v. Sitgreaves, 90 Pa. St. 161.

[5] Vathir v. Zane, 6 Gratt. 246; Hutchinson v. Bogg, 28 Pa. St. 294.

[6] Rogers v. Morton, 12 Wend. 484.

[7] Shirley v. Howard, 53 Ill. 455; Holden v. Cosgrove, 12 Gray, 216.

[8] 1 Parsons on Notes and Bills, 188.

been in any way the subject of fraud or felony,[9] or has been misappropriated and diverted,[10] or that it was given as collateral security,[11] or for a loss for which the party was not liable, or that otherwise it was without valuable consideration,[12] is a good defense as between the parties privy to it. And in some cases that it was given by mistake for too great a sum, or when no sum was due, the evidence showing fraud or a total or partial want of consideration.[13] The same defense which the defendant might make to an action by an indorsee of the note given by him, and the same requirement of proof, may be made by him in an action on a renewal of a former note, both notes being regarded as given upon the same consideration.[14]

SECTION VII.

HOW ILLEGALITY MAY BE PURGED — RENEWAL OF INSTRUMENT.

§ **114. As to bills and notes given in renewal.**— If the consideration of the original bill or note be illegal, a renewal of it will be open to the same objection and defense;[15] and if the original instrument was obtained by fraud, a renewal of it by the original parties without knowledge of the fraud, would stand upon the same footing.[16] But if at the time the renewal was executed the parties signing knew of the fraud in the original, they will be regarded as purging the contract of the fraud, and cannot then plead it.[17] So if the maker of a note held by an indorsee who knew that the

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[9] Holden v. Cosgrove, 12 Gray, 216; Western Bank v. Mills, 7 Cush. 546.

[10] Merchants' Nat. Bank v. Comstock, 55 N. Y. 24.

[11] Leighton v. Bowen, 75 Me. 504.

[12] Dexter Sav. Bank v. Copeland, 77 Me. 269.

[13] Forman v. Wright, 11 Com. B. 481.

[14] Daniel on Negotiable Instruments, §§ 179, 205.

[15] Schutt v. Evans, 109 Pa. St. 627; Wegner v. Biering, 65 Tex. 511; Sawyer v. Wiswell, 9 Allen, 39.

[16] Sawyer v. Wiswell, 9 Allen, 39.

[17] Sawyer v. Wiswell, 9 Allen, 39; Calvin v. Sterrett, 41 Kan. 220.

consideration between the maker and the payee had failed when he took it, executes to him a new note, it has been held to be a waiver of the defense, and the payee of the new note can recover.[18]

§ **115. Partial illegality of instrument.**— If a note or bill be given for a consideration which is in part illegal, a new note for the same, or in renewal of the first, is equally void.[19] But a new note for that part of the consideration which is legal is good and valid. And if several new notes are given for the old one, some of the new ones may be taken to be for the legal part, and so be valid, especially if they are only adequate to this part or if the deduction be otherwise favored by circumstances.[20]

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[18] Gill v. Morris, 11 Heisk. 614; Keyes v. Mann, 63 Iowa, 560.

[19] Chapman v. Black, 2 B. & Ald. 588; Seeligson v. Lewis, 65 Tex. 115; Preston v. Jackson, 2 Stark. 237.

[20] Daniel on Negotiable Instruments, § 206; Crookshank v. Rose, 5 Car. & P. 19.

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of the decedent, the estate is discharged from liability, and the representative alone is bound.[4]

§ **118. Personal representative individually bound.**— Assets in the hands of the personal representative constitute a sufficient consideration for a promise to pay the decedent's debt. He is presumed to have sufficient assets, and hence it is presumed that the obligation is based upon a sufficient consideration.[5]

As between the original parties, the presumption is rebuttable, and he may, therefore, show total or partial deficiency or insufficiency of assets, and thus defeat liability *in toto* or *pro tanto;* but in the hands of a "holder for value," the better opinion is that the presumption of consideration would be conclusive.[6]

But if he desires to exclude all personal liability, he can do so by restricting his promise to pay "out of the assets of C. D.," or by the use of any other expression of similar import.[7]

§ **119. Power to transfer.**—If the instrument be payable to the order of decedent, the personal representative may transfer it by indorsement; and if there be several executors or administrators, the title may be transferred by the indorsement of any one of them.[8] While it has been held otherwise where the note was made payable to the several executors for a debt due the estate, the view sustained by the weight of authority seems to recognize no such distinction.[9]

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[4] Wisdom v. Becker, 52 Ill. 346; Cornthwaite v. First Nat. Bank, 57 Ind. 269.

[5] Snead v. Coleman, 7 Gratt. 303; Boyd v. Johnson, 14 S. W. 804.

[6] Bank of Troy v. Topping, 13 Wend. 273; Rucker v. Wadlington, 5 J. J. Marsh. 238; Steele v. McDowell, 9 Smedes & M. 193; Byrd v. Holloway, 6 Smedes & M. 199; Edwards on Bills, 78.

[7] Snead v. Coleman, 7 Gratt. 303; Kirkman v. Benham, 28 Ala. 501.

[8] Cahoun v. Moore, 11 Vt. 604; Mackay v. St. Mary's Church, 15 R. I. 121; Dwight v. Newell, 15 Ill. 333; Hertell v. Bogert, 9 Paige, 52.

[9] Smith v. Whiting, 9 Mass. 334; Bogert v. Hertell, 4 Hill, 492; 1 Parsons on Notes and Bills, 155; Mackay v. St. Mary's Church, 15 R. I. 121.

§ **120. Guardians and trustees.**—Guardians cannot bind their wards' estates, nor trustees the estates of their *cestuis que trustent* by bills or notes; and hence, though they sign themselves as guardians or trustees, they are personally bound, because otherwise the instrument would be invalid.[10] It is true that they may contract to pay out of an estate; but then the payment would be conditional on the sufficiency of the estate, and the instrument, therefore, not negotiable.[11] If a guardian take a note payable to his order as guardian for the property of his ward, and indorse it to a *bona fide* party for value, it has been held that it is a good transfer, the words, "as guardian," etc., being mere *descriptio personæ*.[12] But the better opinion seems to be that while if the fiduciary, indicated as payee, may transfer a good title, provided he makes the transfer within the authority of and for the benefit of his trust, yet that such words as trustee, etc., suffixed to a payee's name put his indorsee upon inquiry as to the title, and if the transfer be in fraud of the trust, the indorsee must suffer the consequence.[13]

SECTION II.

AGENTS AS PARTIES.

§ **121.** All persons who are themselves competent to become parties to a negotiable contract, in their own individual right, can do so through the instrumentality of an agent.

Three things are essential to the creation of an obligation on the part of one individual by and through the act of another, viz.: (1) The principal himself must be competent; (2) the agent must be competent to act as such; (3) authority, express or implied, verbal or in writing, must be conferred by the principal upon the agent.

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[10] Thatcher v. Dinsmore, 5 Mass. 299; Webster v. Switzer, 15 Mo. App. 351; Conner v. Clark, 12 Cal. 168.

[11] 1 Parsons on Notes and Bills, 90; Story on Bills, §§ 74, 75.

[12] Zellner v. Cleveland, 69 Ga. 633; Thornton v. Rankin, 19 Mo. 193.

[13] Third Nat. Bank v. Lange, 51 Md. 138; Shaw v. Spencer, 100 Mass. 382.

Enough has been already said with reference to the capacity of the principal, and no further elaboration on that subject is deemed necessary. But, referring to the competency of the agent, it should be observed that it is not necessary that the agent should be himself competent to make a contract. He is the mere instrument of the contracting capacity and will, and Mr. Chitty says: "As this agency is a mere ministerial office, infants, *feme coverts*, persons attainted, outlawed, excommunicated, aliens and others, though incapable of contracting on their own account, so as to bind themselves, may be agents for these purposes."[14]

During the existence of slavery in the United States it was held that a slave might be an agent.[15] But imbeciles, lunatics, and children of tender years, who actually lack capacity to be intelligent instruments, and have not the power or discretion to consent, could hardly be regarded as competent to be even the agents of another.[16]

§ 122. Express authority.— It is not necessary that express authority should be granted in any particular form, unless it be authority to execute an instrument under seal, in which case it also must be under seal. Otherwise the authority may be written, or oral; and the agent, to execute or indorse a negotiable instrument, needs nothing more than verbal authority so to do,[17] though it was once thought that a formal power of attorney was necessary.[18] It is obvious, however, that it is safer for one, dealing with an alleged agent, to require production of written authority; or otherwise unmistakable oral proof that authority had been given. If the authority is in writing, it cannot be disputed by parol proof of contrary verbal instructions to

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[14] Chitty on Bills [*28], 36. See Edwards on Bills, 95; Coke's Littleton, 52*a*.

[15] Governor v. Daily, 14 Ala. 469.

[16] Thompson on Bills, 147.

[17] Chitty on Bills [*28], 36; Bettis v. Bristol, 56 Iowa, 41.

[18] Mann v. King, 6 Munf. 428.

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general objects and purposes of the authority which was actually conferred. And in interpreting the authority of the agent, it is to be strictly construed.[22] Thus a general authority to transact business for the principal, will not authorize the agent to bind him as a party to negotiable paper, according to many authorities, and the general principles of the law of agency.[23] It has been held that authority to transact all business for the principal, would empower the agent to transfer a negotiable instrument in his principal's name;[24] but the weight of authority is to the contrary.[25] Authority to conduct, in one's place and stead, his commercial business, and sign the principal's name whenever requisito or expedient in the attorney's good discretion, would, however, be broad enough to cover cases of drawing bills of exchange,[26] and so likewise authority to act "as lawful cashier and financial agent."[27]

§ **125. Authority implied from custom.**— If the principal stand by and tacitly concur in the act of the agent signing his name, he would be as strictly bound as if he had expressly authorized the agent so to do. So, authority may be implied from the course of business and employment, or from repeated recognitions by the principal of the agent's authority.[28] Thus, where a drawee had previously paid several bills accepted in his name by a third person; with whom he had connections in trade, he would be liable to an indorsee, although the bill accepted in like manner had been so accepted without his authority.[29] And it has been held that if a person usually subscribes a negotiable instrument with the name of another, proof of his having done so in

[22] Byles on Bills [*32], 108; Sewanee Mining Co. v. McCall, 3 Head, 619.

[23] Sewanee Mining Co. v. McCall, 3 Head, 619; Chitty on Bills [*29, 30], 39.

[24] Bailey v. Rawley, 1 Swan, 205; Frost v. Wood, 2 Conn. 23.

[25] Kilgour v. Finlayson, 1 H. Bl. 155; Hay v. Goldsmidt, 2 J. P. Smith, 79.

[26] Dollfus v. Frosch, 1 Den. 368.

[27] Edwards v. Thomas, 66 Mo. 482.

[28] Lake Shore Nat. Bank v. Colliery Co., 58 N. Y. Supp. 63.

[29] Barber v. Gingell, 3 Esp. 61; Stroh v. Hinchman, 37 Mich. 490.

many instances is sufficient to charge the party whose name is subscribed, without producing any power of attorney or other proof of agency.[30] But when it is sought to bind the principal on the ground of prior similar transactions, or recognition of such acts by the principal, it must be shown that the bill or note was taken upon the faith of them.[31]

§ **126. How agent should sign.**— The best mode for an agent to sign or indorse a negotiable instrument for his principal, so that it may clearly appear that he is "the mere scribe" who applies the executive hand as the instrument of another, is as follows: "A. B., by his attorney or agent, C. D.;" or, "A. B., by C. D., agent;" or, "C. D., for A. B.;" or, "C. D., agent for A. B."[32]

But it is competent and proper also for the agent to sign simply the principal's name, and to show his authority to do so by extraneous evidence;[33] for, as said by the United States Supreme Court, per Johnson, J.: "It is by no means true that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency."[34] But this style is not favored, as it increases the difficulties of proof, and at one time was questioned.[35]

§ **127. Undisclosed principal.**— It is a general principle of commercial law that a negotiable instrument must wear no mask, but must reveal its character upon its face. And it extends to the liability of parties thereto, who must appear as distinctly as the terms of the instrument itself, in order to be bound thereby. It follows, therefore, that no party

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30 Neal v. Irving, 1 Esp. 61; Haughton v. Ewbank, 4 Camph. 188.

31 St. John v. Redmond, 9 Port. 428; Edwards on Bills, 89.

32 Bradlee v. Boston Glass Co., 46 Pick. 347; Weaver v. Carnall, 35 Ark. 198; 1 Parsons on Notes and Bills, 91; Tannant v. Rocky Mountain Nat. Bank, 1 Colo. 278.

33 Odd Fellows v. First Nat. Bank, 42 Mich. 463; First Nat. Bank v. Gay, 63 Mo. 33.

34 Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326.

35 1 Parsons on Notes and Bills, 91, 92.

can be charged as principal upon a negotiable instrument unless his name is disclosed thereon. The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is "a courier without luggage," whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto, unless his name in some way is disclosed upon the instrument itself;[36] although upon other written contracts, not negotiable, it is often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly.[37] The rule excluding parol evidence to charge an unnamed principal as a party to negotiable paper is derived from the nature of such paper, which being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the original party as the payee himself has, must indicate on its face who is bound for its payment; for any additional liability not expressed in the paper would not be negotiable.[38]

§ **128. When agent individually bound.**— If the agent sign a note with his own name, and discloses no principal, he is personally bound. The party so signing must have intended to bind somebody upon the instrument, and no promisor but himself thereon appearing, it must be construed as his note or as a nullity.[39] And though he term himself "agent," such suffix to his name will be regarded as a mere *descriptio personæ*, or as an earmark of the transaction, and may be rejected as surplusage.[40]

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[36] Cragin v. Lovell, 109 U. S. 194; Texas Land Co. v. Carroll, 63 Tex. 51; Brown v. Baker, 7 Allen, 339.

[37] Lerned v. Johns,. 9 Allen, 419; Leavens v. Thompson, 55 N. Y. Supp. 391.

[38] Webster v. Wray, 19 Nebr. 558; Heaton v. Myers, 4 Colo. 62.

[39] Arnold v. Stackpole, 11 Mass. 27; Sharpe v. Bellis, 61 Pa. St. 71; Finan v. Babcock, 58 Mich. 305.

[40] Toledo Iron & Agr. Works v. Heisser, 51 Mo. 128; Arnold v. Sprague, 34 Vt. 409.

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§ **131. Banks as collecting agents.**— For the convenience of the mercantile world banks are frequently made the collecting agents for the owners or holders of commercial paper. But the mere fact that a bill or note is made payable at a bank does not of itself confer any agency upon the bank, on the part of the payee, to receive the amount. In order to make the bank the payee's agent to receive the money, the paper must be indorsed to, or lodged with, it, for collection, or it must have received authority from the payee to collect the amount due;[47] and without such circumstances or such authority any amount which the bank receives to apply in payment, it will be deemed to have taken as the agent of the payor.[48]

§ **132. Duty of collecting agent to present for acceptance and for payment.**— It is the duty of the bank, as soon as the bill, note, or check is placed in its hands for collection, to take the appropriate steps necessary to its prompt payment or prompt acceptance, by making presentment for acceptance without delay, and presentment for payment at maturity. And if the instrument be not duly accepted or paid, the bank must take all necessary steps to fix the liability of the drawer, if it be a foreign bill, by placing it in the hands of a notary for protest, and by giving due notice of its dishonor to the party who indorsed the instrument to it for collection, whether it be a bill or note, inland or foreign. If the bank fail in any of these duties, it becomes immediately liable in damages to the holder.[49] Assuming that the collecting bank properly and promptly discharges its duty as to presentment for acceptance and for payment, it is not bound to pay the amount of a bill, note, or check placed in its hands for collection to the holder, until such amount is received, or would be received but for the default of itself or some agent for whose act it is responsible.[50] It

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[47] Caldwell v. Evans, 5 Bush, 380; Balme v. Wambaugh, 16 Minn. 120; Glatt v. Fortman, 120 Ind. 385.

[48] Ward v. Smith, 7 Wall. 447; Pease v. Warren, 29 Mich. 9.

[49] Allen v. Merchants' Bank, 22 Wend. 215; Smedes v. Bank of Utica, 20 Johns. 372; Blanc v. Mutual Nat. Bank, 28 La. Ann. 921.

[50] Briggs v. Cent. Nat. Bank, 89 N. Y. 184.

is frequently the case that for the accommodation of customers they are permitted to draw before, and in anticipation of, the reception of such amounts. But this habit is mere favor, and, though long continued, gives the customer no right to demand that it be done in any particular case.[51]

§ 133. Ownership of paper in hands of collecting bank.— A variety of circumstances give rise to controversies as to the right to claim paper, or the proceeds of paper, which was put in bank to be collected.

When the holder places his paper in bank, he usually does so in one of three ways: *First.* As a principal employing the bank as a mere agent for collection, in which case the restrictive indorsement "*for collection*" is, or should always be, used, so that all subsequent holders may be advised of the bank's want of title. This is the form of indorsement generally used when the holder is not a customer of the bank. *Second.* As an avowed seller to the bank, in which case the indorsement is in blank and the transaction a plain one. *Third.* As a customer having an account with the bank, in which case the restrictive indorsement is or is not employed, according to the relations established by agreement between the parties. If the bank treats the paper as a cash deposit, and allows the customer to draw against it in anticipation of the collection, the indorsement is generally in blank.[52]

SECTION III.

PARTNERS AS PARTIES.

§ 134. General authority of partner to bind firm.— The general authority of a partner to bind the firm springs from the mutual agency of the copartners for each other; and from the course and usage of the business in which they are engaged. It follows, therefore, that a person contemplating partnership with another cannot, without a special author-

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51 Scott v. Ocean Bank, 23 N. Y. 289; Morse on Banking, 365.

52 Daniel on Negotiable Instruments, § 340*a*.

ity, bind him by a contract for the proposed partnership benefit — for example, for the purpose of raising capital — his agency not commencing until the connection is consummated.[53] The copartnership being formed, the copartner can bind his associates only in such transactions as pertain to their partnership business; and the copartnership business must be of such a character that the giving of negotiable paper would be the convenient and proper mode of conducting it, in order to create the presumption of agency in a copartner to give a bill or note in the firm's name.

§ **135. Implied authority of partner to bind the firm.**— It results from the very nature of partnership — from the very fact that the copartners are mutual general agents for each other in their copartnership affairs — that the express assent of one to the act of another within the scope of their business is unnecessary. The authority to each partner is implied to bind the firm within the legitimate scope of its business by the very fact that it is a firm, and it has been said by Lord Ellenborough, C. J.: "It would be a strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners, to know whether the others assented to such indorsement or that it should be void." [54]

§ **136. Trading partnerships.**— The borrowing of money and negotiation of bills and notes being incidental to, and usual in, the business of copartnerships formed for the purpose of trade, it follows that when a copartner borrows money professedly for the firm, and executes therefor a negotiable instrument in the copartnership name, it will bind all the partners, whether the borrowing were really for the firm or not, and whether he diverts and misapplies the funds or not, provided the lender is not himself cognizant of the intended fraud. And the burden will not be

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[53] Bank of Fort Madison v. Alden, 129 U. S. 373; Greensdale v. Domer, 7 B. & C. 635.

[54] Swan v. Steele, 7 East, 210; Fulton v. Loughlin, 118 Ind. 286.

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the firm exists only by implication, and may be rebutted by evidence that the party who took the security had previous notice that no such authority existed.[64]

§ 138. As to accommodation paper.— No one member of a firm can bind it, without the consent of all of its members, by signing the copartnership name as drawer, maker, acceptor, or indorser of a negotiable paper for his private accommodation or for the accommodation of a third party, for the obvious reason that such a transaction is not within the scope of copartnership business, unless expressly or impliedly made so, and would ordinarily be without authority, and in fraud of the firm. And every holder of such paper, chargeable with notice of its character, would be disqualified to recover upon it;[65] and if the plaintiff be payee, he would be required to prove the assent of the copartners before he could do so.[66]

If it appears on the face of the bill or note that it was signed by a partner, in the name of the firm, as surety, this will be notice to the world that it was not given in due course of the partnership business; and the burden would be thrown upon the holder not only to show that he gave value for the instrument, but also that all the parties assented to its execution in their name.[67] If the word "surety" be attached to the partnership name, that would impress upon the paper notice of its character.[68]

§ 139. As to private debts of a member of the firm.— No one member of a firm can, without the consent of all of his copartners, bind them by making, drawing, accepting, or indorsing a bill, note, or check for his private debt, in the partnership name; and the creditor who receives such an instrument, or the indorsee who takes it with notice of the consideration, cannot recover upon it.[69] Accordingly, it has

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64 Gallway v. Matthews, 10 East, 264; King v. Faber, 22 Pa. St. 21.

65 Bank of Fort Madison v. Alden, 129 U. S. 372; Heffron v. Hanaford, 40 Mich. 405.

66 Tompkins v. Woodward, 5 W. Va. 230.

67 National Bank v. Law, 127 Mass. 72; Tyree v. Lyon, 67 Ala. 1.

68 Foot v. Sabin, 19 Johns. 154; Boyd v. Plumb, 7 Wend. 309.

69 Daniel on Negotiable Instruments, § 366.

been held that where a creditor drew on his debtor through bank for an individual debt, and the debtor gave the check of the firm to which he belonged in payment, the creditor was held chargeable with notice of the misappropriation by the very nature of the transaction, and through the bank as his agent.[70] But in Nebraska a different conclusion has been reached.[71]

§ **140. Effect of dissolution.**— The dissolution of a partnership may occur by agreement between the partners; by a change in the membership of the firm, by the retirement of one or more of the partners; and by operation of law. The death or bankruptcy of a partner are the most familiar instances of dissolution by operation of law, and as a general rule it is well settled that in those cases no notice is necessary to exonerate the estate of the deceased or bankrupt partner from liability for future acts done by other members in the name of the dissolved firm.[72] Nor is notice necessary when a dormant partner retires, for he has not been held out as a member of the firm.[73] But when dissolution occurs by agreement between the partners, or by retirement of one or more of them, notice of dissolution is necessary to avoid liability for future transactions in the firm name. And the general principles stated may be affected by peculiar circumstances. Thus, if a dormant partner is known to certain individuals to have been a partner he must notify them of his retirement, to avoid future liability for acts of the firm.[74] And continuing members will be bound by the acts of a bankrupt partner in the firm's name if they hold themselves out as still in partnership with him.[75]

§ **141. Dissolution by agreement, or by death; compared.**— When the dissolution has been effected by retirement or

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[70] Davis v. Smith, 27 Minn. 390.

[71] Warren v. Martin, 24 Nebr. 273.

[72] Dickinson v. Dickinson, 25 Gratt. 321; Williams v. Mathews, 14 La. Ann. 11.

[73] Carter v. Whalley, 1 B. & Ad. 11.

[74] Davis v. Allen, 3 N. Y. 168; Cregler v. Durham, 9 Ind. 375.

[75] Lacy v. Woolcot, 2 Dowl. & R. 438.

agreement, one ex-partner has no implied authority to indorse in the partnership name negotiable instruments given to the firm before dissolution. As was said by Lord Kenyon, "the moment the partnership ceases, the partners become distinct persons; they are tenants in common of the partnership property undisposed of from that period; and if they send any securities which did belong to the partnership into the world after such dissolution, all must join in so doing." [76]

But where the dissolution is by the death of one of the partners, the survivor may indorse a note, payable to the firm in his own name.[77] The reason of the distinction between the authority of a partner after dissolution while his copartner is living, and the authority of the survivor when dissolution has been caused by death, is that in the former case the implied authority for one partner to act is all gone; whereas in the latter case the bill or note vests exclusively in the survivor, although he must account therefor as part of the partnership assets.[78] And for the like reason the surviving partner may draw a check on partnership funds to pay a firm debt.[79]

SECTION IV.

CORPORATIONS AS PARTIES.

§ 142. Public and private corporations.— Corporations are either private or public — public when "the whole interests and franchises are the exclusive property and domain of the government itself;" otherwise private. Public corporations are established exclusively for public purposes, and comprise cities, towns, villages, counties, townships, parishes, and all other corporations erected by the government as governmental agencies. Private corporations comprise banks, building associations, railroad companies, and all other

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[76] Abel v. Sutton, 3 Esp. 109.

[77] Johnson v. Berlizheimer, 84 Ill. 54.

[78] Story on Notes, § 125; Crawshay v. Collins, 15 Ves. 218.

[79] Commercial Nat. Bank v. Proctor, 98 Ill. 558; Daniel on Negotiable Instruments, §§ 370*a*, 370*b*.

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ness, or borrows money, it may execute a negotiable bill, note, or bond, and secure it by mortgage, to the creditor in payment.[83]

And in accordance with the propositions just announced, it was said, in a well-considered case, that "the right of corporations in general to give a note, bond, or other engagement to pay a debt is so nearly identical or so inseparably connected with the right to contract the debt, that no doubt upon the question ought to be admitted. When a corporation can lawfully purchase property, or procure money on loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have, the power to give any known assurance which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence."[84]

§ 145. Presumption of regularity.— When a corporation has a general power, express or implied, to be a party to negotiable contracts, such instruments will be presumed to have been executed in the legitimate course of its business, and whether so executed or not will be valid in the hands of a *bona fide* holder without notice.[85] Unless the corporation be specially authorized to do so, the execution or indorsement of accommodation paper for the benefit of a third person is an act beyond the scope of its corporate authority;[86] but according to the principles stated, a *bona fide* holder taking without notice of its character could enforce it.[87] Its indorsement on the paper is presumably valid, and it cannot be inferred in the absence of proof that it was

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[83] Daniel on Negotiable Instruments, § 382, and cases cited.

[84] Curtis v. Leavitt, 15 N. Y. 66.

[85] Supervisors v. Schenck, 5 Wall. 784; Mitchell v. Railroad Co., 17 Ga. 574.

[86] Field on Corporations, 306.

[87] Bird v. Daggett, 97 Mass. 494; National Bank v. Wells, 79 N. Y. 498.

for accommodation.[88] Where a railroad company transferred and guaranteed bonds of another, itself receiving the proceeds, it was held estopped to deny its liability upon the guaranty.[89]

§ **146. Authority of agent of corporation.**—It was the ancient doctrine of the common law that a corporation could not express its assent, and therefore could not constitute an officer or agent, save by instrument under seal.[90] This doctrine is now completely obsolete in the United States, and here there is no doubt that such a body may, by mere vote, or other appropriate corporate act not under seal, appoint an officer or agent whose acts and contracts within the scope of his authority would bind the corporation.[91] And if a corporation employ a person to discharge official duties — such as a bank, which places a person behind its counter to exercise the duties of cashier — it will be bound by his acts although the formalities of qualification have not been complied with, unless the statute creating the corporation provides that his acts shall be void until such formalities be performed.[92] Indeed, the doctrine is well settled that if officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed, and his acts as cashier will bind the corporation, although no written proof is or can be adduced of his appointment. In short, the acts of artificial persons afford the same presumptions as the acts of natural persons.

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[88] Lafayette Bank v. St. Louis Stoneware Co., 2 Mo. App. 299.

[89] Arnot v. Erie R. Co., 5 Hun, 608.

[90] Angell & Ames on Corporations, chap. IX, § 3. p. 214.

[91] Bank of Columbia v. Patterson's Admr., 7 Cranch, 305; Fleckner v. United States Bank, 8 Wheat. 387.

[92] Bank of the United States v. Dandridge, 12 Wheat. 83.

Each affords presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty.[93]

§ **147. Municipal corporations.**—There is no doubt that public corporations may have the power conferred on them to execute bills, notes, checks, and indeed all varieties of negotiable instruments. But the better opinion is, that such power does not exist, unless expressed or clearly implied.[94] The ordinary orders, warrants, certificates of indebtedness, and obligations to pay issued by municipal corporations, if negotiable in form, will in general enable the holder to sue in his own name. But they are not negotiable instruments so as to exclude inquiry into the legality of their issue, or preclude defenses which are available as against the original payees.[95] To invest such instruments with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, would be an abuse of their true character and purpose.[96]

§ **148. Difference between public and private corporations.**—If private corporations, to increase their profits, embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers, when they transgress the limits of their chartered authority.[97] But municipal corporations stand upon a different ground. They are not organized for gain, but for the purpose of government; and debts illegally contracted by their officers cannot

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[93] Bank of the United States v. Dandridge, 12 Wheat. 64; Creswell v. Lanahan, 101 U. S. 352.

[94] Knapp v. Mayor of Hoboken, 39 N. J. L. 394; City of Williamsport v. Commonwealth, 84 Pa. St. 487.

[95] Knapp v. Mayor of Hoboken, 39 N. J. L. 394; 1 Dillon on Municipal Corporations, § 406.

[96] Wall v. Monroe County, 103 U. S. 74; District of Columbia v. Cornell, 130 U. S. 661.

[97] Lloyd v. West Branch Bank, 15 Pa. St. 174.

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CHAPTER VII.

PERSONS PARTIALLY OR WHOLLY DISQUALIFIED.

SECTION I.

INFANTS.

§ **150. General rule.**—Persons under twenty-one years of age are minors, or infants, as they are more generally termed, and contracts made by them have been divided into three classes: First, void contracts, which are those clearly to the infant's disadvantage — as, for instance, a bond made with a penalty; second, voidable contracts, which are those which may or may not be for his benefit, according to circumstances — as, for example, a lease of his lands rendering rent; and third, valid contracts, which are such as are entered into for necessaries.[1] And by necessaries are meant those things which are needed by the infant, and are suited to his means and rank in life.

But this distinction as to void and voidable contracts is now regarded as practically obsolete; all the contracts of an infant, not in themselves illegal, being capable of ratification by him after he has attained his majority, and, therefore, being voidable only. For if absolutely void, they would be incapable of ratification.[2]

§ **151. Necessaries and torts.**— For necessaries an infant may undoubtedly bind himself, and the better opinion is that he may execute a note not negotiable for the amount, the consideration of which might be inquired into, and his protection from imposition insured — he being bound not absolutely for the amount of the note, but only for the real value of the necessaries for which it was given.[3] But it is

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[1] Story on Notes, § 77.

[2] 1 Parsons on Contracts, 295; Byles on Bills [*59], 145; Daniel on Negotiable Instruments, § 223.

[3] Ray v. Tubbs, 50 Vt. 688; 1 Parsons on Notes and Bills, 68.

denied by some of the authorities that an infant can execute any note whatever, of any binding force, even for necessaries.[4] In England it has been held that an infant may execute a single bill (a bond without a penalty) for the exact sum due for necessaries; but not a bond with a penalty, or carrying interest.[5] An infant cannot bind himself for necessaries when he has a parent or guardian who supplies his wants;[6] but when he has authority from his guardian or parent, he may purchase them and bind himself for them.[7] An infant is in general liable for his torts as any other person would be; and if he give a note in satisfaction of damages it has been held that he is bound thereby.[8]

§ **152. Negotiable paper signed by** infants.— In respect to negotiable paper to which infants have signed their names as parties, it may be stated as a general principle, universally recognized wherever the common law prevails, that an infant cannot bind himself absolutely as drawer, indorser, acceptor, or maker of a bill of exchange or negotiable note.[9] In a case where the acceptor of a bill pleaded infancy, and it was replied that it was given for necessaries, Lord Mansfield, C. J., said: "Did anyone ever hear of an infant being liable as an acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to."[10] And although the tenor of the modern authorities is to liberalize the law on the subject of infancy, the doctrine is generally followed that an infant cannot be a party to a negotiable instrument — the reason assigned being, that otherwise, should it be transferred to a *bona fide* holder for value, and without notice of the infancy, the infant, if bound at all, would be bound for the entire sum, and if inquiry

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4 Bouchell v. Clary, 3 Brev. 194; Chitty on Bills [*19], 26.

5 Russell v. Lee, 1 Lev. 86; Chitty on Bills [*19], 26.

6 Angel v. McClellan, 16 Mass. 28; Guthrie v. Murphy, 4 Watts, 80.

7 Rundel v. Keeler, 7 Watts, 237; Watson v. Heasel, 7 Watts, 344.

8 Ray v. Tubbs, 50 Vt. 688; Daniel on Negotiable Instruments, § 224.

9 Williamson v. Harrison, Holt, 359, 3 Salk. 197; Story on Notes, § 78.

10 Williamson v. Watts, 1 Camph. 552.

were admitted into the consideration, the instrument would lose its character as negotiable paper.[11]

§ **153. Infant as payee and indorser.**— An infant may undoubtedly be the payee of a bill or note, and may sue upon and enforce it, since it cannot be but for his benefit if the consideration thereof does not move from himself but from some third person, or if it be for a debt justly due to him.[12] But whether or not an infant can personally receive payment is a different question. As a general rule, payment should be made to his guardian, and if it be made to the infant personally, and be thereby dissipated and lost, the payer would not be discharged.[13] An infant may also indorse a bill or note made payable to him or order, so far at least as to enable the indorsee to recover against the drawer, acceptor, or maker, who, by undertaking to pay to him or to his order, are estopped to deny his capacity to order payment to be made to the indorsee.[14] And to this extent the infant's indorsement would be valid, even if made by his authorized agent or attorney.[15] "It would be absurd," it has been said by Parker, C. J., "to allow one who has made a promise to pay to one who is an infant, or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise."[16] And in respect to the drawer of a bill payable to an infant or order, Lord Mansfield said: "The drawer says, 'let anybody trust the payee on my credit.'"[17]

§ **154. Infant's indorsement voidable only.**— An infant's indorsement is voidable, not absolutely void.[18] And it has

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[11] Swasey v. Vanderheyden, 10 Johns. 33; Conn v. Coburn, 7 N. H. 368.

[12] Warwick v. Bruce, 2 Maule & S. 205; Story on Notes, § 79.

[13] Phillips v. Paget, 2 Ark. 80.

[14] Nightingale v. Withington, 15 Mass. 272; Hardy v. Waters, 38 Me. 450.

[15] Hardy v. Waters, 38 Me. 450.

[16] Nightingale v. Withington, 15 Mass. 272.

[17] Grey v. Cooper, 3 Doug. 65; Daniel on Negotiable Instruments, § 227.

[18] Goodsell v. Myers, 3 Wend. 479; Edwards on Bills, 245.

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and explicit recognition of the contract, and words expressing or necessarily implying a promise to fulfill it. The promise of the adult must be made to the party with whom he contracted, or his authorized agent, in order to amount to ratification; and if made to a third party, it will be insufficient.[26]

It follows, therefore, that mere part payment does not amount to ratification by the adult, but expressions of intention to abide by a former award, or accepting its benefits, would suffice. Hence the infant's conduct may be such as to amount to ratification, but mere silence and failure to disaffirm will not be sufficient alone.[27]

§ **156. Written ratification.**— In England and some of the United States, ratification must be in writing. In 1828, Parliament enacted the statute of 9 George IV, chap. 14, commonly called Lord Tenterden's act, whereby it is provided that "no action shall be maintained whereby to charge any person, upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." And similar statutes have been enacted in most of the United States.

Wherever such a statute exists, a written promise, in accordance with the enactment, is essential to a legal ratification.

SECTION II.

LUNATICS, IMBECILES, AND DRUNKARDS.

§ **157. Presumption of sanity.**— Every person is presumed to be of sane mind until the contrary be shown by him who asserts it;[28] insanity or imbecility cannot in England be shown under a general plea that the defendant did not exe-

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[26] Goodsell v. Myers, 3 Wend. 479; Reed v. Boshears, 4 Sneed, 118.

[27] Daniel on Negotiable Instruments, § 234.

[28] Jackson v. Van Dusen, 5 Johns. 144; 1 Parsons on Notes and Bills, 150.

cute the bill, note, or other instrument declared on, but must be specially pleaded.[29]

The earlier authorities of the English law held that a man should not be allowed to stultify himself by alleging his own lunacy or imbecility;[30] but such a doctrine sounds more like the gibberish of a lunatic than like the decree of a humane and enlightened lawgiver. And it may now be regarded as a general rule of universal law that the negotiable contracts of a lunatic, idiot, or other person *non compos mentis*, from age or personal infirmity, are utterly void.[31]

§ **158. Degree of incapacity.**— Mere weakness of mind, not amounting to imbecility or insanity — mere immaturity of reason, or want of experience and skill in business, is no ground of defense either in law or equity, provided no fraud has been practiced on the party.[32] But if the weakness of mind be so great as to incapacitate the party to guard against imposition and undue influence, it will suffice to vacate his contracts.[33]

§ **159. Ignorance of incapacity.**— It has been held by quite a number of courts that in order to render effectual the defense of insanity or imbecility, it must be made to appear that the other contracting party had knowledge of the defect of mind of the lunatic or idiot, and this view has been upheld not only by many of the courts of last resort in the United States, but also in England. But neither the English nor the American courts are in harmony upon the proposition, there being many well-considered cases which support the contrary view.[34]

§ **160. Necessaries; exception to rule.**— In this regard an imbecile stands upon the footing of an infant. And his

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29 Harrison v. Richardson, 1 Moody & R. 504.

30 Beverly's Case, 4 Rep. 126; Stroud v. Marshall, Cro. Eliz. 398.

31 Daniel on Negotiable Instruments, § 209; Dickerson v. Davis, 19 N. E. 145.

32 Stewart v. Lispenard, 26 Wend. 299; Osmond v. Fitzroy, 3 P. Wms. 129.

33 Johnson v. Chadwell, 8 Humphr. 145.

34 Daniel on Negotiable Instruments, § 210, and cases cited.

executed contracts for necessaries, made while he was temporarily or apparently sane, with a party acting in entire good faith, would be enforced.[35] And if a bill or note were executed by him for necessaries under such circumstances, it would doubtless be valid, at least to the extent of their actual and proven value.[36] A lunatic has been held bound for medical services rendered his wife;[37] and in England, where a nobleman ordered carriages suitable to his rank, and the coachmaker supplied them *bona fide*, and they were actually used, it was held that an action was maintainable on the contract, notwithstanding there had been an inquisition of lunacy finding him to be of unsound mind at the time the carriages were ordered.[38] The recovery for necessaries, instead of being condemned, is encouraged by considerations of humanity. And the courts may safely go farther, and authorize recovery where the consideration has been full and fair, and has entered into the betterment of the lunatic's estate, it being followed like trust money into his hands, and restored in kind or its equivalent.[39]

§ **161. Persons intoxicated.**— Drunkenness is a species of mental aberration, produced by intoxicating stimulants. And if a person become so drunk as to be deprived of understanding and reason, there is no doubt that, while in such a condition, he has no capacity to enter into a contract. And if he should sign a negotiable instrument, either as maker, drawer, indorser, or acceptor, it would certainly be void as to all parties having notice of the condition in which he signed it.[40] If the drunkenness were so complete as to suspend all rational thought, the better opinion is that any instrument signed by the party would be utterly void even in the hands of a *bona fide* holder without notice, for, although it may have been the party's own fault that such an aberra-

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[35] Richardson v. Strong, 13 Ired. 106; McCullis v. Bartlett, 8 N. H. 569.

[36] McCormick v. Littler, 85 Ill. 62.

[37] Pearl v. McDowell, 3 J. J. Marsh. 658.

[38] Baxter v. Earl of Portsmouth, 7 Dowl. & R. 614.

[39] Daniel on Negotiable Instruments, § 212.

[40] Jenners v. Howard, 6 Blackf. 240; Clark v. Caldwell, 6 Watts, 139.

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contrary, commercial intercourse between different nations, under relations of amity with each other, are to be favored and encouraged. But if war should break out between two countries, it at once interposes a barrier to, and an interdiction of, all commercial correspondence, intercourse, and dealing between the citizens of the two countries. The hostile countries become sealed as against each other; and both for the purpose of identifying the citizen thoroughly and emphatically with the policy and interests of his country, and of preventing communications to the enemy which might be damaging in their character, the law of nations absolutely prohibits all intercourse between the citizens of belligerent countries, and pronounces all contracts between them utterly void. Such contracts are not merely voidable, but *ab origine* void, and incapable of being enforced or confirmed.[47] And the rule applies not only to citizens and native subjects, but as well to all persons domiciled in the respective countries.[48]

This disability of alien enemies to contract does not rest upon any peculiarity of English or American law, but upon the universal public law of nations, as stated and approved by the most eminent writers, such as Grotius, Puffendorf, Vattel, Bynkershoek; and in the present age, Wheaton, Story, Kent, Parsons, and others.

§ **164. As drawer, acceptor, indorser, or indorsee.**— If two countries are at war, a citizen of one cannot legally draw a bill of exchange upon a citizen of the other. The same principle likewise applies to an acceptance or indorsement, and even to an indorsee, if the latter knew at the time of the state of war existing.[49]

In the late war between the Confederate States and the United States, many transactions between parties on opposite sides of the hostile line occurred, and the principle that forbids communication between alien enemies has been regarded by the courts of the United States, and of the

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47 Griswold v. Waddington, 16 Johns. 438; The Julia, 8 Cranch, 131.

48 Roberts v. Hardy, 3 Maule & S. 533.

49 Daniel on Negotiable Instruments, §§ 217, 218.

several States, as applicable to them. For while the Confederates States were short-lived, for the time being they waged war like an independent nation, and were accorded belligerent rights.[50]

SECTION IV.

MARRIED WOMEN.

§ 165. Incapacity of married woman to contract at common law.— Wherever the common law prevails a married woman cannot bind herself as the drawer, acceptor, maker, or indorser of a negotiable instrument, and such instruments signed by her (unless as agent for another) are absolutely void.[51] And even a promise made by her after her husband's death to pay a bill or note which she executed during his lifetime will not bind her unless upon a new and good consideration.[52]

Following the principle just announced, it may be added that the wife's identity is so completely merged in the husband's that she can no more contract with him than with a stranger.[53] Therefore the drawing or indorsement of a bill or note by a husband to his wife is void, and she cannot sue upon it either in his lifetime, or against his executor after his decease.[54]

§ 166. Married woman as payee and indorser.— If a bill or note be made payable to a single woman, and she afterward marries, it becomes the property of her husband; and if made to her after marriage, it is the property of her husband. For two reasons, therefore, a married woman, who is the payee of a negotiable instrument, cannot transfer a perfect legal title to it, or bind herself by indorsing it; first, because she has no capacity to contract; and, second, be-

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[50] Billgerry v. Branch, 19 Gratt. 393; Ward v. Smith, 7 Wall. 447.

[51] Van Steenburgh v. Hoffman, 15 Barb. 28; Mason v. Morgan, 2 Ad. & El. 30.

[52] Lloyd v. Lee, 1 Stra. 94; Meyer v. Hayworth, 8 Ad. & El. 467.

[53] National Bank v. Brewster, 49 N. J. L. 231.

[54] Gay v. Kingsley, 11 Allen, 345; Jackson v. Parks, 10 Cush. 550.

cause the instrument is her husband's.[55] But still, although the husband might recover the instrument which has been transferred by his wife, in an action of trover against the holder, the drawer, and acceptor of a bill and the maker of a note, who have bound themselves to pay to the payee or order, are estopped, when that order is made, to deny its sufficiency. It does not lie in their mouths to declare the effect of their own engagement to be different from its terms; and the holder, under the indorsement of a payee, who is a married woman, may recover against them.[56] And if there be an indorser, after the married woman, he cannot dispute her capacity, as his indorsement warrants it.[57] But other parties to the instrument, not being estopped by their relation to it, may show that one — not the payee — who has indorsed it, is a married woman. These views clearly apply where the paper has been executed to the woman after her marriage; but if made to her before, disability subsequently created might be pleaded by any party.[58]

§ 167. Exceptions to the general rule.— There are six general exceptions to the rule that a married woman cannot make a valid contract: (1) When the husband is an alien enemy; (2) when the wife has a separate estate, and the contract is made with reference to or for the benefit of such estate; (3) when the wife is a sole trader; (4) when the contract is made for the wife's necessaries; (5) when the husband adopts the wife's name; (6) when the wife is the agent of her husband.[59]

In either of the instances given, the wife can become a party to a negotiable contract, and be bound as such.

The contractual power of married women has been made the subject of legislation in very many, if not in all the States. The general scope of this remedial legislation is

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55 Shuttleworth v. Noyes, 8 Mass. 229; Cotes v. Davis, 1 Campb. 485.

56 Smith v. Marsack, 6 Com. B. 486.

57 Prescott Bank v. Caverly, 7 Gray, 217.

58 Smith v. Marsack, 6 Com. B. 486; Daniel on Negotiable Instruments, § 242.

59 Daniel on Negotiable Instruments, § 244 *et seq.*

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BOOK III.

THE NEGOTIATION OF THE INSTRUMENT.

CHAPTER VIII.

TRANSFER BY DELIVERY AND INDORSEMENT.

§ 168. **Methods of transfer.**— The legal title to all negotiable contracts is transferred either by mere delivery, or by indorsement and delivery. A negotiable instrument payable to bearer, or indorsed in blank, may be transferred like currency by mere delivery; other bills and notes, by indorsement of the transferrer's name thereon, and delivery to the individual named, unless they are not expressed to be payable to the order of any person, or to bearer, in which case, unless by statute, they are not negotiable in the United States and in England; but it is otherwise in Scotland. But if the paper be payable to A. B., or order, and A. B. indorse it to C. D., without adding "or order," C. D. may, nevertheless, transfer it by indorsement and delivery, and it retains its original negotiable character.[1]

While commercial paper payable to bearer, or indorsed in blank, may be transferred by delivery merely, yet if the payee puts his name upon it, and transfers it, he is liable as an indorser, such indorsement being valid between the indorser and subsequent indorsees;[2] and the holder of paper payable to bearer and indorsed may sue upon it as bearer or indorsee, at his election.[3] When the instrument is made payable to "order," the indorsement of the payee, followed by delivery, is necessary to transfer the legal title; and the transferee, without indorsement, takes it as a mere chose

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[1] Potter v. Tyler, 2 Metc. (Ky.) 58; Blackman v. Green, 24 Vt. 17.
[2] Gwinnell v. Herbert, 5 Ad. & El. 436; Brush v. Reeves, 3 Johns. 439.
[3] Story on Notes, § 132.

in action, and must aver and prove the consideration.[4] And he takes it subject to all equities that attached to it in the hands of his transferrer.[5] The negotiability of a note is not affected by the fact that a corporation indorses it through its seal.[6]

§ 169. Delivery by indorser.— As has been seen, delivery, in any event, by the indorser is essential to completion of his contract; and delivery implies its acceptance by the indorsee. If a transferee of a bill or note by indorsement send it back to his indorser as worthless, the indorsement is declined, and becomes invalid; and he acquires no new title by merely getting possession, without a new transfer; but there need not be a new indorsement, because the former indorsement is capable of becoming again valid by ratification or confirmation.[7] An offer to indorse for another must be accepted in a reasonable time.[8] If the proposed indorsee wrongfully retain the note after refusing its acceptance, he cannot upon payment of a judgment for the wrongful conversion hold the indorser liable; such payment will invest him with title to the converted property as of the date of the conversion, which is merely the obligation of the makers of the note, the contract of indorsement having never been consummated.[9]

SECTION I.

NATURE OF, AND LIABILITIES CREATED BY, CONTRACT OF INDORSEMENT.

§ 170. Meaning of term "indorsement."— Indorsing an instrument, in its literal sense means writing one's name on the back thereof; and, in its technical sense, it means writing one's name thereon with intent to pass title thereto and to incur the liability of a party who warrants payment of the

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4 Van Eman v. Stanchfield, 10 Minn. 255; Paris v. Wells, 68 Ga. 604.

5 Hadden v. Rodkey, 17 Kan. 429.

6 Rand v. Dovey, 83 Pa. St. 280; Daniel on Negotiable Instruments, § 663 *et seq.*

7 Cartwright v. Williams, 2 Stark. 340.

8 Claflin v. Briant, 58 Ga. 414.

9 Haas v. Sacket, 40 Minn. 53.

instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser. Indorsement, strictly speaking, is applicable only to negotiable paper, and the term includes delivery for value to the indorsee, but it is otherwise as to an instrument not negotiable.[10]

§ 171. An indorsement a separate and independent contract. — The indorsement of a negotiable contract is not merely a transfer thereof, but it is a fresh and substantive contract in itself, embodying all the terms of the instrument indorsed.[11] The indorsement of a bill is equivalent to the drawing of a new bill by the drawer upon the drawee (or acceptor, if it be accepted) in favor of the indorsee; and the indorsement of a note is equivalent to the drawing of a bill upon the maker, who stands in the relation of acceptor, as it were, in favor of the indorsee.[12] So entirely distinct and independent is the contract of the indorser of a note from that of the maker that at common law a separate action against each was indispensable.[13]

§ 172. Liabilities assumed by indorser. — The indorser engages (1) that the negotiable instrument will be accepted or paid, as the case may be, according to its purport; but this engagement is conditioned upon due presentment or demand, and notice;[14] (2) that it is in every respect genuine; (3) that it is the valid instrument it purports to be; (4) that the ostensible parties are competent; (5) and that he has good title to it and the right to indorse it. And if it turns out that any of these engagements but that first named are not fulfilled, the indorser may be sued for recovery of the original consideration which has failed, or be held liable as a party, without proof of demand and notice.[15]

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[10] Daniel on Negotiable Instruments, § 666.

[11] Brown v. Hull, 33 Gratt. 27; Bank of British North America v. Ellis, 6 Sawy. 98.

[12] Evans v. Gee, 11 Pet. 80; Ingalls v. Lee, 9 Barb. 947.

[13] Brown v. Hull, 33 Gratt. 29; Patterson v. Todd, 18 Pa. St. 426.

[14] Callahan v. Bank of Kentucky, 82 Ky. 235.

[15] Chitty on Bills [*95], 116; Story on Bills, § 108; Copp v. McDugall, 9 Mass. 1.

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forged, fictitious, or altered. Undoubtedly, and by universal admission, this principle applies to the signatures of the drawer, acceptor, and maker of the bill or note, who are the original parties, and it is often expressed in language to the effect that the indorser warrants that it is a genuine instrument.[19] This rule, however, would not apply where the holder procured the indorsement of a forged note with knowledge of the forgery, and represented to the indorser that it was genuine, or where the holder has received the paper after maturity and without consideration.[20] Whether or not the indorser's engagement extends to the genuineness of prior indorsements is not so well settled. Undoubtedly the indorser admits their genuineness, as he is estopped to deny his title, which would otherwise be invalid,[21] and notwithstanding the doubts and dissents which have been expressed, it is clear upon principle that the indorser warrants the instrument throughout.[22]

§ **176. Third, as to validity.**— The indorser engages that the bill or note is a valid and subsisting obligation, binding all prior parties according to their ostensible relations; and he may be held liable although the instrument be entirely null and void as between prior parties themselves; and also as between prior parties and even *bona fide* holders without notice.[23] In an early English case, where the suit was by the indorsee against the maker of a note void for gaming, Lee, C. J., said: "The plaintiff is not without remedy, for he may sue Church (the indorser) upon his indorsement." [24]

§ **177. Fourth, as to competency of original parties.**— The indorser contracts that the original parties to the bill or note were competent to bind themselves, whether as drawer, acceptor, or maker; for otherwise, although ostensible, they

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19 Edwards on Bills, 188, 289; Howe v. Merrill, 5 Cush. 83.

20 Turner v. Keller, 66 N. Y. 66.

21 Ogden v. Saunders, 12 Wheat. 313; Story on Bills, §§ 110, 111.

22 Daniel on Negotiable Instruments, § 672.

23 1 Parsons on Notes and Bills, 218; Story on Bills, § 190.

24 Bowyer v. Bampton, 2 Stra. 1155.

would not be real parties to it. Therefore, if the drawer, acceptor, or maker became a party under duress, or were an infant, lunatic, or married woman, the indorser's contract is broken,[25] and he may be sued for recovery of the original consideration which has failed, or upon the instrument itself, without proof of demand and notice.[26] So, if the instrument purported to be signed by procuration, he engages that there is competent authority in the agent.[27]

But whether or not the indorser's engagement is that all of the antecedent parties are competent to contract is questionable. Quite a number of cases are to be found, both for and against the proposition.[28]

§ **178. Fifth, as to** title.—The indorser contracts that he has a good title to the bill or note, and a right to transfer it.[29] If he has stolen or found the instrument, or otherwise acquired possession without title, and it be payable to bearer or indorsed in blank, he might, before its maturity, invest a *bona fide* indorsee without notice with a perfect title, although not himself possessing it; and even after maturity, the *bona fide* indorsee might get from him some superior rights to his own.[30]

SECTION II.

FORM AND VARIETIES OF INDORSEMENT.

§ **179. As to place of indorsement.**— While an indorsement, as its derivation and meaning would indicate, should be, and generally is, placed on the back of the instrument, it may be written — although unusual and irregular — on any other portion of it, even on the face, and under the maker's name.[31]

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[25] Bowman v. Hiller, 130 Mass. 153; Haly v. Lane, 2 Atk. 181; Robertson v. Allen, 59 Tenn. 233.

[26] Daniel on Negotiable Instruments, §§ 669, 675.

[27] Edwards on Bills, 289; Story on Bills, § 110.

[28] Daniel on Negotiable Instruments, § 676, and cases cited.

[29] Williams v. Tishomingo Sav. Inst., 57 Miss. 633; Edwards on Bills, 289.

[30] Daniel on Negotiable Instruments, § 677.

[31] Partridge v. Davis, 20 Vt. 449; Bigelow on Bills and Notes, 135.

At any rate, the indorsement must, as a general rule, be somewhere on the paper itself, or attached thereto, and unless it is, the party cannot be held liable as an indorser,[32] but a promise made on a sufficient consideration will sustain an action upon its breach.[33]

§ **180.** Allonge.— It is not necessary, however, that the indorsement should be upon the original bill or note, in order to constitute it such, in the full sense of the term. It sometimes happens that by rapid circulation from hand to hand, the back of the paper is completely covered by indorsements; and in such cases the holder may tack or paste on a piece of paper sufficient to bear his own and subsequent indorsements, and thereon the indorsements may be made. Such addition to the original instrument is called an *allonge*, and it becomes for the purposes above named, incorporated as a part of it.[34]

§ **181.** Varieties of indorsement.— There are various liabilities which may be engrafted on a negotiable instrument, evidenced by the character and terms of the indorsement thereon. An indorsement may be (1) in full or (2) in blank; it may be (3) absolute or (4) conditional; it may be (5) restrictive; it may be (6) without recourse on the indorser; and there may be (7) joint indorsements of the instrument, (8) successive indorsements, and also (9) irregular indorsements.[35]

§ **182.** First, an indorsement in full.— It is one which mentions the name of the person in whose favor it is made; and to whom, or to whose order, the sum is to be paid. For instance: "Pay to B., or order," signed A., is an indorsement in full by A., the payee or holder of the paper to B. An indorsement in full prevents the bill or note from being indorsed by any one but the indorsee.[36] And none but the special indorsee or his representative can sue upon it.[37]

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[32] Fenn v. Harrison, 3 T. R. 757; Daniel on Negotiable Instruments, § 748*a*.

[33] Moxon v. Pulling, 4 Campb. 51; French v. Turner, 15 Ind. 59.

[34] Crosby v. Roub, 16 Wis. 622; Folger v. Chase, 18 Pick. 63.

[35] Daniel on Negotiable Instruments, § 691.

[36] Mead v. Young, 4 T. R. 28.

[37] Lawrence v. Fussell, 77 Pa. St. 460; Reamer v. Bell, 79 Pa. St. 292.

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ment is one by which the indorser annexes some other condition to his liability. Sometimes the condition is precedent, and sometimes subsequent. Thus, "Pay to A. B., or order, if he arrives at twenty-one years of age," or, "if he is living when it becomes due," is an indorsement upon a condition precedent. "Pay A. B., or order, unless, before payment, I give you notice to the contrary," is upon a condition subsequent. The condition attached to the indorsement in no manner affects the negotiability of the paper.[42]

§ **185. Fifth, as to restrictive indorsements.**— An indorsement may be so worded as to restrict the further negotiability of the instrument; and it is then called a restrictive indorsement. Thus, "pay the contents to J. S. only," or "to J. S. for my use," or "to order for my use," or "for me," are restrictive indorsements, and put an end to the negotiability of the paper.[43] Of the like character is an indorsement, "credit my account," or "pay J. S. or order for account or on account of C. D.," or "for collection," or "for collection and immediate returns."[44] These and similar restrictive words indicate that the indorsee is merely an agent to receive the money, and that he paid no consideration for the paper, as a purchaser would not intelligently accept such an indorsement. The indorsee in such a case can only collect the money; he cannot sell or hypothecate the instrument for his own benefit, nor can he hold the indorser liable to himself. The restrictive words of the indorsement give notice of the trust engrafted upon it, and if the indorsee passes it off for his own debt, or in any other manner violative of the trust, the transferee would take it subject to the trust.[45]

§ **186. Sixth, as to qualified indorsements, or indorsements without recourse.**— An indorsement qualified by the words "without recourse," "*sans recours*," or "at the indorsee's

[42] Story on Notes, § 149; Daniel on Negotiable Instruments, § 697.

[43] Wilson v. Holmes, 5 Mass. 543; Williams v. Potter, 72 Ind. 354.

[44] First Nat. Bank v. Reno County, 3 Fed. 257; White v. National Bank, 102 U. S. 658; Continental Nat. Bank v. Weems, 69 Tex. 489.

[45] Hook v. Pratt, 78 N. Y. 371; Claflin v. Wilson, 51 Iowa, 15; Daniel on Negotiable Instruments, § 698.

own risk," renders the indorser a mere assignor of the title to the instrument, and relieves him of all responsibility for its payment,[46] though not from certain liabilities which have been already enumerated.[47] But such an indorsement does not throw any suspicion upon the character of the paper.[48]

§ 187. **Seventh, as to joint indorsements.**— If a bill or note be made payable to several persons not partners, the transfer can only be made by a joint indorsement of all of them; and as Chitty says, "If a bill has been transferred to several persons not in partnership, the right to transfer is in all collectively, and not in any one individually."[49] Where, however, one of two or more joint payees or transferees undertake to transfer the instrument, the extent of the transfer will depend upon the nature of his interest. Such interest, whatever it is, passes to his indorsee or assignee; but nothing beyond that, as against his coparty, unless indeed there be some other element in the transaction in the nature of fraud, agency, or other circumstance, modifying the rights of the parties.[50] No action could be maintained on the indorsement of one of the joint parties,[51] the interest passing thereby being equitable merely.

§ 188. **Eighth, as to successive indorsements.**— When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint obligation, whether the indorsements be made for accommodation or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the in-

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46 Wilson v. Codman's Exr., 3 Cranch, 192; Borden v. Clark, 26 Mich. 410.

47 See *ante*, § 173.

48 Lomax v. Picot, 2 Rand. 260; Kelley v. Whitney, 45 Wis. 117.

49 Chitty on Bills [*201], 232; Daniel on Negotiable Instruments, § 701*a*.

50 Brown v. Dickinson, 27 Gratt. 693.

51 Caverick v. Vickery, 2 Doug. 652.

dorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them.[52]

It follows from the principles stated that while the right of contribution exists between equal indorsers, contribution does not arise between successive indorsers. The presumption is that the indorsements were made in the order appearing upon the instrument, but it should be noted, however, that the indorser is not necessarily bound by and according to the actual date of the indorsement, for the contract determines the nature and extent of his liability; and if it appear that the instrument was indorsed by one party with the agreement that another should become prior indorser, the latter will be held responsible first in point of contract though second in point of time.[53]

§ 189. **Ninth, as to irregular intervening indorsements.**—Thero are some cases of irregular indorsements that call for attention. Thus, suppose a bill be indorsed specially to A., and then, before A.'s indorsement, there appears the indorsement of B. In such a case, Alderson, B., said: "The indorsement only operates as against the party making it, and then as a fresh drawing."[54] Upon such an indorsement of a note, the party cannot be sued as a maker. Littledale, J., said, in such a case: "It may be correct to say that an indorsement of a bill is in the nature of a new drawing. But supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker." It was held, therefore, that the party must be sued as an indorser; but that a prior party could not be sued at all, as a link in the chain of title was lacking.[55]

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[52] Daniel on Negotiable Instruments, § 703.

[53] Daniel on Negotiable Instruments, § 704; Chalmers v. McMurdo, 5 Munf. 252; Slack v. Kirk, 67 Pa. St. 380.

[54] Penny v. Innes, 5 Tyr. 107.

[55] Gwinnell v. Herbert, 5 Ad. & El. 430.

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maker; another, that he is presumably a surety or guarantor in the form of a joint maker; another, that he is secondarily liable as a guarantor; another, that he is presumably a second indorser, and still another, that he is *prima facie* first indorser. The authorities in support of the five conflicting views stated will be found collated in the notes to sections 713 to 715, inclusive, of Daniel on Negotiable Instruments.

Very many, if not a majority, of the cases, including the Supreme Court of the United States, support the view that such party should be regarded as a joint maker; yet, upon reason, it would seem that the party who puts his name on the back of a negotiable instrument before it is indorsed by the payee should be presumed to be a first indorser. Parties often so sign their names for accommodation of the maker, and are themselves as much surprised as the holders of the paper to find that difficult questions arise as to the nature of their obligation. And the law merchant should, in its elasticity to fit all manner of commercial transactions, recognize customary transactions, and apply to them the natural and simple presumptions that render them intelligible and practical. Strained technical dissertations and conclusions have so bungled and confounded the question which we have considered, that a fresh mind investigating it is lost in labyrinths of suggestion and decision, while as we think an easy solution may be found in adopting the views above presented.

§ 193. Admissibility of parol evidence to ascertain intention as between immediate parties.— The authorities very generally concur, though not with entire unanimity, that, as between the immediate parties, the interpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction.[59] If the person who places his name on the back of the note before the payee intended

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[59] Good v. Martin, 95 U. S. 95; Rey v. Simpson, 22 How. 241.

at the time to be bound to the payee only as a guarantor of the maker, he shall not be deemed to be a joint promisor or an absolute promisor to the payee.[60] If he intended to bind himself as a surety or joint maker of the note, he will not be permitted to claim afterward that he was only a guarantor.[61] And if he intended to be bound only as an indorser, the better opinion is that this also may be shown as between him and the payee.[62]

§ 194. Parol proof between remote parties.— Whether or not there is the same liberty in the use of parol proof when the note has been passed to a *bona fide* holder for value, and without notice, is a question upon which the authorities are by no means so uniform. Some of them confine parol proof to cases in which the note is still in the hands of the original party to whom it was first delivered as a valid instrument;[63] but others declare that it is equally competent in a suit by a *bona fide* holder on the ground that the contract is ambiguous.[64] In a comparatively recent case before the United States Supreme Court, where the question arose between a *bona fide* indorsee and the original party so signing his name, the court, while recognizing "irreconcilable conflict" of the authorities, said: "But there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed." [65]

§ 195. Difference between guaranty and ordinary suretyship. — Guaranty is a peculiar kind of suretyship, as is also an

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[60] Seymour v. Farrell, 51 Mo. 95; Worden v. Salter, 90 Ill. 160.

[61] Rey v. Simpson, 22 How. 241; Walz v. Alback, 37 Md. 404.

[62] Eberhart v. Page, 89 Ill. 550; Mammon v. Hartman, 51 Mo. 169.

[63] Houston v. Bruner, 39 Ind. 383; Whitehouse v. Hansen, 42 N. H. 18.

[64] Greenough v. Smead, 3 Ohio St. 415; Rey v. Simpson, 22 How. 241.

[65] Good v. Martin, 95 U. S. 95.

indorsement; but guaranty differs from indorsement, and it differs also from the ordinary contract of a surety. The distinction between a guarantor and an ordinary surety is not easily defined, and the terms have been frequently used as convertible. A surety is generally a comaker of the note, while the guarantor never is a maker; and the leading difference between the two is, that the surety's promise is to meet an obligation which becomes his own immediately on the principal's failure to meet it, while the guarantor's promise is always to pay the debt of another.[66] A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatever, or any notice of his default. He may be damaged by reason of no demand being made or notice given, and he may be sued as a promisor.[67]

The guarantor's liability is less stringent, and unless demand is made within a reasonable time, and notice given in case of default, he is discharged to the extent that he may be damaged by delay. Thus, if the debtor has, in the meantime, become insolvent, so that he could not have recourse upon him, he could not be held.[68] Thus, we see the surety's liability is primary and direct, like that of the principal. The guarantor's is secondary and collateral. And, in general, the guarantor contracts to pay, if, by the exercise of due diligence, the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment at once, if the principal debtor makes default. As has been well said, the surety "is an insurer of the debt; the guarantor is the insurer of the solvency of the debtor."[69] Nor does his guaranty inure to the benefit of an indorser signing before him, and with whom he is not in privity.[70]

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[66] 2 Parsons on Notes and Bills, 118.

[67] Perry v. Barret, 18 Mo. 140.

[68] Perry v. Barret, 18 Mo. 140.

[69] Krampt's Executrix v. Hatx's Executors, 52 Pa. 525; Arents v. Commonwealth, 18 Gratt. 770.

[70] Phillips v. Plato, 42 Hun, 189; Daniel on Negotiable Instruments, § 1753.

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CHAPTER IX.

NATURE AND RIGHTS OF A BONA FIDE HOLDER.

SECTION I.

THE RIGHTS OF A BONA FIDE HOLDER.

§ **197.** It is a general principle of the law merchant that, as between the immediate parties to a negotiable instrument — parties between whom there is a privity — the only superiority of such an instrument over other unsealed evideuces of debt is that it *prima facie* imports a consideration. But a *bona fide* holder for value of such an instrument takes it discharged of all the equities existing between antecedent parties, and may recover on it although it be without any validity as between the parties prior to himself, as, for example, if it was without consideration originally, or the consideration has failed, or the instrument was subsequently released or paid, or even though it was originally obtained by fraud, theft, or robbery.[1] This general rule is subject to certain exceptions, treated of in the succeeding sections.

It should be observed, however, that as between him and his immediate predecessor, or party between whom and himself a privity exists, he stands upon the same footing as the payee of a note against the maker. Fraud, illegality, want or failure of consideration may be pleaded against him by such immediate party as freely as if the instrument were not negotiable.[2]

§ **198.** As to anterior parties to the transfer of the instrument, the rule is, as between them on the one part and the holder on the other, altogether different. They are not in

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[1] Daniel on Negotiable Instruments, § 769*a*, and cases cited.

[2] Daniel on Negotiable Instruments, § 810.

privity with him, and they cannot set up against him defenses which might be valid as between them and any party prior to him, unless he is affected by such defenses through *mala fides*, notice, or otherwise having taken the paper without value, or without the usual course of business,[3] which circumstances will be hereinafter discussed.

§ 199. Meaning of term "bona fide holder;" presumption.— Two propositions may be considered as settled principles of commercial law — principles which have been, for the most part, reiterated by the Supreme Court of the United States, and prevail throughout the Union:

First. That to entitle one to the rights and protection of a purchaser or holder of a negotiable instrument, as set out in the preceding paragraphs of this chapter, the paper must have been acquired (1) *bona fide*, (2) for a valuable consideration, (3) in the usual and ordinary course of business, (4) before maturity, or rather when it was not overdue, and (5) without notice of facts which impeach its validity as between antecedent parties.[4]

Second. The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is necessary, imports *prima facie* that he acquired it *bona fide* for full value, in the usual course of business, before maturity, and without notice of any circumstance impeaching its validity; and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where indeed such proof is necessary), *prima facie* establishes his case; and he may there rest it.[5]

§ 200. What rebuts the presumption.— Countervailing proof that the instrument was executed without consideration as between the original parties — as, for instance, that it was executed for accommodation as between them, or that

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[3] Daniel on Negotiable Instruments, § 811.

[4] Daniel on Negotiable Instruments, § 769*a*.

[5] Daniel on Negotiable Instruments, § 812, and cases cited.

the consideration, originally valid, has subsequently failed — does not impair the holder's superiority of position, and he may still rest his case upon the instrument itself, from which it will still be presumed that he acquired it in a manner entitling him to stand upon the vantage ground of a *bona fide* holder for value.[6] While the authorities are not uniform, it may be considered fairly well settled that proof of mere misapplication of the instrument, where it has subserved its substantial purpose, does not shift the burden of proof.

But if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument; or if the circumstances raise a strong suspicion of fraud or illegality, the owner must then respond by showing that he acquired it *bona fide* for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary, for the presumption is natural that an instrument so issued would be quickly transferred to another; and unless he gave value, which could be easily proved if given, it would perpetrate great injustice, and reward fraud to permit him to recover.[7] And if it be shown that the original owner lost the bill or note, then, also, the burden of proof is upon the holder to prove his title.[8]

§ 201. Owner, though not himself bona fide holder, acquires title of his transferrer.— A transferee can generally get as good a title as his transferrer possesses, and it is, therefore, a settled principle that if the party who transferred the instrument to the holder acquired the note before maturity, and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it were overdue

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[6] Commissioners v. Clarke, 94 U. S. 285; Goodman v. Simonds, 20 How. 343.

[7] Collins v. Gilbert, 94 U. S. 761; Crampton v. Perkins, 65 Md. 24.

[8] Union Nat. Bank v. Barber, 9 N. W. 809.

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been held, to equities which may have intervened between remote indorsers and indorsees, but only to those which exist, at the time of indorsement to him, between the principal parties and the original holder, and between himself and his own indorser.[13] But if there be an equity attaching directly to the bill or note itself, it has been held in England that it may be asserted against an indorsee after maturity by a third party who claimed the right to follow the bill.[14] And if the equity be a claim of some right to the instrument directly attached to it, we perceive no good reason why it may not be asserted against an indorsee after maturity by any party whatsoever.[15]

§ 203. **After maturity, negotiable paper circulates, but transferee only acquires the right and title of the transferrer.** — After maturity negotiable paper still passes from hand to hand *ad infinitum* until paid. Moreover, the indorser, after maturity, writes in the same form, and is bound only upon the same condition of demand upon the drawer and notice of nonpayment as any other indorser. The paper retains its commercial attributes, and circulates as such in the community; but there is this vital distinction between the rights of a transferee who received the paper before, and of one who received it after maturity. The transferee of negotiable paper to whom it is transferred after maturity, acquires nothing but the actual right and title of the transferrer;[16] and the like rule applies to the transferee who takes the paper after a refusal to accept by the drawee, provided he had notice of such refusal.[17] In other words, the transferee of negotiable paper refused acceptance (with notice thereof), or overdue, takes it subject to all the equities with which it was encumbered in the hands of the

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[13] Hill v. Shields, 81 N. C. 250.

[14] Ames on Bills and Notes, vol. I, 891; Benjamin's Chalmers' Digest, 140.

[15] Daniel on Negotiable Instruments, § 726*b*.

[16] Texas v. Hardenburg, 10 Wall. 68; Morgan v. United States, 113 U. S. 500.

[17] O'Keefe v. Dunn, 6 Taunt. 305; Bartlett v. Benson, 14 M. & W. 733.

party from whom he received it; for it comes, to use Lord Ellenborough's words, "disgraced to him." Thus, if he took it from a thief, or finder, or from a bankrupt incapacitated by law to make the transfer, he could not recover on it, inasmuch as the thief, finder, or bankrupt could not.[18]

§ **204. Defenses to which such indorsee is subjected.**— But an indorsee of an overdue bill or note takes it subject to equities arising out of the transaction in which the instrument was executed, and existing at the time of the transfer, and not to a set-off arising out of collateral matters; in other words, he takes the paper subject to its existing equities. This doctrine was settled in England by the case of Burrough v. Moss,[19] and has been uniformly followed, and has been held to apply even though the indorsee had notice, gave no consideration, and took the paper on purpose to defeat the set-off.[20] But no equity arising after the transfer can affect the holder.[21] He is therefore subject to the defense — (1) That it was affected in its inception with some inherent vice, as, for instance, fraud, illegality, or duress; or (2) that the consideration failed, or that payment had been made, or that there had been accord and satisfaction at the time of the indorsement, or that there was some equitable defense arising out of the transaction, in which the paper was given, which disabled his indorser in whole or in part to recover.[22] Any of these defenses is called an equity attaching to the instrument.

§ **205. Whether accommodation character of instrument is an equity attaching to it after maturity.**— The general rule, that the purchaser of overdue paper can stand in no better position than his transferrer, does not apply so far as to

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[18] Byles on Bills [*161], 284; Ashurst v. Royal Bank, 27 Law Times. 168.

[19] 10 B. & C. 558.

[20] Oulds v. Harrison, 10 Exch. 572; Havessler v. Greene, 8 Mo. App. 454.

[21] Baxter v. Little, 6 Metc. (Mass.) 7: Haywood v. Stearns, 39 Cal. 58.

[22] Daniel on Negotiable Instruments, § 725*a*.

invalidate bills and notes drawn, indorsed, or accepted for accommodation, overdue at the time they are negotiated or transferred, it being considered that parties to accommodation paper hold themselves out to the public, by their signatures, to be bound to every person who shall take the same for value, the same as if it were paid to themselves.[23] And the fact that the purchaser knew that the paper was so drawn, indorsed, or accepted for accommodation, does not weaken his position.[24] This principle is well established in England, and it is to be regretted that the decisions in the United States do not uniformly follow the English rule.

In the United States a number of cases follow the English rule, but in others it is presumed that the accommodating party intended to lend his credit only until the maturity of the paper, and did not contemplate its subsequent negotiation; and it is accordingly held that *prima facie* he is entitled to defend against an indorsee after maturity.[25] If there was an agreement, express or implied, not to negotiate an accommodation bill after maturity, the weight of authority is justly to the effect that such agreement would constitute an equity attaching to it upon its transfer after maturity;[26] but in an English case, demurrer was sustained to a plea that it was agreed by the parties that the paper should not be negotiated after maturity, knowledge of the purchaser of such agreement not being averred.[27]

§ 206. Rights of bona fide holder, where the instrument originated in fraud or violation of authority.— There are numerous cases in which the line of demarcation between the fraud which does not affect the *bona fide* holder for value, and without notice, and that which utterly vitiates the instrument in all hands whatsoever, is narrow and difficult to distinguish. The distinctions taken are frequently

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[23] Charles v. Marsden, 1 Taunt. 224; Carruthers v. West, 11 Q. B. 143.

[24] Charles v. Marsden, 1 Taunt. 224.

[25] Daniel on Negotiable Instruments, § 726, and cases cited.

[26] Charles v. Marsden, 1 Taunt. 224; Parr v. Jewell, 16 C. B. 684.

[27] Carruthers v. West, 11 Q. B. 143.

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§ 208. Where the maker has perfected the instrument, and left it undelivered in a safe, desk, or other receptacle, it should then be at his hazard. Such papers are made for use, and not for preservation. The maker creates the risk of their being eloigned, by keeping them on hand, and places them on the same basis as negotiable papers which have been put upon the market. When once issued the purchaser is protected and the owner loses, even though he had guarded his property with bolt and bar; and if bankers and others who must necessarily be in possession of negotiable securities in the course of trade are not protected, we can discover no principle which can be invoked to protect one who holds his own paper contrary to the ordinary wants and usages of trade.[30]

But, as will be seen in a succeeding section, if the instrument be incomplete, and there has been no delivery of it to an agent in trust or otherwise intervening, no negligence can be imputed to the maker, and he is not, therefore, bound, even to a *bona fide* holder without notice.[31]

§ 209. **When instrument has been intrusted to another with blanks.**— If the party sought to be charged upon the negotiable instrument has been betrayed by his agent, or some other party to whom he has intrusted his signature on a blank paper, and who has fraudulently written over it a bill or note. There is no doubt that if the bill or note were complete with the exception that there was a blank left for the sum, the parties who had signed, accepted, or indorsed it would be bound to pay any sum with which it might be filled up to a *bona fide* holder without notice of the limitation of authority to the agent or other person having it in hand,[32] and it is immaterial that such holder knew that it had been signed, accepted, or indorsed in blank, unless

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[30] Thompson on Bills (Wilson's ed.), 92; 1 Parsons on Notes and Bills, 114.

[31] See *post*, § 223.

[32] Michigan Bank v. Eldred, 9 Wall. 544; Violett v. Patton, 5 Cranch, 142.

he was also cognizant of its being fraudulently filled up.[33] If he knew when he took the paper that authority as to filling it up was exceeded, he could not recover.[34]

It seems, also, to be well settled that if the party sought to be charged has intrusted his blank signature to an agent or other person, and has authorized such agent or other person to fill the blank in some form, for some purpose, that he would be bound to a *bona fide* holder if the agent or person wrote over such signature a bill or note. Thus, where papers indorsed in blank were left with a clerk, with authority to use them for certain purposes, and they were fraudulently obtained from him and used differently, the indorser was held liable.[35]

§ 210. When executed under mistake and misrepresentation. — If the party possesses ordinary faculties and knowledge, and is betrayed into signing a bill or note by the assurance that it is an instrument of a different kind, and is guilty of any negligence in signing the paper, it is generally agreed that he is bound;[36] and the act itself can hardly be committed without negligence.[37] A man has no right to have eyes and see not; or ears and hear not; and while the law should protect those who suffer from the want of the senses in their proper development, or ordinary education, it should not permit those who have both capacity and education to throw the burden of their failure to use them upon innocent third parties. In such cases we should say the act of signing the paper without intending to do so, as a general rule, imported negligence *per se*, and rendered the party liable.[38] If he has full and unrestricted means of ascertaining the true character of the instrument before signing it, but neglecting to avail himself of such means of information, and relying on others' representations, he signs and

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[33] Huntington v. Branch Bank, 3 Ala. 186.

[34] Clewer v. Wynn, 59 Ga. 246.

[35] Putnam v. Sullivan, 4 Mass. 45.

[36] Chapman v. Rose, 44 How. Pr. 364; Ruddell v. Phalor, 72 Ind. 533.

[37] First Nat. Bank v. Johns, 22 W. Va. 520.

[38] Ort v. Fowler, 31 Kan. 478.

delivers a negotiable paper, instead of a different paper, which he intended to sign, he cannot be heard to impeach it when it has been passed to a *bona fide* holder.

While the doctrine herein announced is supported by the strongest cases, in quite a number of the States the courts go far to protect the defrauded parties to the paper rather than the innocent holders; and in England it would seem that the holder under such circumstances is not protected.[39]

§ 211. When delivered by third party in violation of instructions.— Still another class of cases, presenting a question somewhat different from any yet discussed, has arisen where parties have signed their names to bills and notes, either perfect in form, or in blank, with authority only to deliver them as complete and valid instruments upon condition that some other person shall become a party, or some contingency be fulfilled. In these cases it will be observed the person with whom such instrument is left is its mere custodian, and not an agent having any absolute power to dispose of it. He is not, as to the instrument, an agent with limited powers, but the agency itself is conditioned upon the happening of the event upon which he is to become the agent to deliver. In such case the weight of authority in the United States, with reason, supports the view that the *bona fide* holder for value can recover, notwithstanding such defense; but there is high authority in England for the contrary view.[40]

§ 212. Escrows.— In none of the cases, however, is it maintained that a bill or note, either in full or in blank, intrusted to the payee, to be valid upon a condition, will not be binding if the condition is violated. Such delivery to the payee is in law absolute and complete; and whether the instrument be negotiable or under seal, the doctrines which apply when third parties are the custodians do not extend to them.[41] An instrument under seal deposited with a third party, to be delivered upon condition, is called an escrow;

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[39] Daniel on Negotiable Instruments, § 850.

[40] Daniel on Negotiable Instruments, § 854.

[41] Massman v. Holscher, 49 Mo. 87.

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ties are contemplated,[45] and also where the party taking them has notice that the condition is violated.[46] If the sealed instrument, perfect on its face, be left with the obligee, upon condition that it should be valid only upon its execution by a third person, the delivery is complete, and it is valid and operative though not so executed.[47]

§ 214. Defenses excluded by estoppel in pais.— Defenses that might otherwise be successfully interposed against the *bona fide* holder for value may be excluded by reason of the representations or conduct of the defendant, which is called in law estoppel *in pais*. Thus, if the holder purchased the note with the defendant's knowledge and consent, it has been held that the latter cannot set up prior payment, or other defense against it.[48] It is to be observed that estoppel does not arise unless the act or course of conduct alleged to constitute it is acted upon by the party seeking to benefit by it,[49] and therefore a statement made by the maker to the indorser of a note after he acquires it, that it is all right, does not amount to estoppel.[50] Nor does it arise where there is a mistake or misunderstanding as to the identity of the note concerning which the representation is made.[51]

Representations, referring only to the then existing status of the instrument, will not exclude defenses subsequently arising.[52] And where they are made by an indorser, and not by the maker, they bind the former, but not the latter.[53] This plea, on the part of the plaintiff, which excludes the right of the defendant to set up the true condition of affairs as a defense, is called "estoppel in pais," it being an extraneous matter dehors the record. And whenever

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45 Ward v. Churn, 18 Gratt. 801.

46 Nash v. Fugate, 32 Gratt. 595.

47 Simonton's Estate, 4 Watts, 180; Duncan v. Pope, 47 Ga. 445.

48 Downer v. Reed, 17 Minn. 493.

49 Moore v. Robinson, 62 Ala. 537.

50 Crossan v. May, 68 Ind. 242; Hoover v. Kilander, 83 Ind. 420.

51 Erickson v. Roehm, 33 Minn. 53.

52 Maury v. Coleman, 24 Ala. 381; Allen v. Frazee, 85 Ind. 283.

53 Dowee v. Schutt, 2 Den. 621.

it is relied upon where the system of common law pleading prevails, it has been held that it must be specially pleaded.[54]

§ **215. Good faith essential to estoppel.**— It is to be observed respecting estoppel that while it exacts good faith from the party bound, it likewise exacts good faith in the party dealing with him. Therefore, if the latter is himself cognizant of a fraud upon the maker at the time of the purchase, and knows, also, that the maker is ignorant respecting it, good faith would require that he should inform the maker of it, and if he does not so inform him, the maker will not be estopped by having told the purchaser that the note was all right, and would be paid at maturity, from setting up the fraud of which the purchaser had notice.[55] And so the holder will not be protected if he knew of any illegality in the instrument.[56] In other words, estoppel is a plea that is born of, and must be nourished by, equity, and he that asks equity must do equity. If he conceals facts from the maker he acts inequitably and cannot recover.[57]

§ **216. Amount of recovery; general rule.**— The holder may recover the full amount if the note was made, or bill accepted, upon a valuable consideration. And even if there was no consideration, as between the original parties, but a mere becoming a party for accommodation, the holder, although he knew the fact, could recover the whole amount, provided he paid full value.[58] But if he paid less than full value, it is a matter of dispute whether or not he is limited, in his recovery, against the maker, to the amount advanced. The English courts sustain the affirmative of the proposition, but the authorities in the United States are directly at war. The true doctrine seems to be, that the party paying less than its face value for paper made, accepted, drawn, or indorsed for accommodation, and not knowing the fact at the time of purchase, is entitled to recover the full amount

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[54] Davis v. Thomas, 5 Leigh, 1.

[55] Sackett v. Kellar, 22 Ohio St. 554.

[56] Watson v. Hoag, 40 Iowa, 143.

[57] Platt v. Jerome, 2 Blatchf. 186.

[58] Charles v. Marsden, 1 Taunt. 224.

against the accommodation parties, because they have deliberately and intentionally put forth themselves to be treated as being bound in the manner indicated.[59] But the view has been taken in a number of cases that he is only a *bona fide* holder to the extent of the consideration paid by himself or a prior party, and can recover that only against the accommodation party.[60] And even if he knew they were accommodation parties at the time of purchase, it would make no difference, provided the party he purchased it from was a *bona fide* holder, who could himself enforce it, or was a subsequent holder to the parties between whom the accommodation existed, and appeared to the purchaser to be himself a *bona fide* holder, and not an agent for any of the parties to the accommodation.[61]

§ 217. Amount of recovery when bill or note has inception in fraud.— When the execution of the bill or note has been induced by fraud, a different rule, according to a number of authorities, would apply. The *bona fide* holder of it for value, and without notice, is undoubtedly entitled to be protected against a loss which would befall him if the party defrauded were permitted to set up the defense of fraud on the part of the payee against him, as we have already seen. But it does not, therefore (as has been considered), follow that he may recover of such party the whole amount, when he has paid a less sum. For his protection and security against loss, it is only necessary that he should be paid back the amount which he was induced to give for the instrument by its appearance of validity, and therefore such amount is the limit of his recovery against the drawer or maker who was defrauded into the execution of the instrument.[62] But the United States Supreme Court has expressed itself in favor of the doctrine that the purchaser

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[59] Moore v. Baird, 30 Pa. St. 138; Dunn v. Ghost, 5 Colo. 139.

[60] Holcomb v. Wyckoff, 35 N. J. L. R. 37; Stoddard v. Kimball, 6 Cush. 469.

[61] Holcomb v. Wyckoff, 35 N. J. L. R. 37; Gimmi v. Cullen, 20 Gratt. 439.

[62] Holcomb v. Wyckoff, 35 N. J. L. R. 38; Story on Bills, § 188.

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under guardianship, the signature would impart no validity to it, and the *bona fide* holder could not recover against him, or her, however ignorant of the incapacity when he took the paper.[68]

§ 220. **Instrument obtained by imposition on infirm or illiterate persons.**— If one laboring under the disadvantage of some natural infirmity or defect of education has been imposed upon, and thereby deceived into executing a negotiable contract, under the impression that it was for a different amount, or was a contract of a different character, the defense of fraud and imposition avails against a *bona fide* holder for value. The case suggested is closely allied in principle to the defense of incapacity. Thus, if a note were fraudulently or falsely read to a blind man, and he were to sign it believing it to have been correctly read; or if the party were unable to read, and signed a note, after due inquiry and precaution, under the assurance that it was an agreement of a different kind, we should have a new element entering into the consideration of his liability. In such cases the want of faculties to detect the fraud shields the party from its consequences, and the authorities justly exonerate him.[69]

He has created no agency or trust. He has not intentionally or knowingly given the appearance of validity to the paper. It cannot be said that he has acted negligently, because his infirmities prevented that diligence which men of ordinary faculties and of education possess.[70]

§ 221. **(2) As to instruments declared void by law.**— If the statute law pronounces the contract evidenced by the instrument to be void, because made upon a gambling, usurious, or other illegal consideration, it is an absolute nullity; and, although in form negotiable, no currency in the market, and no degree of innocence or ignorance on the part of

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[68] Daniel on Negotiable Instruments, § 806*a*.

[69] Putnam v. Sullivan, 4 Mass. 45; Schuylkill County v. Copley, 67 Pa. St. 386.

[70] Daniel on Negotiable Instruments, § 847.

the holder can impart any validity to it.[71] But although the party executing such bill or note cannot be bound even to a *bona fide* holder, the indorser will be liable upon his indorsement, which warrants its validity, and is a separate and independent contract.[72] And in many localities negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations — that is, void between the parties, but valid in the hands of a *bona fide* holder.[73]

But sometimes the statute declares a contract void as between original parties, and in such cases a *bona fide* purchaser is not affected by the illegality;[74] and when the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving *bona fide* ownership for value.[75] But a failure of consideration does not throw this burden upon him.[76] And in all cases where the statute does not declare the instrument void, *bona fide* ownership for value being proved, the holder is entitled to recover.[77]

§ 222. **(3) Want of consent.**— So where the party has never in fact signed the instrument as it then stands, as, for instance, where it was forged in its inception, and is not genuine, or was subsequently materially altered; or if such signature were written on the fly-leaf of a book loaned to such person, or in an album, or were left with him for any legitimate purpose, such as to be used as a means of identifying the writer's handwriting.[78] In such cases the *bona fide*

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[71] Sondheim v. Gilbert, 117 Ind. 76; Harper v. Young, 112 Pa. St. 419.

[72] Daniel on Negotiable Instruments, § 671 *et seq.*

[73] Haight v. Joyce, 2 Cal. 64; Cheney v. Cooper, 14 Nebr. 415.

[74] Paton v. Coit, 5 Mich. 505.

[75] Vallett v. Parker, 6 Wend. 615; Johnson v. Meeker, 1 Wis. 436.

[76] Wilson v. Lazier, 11 Gratt. 478.

[77] Williams v. Cheney, 3 Gray, 215; Hubbard v. Chapin, 2 Allen, 328.

[78] Indiana Nat. Bank v. Holtzclaw, 98 Ind. 85; Caulkins v. Whisler, 29 Iowa, 495; Nance v. Lary, 5 Ala. 370; Daniel on Negotiable Instruments, chaps. XLII and XLIII, on Forgery and Alteration.

holder cannot enforce it, for the defendant has only to say: "This is not my contract," "*non hæc in fœdra veni.*" So if executed by one acting as agent of the principal, but exceeding his authority, the *bona fide* holder cannot recover unless the principal were in fault in inducing him to believe that the agent had authority.[79]

§ 223. Instrument incomplete and undelivered.— A class of cases, illustrative of want of consent, arises when in an incomplete instrument has been signed and stolen, without any delivery to an agent in trust, or otherwise, intervening. In such cases no trust for any purpose has been created. No instrument has been perfected. No appearance of validity has been given it. No negligence can be imputed. Therefore if the blank be filled, it is sheer forgery, in which the maker is in nowise involved, and he is not therefore bound, even to a *bona fide* holder without notice.[80]

§ 224. Duress.— Any contract entered into under duress lacks the first essential of validity — the consent of the contractor — and negotiable instruments form no exception to the rule. As between immediate parties, proof of duress at once annuls the instrument, or rather enables the party who was under duress to avoid it, at his option;[81] but whether or not, in the hands of a *bona fide* holder for value without notice, the duress in its inception renders it voidable, is a question upon which the authorities do not altogether agree. In England the rule seems to be that the defense of duress cannot be pleaded against the *bona fide* holder for value, and the English doctrine is cited by many text-writers on bills and notes (including Byles, Chitty, and Story) without criticism or dissent, and as a correct statement of the law. But Roscoe, in his Digest of Bills and Notes, agrees with the proposition stated in the text, as

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[79] Andover Bank v. Grafton, 7 N. H. 298; The Floyd Acceptance, 7 Wall. 666.

[80] 1 Parsons on Notes and Bills, 114; Daniel on Negotiable Instruments, § 839.

[81] Bush v. Brown, 49 Ind. 573; Fairbanks v. Snow, 145 Mass. 153.

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but which are not available against *bona fide* purchasers for value without notice." [84]

SECTION III.

WHAT CONSTITUTES A BONA FIDE HOLDER.

§ 226. Requisites of; general rule.— As has been seen, to entitle the purchaser or holder of a negotiable instrument to the peculiar rights and protection set out in the first section of this chapter, such purchaser must have acquired title to the instrument (1) *bona fide*, (2) for a valuable consideration, (3) in the ordinary course of business, (4) before maturity, and (5) without notice of facts which impeach its validity as between antecedent parties.

§ 227. Bona fides essential.— The holder, in order to be entitled to protection against offsets and equities and defenses based upon frauds, pleaded by prior parties, must have acquired the paper in good faith from his predecessor. "Fraud cuts down everything," [85] and although the holder may pay value, yet, if his acquisition of the paper be in any respect fraudulent — as where it is made or transferred to give him preference over other parties to a compromise of creditors — he cannot claim the position of a *bona fide* holder.[86] In pleading, *mala fides* must be distinctly alleged, and an allegation that the party is not the *bona fide* holder is not sufficient.[87] It is the *bona fides* of the holder alone that is to be considered, not that of his transferrer, and the fact that the payee had an interest to part with the paper, is not a circumstance which affects the rights of his indorsee.[88]

§ 228. Effect of negligence on bona fides.—For quite a long period of time the courts of England oscillated between two propositions, viz.: Whether good faith alone, or good faith in conjunction with the exercise of due diligence, constituted the test of the holder's right to recover. But the

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[84] Norton on Bills and Notes, 216.

[85] Rogers v. Hadley, 32 L. J. Exch. 248.

[86] Daniel on Negotiable Instruments, § 193 *et seq.*

[87] Uther v. Rich, 10 Ad. & El. 784.

[88] Helmer v. Krolick, 36 Mich. 373.

Court of King's Bench finally decided that, while gross negligence might be evidence tending to show *mala fides*, and as such admissible, it did not in itself amount to proof of *mala fides*, and was not sufficient to deprive the holder of his right to recover.[89] Thus the *bona fides* of the purchaser or holder was restored as the test of his right to recover, and, after a wide departure, the law re-established upon the original basis established by Lord Kenyon. And Lord Denman, C. J., said: "The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

The rule thus finally re-established in England has been followed and approved there in subsequent cases,[90] and has met with the approbation of most all of the writers on negotiable instruments, on the ground that it relieves them of the clog which the contrary doctrine imposes on their negotiability, and presents at once the clear and intelligible question of *bona fides* for the consideration of the jury; whereas, to leave it to a jury to determine as to the degree of caution which a prudent man must exercise on taking such an instrument, would lead to much perplexity and to frequent injustice.[91]

§ 229. American view.— In the United States the decisions of the courts have varied, some following the rule in the case of Gill v. Cubitt,[92] in which the principle was laid down

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89 Goodman v. Harvey, 4 Ad. & El. 870.

90 Easely v. Crockford, 10 Bing. 243; Raphael v. Bank of England, 33 Eng. L. & Eq. 278.

91 Story on Notes, §§ 197, 382; Edwards on Bills, 506; 2 Parsons on Notes and Bills, 277–279.

92 3 B. & C. 466.

that, although the holder had given value for the bill or note, yet, if he took it under circumstances which ought to have excited the suspicions of a prudent and careful man, he could not recover, but by far the greater number concurring in the principle which has been finally established as the law of England.[93] Chancellor Kent, in his Commentaries embodies the views taken in Gill v. Cubitt; but at that time the present prevailing doctrine had not been re-established, and it is to be supposed that he merely incorporated in his text the then existing decisions of the English courts.[94] But both upon principle and authority, it is safe to say that the experience of the commercial world, and of the courts before which the doctrines here discussed have so often passed in review, have satisfied jurists, as well as men of business, that the interests of commerce are best subserved by the liberal view which promotes the circulation of negotiable instruments; and that the *bona fides* of the transaction should be the decisive test of the holder's rights.[95] It is not the duty of parties about to purchase negotiable paper to make any inquiries not required by good faith, as to possible defenses of which they have no notice, either from the face of the paper, or facts communicated at the time.[96]

In a case before the United States Supreme Court, Mr. Justice Swayne, who delivered the opinion, disapproved Gill v. Cubitt, 3 B. & C. 466, and quoted with approval Goodman v. Harvey, 4 Ad. & El. 870, in which Lord Denham said: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff

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[93] See cases cited in support of both views, Daniel on Negotiable Instruments, § 775.

[94] 3 Kent Comm. 103, 104.

[95] Hamilton v. Vought, 34 N. J. L. 187.

[96] Murray v. Beckwith, 81 Ill. 43; Houry v. Eppinger, 34 Mich. 29.

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gence will not of itself be sufficient to impeach the holder's or purchaser's title. This is not merely gross negligence, but may be regarded as willful or fraudulent blindness, and abstinence from inquiry, so great as to amount to evidence of bad faith. For it is the obvious suggestion of reason that a *bona fide* owner would not throw away his property for a mere song, and that the purchaser acted in bad faith when he acquired it for comparatively nothing.[1]

§ 232. Line of demarcation between negligence and notice.— It is difficult, indeed impossible, to lay down the exact line of demarcation and state what proportion the amount paid must bear to the face of the paper in order to charge the purchaser *prima facie* with notice, or raise the presumption of bad faith on his part. But, in general terms, it may be said that the consideration should be so utterly trifling as to bear upon its face the impress of fraud to leave open no reasonable conjecture but that the purchaser must have known, from the very nature of the facts, that they could not have originated from any but a corrupt source.[2] The known solvency of prior parties would of course strengthen the argument of implied notice and bad faith wherever they were alleged. If the amount paid for the paper were not so insignificant as, *per se*, to charge the transferee with notice, it might still be so inadequate as to be a pregnant fact to be given due consideration in connection with others, in determining whether he should be so chargeable or not.[3] As said in Rhode Island by Potter, J.: "The fact that the plaintiff purchased the note for a sum much below its face, even if he did not know of any equities between the original parties, might be a circumstance tending to show that he had willfully shut his eyes to the means of knowledge of the facts."[4]

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[1] Johnson v. Butler, 31 La. Ann. 776; Smith v. Jansen, 12 Nebr. 125; Richmond v. Diefendorf, 58 N. Y. Supp. 538.

[2] Daniel on Negotiable Instruments, §§ 795, 796.

[3] Chouteau v. Allen, 70 Mo. 341.

[4] Millard v. Barton, 13 R. I. 610; Daniel on Negotiable Instruments, § 779.

§ 233. The apparent purchase must have been a purchase in fact, and not a mere bookkeeping entry.— Mere discount and credit do not of themselves constitute a *bona fide purchaser* for value. To occupy that position the holder must actually have parted with some thing of value for the note. Thus, where a bank discounted a note for a company, and credited it with the amount, the credit, on account of other deposits, subsequently increasing, so that at the time of suit on the note the bank had actually paid nothing for it, it was held not a purchaser for value, and that its remedy was to tender the note back to the company, and cancel the credit.[5]

§ 234. When taken as collateral security for debt contracted at the time.— When the bill or note of a third party, payable to order, is indorsed as collateral security for a debt contracted at the time of such indorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and is entitled to protection against equities and offsets and other defenses available between antecedent parties — provided, of course, that the bill or note transferred as collateral security is itself at the time not overdue. And the same principle applies where the collateral bill or note is payable to bearer, and is transferred to the creditor by delivery. This doctrine rests upon clear grounds. There is an evident present consideration for the transfer of the collateral bill or note; a present change in the legal rights of the parties. And the text-writers, supported by an almost unbroken train of decisions, agree that the indorsee is entitled to protection to the extent of the debt secured.[6]

And likewise, when the debt is not yet due and the collateral bill or note is indorsed as security and there is an agreement for delay until the collateral shall mature, such

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[5] Manufacturers' Nat. Bank v. Newell, 71 Wis. 312; Dresser v. M. & I. R. Co., 93 U. S. 92; Lancaster County Nat. Bank v. Huver, 114 Pa. St. 216.

[6] Texas Banking Co. v. Turnley, 61 Tex. 369; Best v. Crall, 23 Kan. 482; Miller v. Boykin, 70 Ala. 476,

agreement by the creditor constitutes a consideration and makes him a holder for value.[7]

§ 235. When taken as collateral for pre-existing debt.—When there is no express or implied agreement for forbearance and delay as to the pre-existing debt, the transferee of the collateral cannot be regarded as a *bona fide* holder for value within the law merchant, unless simply becoming a party to the bill or note transferred as collateral security for the debt, and the existence of the debt, are sufficient to create that relation. Many cases deny that it is. But this alone is, in our judgment, sufficient. The maker has sent out a negotiable contract to pay the bearer or indorsee a certain sum. It has been acquired before maturity for a valuable consideration, and the burden of fixing the liability of the indorser (if any) assumed. The holder is naturally lulled into security and inactivity, by crediting the face of the note; and he should not be made to suffer by the maker for confidence which his own promise created. In Maryland this subject has been fully considered and the views of the text approved; and so likewise in Indiana, and in New York.

In the United States Supreme Court the question under consideration was fairly presented, and it was called on to determine whether the transfer of a negotiable note, *merely*, as collateral security for a pre-existing debt, was such a negotiation as excluded defenses which were available between anterior parties. In the case referred to, it appeared that the Brooklyn City and Newtown R. R. Company executed and delivered to H. & J. a certain note for the purpose only of raising money for the company; and that H. & J. indorsed it in blank, and transferred it as security for a call loan to the National Bank of the Republic. The court sustained the right of the bank to recover against the railroad company, notwithstanding the fact that the transaction was in New York, in which State the decisions of the courts are, in principle, opposed to such right. And the

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[7] Daniel on Negotiable Instruments, § 825.

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§ **237. Ordinary or usual course of business.**— The holder must have acquired the paper in the ordinary or usual course of business, by which phrase is meant to describe a transfer according to the usages and customs of commercial transactions.[15] Whether or not a transfer in payment of pre-existing debt is of this character, was for a long time questioned; but the doctrine is now settled that it is.[16] And when the paper is transferred as collateral security for a contemporaneous or pre-existing debt, there are many variations of the question, and many views taken, as to whether or not it is in the usual course of business for a valuable consideration, according to the mercantile use of those terms.[17]

§ **238. Transfers which are not in usual course of business.**— There are some transfers, however, in which the legal or equitable title to the instrument passes, but which are not in the usual course of business.

Thus, a receiver appointed by a court, and who comes in possession of a bill or note of a litigant by operation of law acquires no better title than such litigant possessed, for, as said in New York, "he acquires title by legal process, and not in the regular course of dealing in commercial paper."[18] The like decision was rendered in Connecticut, in respect to the receivers of assets of a bank, for the benefit of its creditors.[19] So the assignment of a bill or note by operation of a bankrupt or insolvent law, is an instance out of the usual course of commercial business. So also is a transfer by the payee or holder to a trustee for the benefit of creditors.[20] Under statute in the State of Iowa, it has been held, that an indorsement of a note by the sheriff, who had levied upon it, had the same effect as if made by the holder himself.[21] But if the note levied on were not the property

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15 Kellogg v. Curtis, 69 Me. 212; Elias v. Finnegan, 37 Minn. 145.

16 *Ante*, § 100; Merchants' Bank v. McClelland, 9 Colo. 611.

17 *Ante*, §§ 234, 235.

18 Briggs v. Merrill, 58 Barb. 379.

19 Litchfield Bank v. Peck, 29 Conn. 384.

20 Billings v. Collins, 44 Me. 271; Roberts v. Hall, 37 Conn. 205.

21 Earhart v. Gant, 32 Iowa, 481.

of the debtor, neither the purchaser nor anyone claiming under him could acquire a title by its sale under execution.[22]

A bill or note in the hands of one not the payee, and unindorsed where it is not payable to the payee or bearer, would be open to defenses in the hands of the transferee, for such possession and transfer are not in the usual course of business.[23] A bill in the hands of the drawer, and payable to his order, might be properly acquired from him, and the holder under his indorsement would be protected against defenses, for the acceptor is the primary debtor, and the drawer the original creditor.[24]

§ 239. Meaning of term "before maturity."— The holder in order to acquire a better right and title to the paper than his transferrer, must become possessed of it before it is overdue. For if it were already paid by the maker or acceptor, and had been left outstanding, it would be already discharged, and they would not be bound to pay it again to anyone who acquired it after the period when payment was due. And if it were not paid at maturity, it is then considered as dishonored; and although still transferable in like manner and form as before, yet the fact of its dishonor, which is apparent from its face, is equivalent to notice to the holder that he takes it subject to its infirmities, and can acquire no better title than his transferrer.[25] The doctrine applicable to this subject has been admirably stated by Chief Justice Shaw, who says: "Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises: Why is it in circulation? Why is it not paid? Here is something wrong. Therefore, although it does not give the indorsee notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any de-

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22 McCormick v. Williams, 54 Iowa, 50.

23 Kempner v. Comer, 73 Tex. 201; Durein v. Moeser, 36 Kan. 443.

24 Merritt v. Duncan, 7 Heisk. 156.

25 Morgan v. United States, 113 U. S. 500; Speck v. Pullman Car Co., 121 Ill. 57.

fense which might be made if the suit were brought by the indorser."[26] But there is this limitation to this doctrine: that if the holder acquired the paper after maturity, from one who became a *bona fide* holder for value and without notice before maturity, he is then protected by the strength of his transferrer's title.[27]

§ 240. **When instruments payable on sight or demand deemed overdue.**— The test has been well and accurately stated by Parsons in his work on Notes and Bills. He says: "A reasonable time must elapse before mere non-payment dishonors the bill or note. What this time is, has not been and cannot be fixed by any definite and precise rule. One day's delay of paper on demand certainly would not dishonor it; five years certainly would. And in each case, how many days, or weeks, or months are requisite for this effect, must depend upon the test, whether so long a time has elapsed, that it must be inferred from the particular circumstances and the general conduct of business men, both of which should be considered, that the paper in question must have been intended to be paid within this period, and if not paid, must have been refused."[28]

§ 241. **Presumption that bill or note is acquired before maturity.**— There is always a presumption when the payee's or an indorser's name is indorsed upon the bill or note, that it was done before its maturity; and likewise the presumption that the holder acquired the instrument before maturity, whether the legal title be transferable by indorsement, or by delivery merely.[29] Indeed the law will presume in favor of the holder, according to many authorities, that the indorsement or assignment was of even date with the instrument itself;[30] but it can rarely be the case that any stronger or more definite presumption will be needed than that he acquired it before maturity, as he is then protected against

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26 Fisher v. Leland, 4 Cush. 456.

27 *Ante*, § 201.

28 1 Parsons on Notes and Bills, 263, 264.

29 New Orleans, etc. v. Montgomery, 95 U. S. 16.

30 Daniel on Negotiable Instruments, § 728.

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overdue and unpaid is a controverted matter. The weight of authority is to the effect that the *bona fide* purchaser for value of negotiable paper is within the protection of the law merchant although interest is overdue and unpaid at the time of the purchase, interest being a mere incident of the debt, and the holder losing no right as against the parties, whether makers or indorsers, by failure to demand it.[36] This seems to be the correct rule, though the contrary view is not without some weighty considerations to support it.[37] Where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored when one is overdue and unpaid.[38]

§ **244. Transfer on last day of grace.**— A purchaser of a negotiable instrument, before the close of business hours, on the last day of grace, and before its dishonor, has been held, and, as we think, correctly, to be fully protected as having received it while current;[39] but a contrary view has been taken in Massachusetts.[40]

§ **245. "Purchaser without notice."**— The holder must have acquired the paper without notice of its dishonor. Sometimes a bill payable at so many days after sight, or after a certain event, is presented for acceptance, and dishonored before the time of payment by nonacceptance; and in such cases, the party acquiring it with notice of such dishonor stands upon the same footing as one who acquires it after maturity, and is chargeable in like manner with constructive notice of any flaw in the right or title of his transferrer.[41] Sometimes the instrument bears upon its face the marks of its dishonor for nonacceptance, and in such cases it bears, as has been said, "a death wound apparent on it."[42]

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[36] National Bank v. Kirby, 108 Mass. 497; Kelley v. Whitney, 45 Wis. 110.

[37] Newell v. Gregg, 51 Barb. 263.

[38] Boss v. Hewitt, 15 Wis. 260; Patterson v. Wright, 64 Wis. 291.

[39] Fox v. Bank, 30 Kan. 442; Bosch v. Cassing, 64 Iowa, 314.

[40] Pine v. Smith, 11 Gray, 38.

[41] Crossly v. Ham, 13 East, 498.

[42] Goodman v. Harvey, 4 Ad. & El. 870; Byles on Bills [*160], 283.

If it has been dishonored for nonpayment when payable on demand or at sight, the like rule applies; but it is only when the bill or note is payable at a day certain that the purchaser can perceive, by the very fact that it is overdue, that it has been dishonored. The United States Supreme Court has observed on this subject that "a person who takes a bill which, upon the face of it, was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder. If he chooses to receive it under the circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." [43]

§ 246. Notice of fraud, defect of title, and illegality.— In order to stand upon a better footing than his transferrer, the holder must acquire the instrument without notice of fraud, defect of title, illegality of consideration, or other fact which impeaches its validity in his transferrer's hands; and the word notice in this connection signifies the same as knowledge. Knowledge of fraud or illegality impeaches the *bona fides* of the holder, or at least destroys the superiority of his title, and leaves him in the shoes of the transferrer.[44] And any fraud upon the transferrer incapacitates the transferee or one acquiring from him with notice from recovering against the transferrer.[45]

§ 247. Time of notice.— The notice affecting the holder must exist at the time he acquires the paper, for then his relation to it is fixed; and subsequent notice does not affect his title or right to transfer it.[46] If notice of fraud be communicated to the holder before he pays for the paper, although the contract has been entered into, he cannot stand upon the footing of a *bona fide* holder without notice,[47] and if he has paid a part of the amount agreed upon when he

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[43] Andrews v. Pond, 13 Pet. 65; Angle v. Insurance Co., 92 U. S. 341; District of Columbia v. Cornell, 130 U. S. 661.

[44] Hanauer v. Doane, 12 Wall. 342; Crampton v. Perkins, 65 Md. 24; Mace v. Kennedy, 68 Mich. 389.

[45] Lenheim v. Fay, 27 Mich. 70.

[46] Perkins v. White, 36 Ohio St. 530.

[47] Crandell v. Vickery, 45 Barb. 156; Davis v. Wait, 12 Greg. 425.

receives notice of fraud, he will only be protected to that extent, and no more.[48] Actual notice of the defect is not required, where the evidence of the infirmity consists of matters apparent on the face of the instrument.[49]

§ 248. Notice of accommodation paper.— It is to be observed, however, that knowledge of the mere want of consideration as between the original parties will not alone prevent the purchaser from becoming a *bona fide* holder and occupying a better position than his transferrer. Accommodation paper is daily placed in market for discount or sale, and an indorsee or purchaser who knows that a bill or note still current was drawn, made, accepted, or indorsed without consideration is as much entitled to recover as if he had been ignorant of the fact,[50] and even where he acquires it overdue.[51] Nor is it a good ground of defense against a *bona fide* holder for value that he was informed that the note was made or the bill accepted in consideration of an executory contract, unless he was also informed of its breach.[52] If he has such knowledge he cannot recover.[53] And if anyone purchase accommodation paper with knowledge that the terms and conditions on which the accommodation was given have been violated, he is not a *bona fide* holder as against the party who lent his name for accommodation.[54] The defense must not only show that the paper was diverted from its purpose, but also that such diversion

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[48] Dresser v. M. & I. R. Co., 93 U. S. 93; Weaver v. Barden, 49 N. Y. 286.

[49] *Post*, § 251.

[50] Thatcher v. West River Nat. Bank, 19 Mich. 202; Stephens v. Monongahela Nat. Bank, 87 Pa. St. 163; Powell v. Waters, 17 Johns. 176.

[51] *Ante*, § 205.

[52] Patten v. Gleason, 106 Mass. 439; Bank v. Cason, 39 La. Ann. 867.

[53] Wagner v. Diedrich, 50 Mo. 484; Bonman v. Van Kuren, 29 Wis. 218.

[54] Buchanan v. Findley, 9 B. & C. 738; Daggett v. Whiting, 35 Conn. 372.

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negotiating for the paper, and has no claim whatever for peculiar protection.[59]

§ **251. Implied or constructive notice from appearance of the paper.**— Express notice is not indispensable. There may be evidence of the infirmity in the paper apparent on its face, or such indications as to put the purchaser upon inquiry. And in such cases constructive notice is held sufficient upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of third persons an inquiry as to the facts is a moral duty, and diligence an act of justice.[60] In Connecticut the unusual character of the instrument — its being written on tracing paper, coupled with suspicious circumstances in the negotiation — was held to authorize inquiry of a broker "whether a banker or a broker would discount a note of that character without a willful failure to inquire into the circumstances under which it was obtained," with a view to impeaching the good faith of the transaction.[61] And so in New York, an unsigned blank left for signature was held to affect the purchaser with notice of the defect.[62] A line drawn over the words "*or order*" and a memorandum written on the paper, "this note is not negotiable," would of course notify the purchaser.[63]

In Maryland the doctrine of notice was applied to the case of a note payable to a certain person as "Trustee," and indorsed in the same style by the trustee, who sold the note and appropriated the proceeds; and the court held that the word "trustee" put the purchaser upon inquiry, and that he could not trace title as against the maker through such an indorsement, as the trustee had no power to dispose of the trust subject for his own benefit.[64]

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[59] Norvill v. Hudgins, 4 Munf. 496; Gilman v. New Orleans R. Co., 72 Ala. 581.

[60] Davis Machine Co. v. Best, 105 N. Y. 59; Hamilton v. Wilson, 67 Ga. 498; Angle v. Insurance Co., 92 U. S. 342.

[61] Rowland v. Fowler, 47 Conn. 347.

[62] Davis Machine Co. v. Best, 105 N. Y. 59.

[63] Prins v. So. Branch Lumber Co., 20 Ill. App. 236.

[64] Third Nat. Bank v. Lange, 51 Md. 138.

§ 252. Constructive notice from extrinsic circumstances.—The circumstances of the transaction may be of such a character as to intimate strongly a defect in the title, and if they are such as to invite inquiry they will suffice, provided the jury think that abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the paper.[65] Then indeed his *bona fides* would be impeached. But further than this, gross negligence, which is not in itself proof of *mala fides*, may be so great as to amount to proof of notice. "I agree," says Baron Parke, "that notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party willfully shuts his eyes."[66]

§ 253. Particular and general notice.—It is quite clear and well-settled that the purchaser need not have notice of the particular fraud, or equity or illegality, in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is some fraud, or equity or illegality affecting the original parties. "Thus, if when he took the bill he were told in express terms that there was something wrong about it, without being told what the vice was, or if it can be collected by a jury, from circumstances fairly warranting such an inference that he knew, or believed, or thought that the bill was tainted with illegality or fraud, such a general or implicit notice will equally destroy the title."[67] So if he knows that the maker denies his liability or refuses to acknowledge it.[68]

§ 254. Circumstances constituting notice.—Notice of fraud, or defect of title, or of defense valid between prior parties may be derived from circumstances, and be as effectual as personal observation, or hearing of the facts in question.

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[65] Hulbert v. Douglass, 94 N. C. 122; Bank of Hamburg v. Flynn, 38 Fed. 798; Ormsbee v. Howe, 54 Vt. 182.

[66] May v. Chapman, 16 M. & W. 355.

[67] Byles on Bills [*119], 226; Oakley v. Ooddeen, 2 F. & F. 659; Henry v. Sneed, 99 Mo. 422.

[68] Boyce v. Geyer, 2 Mich. N. P. 71; Studebaker v. Manufacturing Co., 70 Mo. 274.

Thus, where the assignee of a note, at the time of assignment, requests and receives, as security from the transferrer, a conveyance of land for the purchase money of which the note is given, with a provision in the deed that the assignee is to comply with the terms of the contract of sale to the prior purchaser, the assignee will be chargeable with notice of the character of the note.[69] Mere proof of an advertisement in a newspaper cautioning parties against purchasing a bill or note, even when made in the place of residence of the purchaser, is not of itself sufficient to show notice to the purchaser of any fraud affecting its validity.[70]

§ 255. Notice to agent.—It is a general principle of law that notice to an agent is notice to the principal, and therefore if the holder in taking the bill employs an agent, though he be unaffected with notice to himself personally, yet notice to the agent so employed, express or implied, is notice to the holder.[71] And notice to a subagent whose appointment has been authorized by the principal is equally notice to the principal.[72] But this rule is subject to the qualification that the knowledge of the agent, in order to affect his principal, should either have been acquired in the same transaction, or at least so recently as that it may be presumed to have remained in his memory; and it must be knowledge of a fact material to the transaction, and which it would be the duty of the agent to communicate to his principal.[73] That the principal is bound by such knowledge or notice as his agent obtains in negotiating the particular transaction is everywhere conceded. Constructive notice to an agent is not to be extended.[74] Notice to the active managing officers of a corporation is notice to the corporation itself. It is immaterial what the official position may be if

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[69] Packwood v. Gridley, 39 Ill. 383.

[70] Kellogg v. French, 14 Gray, 354.

[71] Story on Agency, § 140; Varnum v. Milford, 4 McLean, 93; Henry v. Sneed, 99 Mo. 423.

[72] Boyd v. Vanderkemp, 1 Barb. Ch. 273.

[73] The Distilled Spirits, 11 Wall. 366; Le Neve v. Le Neve, 2 Lead. Cas. in Eq. 179.

[74] Wyllie v. Pollen, 32 L. J. Ch. 782.

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BOOK IV.

FIXING LIABILITY TO PAY THE INSTRUMENT.

CHAPTER X.

PRESENTMENT FOR ACCEPTANCE, AND ACCEPTANCE.

SECTION I.

WHAT BILLS OF EXCHANGE SHOULD BE PRESENTED FOR ACCEPTANCE.

§ **256. General principles.**—The subject-matter of this chapter applies only to bills of exchange, foreign and inland. The law of presentment for acceptance and of acceptance can have no application to a negotiable contract, where, from its nature, there is or can be no acceptor. The certification of checks, however, is closely allied to the subject of presentment for acceptance, and acceptance. This subject has been fully treated in a preceding chapter.[1] It is the right of the holder of a bill to present it for, and insist on its, acceptance, even so late as the day before it falls due. If not presented for acceptance until the day it falls due, the right to demand acceptance becomes merged in the right to demand payment. If the bill be presented for acceptance before it falls due, it becomes dishonored if acceptance be refused; and notice must be forthwith given to the parties whom it is intended to charge. And suit may at once be instituted against the drawer, and against the indorsers.[2]

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[1] *Ante*, §§ 35–38.

[2] Townsley v. Sumrall, 2 Pet. 170; Landrum v. Trowbridge, 2 Metc. (Ky.) 281; National Bank v. Gunhouse, 17 S. C. 496; Woodward v. Row, Keb. 132.

This rule of commercial law is so general and binding that a statute of a State which forbids a suit from being brought in such a case until after the maturity of the bill, can have no effect upon suits brought in the United States courts. The requisition of a State statute like this would be a violation of the general commercial law, which a State has no power to impose, and which the courts of the United States would be bound to disregard. So also if the State statute seeks to make the right of recovery, in a suit brought in case of nonacceptance, dependent upon proof of subsequent presentment, protest, and notice for nonpayment.[3]

§ 257. What bills must be presented for acceptance.— Bills payable on demand or at sight without grace (which are immediately payable on presentment), or payable at a certain number of days after date, or after any other certain event, or payable on a day certain, need not be presented, for acceptance at all, but only for payment. And the fact that such bills are payable at a bank, or other particular place, does not alter the rule on the subject.[4] But it is usual and best, when the bill is payable at a future day, to present it for acceptance, in order to ascertain whether it will certainly be honored, and to procure the assurance of the acceptor's liability.[5] And in such cases, if acceptance be refused, the holder must make protest, and give notice in the same manner as if the bill were payable at so many days after sight.[6] There are, however, three exceptions to this general rule that it is not necessary to present a bill payable at a fixed time for acceptance, but only at maturity for payment: First, when there is an express direction to the payee or holder of a bill; second, when it is put into the hands of an agent for negotiation; and, third, where the drawer and drawee are either the same person, or the drawer is a member of the firm or connected with the corporation

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3 Watson v. Tarpley, 18 How. 517.

4 Bank of Washington v. Triplett, 1 Pet. 25; Townley v. Sumrall, 2 Pet. 170.

5 United States v. Barker, 4 Wash. C. C. 464; Story on Bills, § 288.

6 Allen v. Suydam, 20 Wend. 321; Landrum v. Trowbridge, 2 Metc. (Ky.) 281; Philpott v. Bryant, 3 Car. & P. 244.

which is the drawee. Thus, a bill drawn without being addressed to any drawee, or drawn by a party upon himself, or by a partner upon the firm of which he is a member, for partnership purposes. A bill drawn by the president of a corporation in its behalf, on the treasurer thereof, would be a bill drawn by the corporation on itself, and hence not need acceptance.[7]

Bills payable at sight, or at so many days after sight, or after demand, or after any other event not absolutely fixed, must be presented to the drawee for acceptance and payment, or for acceptance only, without unreasonable delay, or the drawer and indorsers will be discharged, for they have an interest in having the bills accepted immediately in order to shorten the time of payment, and thus put a limit to the period of their liability; and also enable them to protect themselves by other means before it is too late, if the bill is not accepted and paid within the time originally contemplated by them.[8] When the words "acceptance waived" are embodied in a bill, the ordinary proceedings in acceptance are dispensed with, and merged into those of payment or nonpayment.[9]

§ 258. **When drawer of bill requiring presentment for acceptance bound without such presentment.**—Presentment to the drawee, it has been held, is necessary, even though the drawer has requested him not to accept;[10] but the holder is not bound to present again after refusal to accept and notice given, even though the drawer requests him to do so, and promises that the bill shall be honored.[11]

The only cases in which the holder of a bill which, according to its tenor, should be presented for acceptance, can charge the drawer without presenting it for acceptance,

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[7] Daniel on Negotiable Instruments, § 465.

[8] Bell v. First Nat. Bank, 115 U. S. 379; Mitchell v. De Grand, 1 Mason, 176; Robinson v. Ames, 20 Johns. 146.

[9] Carson v. Russell, 26 Tex. 472; English v. Wall, 12 Rob. (La.) 132; Webb v. Mears, 9 Wright, 222.

[10] Hill v. Heap, Dowl. & R. N. P. 57; 1 Parsons on Notes and Bills, 388.

[11] Hickligg v. Hardey, 7 Taunt. 312.

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that the firm has been dissolved by bankruptcy does not render it necessary to present the bill to both.[20]

§ **260. Presentment to agent of drawee.**— The holder or his agent must be careful, when he does not find the drawee in person, to assure himself that the party to whom he presents the bill for acceptance is his authorized agent. And though in the case of a presentment for payment it may suffice to demand payment at the residence of the acceptor, yet in case of a presentment for acceptance, the holder must endeavor to see the drawee or his authorized agent, personally. And, therefore, where in an action against the drawee on a refusal to accept, it appeared that the witness had carried the bill to a place which was described to him as the drawee's house, and that he offered it to a person in a tanyard, who refused to accept it; and the witness did not know the drawee's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so, it was held that the evidence of presentment to the drawee for acceptance was insufficient.[21] In accordance with the principles stated, it may be added that there is no doubt that a clerk found in the drawee's counting-room is a competent person to whom the bill can be presented, and his refusal to accept is, in law, the refusal of the drawee.[22]

§ **261. Presentment in case of drawee's death.**— In the event the drawee be dead at the time the bill should be presented for acceptance, the most that could be expected of the holder would be that he should inquire after the personal representative of the deceased drawee, and if he live within a reasonable distance, present the bill to him. Chitty and Byles both give their indorsement to this proposition.[23] But some of the best text-writers, as well as many of the cases, state that the holder is not bound to present

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[20] Gates v. Beecher, 60 N. Y. 523.

[21] Cheek v. Roper, 5 Esp. 175.

[22] Daniel on Negotiable Instruments, § 457.

[23] Chitty on Bills [*280], 318; Byles on Bills [*177], 303.

the bill to the executor or the administrator of the drawee.[24] In any event, the holder has the right, and it becomes his duty, to protest the bill for nonacceptance, if there be, at the time of presentment, no executor or administrator of the deceased drawee. It should be observed, in this connection, that an acceptance by the personal representative of the drawee is binding upon the representative individually, and not in his official character, and further, that the holder is not obliged to receive the acceptance of the executor or administrator at all. Upon sound principle, therefore, it should follow that if the drawee be dead, the holder should have the right, and be impressed with the duty, of protesting the bill without any presentment to the personal representative.

SECTION III.

THE PLACE WHERE, AND HOW, PRESENTMENT SHOULD BE MADE.

§ 262. Sergeant Onslow's act.— It was at one time a question much litigated in England, whether, if a bill payable generally — that is, without specification of a place of payment — was accepted payable at a particular place, such an acceptance was a qualified one. It was decided in the House of Lords (contrary, however, to the opinion of eight of the twelve judges to whom the question was referred), that such an acceptance was a qualified one, and that a demand at the particular place named was a condition precedent to a recovery against the acceptor, as well as against the drawer and indorser.[25] This decision led to the passage of the statute of 1 and 2 George IV., chap. 78 (called Sergeant Onslow's act), in which it was recited that the practice and understanding of merchants had been different; and enacted that an acceptance payable at a particular place without further expression, should not be deemed a conditional acceptance; but if it were payable at a specified place "only,

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[24] Edwards on Bills, 401, 454, note 2.

[25] Rowe v. Young, 2 Brod. & B. 165.

and not otherwise, or elsewhere," it should be deemed conditional.[26]

§ **263. American statutes and decisions as to place of presentment for acceptance.**— In many of the States of the United States the English statute has been substantially enacted; and the courts, with few exceptions, have, independently of statute, followed the judgment of the eight judges against the House of Lords. Therefore, by the American law, it is settled that demand of payment at the place specified need not be averred by the plaintiff; but if the acceptor was at the place at the time specified, and ready to pay the money, it was a matter of defense to be pleaded on his part; which defense, however, is no bar to the action, but goes only in reduction of damages, and in prevention of costs.[27]

§ **264. Residence, or place of business.**— The presentment of the bill or note for acceptance should be at the place of the domicile of the drawee, whether it be payable generally, or at a particular place — the place of payment being immaterial until after acceptance.[28] If the drawee has removed his residence from the place to which it is addressed — or really resided at a different place — the bill should be presented at his new or real place of domicile, if the holder can ascertain it by diligent inquiries. If by such inquiries the drawee's place of domicile cannot be ascertained, or if he has absconded, the bill may be treated as dishonored.[29] If the drawee has his dwelling-house in one part of the town or city, and his place of business at another, it may be made at either place; and if the drawee resides in one town, and has his place of business at another, the holder may present the bill at either.[30]

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[26] Daniel on Negotiable Instruments, § 456.

[27] 1 Parsons on Notes and Bills, 305–311; Story on Bills, §§ 355–357; Edwards on Bills, 426, 428.

[28] Chitty on Bills (13th Am. ed.), 316.

[29] Anderson v. Drake, 14 Johns. 114; Freeman v. Boynton, 7 Mass. 483.

[30] Story on Bills, § 236.

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should in all cases be made during the usual hours of business, and such hours, except where presentment must be at a bank, generally range through the whole day to hours of rest in the evening.[36] Eight o'clock in the evening would not be too late to present a bill for acceptance to a tradesman.[37] And it matters not at what hour it is made, provided an answer be given by an authorized person.[38] But it is a mere nullity if made at an unreasonable hour — after bed-time or business hours — if no such answer be given.[39] If there is a known custom or usage in a town or city, which regulates business hours, that should govern in determining the proper hour for presentment at the drawee's place of business.[40]

§ 268. Within what period of time presentment for acceptance must be made.— It seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain — as, for instance, on a day named, or a fixed day after date — it need not be presented until the day of payment, in order to charge the drawer or an indorser.[41] The reason of this is that the drawer, by fixing a day certain for payment, assumes the responsibility of providing funds at that time, whatever may have been his previous credit with the drawee. And as to the indorser, by the very act of indorsement, he draws a new bill on the same terms; and, besides, he waives his right of immediate acceptance by not enforcing it himself, but putting his bill into circulation without acceptance.[42] If payable at sight, or at a certain time after sight, or on demand, the only rule which can be laid down is that it must be presented within a reasonable time,[43] unless there be some well-established usage of trade

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[36] Elford v. Teed, 1 Maule & S. 28; Cayuga County Bank v. Hunt, 2 Hill, 635.

[37] Chitty on Bills [*313].

[38] Chitty on Bills [*316].

[39] Story on Bills, § 237.

[40] Story on Bills, §§ 236, 349; Story on Notes, § 135.

[41] Townsley v. Sumrall, 2 Pet. 178; Bachellor v. Priest, 12 Pick. 399.

[42] Allen v. Suydam, 17 Wend. 368.

[43] Wallace v. Agry, 4 Mason, 336; Bridgeport Bank v. Dyer, 19 Conn. 136.

which fixes a definite time for such presentment, in which case such usage would control.[44] If the bill be not presented within a reasonable time, the drawee is discharged, although all the parties continue solvent, and there is no damage caused by the delay.[45]

§ **269. Due diligence must be exercised.**—It is not necessary for the holder to take the first opportunity to present for acceptance,[46] though to avoid question in case of loss it is advisable to do so — due diligence — that is, presentment within a reasonable time, is all that is necessary. "The distinction is," as was said by Gibbs, C. J., "between bills payable at a certain number of days after date, and bills payable at a certain number of days after sight. In the former, the holder is bound to use all due diligence, and present the bill at maturity; but in the latter case, he has a right to put the bill into circulation before he presents it, and then, of course, it is uncertain when it will be presented to the drawee. It is to the prejudice of the holder if he delays to do it, and he loses his money and interest."[47]

There are certain circumstances which may affect the question of reasonable time; for instance: (1) The passing of the bill into circulation. In such case a larger latitude is allowed for presentment for acceptance, and a long delay, even for as much as a year, would not be deemed negligence. (2) Fluctuations of the rate of exchange. The falling or rising of the rate of exchange in the place of residence of the drawee should be taken into consideration in determining whether or not there was unreasonable delay; *i. e.*, if exchange fell immediately after the sale of the bill, a more extended period might fairly and reasonably be allowed the holder, in order to enable him *bona fide* to endeavor to make a fair profit, or, at all events, to endeavor

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[44] Mellish v. Rawdon, 9 Bing. 416.

[45] Carter v. Flower, 16 M. & W. 743; Thornburg v. Emmons, 23 W. Va. 333.

[46] Muilman v. D'Eguino, 2 H. Bl. 565; Prescott Bank v. Caverly, 7 Gray, 217.

[47] Coupy v. Harden, 7 Taunt. 159.

to secure himself from loss. (3) The facilities of communication between the parties. This includes the character of the communication, the distance between the respective residences of the holder and drawee, and the length of time necessary to effect communication between the one place and the other. (4) War, sickness, or accident. Any reasonable cause, such as sickness, inevitable accident, or intervention of war, or other circumstances beyond the holder's control, will excuse delay in presentment for acceptance.[48]

SECTION V.

THE NATURE AND EFFECT OF ACCEPTANCE.

§ 270. Liability of drawer before acceptance.— The drawer of a bill undertakes that when it is presented to the drawee he will accept it; and by acceptance is meant an undertaking on the acceptor's part to pay the bill according to its tenor.[49] Until the bill has been accepted, the drawer is the primary debtor, and his liability is contingent and conditioned upon a strict compliance with the law as to presentment of the bill for acceptance (if the bill be of such a character that it is necessary to present it for acceptance), and due protest and notice of dishonor. After acceptance, the drawer becomes secondarily liable, and his position is that of the first indorser upon a promissory note.[50]

§ 271. Relation of drawee to bill before acceptance.— Until he has accepted the bill, so entirely is the drawee a stranger to it, that he may himself discount it. And he may then transfer it as the *bona fide* holder to another, who may sue and charge the drawer.[51] He may discount it either for the drawer, the payee, or an indorsee. "If the acceptor discounts the bill for the drawer, and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an in-

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48 Daniel on Negotiable Instruments, §§ 468–478.

49 Story on Bills, § 272; Cox v. National Bank, 100 U. S. 712.

50 Daniel on Negotiable Instruments, § 479.

51 Desha v. Stewart, 6 Ala. 852; Swope v. Ross, 40 Pa. St. 186.

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§ 273. What acceptance admits: (1) Signature of drawer.— It follows from the fact that the acceptor assumes to pay the bill, and becomes the principal debtor for the amount specified, that acceptance is an admission of everything essential to the existence of such liability. Therefore, acceptance is, in the *first* place, an admission of the signature of the drawer, the drawee being supposed to know his correspondent's handwriting, and, by accepting, to acknowledge it; and in a suit against the acceptor he would not be permitted to plead or show that the handwriting was not the drawer's, and would be bound by his acceptance even though the drawer's name were forged.[59]

§ 274. (2) Admission of funds of drawer in drawee's hands. — In the *second* place, acceptance admits that the acceptor had funds of the drawer in his hands, for the drawing of the bill implies this, and acceptance in the usual course of business only follows when it is the fact. Therefore, the acceptor cannot deny that he was in funds when suit is brought by a holder of the bill;[60] though as between himself and the drawer it is only *prima facie* evidence that the drawer had funds in his hands, and he may rebut this presumption by showing that the acceptance was for the drawer's accommodation, or otherwise under circumstances which place him under no obligation to pay the bill to him.[61] But, notwithstanding the presumption that the acceptor has funds of the drawer, yet, where bills have been drawn upon letters of credit to enable a party to purchase and ship merchandise, this presumption is rebutted, and the drawer becomes the primary debtor, and is liable to the acceptor for his advances. But if the acceptor has notice that one of two joint drawers of such a bill has merely loaned his name

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[59] Jenys v. Fawler, 2 Stra. 946; Hoffman & Co. v. Bank of Milwaukee, 12 Wall. 193; Goetz v. Bank, 119 U. S. 556.

[60] Raborg v. Peyton, 2 Wheat. 385; Hortsman v. Henshaw, 11 How. 177; Heurtematte v. Morris, 101 N. Y. 63.

[61] Daniel on Negotiable Instruments, §§ 174–176; Park v. Nichols, 20 Ill. App. 143; Klopfer v. Levi, 33 Mo. App. 322.

to give currency to the bill, such drawer is no more liable to the acceptor than if he had merely indorsed the bill.[62]

§ 275. **(3) Admission of drawer's capacity to draw.**— In the *third* place, the acceptor admits the capacity of the drawer to draw the bill, for otherwise it would not be valid;[63] and therefore he cannot set up a plea, that the drawer of a bill, which he had accepted, was a body corporate having no legal authority to draw the bill, or was a bankrupt, infant, married woman, or fictitious person.[64] When the bill is drawn in the name of a firm, acceptance admits that there is such a firm, and if it be drawn by a person as executor, it admits his right to sue in that character.[65]

§ 276. **(4) Admission of payee's capacity to indorse.**— In the *fourth* place, the acceptor admits the capacity of the payee to indorse the bill when it is drawn payable to the payee's order, for by the very act of acceptance he agrees to pay to his order;[66] and, therefore, he cannot show that at the time of acceptance the payee was an infant, an insane person, a married woman, a bankrupt, or a corporation without legal existence.[67] It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world, that the other has such power.[68] Indeed, there could be no reason why the acceptor should be interested to show that the payee was incompetent to make the order; for he has been guaranteed in that regard by the drawer, and may

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[62] Turner v. Browder, 5 Bush, 216.

[63] Story on Bills, § 113; Byles on Bills [*193], 325.

[64] Halifax v. Lyle, 3 Welsb., Hurl. & Gord. (Exch.) 466; Braithwaite v. Gardiner, 8 Q. B. 473; Taylor v. Croker, 4 Esp. 187; Cowton v. Wickersham, 54 Pa. St. 302; Cooper v. Meyer, 10 B. & C. 468.

[65] Bass v. Clive, 4 Maule & S. 13; Aspinwall v. Wake, 10 Bing. 51.

[66] Daniel on Negotiable Instruments, §§ 93, 242.

[67] Jones v. Darch, 4 Price, 300; Smith v. Marsack, 6 C. B. 486; Drayton v. Dale, 2 B. & C. 293; Daniel on Negotiable Instruments, § 93 *et seq.*

[68] Daniel on Negotiable Instruments, chap. 42, section 3.

charge the amount in account against him whether the payee were competent or not.

§ 277. (5) Admission of agent's handwriting and authority. — In the *fifth* place, if the bill be drawn by one professing to act as agent of the drawer, the acceptance admits his handwriting and authority as agent to draw.[69] In the leading case of Robinson v. Yarrow, the question arose between the acceptor and the indorsee of the drawer by procuration, and the doctrine is stated in the text in the language generally used by text-writers and judges. It is, however, contended with force in a Louisiana case, that the doctrine only applies as between the acceptor and a *bona fide* transferee without notice of want of authority in the agent to draw; and that as between the acceptor and the payee who has taken the bill from the agent, the former is not estopped from showing that the agent drew without authority, the payee being himself under obligation to make due inquiry.[70] And this seems to be a reasonable limitation of the principle.

§ 278. What acceptance does not admit: (1) Signature of payee.— But beyond these admissions the acceptance does not go. In the *first* place, it does not admit the genuineness of the signature of the payee when it purports to bear his indorsement, or that of any other indorser, for with their handwriting he is not presumed to be familiar; and, therefore, if the signature of the payee or other indorser be forged, the acceptor will not be bound to pay the bill to any one who is compelled to trace title through such indorsements.[71] And if he has gone so far as to pay the bill to any one holding it under such forged indorsement, he may, as a general rule, recover back the amount.[72] The rule would not apply, however, where the drawer had issued the bill with the forged indorsement upon it, for then the

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[69] Robinson v. Yarrow, 7 Taunt. 455; 1 Parsons on Notes and Bills, 322.

[70] Angel v. Ellis, 1 McGloin, 61.

[71] Holt v. Ross, 54 N. Y. 474; Edwards on Bills, 432.

[72] Holt v. Ross, 54 N. Y. 474; Dick v. Leverich, 11 La. 573; Williams v. Drexel, 14 Md. 566.

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§ 280. (3) Acceptance no admission of genuineness of terms in body of the bill.— In the third place, the acceptance does not admit the genuineness of the terms contained in the body of that bill at the time of the acceptance; and, therefore, if at that time they had been altered so as to purport to bind the drawer for a larger sum, or in a different manner than that in the original bill, he will not be bound by his acceptance to pay the amount, unless the drawer had by his own carelessness afforded opportunity for the alteration, and the acceptor could therefore charge him in account with the whole amount.[77] But where the drawer alters it himself, or acquiesces in an alteration, before acceptance, it binds him, and therefore the acceptor.[78]

If the drawer were not responsible for affording the opportunity for the alteration to be made, the acceptor could not only defend against a recovery upon the bill, but might himself recover back the amount paid upon it, or, at least, to the extent of the amount for which he would still remain liable to the drawer.[79] If, however, the acceptor were himself responsible for issuing the bill in such a form as to admit of its being easily forged or altered — as where an acceptor wrote his acceptance in blank, on an agreement with the drawer that he should not draw for over $1,000, and the latter inserted a larger sum and passed the bill to the plaintiff — he would be bound for the whole amount, and could not recover it back if paid.[80]

SECTION VI.

BY WHOM, AND WHEN, BILLS SHOULD BE ACCEPTED.

§ 281. Person who may accept.— The drawing of a bill imports a contract on the part of the drawer that the drawee is a person competent to accept; and, therefore, if the

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77 Young v. Grote, 4 Bing. 253; Young v. Lehman, 63 Ala. 519; White v. Continental Nat. Bank, 64 N. Y. 320.

78 Langton v. Lazarus, 5 M. & W. 628; Ward v. Allen, 2 Metc. (Mass.) 57.

79 Bank of Commerce v. Union Bank, 3 N. Y. 230.

80 Van Duzer v. Howe. 21 N. Y. 531.

holder upon presentment of the bill ascertains that the drawee is incapable of contracting — for instance, is a minor, an idiot, or a married woman — he may cause it to be protested, and proceed against antecedent parties, as usual in cases of dishonor.[81]

It follows, therefore, as a general rule, that the bill should and can be accepted only by the party on whom drawn or his authorized agent, except in the cases of acceptance for honor;[82] and if a bill addressed to one be accepted by two persons, it has been thought that the acceptance of the first will be vitiated by having been altered in an essential part,[83] unless made with the acceptor's consent. But if any other person, after an acceptance, subsequently accepts the bill for the purpose of guaranteeing its credit, at the acceptor's request, in the usual form of an acceptance, then, if there is a sufficient consideration, he may be bound thereby as a guarantor; but he is not liable as an acceptor.[84] And the addition will not be a material alteration.[85]

A party may be bound as an acceptor by any name or designation he may see fit to adopt, provided it clearly appears by extraneous evidence who was intended; and if he intends to contract by a certain designation, he is estopped to deny that the name by which he assumed to enter into the contract was the appropriate appellation. "The West Tennessee Department of the Life Association of America" would therefore be bound upon an acceptance made by its proper officer of a bill addressed to "The Western Department of the Life Association of America."[86]

§ 282. When accepted by stranger to the instrument.— Where a person other than the one addressed as drawee writes his name across the face of the bill, it would be com-

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81 Edwards on Bills, 381; Chitty on Bills [*192], 221; Tooting v. Hubbard, 3 Bos. & P. 291.

82 Polhill v. Walter, 3 B. & Ad. 114; May v. Kelly, 27 Ala. 497; Keenan v. Nash, 8 Minn. 409.

83 Thompson on Bills, 112, 212.

84 Story on Bills, § 254; Jackson v. Hudson, 2 Gamph. 447.

85 Smith v. Lockridge, 8 Bush, 425.

86 Hascall v. Life Assn. of America, 5 Hun, 152.

petent for him to show as between immediate parties (and on account of its ambiguity, perhaps, as to others) in what character he intended to be bound.[87]

But if a party accept a bill in which no drawee is named, it will be regarded as acknowledging that he was the drawee and will operate as a complete accepted instrument.[88]

§ 283. **An acceptance may be made by an agent** but certainly the holder may require the production by him of clear and explicit authority from his principal to accept in his name, and without its production may treat the bill as dishonored;[89] and it has been doubted whether the holder is bound to acquiesce in an acceptance by an agent, as such an acceptance would multiply the proofs of the holder's title.[90] But if the agency were clear, we think the holder would be bound to take the agent's acceptance — acceptance by procuration, as it is termed.[91] If the holder takes an acceptance from one unduly alleging his agency, and without giving notice to antecedent parties, they will be released, if the principal refuses to ratify the act.[92]

If the bill be drawn upon an agent in his individual name, it would seem clear on principle that none but he, as an individual, could accept.[93]

§ 284. **Bills drawn on joint parties and partners.**— If a bill is drawn on two persons not partners, both should accept, and if either refuse, the bill may be protested for his non-acceptance;[94] but the party accepting will be bound by his acceptance.[95] If the bill is addressed to two persons, "or

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87 Curry v. Reynolds, 44 Ala. 349.

88 Wheeler v. Webster, 1 E. D. Smith, 1; Gray v. Milner, 8 Taunt. 739; Davis v. Clarke, 6 Q. B. 16.

89 Atwood v. Munnings, 7 B. & C. 278; Roscoe on Bills, 71.

90 Coore v. Callaway, 1 Esp. 115; Chitty on Bills (13th Am. ed.), 321.

91 Thompson on Bills, 211.

92 Thompson on Bills, 211; Chitty on Bills (13th Am. ed), 321.

93 Daniel on Negotiable Instruments, § 487.

94 Dupays v. Shepherd, Holt, 297; Chitty on Bills (13th Am. ed.), 73, 321.

95 Owen v. Van Uster, 10 C. B. 318; Smith v. Melton, 133 Mass. 369.

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acceptance was filled up after the lapse of twelve years, and, as the jury found, after the lapse of a reasonable time, the acceptor was held liable to a *bona fide* indorsee.[5] Furthermore, the acceptor in blank will be liable for any amount for which the bill is filled up when it has passed into the hands of any *bona fide* holder, without notice that his authority has been exceeded.[6]

Acceptance dates from delivery, until which time it is revocable;[7] but if not in the hands of the acceptor, and accepted verbally, this principle would have no application.[8]

§ 286. **Acceptance of bill after maturity, and after death of drawer.**— There may be acceptance of a bill after it has become payable, and after protest, in which case the bill is regarded as payable on demand.[9] And after acceptance has been once refused, the drawee may afterward accept, and bind himself as acceptor — but he cannot bind the other parties unless the bill was duly protested.[10]

Death of the drawer is no revocation of a bill in the hands of a *bona fide* holder; and, therefore, after his death, it may be accepted by the drawee, although he has knowledge of that fact.[11] The presumption is that a bill was accepted before maturity, and within a reasonable time after date.[12]

§ 287. **Drawee may deliberate twenty-four hours whether or not to accept.**— When the bill is presented to the drawee for acceptance, he is entitled, if he desires it, to a reasonable time to examine into the state of his accounts with the drawer, and deliberate whether or not he will honor the bill. To afford him this opportunity, which it may be

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5 Montague v. Perkins, 22 Eng. L. & Eq. 516.

6 Bank of Commonwealth v. Curry, 2 Dana, 142; Moody v. Threlkeld, 13 Ga. 55.

7 Cox v. Troy, 5 B. & Ald. 474.

8 1 Parsons on Notes and Bills, 291.

9 Christie v. Pearl, 7 M. & W. 491; Bank of Louisville v. Ellery, 34 Barb. 630.

10 Wynne v. Raikes, 5 East, 514; Thompson on Bills, 214.

11 Cutts v. Perkins, 12 Mass. 206; Hammond v. Barclay, 2 East, 227.

12 Roberts v. Bethel, 12 C. B. 778.

very necessary for him to avail of, he is allowed twenty-four hours, and it is usual to leave the bill with him for that period;[13] though it has been said that if the post goes out in the meantime, the bill should be protested immediately if not accepted, and notice of dishonor sent.[14] But this rule is too rigid, especially in countries like the United States, in which the mail facilities are so great; nor does it consist with the rule allowing a whole day for preparation of notice.[15]

But if the drawee refuses to accept within the twenty-four hours, the bill must be protested immediately;[16] and if at the end of twenty-four hours the drawee does not signify his acceptance, protest must be immediately made, and notice given.[17]

§ **288. As to the date of acceptance.**— If the acceptance bears a date, it will be taken as *prima facie* evidence of the time when it was made, even when the date is in a different handwriting from the rest of the acceptance.[18] When the acceptance bears no date, there is no presumption that it was made at the date of drawing; but, on the contrary, it will be presumed that it was made afterward.[19] The presumption is, that it was made within a reasonable time after drawing, and prior to the term of payment.[20] It is said, in Pardessus, that it may be inferred to have been accepted on the date of the bill.[21]

§ **289. Acceptance for honor.**— There is a peculiar kind of acceptance called acceptance for honor, or *supra protest.*

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[13] Connelly v. McKean, 64 Pa. St. 113; Overman v. Hoboken City Bank, 31 N. J. L. 563; Montgomery County Bank v. Albany City Bank, 8 Barb. 399.

[14] Bellasis v. Hester, 1 Ld. Raym. 280; Thompson on Bills, 213.

[15] Morrison v. Buchanan, 6 Car. & P. 18; Chitty on Bills (13th Am. ed.), 317–321.

[16] 1 Parsons on Notes and Bills, 348; Edwards on Bills, 400.

[17] Ingram v. Forster, 2 J. P. Smith, 242.

[18] Glossup v. Jacob, 4 Camph. 227; Thompson on Bills, 217.

[19] Begbi v. Levi, 1 C. & J. 180.

[20] Roberts v. Bethel, 22 L. J. C. P. 69.

[21] 1 Pardessus, 393.

This most frequently happens when the original drawee (and the drawee *au besoin*, if any) refuses to accept the bill, in which case a stranger may accept the bill for the honor of some one of the parties thereto, which acceptance will inure to the benefit of all the parties subsequent to him for whose honor it was accepted.[22]

§ 290. **Circumstances under which there may be such acceptance; method of.**— An acceptance for honor is only allowable when acceptance by the drawee has been refused, and when the bill has been protested, and hence it is called acceptance *supra protest*.[23]

The reason assigned for this is that the drawers and indorsers have a right to say that the bill was not primarily drawn on the acceptor for honor; and the only proper proof of the refusal of the original drawee is by protest, that being the known instrument, by the custom of merchants, to establish the facts.[24] The usual form used in such acceptance is, "Accepted *supra protest*, for the honor of A. B." Another approved form is, "Accepted under protest, for the honor of A. B., and will be paid for his account, if regularly protested and refused when due." It is essential that the acceptor for honor appear before a notary public and declare that he accepts the protested bill in honor of the drawer or indorser, as the case may be, and that he will pay it at the appointed time.[25]

It is the duty of the acceptor *supra protest*, as soon as he has made the acceptance, to notify the fact to the party for whose honor it is done;[26] and the party paying a bill under protest for honor must give reasonable notice to the person for whose honor he pays, otherwise he will not be bound to refund.[27]

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22 Konig v. Bayard, 1 Pet. 250; Hoare v. Cazenove, 16 East, 391; Story on Bills, §§ 255, 256.

23 Bayley on Bills, 177; Story on Bills, §§ 255, 256.

24 Story on Bills, § 256.

25 Gazzam v. Armstrong, 3 Dana, 554.

26 Story on Bills, § 259; Edwards on Bills, 441.

27 Wood v. Pugh, 7 Ohio, pt. II, 156.

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ance should designate for whose honor it was made, in which case it could be at once perceived for whose benefit it inured.[33] If the acceptance do not specify for whose honor it was made, it will be construed to be for the honor of the drawer;[34] and if for the honor of the bill, or of all the parties, it should be so expressed.[35]

§ 293. As to the rights of an acceptor for honor.— By his acceptance for honor, the acceptor has recourse against the party for whose honor he accepts, and all parties whom the latter would have recourse against, and none others.[36] But the acceptor for the honor of the drawer cannot recover against him without proof of a presentment for acceptance or payment, and refusal and notice to the drawer.[37]

If he accepts for the honor of the drawer only, he will in general have no recourse against the indorsers; and if for the honor of an indorser, he will have no recourse against a subsequent indorser[38]— the exception arising in cases where the person for whose honor he accepts the bill might have recourse against either, as when he is an accommodation drawer or indorser.[39]

§ 294. As to the liability of the acceptor for honor.— The acceptance for honor or *supra protest* is not an absolute engagement like an ordinary acceptance for value. It is a conditional engagement, and to render it absolute, the performance of several acts as conditions precedent are essential. Such an acceptance, says Lord Tenterden, C. J., "is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, 'keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be

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[33] Hussey v. Jacob, 1 Ld. Raym. 88; 1 Parsons on Notes and Bills, 313.

[34] Chitty on Bills [*346], 387; 1 Parsons on Notes and Bills, 313.

[35] Gazzam v. Armstrong, 3 Dana, 552.

[36] Goodall v. Polhill, 1 C. B. 233; Byles on Bills [*259], 406.

[37] Baring v. Clark, 19 Pick. 220; Schofield v. Bayard, 3 Wend. 488.

[38] Gazzam v. Armstrong, 3 Dana, 554.

[39] Story on Bills, § 256.

not paid by the party on whom it was originally drawn, come to me and you shall have your money.' "[40] The nature of such an acceptor's undertaking is more analogous to that of an indorser[41] than that of an ordinary acceptor, and to render him absolutely liable it is necessary:

First. To present the bill at maturity to the original drawee, notwithstanding his prior refusal, because between the time of such refusal and the time of maturity, effects may have reached the drawee, out of which he might, if the bill were again presented, pay it; and the drawer and other parties are entitled to the chance of any benefit which might arise from such second demand. And if it were not made (except in the case of a bill made payable at a place not being the residence of the drawee), the drawer and indorsers would be discharged; and as the acceptor *supra protest* would thereby lose recourse against them, he is also discharged.[42]

Second. Upon refusal by the original drawee to pay the bill when it is presented at maturity, it must be again protested for nonpayment, and such protest and presentment must be alleged in the declaration against the acceptor *supra protest.* And *third*, it is then necessary to present the bill in due time to the acceptor *supra protest.*[43]

If on such presentment the acceptor *supra protest* refuses to pay, there must be another formal protest, stating the presentment for payment to the drawee, the protest for his nonpayment, the presentment of the bill and acceptance to the acceptor *supra protest*, and demand of payment of him, and the protest for his nonpayment; and notice thereof must be forthwith forwarded to the drawer and indorsers.[44]

§ 295. Admissions of acceptor for honor.—There appears to be a conflict of opinion as to the extent of the admission

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[40] Williams v. Germaine, 7 B. & C. 457.

[41] 1 Parsons on Notes and Bills, 315.

[42] Barry v. Clark, 19 Pick. 220; Story on Bills, § 261.

[43] Chitty on Bills [*350, 351], 392; Story on Bills, § 261.

[44] Chitty on Bills [*352], 393; 1 Parsons on Notes and Bills, 320.

of the acceptor *supra protest*. The rule has been broadly stated to be that he does not admit the genuineness of the signature of any party for whose honor the acceptance is given, not even the drawer's, and therefore he could recover money paid to the holder if the bill should prove to be a forgery;[45] but the rule stated is certainly subject to the modification that one who accepts for the honor of the drawer is estopped from denying that the bill is a valid bill; and, consequently, it would not be competent for him to set up as a defense to an action by an indorsee that the payee is a fictitious person, and that he was ignorant of the fact at the time he accepted the bill.[46]

§ 296. Holder not bound to take acceptance for honor.— The holder is in no case bound to take an acceptance for honor;[47] but if he receives it, and it is for the honor of a particular party, he cannot sue such party until the maturity of the bill, and its dishonor by the acceptor *supra protest*.[48] And if the acceptance is for the honor of all the parties to the bill, he cannot sue any of them until it has matured and been dishonored.[49]

But there seems to be no reason why the holder may not sue prior parties, when the acceptance is for honor of a particular party, after giving them due notice.[50]

SECTION VII.

FORM AND VARIETIES OF ACCEPTANCE.

§ 297. Varieties of.— According to the law merchant, an acceptance may be (1) expressed in words or (2) implied from the conduct of the drawee. (3) It may be verbal or written. (4) It may be in writing on the bill itself or on a separate paper. (5) It may be before the bill is drawn

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45 1 Parsons on Notes and Bills, 323.

46 Phillips v. Thurn, 18 C. B. (N. S.) 694.

47 Mitford v. Walcott, 12 Mod. 410; Chitty on Bills [*345], 387.

48 Williams v. Germaine, 7 B. & C. 468.

49 Story on Bills, § 258.

50 Story on Bills, § 258.

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it.[57] But merely paying and crediting a part of the amount on the bill would not amount to an acceptance in writing.[58]

§ **299. Implied acceptance.**— Acceptance may be implied from the conduct of the drawee. Any act which clearly indicates an intention to comply with the request of the drawer, or any conduct of the drawee (no statute intervening) from which the holder is justified in drawing the conclusion that the drawee intended to accept the bill, and intended to be so understood, will be regarded as an acceptance.[59] Keeping a bill a considerable length of time without returning an answer, may, under some circumstances, be considered as an acceptance, especially if the drawee be informed that delay will be so considered, and there be an inference from the language of the drawee that he intended an acceptance.[60] But the mere detention for an unreasonable time, unattended by special circumstances, will not, in law, amount to an acceptance.[61]

In an English case Lord Ellenborough expressed the opinion that destruction of the bill by the drawee would constitute an implied acceptance, especially if the drawee had not previously refused to accept.[62] The correctness of this doctrine is doubted by eminent text-writers,[63] and it does not seem to be consonant with sound principle. There is a statute in New York which in substance provides that if the drawee destroy the bill, or refuse within twenty-four hours after its delivery to him to return the bill, such conduct shall be deemed an acceptance.[64]

§ **300. Verbal acceptance.**— As has been seen, the law merchant, unaffected by statute, permits a verbal acceptance,

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[57] Kaufman v. Barrenger, 70 La. Ann. 419.

[58] Bassett v. Haines, 9 Cal. 261.

[59] Andressen v. First Nat. Bank, 2 Fed. 125; Billing v. De Vaux, 3 M. & G. 565; McCutcheon v. Rice, 56 Miss. 455.

[60] Chitty on Bills [*295], 334; Harvey v. Martin, 1 Campb. 425.

[61] Mason v. Barff, 2 B. & Ald. 26; Colorado Nat. Bank v. Boettcher, 5 Colo. 190.

[62] Jeune v. Ward, 1 B. & Ald. 653.

[63] Chitty on Bills [*296], 335; Edwards on Bills, 418.

[64] R. S., § 11 (2d ed.), p. 757.

and it is as binding upon the drawee as a written acceptance; but the holder may always insist upon a written acceptance, and in default thereof treat the bill as dishonored.[65] Any words used by the drawee to the drawer or holder, which by reasonable intendment signify that he honors the bill, will amount to such acceptance; though it would be different if the words were addressed to a stranger having no interest in the bill. Thus, where a foreign bill drawn on defendant was protested by nonacceptance and returned, and afterwards the drawee told the plaintiff, "If the bill comes back I will pay it," was held an acceptance.[66] So, if the drawee say, "Leave your bill with me, and I will accept it."[67] So, where the holder met in the street the drawee of the bill which had been sent to his counting-house, and returned unaccepted, and the drawee said, "If you will send it to the counting-house again, I will give directions for its being accepted," Lord Ellenborough held that if the bill had been sent accordingly, it would operate as an acceptance, but otherwise not, the words being conditional.[68] The words used, therefore, must evince a clear intention on the part of the drawee to bind himself to the payment of the bill at all events, in order to amount to an acceptance, and equivocal language will not suffice. Therefore, where the drawee said, on the day after presentment for acceptance, when the plaintiff's clerk called for the bill, "There is your bill, it is all right," it was held no acceptance.[69] It should be added that, in order to amount to a verbal acceptance, the words used must be addressed to the drawer or holder, or their agent, or to some one who takes the bill on the faith and credit imparted by the words used.[70]

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[65] Chitty on Bills [*287], 326; Edwards on Bills, 417.

[66] Cox v. Coleman, Chitty, Jr., on Bills, 274.

[67] Chitty, Jr., on Bills, 12.

[68] Anderson v. Hick, 3 Campb. 179.

[69] Powell v. Jones, 1 Esp. 17.

[70] Daniel on Negotiable Instruments, § 507; Martin v. Bacon, 2 S. C. 132.

§ 301. Statutory rule as to written acceptance.— In the year 1821 it was enacted in England, by the statute 1 & 2 Geo. IV., chap. 78, § 2, that "no acceptance shall be sufficient to charge any person, unless such acceptance be in writing on such bill." Since that statute it has been laid down by high authority that a mere signature on the face of the bill, without any words of acceptance, may be an acceptance in writing within the meaning of the statute;[71] and, on the other hand, that words of acceptance without a signature, if intended as an acceptance, might suffice.[72] By statute 19 & 20 Victoria, chap. 78, § 2, it was enacted "that no acceptance of any bill of exchange shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor or some person duly authorized by him." After this enactment it was contended that inasmuch as before its passage a mere signature was deemed an acceptance in writing — within the statute 1 & 2 Geo. IV., it was still not the less so; and that inasmuch as it was a signature of the acceptor, the bill was both accepted in writing, and signed by the acceptor within the meaning of the statute 19 & 20 Victoria. But looking at the history of the statute, Lord Denman was of the contrary opinion; and the mere signature was held not to amount to an acceptance under the later statute.[73] The decision, however, was immediately nullified by act of Parliament.[74] Under a similar statute in New York, to that of 19 & 20 Victoria, the mere signature of the drawee was deemed a sufficient acceptance.[75] In many of the United States statutes have been enacted which expressly require that all acceptances shall be in writing, and in most of these States the written acceptance is required to be signed by the acceptor.

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[71] Byles on Bills (12th ed.), 191; Leslie v. Hastings, 1 Moody & R. 119.

[72] Dufaur v. Oxenden; 1 Moody & R. 90.

[73] Hindlaugh v. Blakey, 3 C. P. Div. 136.

[74] See Steele v. McKinlay, 34 Eng. Rep. 106.

[75] Spear v. Pratt, 2 Hill, 582.

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written within a reasonable time before the bill is drawn, for otherwise the drawer will be presumed to have declined to act on the authority granted him to draw, and the drawee will not be construed to have intended an indefinite liability.[83] And second, the promise must so describe the bill that there can be no doubt of its application to it.[84] High authorities go further, and declare that the promise must put its finger, so to speak, upon the specific bill; and that otherwise, if the promise be broken, the promisor may be sued by the drawer for breach of promise to accept; but cannot be sued by anyone as acceptor.[85]

§ **305. To what bills promises to accept are applicable.**— The rule that the promise to accept, designating the specific bill, amounts to an acceptance, seems applicable only to the cases of bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight; for, in order to constitute an acceptance in the latter cases, a presentment is indispensable, since the time that the bill is to run cannot be otherwise ascertained.[86] And a mere promise to accept without more, it is thought, applies only to bills payable at the drawee's or payee's place of business.[87]

§ **306. Absolute and conditional acceptances; rights of holder as to.**— It is the right of the holder of the bill to require an absolute and unconditional acceptance — that is, an acceptance in conformity with the tenor of the bill — and may cause it to be protested unless it be so accepted.[88] The holder may, however, at his risk, take a conditional, varying, or qualified acceptance, and in such cases the acceptor will, if the condition be complied with, or the qualification admitted, be bound thereby; and the holder will

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[83] Coolidge v. Payson, 2 Wheat. 66; Greele v. Parker, 5 Wend. 414.

[84] Franklin Bank v. Lynch, 52 Md. 270.

[85] Coolidge v. Payson, 2 Wheat. 66; Boyce v. Edwards, 4 Pet. 111; Schimmelpennich v. Bayard, 1 Pet. 264.

[86] Wildes v. Savage, 1 Story C. C. 28; Franklin Bank v. Lynch, 52 Md. 270.

[87] Michigan State Bank v. Leavenworth, 28 Vt. 209.

[88] Boehm v. Garcias, 1 Campb. 425; Parker v. Gordon, 7 East, 385; Gibson v. Smith, 76 Ga. 34.

likewise be bound by it.[89] The burden of proof is on the plaintiff to show performance of the condition of a conditional acceptance;[90] and although absolute then it should be set out as conditional, with an averment of performance.[91]

On the offer of a conditional or varying acceptance, if the holder resolve to reject it altogether, he may protest generally, or give general notice of nonacceptance; but if he is willing to accept the offer, he should then give notice of its exact terms to all the parties, and state his readiness to accept the offer if they will respectively consent.[92] A general or unqualified protest or notice of nonacceptance would, in such a case, evince that the holder did not acquiesce in the offer, and preclude him from afterward availing himself of it;[93] but not if he was not aware of the acceptance when he caused the bill to be noted or protested for nonacceptance.[94]

§ 307. Qualification of rule.—The rule above stated is, in respect to the indorsers of a bill, of absolute and invariable application.[95] But in respect to the drawer, it is subject to qualification. The drawer warrants that the drawee is in funds, and that he will accept and pay the bill. And he is bound to know whether or not the drawee is in funds. Therefore, when he draws without having a right to do so, he is not entitled to notice of dishonor. And upon the same principle it is thought that he cannot be injured, and will not be discharged by the holder's taking a qualified acceptance payable at a future day.[96] True, such an acceptance is a departure from the tenor of the bill; but the drawer, having improperly drawn the bill, cannot complain of the holder

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89 Anderson v. Hick, 3 Gamph. 179; Taylor v. Newman, 77 Mo. 265; Hughes v. Fisher, 10 Colo. 383.

90 Read v. Wilkinson, 2 Wash. C. C. 514; First Nat. Bank v. Bensley, 1 Fed. 609.

91 Langston v. Corney, 4 Camph. 176.

92 Daniel on Negotiable Instruments, § 510; Chitty on Bills [*301], 340.

93 Sproat v. Mathews, 1 T. R. 182.

94 Fairlie v. Herring, 3 Bing. 625.

95 Edwards on Bills, 428, 430.

96 Walker v. Bank of New York, 13 Barb. 636; Edwards on Bills, 429.

for taking those steps which seem essential to prevent its entire dishonor, and to secure its payment.[97]

§ 308. **Illustrations of conditional acceptance.**—Acceptances "to pay as remitted for;" "to pay when in cash for the cargo of the ship Thetis;" "to pay when goods consigned to me are sold;" "to pay when a cargo of equal value is consigned to me;" "payable when house is ready for occupancy;" "to pay when in funds," are examples of conditional acceptances.[98] An acceptance to pay "when in funds" renders the drawee liable only when he has funds;[99] although it has been held that this implied when the drawee has funds which the drawer has a present right to demand and receive, and that it did not apply to wages for daily labor earned after acceptance, and needed for the daily subsistence of the laborer.[1] "When in funds" means "when in cash," and available securities will not answer this condition until actually converted into money.[2] If the funds are not received in the acceptor's lifetime, but are collected by the administrator, the latter is liable as representative of the deceased,[3] but the condition of the word "administrator" to an acceptance does not make it a conditional one, nor qualify his liability.[4] If the holder receive an acceptance to be paid "when in funds," he cannot resort to the drawer until the acceptor refuses to pay after he is in funds;[5] and the conditional acceptor will not be liable if the funds are intercepted, or compliance with the condition is prevented, by operation of law.[6]

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97 Edwards on Bills, 429.

98 Banbury v. Lissett, 2 Stra. 1211; Julian v. Shorbrook, 2 Wills, 9; Smith v. Abbott, 2 Stra. 1152; Mason v. Hunt, 2 Doug. 297; Cook v. Wolfendale, 105 Mass. 401; Marshall v. Clary, 44 Ga. 513.

99 Marshall v. Clary, 44 Ga. 513.

1 Wintermute v. Post, 4 Zabr. 420.

2 Campbell v. Pettengill, 7 Greenl. 126.

3 Swansey v. Breck, 10 Ala. 533; Gallery v. Prindle, 14 Barb. 186.

4 Tassey v. Church, 4 Watts & S. 346.

5 Campbell v. Pettengill, 7 Greenl. 126; Gallery v. Prindle, 14 Barb. 186.

6 Browne v. Coit, 1 McCord, 408.

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should appear on its face. It has been laid down that acceptance may be rendered conditional by another contemporaneous writing,[13] but such condition could have no effect against a *bona fide* holder ignorant of it.[14] The terms of an acceptance in writing cannot be varied by any contemporaneons parol agreement, as that is against the first principles of the law of evidence.[15] Where a verbal acceptance is competent, a condition annexed to a verbal acceptance may be shown, because it does not vary or contradict the contract, but shows what the contract was.[16] But the acceptor having one accepted absolutely, cannot by subsequent declarations annex a condition to his liability.[17]

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13 Bowerbank v. Monteiro, 4 Taunt. 884.

14 United States v. Bank of Metropolis, 15 Pet. 377; Montague v. Perkins, 22 Eng. L. & Eq. 516.

15 Adams v. Wordley, 1 M. & W. 347; Goodwin v. McCoy, 13 Ala. 271; Foster v. Clifford, 44 Wis. 569.

16 Edwards on Bills, 426.

17 Wells v. Brigham, 6 Cush. 6.

CHAPTER XI.

PRESENTMENT FOR PAYMENT.

§ 311. Obligations of maker, acceptor, drawer, and indorser, respectively, as to payment; general rule.—The engagement entered into by the acceptor of a bill and the maker of a note is, that it shall be paid at its maturity — that is, on the day that it falls due, and at the place specified for payment, if any place be designated — upon its presentment. This engagement is absolute, but that of the drawer of a bill and the indorser of a bill or note is conditional, and contingent upon the true presentment at maturity, and notice in case it is not paid. The maker and acceptor are bound, although the bill or note be not presented on the day it falls due;[1] but the drawer and indorsers are discharged if such presentment be not made, unless some sufficient cause excuses the holder for failure to perform that duty.[2] It is important, therefore, to ascertain how the presentment should be provided for by the holder of the bill or note, lest by failure to observe the necessary precautions, the drawer and indorsers may be discharged, and the solvency of his debt destroyed or impaired. We shall consider, therefore, in order:

(1) The person by and to whom the instrument should be presented.

(2) The time of presentment.

(3) The place of presentment.

(4) The mode of presentment.

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[1] Sims v. National Com. Bank, 73 Ala. 251.

[2] Magruder v. Bank of Washington, 3 Pet. 92; Cox v. National Bank, 100 U. S. 712; Harvey v. Girard Nat. Bank, 119 Pa. St. 212.

SECTION I.

BY AND TO WHOM THE INSTRUMENT SHOULD BE PRESENTED.

§ 312. By whom.— Any *bona fide* holder of a negotiable instrument, or anyone lawfully in possession of it for the purpose of receiving payment, may present it for payment at maturity.[3] A notary public, or any agent duly authorized, may make presentment of the instrument for payment; and it is well settled that this authority need not be in writing.[4]

The mere possession of a negotiable instrument which is payable to the order of the payee, and is indorsed by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of his right to present it, and to demand payment thereof.[5] And payment to such person will always be valid, unless he is known to the payor to have acquired possession wrongfully. And if the party holding possession of a negotiable instrument which is not indorsed by the payee, or has been indorsed by him specially, to another, and has not been indorsed over by such indorsee but has been placed in the holder's hands as agent, for the purpose of receiving payment, such agent may present it for payment, and payment to him will be valid; even, as it has been held, although made in a manner different from that provided for in the instructions to the agent. The fact that the instrument is not indorsed by the owner is, as has been held, under such circumstances, of no importance. Such indorsement would be necessary to the negotiation of the instrument, but would not be necessary to the validity of the payment.

As has been indicated, the presentment may be made by the holder or owner himself, or by his duly authorized agent, and his authority need not be in writing, although possibly the maker or acceptor may insist upon a written authori-

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[3] Leftly v. Mills, 4 T. R. 170; Bachellor v. Priest, 12 Pick. 399.

[4] Bank of Utica v. Smith, 18 Johns. 230; Hartford Bank v. Barry, 17 Mass. 94.

[5] Weber v. Orten, 91 Mo. 680; Jackson v. Love, 82 N. C. 405.

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Supreme Court of the United States expressed the opposite opinion, which seems to us the correct one.[11] Some of the cases hold that possession of the bill by a prior indorser is sufficient where the subsequent indorsements are cancelled;[12] but the better view seems to be, and it is sustained by most respectable authority, that it makes no difference that the subsequent indorsements remain uncancelled.[13] The party may not be still the proprietor in interest of the instrument, but his possession of it would be *prima facie* evidence that he had paid it himself to a subsequent indorsee, and had reacquired the right to demand payment. And it would also be consistent with the idea that he was holding it and suing for the benefit of a subsequent indorsee.[14]

§ **315. When holder is dead.**— If the holder die before the time for presentment for payment, it must be made by his personal representative.[15] If there be no personal representative at the time, presentment and demand within a reasonable time after his appointment will be sufficient to charge subsequent parties, although presentment and demand were not made at maturity.[16]

If the holder's estate has passed to an assignee in bankruptcy, the assignee, or some person authorized by him, should make presentment.[17]

If the holder is a *feme sole*, and she has become a married woman at maturity, the presentment should be made by her husband; and a presentment by her, without his consent or authority, would be insufficient to charge the maker, or validate a payment. If the note belonged to a partnership,

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[11] Dugan v. United States, 3 Wheat. 172.

[12] Bank of Utica v. Smith, 18 Johns. 230; Bowie v. Duvall, 1 Gill & J. 175; Chautauqua County Bank v. Davis, 21 Wend. 584.

[13] Dugan v. United States, 3 Wheat. 172; Lonsdale v. Brown, 3 Wash. C. C. 404; Bank of Kansas City v. Mills, 24 Kan. 610.

[14] Bank of United States v. United States, 2 How. 711; Bachellor v. Priest, 12 Pick. 399; Merz v. Kaiser, 20 La. Ann. 377.

[15] 1 Parsons on Notes and Bills, 360; Story on Notes, § 249.

[16] White v. Stoddard, 11 Gray, 528.

[17] 1 Parsons on Notes and Bills, 360; Edwards on Bills, 494.

and one member be dead at maturity, presentment should be made by the survivor.[18]

§ 316. To whom; general rule.— Presentment for payment must be made to the drawee or acceptor of the bill, or maker of the note, or to an authorized agent. A personal demand is not necessary, and it is sufficient to make the demand at his usual residence or place of business of his wife or other agent; for it is the duty of an acceptor or promisor, if he is not present himself, to leave provision for the payment of his bills or notes.[19]

There is no doubt that a clerk found at the counting-room of the acceptor or promisor is a competent party for presentment for payment to be made to, without showing any special authority given him.[20] But where the protest stated the mere fact of presentment "at the office of the maker," it will be considered insufficient, as not showing that the paper was presented to party at the office authorized to pay or refuse payment.[21] A demand upon the servant of the owner "who used to pay money for him," was held sufficient in England.[22]

§ 317. Presentment to person on premises.— If presentment be made at the place specified in the instrument, or in the case of one payable generally at the place of business of the acceptor or maker during business hours, or at his domicile during a reasonable hour of the day, it is sufficient if it be made to any person to be found upon the premises, especially if the maker be absent or inaccessible.[23] Where presentment was made to the wife of the maker, she informing the holder that her husband was out of town, it was held

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18 Daniel on Negotiable Instruments, § 578.

19 Matthews v. Haydon, 2 Esp. 509; Brown v. McDermott, 5 Esp. 265.

20 Bradley v. Northern Bank, 60 Ala. 259; Stainback v. Bank of Virginia, 11 Gratt. 260.

21 Nave v. Richardson, 36 Mo. 130.

22 Bank of England v. Newman, 12 Mod. 241.

23 Cromwell v. Hynson, 2 Campb. 596; Phillips v. Astberg, 2 Taunt. 206; Draper v. Clemons, 4 Mo. 52.

sufficient.[24] And so it was deemed sufficient to charge the indorser where the holder presented the bill to an inmate of the maker's house, who was coming out, and who stated that the acceptor had removed — the holder leaving a card containing notice for the acceptor of the maturity of the bill.[25] Where there is no one to answer, presentment at the maker's dwelling is sufficient.[26]

§ **318. When acceptor or maker is dead.**— If the acceptor or maker be dead at the time of the maturity of the bill or note, it should be presented to his personal representative, if one be appointed, and his place of residence can, by reasonable inquiries, be ascertained.[27] If there be no personal representative, then presentment should be made, and payment demanded, at the dwelling-house of the deceased, if the instrument were payable generally.[28] But if it was drawn payable at a particular place, then it will be sufficient that it was presented at such place.[29]

§ **319. Where there are several promisors.**— When the note is executed by several joint promisors who are not partners, but liable only as joint and several promisors, it has been held, and, as we think, correctly, that presentment should be made to each, in order to fix the liability of an indorser.[30] But presentment of a bill drawn upon or accepted by, and of a note executed by, a copartnership firm, is sufficient, if made to any one of the members of such firm.[31] And if the

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[24] Moodie v. Morrall, 1 Const. Rep. 367.

[25] Buxton v. Jones, 1 M. & G. 83; Story on Bills (Bennett's ed.), § 350, note 1.

[26] Stivers v. Prentice, 3 B. Mon. 461.

[27] Magruder v. Union Bank, 3 Pet. 87; Juniata Bank v. Hale, 16 Serg. & R. 167.

[28] Magruder v. Union Bank, 3 Pet. 87; Juniata Bank v. Hale, 16 Serg. & R. 167; Story on Notes, § 253.

[29] Boyd's Admr. v. City Sav. Bank, 15 Gratt. 501; Holtz v. Boppe, 37 N. Y. 634; Philpot v. Bryant, 1 Moore & P. 754.

[30] Blake v. McMillen, 33 Iowa, 150; Union Bank v. Willis, 8 Metc. (Mass.) 504; Arnold v. Dresser, 8 Allen, 435.

[31] Branch of State Bank v. McLeran, 26 Iowa, 306; Shedd v. Brett, 1 Pick. 401.

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can, as matter of course, be of no effect, as the drawer or indorser will already have been discharged, unless there were sufficient legal excuse for the delay.[39] The evidence must be distinct as to the promptness of the presentment or the excuse for delay, as the burden of proof is on the plaintiff.[40]

§ 321. Note payable in instalments.— If a note be payable in instalments, the presentment should be made on each consecutive instalment as it falls due, as if it were (as in fact it is legally considered) a separate note in itself.[41] It would be different, probably, if the condition were annexed to the note that upon failure to meet any instalment, the whole should fall due, in which case notice should be communicated to the drawer or indorser that the whole sum was due, and the holder looked to him for payment.[42] If no time for payment be named in the bill or note it is payable on demand;[43] and payable "on demand at sight," is equivalent to payable "at sight."[44]

§ 322. At what hour of the day presentment should be made. — When the bill or note is made payable at a bank, it should be presented during banking hours, the parties executing their paper payable at a particular place, being bound by its usage; and in such case a presentment after banking hours is sufficient.[45] But it is settled that when a bill or note is payable at a bank, a demand made at the bank after banking hours, the officers being there, and a refusal, the cashier or teller stating that there were no funds, is sufficient.[46] But if the instrument be payable generally "at

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39 Windham Bank v. Norton, 22 Conn. 213.

40 Robinson v. Blen, 20 Me. 109; Pendleton v. Knickerbocker Life Ins. Co., 7 Fed. 170.

41 Oridge v. Sherborne, 11 M. & W. 374.

42 1 Parsons on Notes and Bills, 374.

43 Collins v. Trotter, 81 Mo. 278; Thompson v. Ketchum, 8 Johns. 189; Bowman v. McChesney, 22 Gratt. 609.

44 Bowman v. McChesney, 22 Gratt. 609.

45 Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 Maule & S. 28.

46 Reed v. Wilson, 41 N. J. L. 29; Salt Springs Nat. Bank v. Burton, 58 N. Y. 432; First Nat. Bank v. Owen, 23 Iowa, 185.

bank," no particular bank being named, the hour will be determined by the usual banking hours at the several banks of the place where it is payable.[47] It is for the jury to say what are business hours, and in fixing them otherwise than in respect to the banks, they are to have reference to the general hours of business at the place, rather than to the custom of any particular trade.[48] The courts of England take judicial cognizance of the banking hours of London, but not of other cities or towns in the Empire,[49] while the American courts take judicial notice of the banking hours of any large city within the jurisdiction of the court trying the cause; *i. e.*, the courts of Massachusetts would not take cognizance of the banking hours of the city of New York, but would of Boston.[50]

If the instrument, by its terms, is not payable at a bank or other named place, presentment may be made at any reasonable hour of the day, within what are termed "business hours," which really means throughout the whole day to the hours of rest in the evening.[51]

§ 323. Business hours in reference to business places and places of residence.— When presentment is at the place of business it must be during the hours when such places are customarily open,[52] or at least while some one is there competent to give an answer. It is only when presentment is at the residence that the time is extended to the hours of rest.[53] But presentment at any hour cannot be considered unreasonable if any person competent to answer be found there who gives an answer refusing to pay,[54] and an aver-

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[47] United States Bank v. Carneal, 2 Pet. 543; Church v. Clark, 21 Pick. 310.

[48] Thompson on Bills, 302.

[49] Parker v. Gordon, 7 East, 385; Jameson v. Swinton, 2 Taunt. 225; Hare v. Henty, 10 C. B. (N. S.) 65.

[50] Morse on Banking, 371.

[51] Salt Springs Nat. Bank v. Burton, 58 N. Y. 432; Skelton v. Dunston, 92 Ill. 49.

[52] Lunt v. Adams, 17 Me. 230.

[53] Barclay v. Bailey, 2 Camph. 427.

[54] Garnett v. Woodcock, 1 Stark. 475; Chitty on Bills [*387], 438.

ment of presentment and demand at the maker's office has been held to import that it was during the usual hours of business.[55]

§ 324. **When instrument payable on demand.**— All bills of exchange payable on demand are closely assimilated to checks, and contemplate the immediate payment of the amount called for. They are payable immediately on presentment, without grace, and if the drawee and the payee or indorsee reside in the same place, it is laid down by a number of the authorities that they must be presented within business hours of the day on which they are drawn in order to hold the drawer in the event of the failure of the drawee to honor them.[56] And that if the drawee resides in a different place they must be forwarded by the regular post of the day after they are received.[57] But these rules are not inflexible. What is reasonable time must depend upon circumstances and in many cases upon the time, the mode, and the place of receiving the bills, and upon the relations of the parties between whom the question arises.[58] Where the draft required indorsement by a school board, which had to be convened, delay of a week to forward it was held justifiable.[59]

Promissory notes payable on demand would seem to stand on a somewhat different footing. In England a note on demand is regarded as a continuing security which it is not necessary to present for payment on the next day when the parties reside in the same place; or to send by the post of the next day when they reside in different places;[60] but in the United States, as a general rule, a different view is

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[55] Wallace v. Crilleo, 46 Wis. 577; Daniel on Negotiable Instruments, § 603.

[56] Kampmann v. Williams, 70 Tex. 571; McMonigal v. Brown, 45 Ohio St. 504.

[57] Chitty on Bills (13th Am. ed.), 432; Parker v. Reddick, 65 Miss. 246.

[58] Morgan v. United States, 113 U. S. 501; Marbourg v. Brinkman, 23 Mo. App. 513.

[59] Muncy Borough School Dist. v. Commonwealth, 84 Pa. St. 464.

[60] Morgan v. United States, 113 U. S. 501; Brooks v. Mitchell, 9 M. & W. 15.

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dorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be, that though the holder may demand payment immediately, yet he is not bound to do so. It is, therefore, conceived that a common promissory note payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received in order to charge the indorser; and when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the jury whether, under all the circumstances, the delay of presentment was or was not unreasonable." [64]

§ 326. **Days of grace; origin and nature of.**— They were originally days allowed by way of favor to the drawee of a foreign bill to enable him to provide funds for its payment without inconvenience; and were called "days of grace," or "respite days," because they were gratuitous, and dependent on the holder's pleasure, and not to be claimed as a right by the person on whom it was incumbent to pay the bill.[65] By custom, however, they became universally recognized; and although still termed "days of grace," they are now considered wherever the law merchant prevails as entering into the constitution of every bill of exchange and negotiable note, both in England and the United States, and form so completely a part of it that the instrument is not due in fact or in law until the last day of grace.[66] Therefore a demand of payment on the day before or after the third day of grace would not authorize a protest, or charge drawer or indorser.[67] And interest is chargeable on the period of grace allowed without impeachment as usurious.[68]

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[64] Byles on Bills (Sharswood's ed.), 338.

[65] Chitty on Bills [*374], 422.

[66] Bank of Washington v. Triplett, 1 Pet. 25; Ogden v. Saunders, 12 Wheat. 213; Bell v. First Nat. Bank, 115 U. S. 373.

[67] Bank of Washington v. Triplett, 1 Pet. 25; Donegan v. Wood, 49 Ala. 242.

[68] Bank of Utica v. Wager, 2 Cow. 712; Ogden v. Saunders, 12 Wheat. 213.

This indulgence was often important to the drawee, who might not be instantly in funds, nor advised that the bill would at that time be presented for payment; and also even when it was accepted, because of the scarcity of the precious metals in which payment was to be made. And they fixed a limit to the time which the holder might indulge the payor without being guilty of laches in not protesting it.[69]

§ 327. **What bills and notes entitled to grace; whether sight bills entitled to.**— All bills of exchange and negotiable notes are entitled to grace,[70] except those payable on demand[71] or without specification of time, in which case on demand without grace is understood,[72] or those expressly payable without grace.[73] The authorities are uniform in support of this statement of the law, except in respect to its inclusion of sight bills and notes, which by some is denied and by others doubted. In England there has not been, that we are aware of, a direct decision of the question; but it has been taken for granted in some cases, and distinctly intimated in others, that a sight bill or note is entitled to three days' grace;[74] and the weight of authority in the United States is to the same effect.[75] The expression "after sight" in a bill of exchange has a different signification from the like expression in a promissory note. In a bill of exchange it means after acceptance, or protest for nonacceptance, and not after a mere private exhibition to the drawee, for the sight must appear in a legal way.[76] But a note is incapable of acceptance, and the words "at or after sight" used in it

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69 Story on Bills, § 333.

70 Brown v. Chancellor, 61 Tex. 440; 1 Parsons on Notes and Bills, 404.

71 Edwards on Bills, 523; Oridge v. Sherborne, 11 M. & W. 374; Woodruff v. Merchants' Bank, 25 Wend. 673.

72 Story on Bills, § 343; First Nat. Bank v. Price, 52 Iowa, 570; 1 Parsons on Notes and Bills, 381.

73 Daniel on Negotiable Instruments, § 633.

74 Webb v. Fairmauer, 3 M. & W. 473; Coleman v. Sayer, 1 Barn. 303; Dehers v. Harriot, 1 Show. 163; Jansen v. Thomas, 3 Doug. 421.

75 Daniel on Negotiable Instruments, § 617.

76 Campbell v. French, 6 T. R. 212; Mitchell v. De Grand, 1 Mason, 176.

would merely import that payment was not to be demanded until it had been again exhibited to the maker.[77] If the bill or note be payable in instalments, it is entitled to grace on each instalment, for it is really so many instruments in one form.[78] If it is payable "on demand at sight," it is the same as if payable "at sight."[79]

§ 328. **Number of days allowed by law merchant and by custom.**— The law merchant, as it prevails in England and the United States, limits the allowance of grace to three days,[80] and although it is settled that by special established usage in a particular locality it may be denied altogether, or a different number of days may be granted,[81] the courts take judicial notice of the period fixed by the law merchant, and will recognize that only unless the usage varying it is alleged and proved.[82] In the District of Columbia the usage at one time prevailed to allow four days, and it was sustained as binding upon parties to negotiable instruments there payable, by the United States Supreme Court.[83] It extended, however, only to notes discounted in bank.[84] In Louisiana, at one time, ten days were allowed; but this was changed by statute to conform to the law merchant in the United States,[85] and, of course, no custom can affect a positive enactment.[86] In the absence of any statute, the usage of banks in particular localities in allowing grace, and the number of days, may alter the law merchant in that particular.[87] The following principles on this subject may be re-

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77 Holmes v. Kerrison, 2 Taunt. 323; Sutton v. Toomer, 7 B. & C. 416.

78 Oridge v. Sherborne, 11 M. & W. 374.

79 Dixon v. Nuttall, 1 Cromp., M. & R. 307.

80 Hill v. Lewis, Skin. 410; Wood v. Corl, 4 Metc. (Mass.) 203.

81 Renner v. Bank of Columbia, 9 Wheat. 581; Mills v. Bank of United States, 11 Wheat. 431.

82 Renner v. Bank of Columbia, 9 Wheat. 581; Reed v. Wilson, 41 N. J. L. 29.

83 Mills v. Bank of United States, 11 Wheat. 431.

84 Cookendorfer v. Preston, 4 How. 317.

85 Dubreys v. Farmer, 22 La. Ann. 478.

86 Perkins v. Franklin Bank, 21 Pick. 483.

87 Renner v. Bank of Columbia, 9 Wheat. 581; Adams v. Otterback, 15 How. 539.

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minate on February twenty-eighth, and presentment should be on March the second.[91]

§ 330. **As to the computation of days.**— In computing the number of days which a bill or note, payable at or in so many days from date, has to run, the day of date is always excluded; and if payable at so many days after sight, after demand, or after a particular event, the day of sight, demand, or of the happening of the event is likewise excluded.[92] So, if it be presented on one day, and accepted on another, the day of acceptance is excluded.[93] The expressions, "in thirty days," — "in thirty days from date," — "at thirty days," — and "thirty days after date," are synonymous.[94] As said in Maine, by Howard, J.: "If there be several notes of the same date, some payable in six months, some in six months from date, and some in six months after date, they all have the same pay day. In all of them the day of the date is excluded." [95] But if a bill or note without grace, or any noncommercial instrument for payment of money, falls due on a Sunday or a legal holiday, it is not payable until the next regular business day, for the payor is not compellable by law to pay on the exact day named, and the next day is the first day that the creditor can demand payment.[96] But the debtor cannot require the creditor to extend his indulgence beyond three calendar days; and therefore when grace on a bill or note entitled to it expires on a Sunday or other nonbusiness day, the bill or note would fall due on the day preceding.[97]

§ 331. **Calendar by which computed.**— The Gregorian calendar, or new style of computing time, is adopted in the

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91 Wagner v. Kenner, 2 Rob. (La.) 120; Chitty on Bills [*373], 421; 1 Parsons on Notes and Bills, 409.

92 Coleman v. Sayer, 1 Barn. 303; Hill v. Norvell, 3 McLean, 583; Loring v. Halling, 15 Johns. 120; Mitchell v. De Grand, 1 Mason, 176; Barlow v. Planters' Bank, 9 How. (Miss.) 129.

93 Mitchell v. De Grand, 1 Mason, 176.

94 Ammidown v. Woodman, 31 Me. 580; Henry v. Jones, 8 Mass. 453.

95 Ammidown v. Woodman, 31 Me. 580.

96 Salter v. Burt, 20 Wend. 205; Kuntz v. Tempel, 48 Mo. 75.

97 Bussard v. Levering, 6 Wheat. 192; Reed v. Wilson, 41 N. J. L. 29; Story on Bills, § 388.

United States, and everywhere else, except in Russia, and those countries where the Greek Church is the established religion. They use the Julian calendar, or old style, as it is called. There is the difference of twelve days between the two styles; and the addition of that number to the old makes the new style. The 1st of January in St. Petersburg, Russia, is, therefore, the 13th of January in England and the United States. The style of the place of payment, however, always prevails; and if a bill were drawn in London on the 1st of September, payable in St. Petersburg on the 1st of January, it would fall due on the day corresponding to the 13th of January in England; and *vice versa*. This is because the parties are to be regarded as contracting in reference to the meaning of terms at the place of their fulfillment.[98]

§ **332. How grace dispensed with.**— By any language in the bill or note of that import, grace may be disallowed. And such words as "without grace," or "no grace," obviously disallow it; and the word "fixed" has been held to have the same import.[99] But the expression "without defalcation" does not;[1] nor would a mere marginal memorandum of the day of the month and year on which the time after date at which the instrument was expressed to be payable fell due.[2] But where a bill at sixty days' sight was accepted on September 14th, payable November 16th, it was held that November 16th was indicated by the acceptor to be the absolute day of payment, he having intended to allow for grace in his calculation, and that presentment on that day was necessary.[3]

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[98] Story on Bills, § 331; 1 Parsons on Notes and Bills, 388; Chitty on Bills [*369], 417; Daniel on Negotiable Instruments, § 632.

[99] Perkins v. Franklin Bank, 21 Pick. 483; Durnford v. Patterson, 7 Mart. 460.

[1] Bell v. First Nat. Bank, 115 U. S. 382; McDonald v. Lee, 12 La. 435.

[2] Perkins v. Franklin Bank, 21 Pick. 483.

[3] Bell v. First Nat. Bank, 115 U. S. 382; Kenner v. Creditors, 19 Mart. 540.

SECTION III.

PLACE OF PRESENTMENT.

§ 333. When the instrument is payable generally.— The presentment of the bill or note for payment should be made at the city, town, or other place in which the acceptor or maker has his home or domicile, or his place of business, provided there be no place designated in the instrument or agreed upon by the parties as the place where it shall be paid at maturity.[4] If such place is designated or agreed upon, it will be sufficient to make presentment there.[5] And averment of presentment there is always sufficient, without any addition.[6] If the bill be addressed to the drawee in a particular city, as, for instance, to "A. B., New York," the city named would be regarded as the place of presentment for payment, if the acceptance be without explanation or condition.[7] If the maker or acceptor has both a dwelling-house and a business house in the same city, town, or other place, the presentment may be made at either.[8] And if the maker or acceptor have a dwelling-house or domicile in one city, and a place of business in another, it will, as it seems, be sufficient to present the instrument at either.[9] If a bill be payable in a particular town, a presentment at all of the banker's houses there will suffice.[10] In such case, where the maker used due diligence to find at what bank the note was left for presentment without success, he was relieved from a penalty for failure to pay it the instant of maturity.[11]

§ 334. When payor has well-known place of business.— When, however, the maker or acceptor has a well-known

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[4] Cox v. National Bank, 100 U. S. 713; Mitchell v. Baring, 10 B. & C. 11.

[5] Brent's Exr. v. Bank of Metropolis, 1 Pet. 92; Eason v. Isbell, 47 Ala. 456.

[6] Cox v. National Bank, 100 U. S. 716; Hawkey v. Borwick, 4 Bing. 136.

[7] Cox v. National Bank, 100 U. S. 716.

[8] Story on Bills, § 236.

[9] Story on Bills, §§ 236, 351; 1 Parsons on Notes and Bills, 422, note.

[10] Hardy v. Woodroofe, 2 Stark. 319; Byles on Bills [*207], 323.

[11] Ansel v. Olson, 39 Kan. 767.

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ment should be made at his residence, and a presentment at the former place of business will not suffice.[18]

§ 336. **When presentment is to party in person, place generally unimportant.**— When the presentment is made to the maker or acceptor personally, the place is not important, provided there is an express or implied refusal to pay. Presentment at the barn-yard has been held sufficient, the party "making no objection, and intimating no readiness to pay;"[19] and even in the street presentment would seem to be usually good, unless objected to as improper, or some reason were given for the refusal.[20] This view seems to us correct. But it would be more business-like not to make demand at such a place, and there are authorities which hold that the party is not bound to pay any attention to a demand so entirely outside of the custom of merchants.[21] In a case in Maine demand on the street of the maker, he having no place of business, and raising no objection, was held sufficient to charge the indorser.[22]

§ 337. **Due diligence in seeking maker to make presentment.**— Whether or not due diligence to find the maker of a note at the place where it is dated, will be sufficient, has been debated. The place of date is *prima facie* evidence that it is the place of the maker's residence and place of business; and it is sufficient, we should say, to charge an indorser to have the note in that place at the time of maturity, and to make proper inquiry after the place of the maker's residence or place of business, provided that the holder does not know that his residence is elsewhere.[23] And if it were proved that the maker resided elsewhere, it would not devolve upon the holder the burden of showing that he had made inquiries as

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18 Granite Bank v. Ayres, 16 Pick. 392.

19 Baldwin v. Farnsworth, 1 Fairfax, 414.

20 1 Parsons on Notes and Bills, 421; King v. Crowell, 61 Me. 244; Townsend v. Dry Goods Co., 85 Mo. 508.

21 King v. Holmes, 11 Pa. St. 456.

22 King v. Crowell, 61 Me. 244.

23 Britton v. Nichols, 104 U. S. 757; Bank of Fayetteville v. Lutterloh, 95 N. C. 499; Salisbury v. Bartleson, 39 Minn. 366.

to his residence.[24] While this doctrine is sustained by high authority both in England and the United States, and is doubtless correct, there are decisions *contra*.[25]

§ 338. When payable at either of several places or banks.— If a bill of exchange be drawn payable at either of two places, and is accepted accordingly, as, for example, if drawn payable at Maidstone or London, the holder has his choice to present it at either place for payment; and the like rule applies to a note made payable at either of two places. If the bill or note be not duly paid at the place where it is presented, the holder may protest it and give notice to the drawer and indorsers, who will be bound by its presentment and dishonor at the place of his election; although if presented at the other place it would have been duly paid; for in such cases all the parties agree to pay the bill or note upon due presentment at either place.[26] And sometimes the instrument is made payable at any or either of the banks of a particular place. In all such places the stipulation as to the place of payment is understood to be for the accommodation of the payee or holder, who is given the right to elect the bank at which the note should be presented in order to charge the indorsers; and if, upon presentment at any or either bank in the place named, payment is refused, the indorsers, as well as the maker, are bound. The maker's promise is to pay the note at any of the banks in the place, and the duty is imposed upon him to look at all the banks for it, or provide funds to pay it at all of them when it is due.[27]

SECTION IV.

MODE OF PRESENTMENT.

§ 339. Must be actually exhibited.— Presentment of the bill or note, and demand of payment, should be made by an actual exhibition of the instrument itself; or at least the de-

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[24] Smith v. Philbrick, 10 Gray, 252.

[25] Daniel on Negotiable Instruments, § 640, and cases cited.

[26] Daniel on Negotiable Instruments, § 648; Beeching v. Gower, 1 Holt. 313; Story on Bills, § 354.

[27] Malden Bank v. Baldwin, 13 Gray, 154.

mand of payment should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case.[28] This is requisite in order that the drawee or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of it upon paying the amount. If, on demand of payment, the exhibition of the paper is not asked for, and the party to whom demand is made declines to pay on other grounds, a more formal presentment by actual exhibition of the paper will be considered as waived.[29] Where the note was in bank, a few rods from the maker's house, and the maker was informed by note from the cashier that it was there and requested payment, it was held sufficient;[30] and it was likewise so held, where the statement in the protest was that the notary went, with the draft, to the bank and demanded payment.[31] So, if the maker calls on the holder on the day of payment, at his place of business, declares his inability to pay it, and requests him to give notice to the indorser, it is sufficient to charge the indorser, as an exhibition of the paper would have been useless.[32] But it is better in all cases to make an actual exhibition of the paper, in order to avoid all question. It seems that delivery of written demand to a servant at the house of the promisor is insufficient.[33] The demand of payment should not vary from the tenor of the paper; and if it be payable simply in money, without specifying the kind, a demand for gold coin would be insufficient to charge an indorser.[34]

§ **340. Presentment by mail.**— Bills of exchange are most frequently drawn on parties at distant places, and it is un-

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[28] Musson v. Lake, 4 How. 262; Nailor v. Bowie, 3 Md. 251; Crandall v. Schroeppel, 1 Hun, 557; Etheridge v. Ladd, 44 Barb. 69.

[29] Lockwood v. Crawford, 18 Conn. 361; King v. Crowell, 61 Me. 244.

[30] Tredick v. Wendell, 1 N. H. 80.

[31] Bank of Vergennes v. Cameron, 7 Barb. 143.

[32] Gilbert v. Dennis, 3 Metc. (Mass.) 495.

[33] Duke of Norfolk v. Howard, 2 Show. 235.

[34] Langenberger v. Kroeger, 48 Cal. 147.

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the time it was handed the debtor and the time payment was actually demanded.[40]

§ 342. As to mode of presentment of negotiable paper payable at a bank.— When a bill or note is made payable at a bank, it is considered a sufficient presentment of it if it is actually in the bank at maturity, ready to be delivered up to any party who may be entitled to it on payment of the amount due; and if, at the close of business hours, the bill or note remains unpaid, it is considered as dishonored, and notice should be immediately given to the proper parties.[41] Such also is the case when the instrument is payable at a particular place.[42] Sometimes a formal presentment of the bill or note, in such cases, at the bank, or upon the maker, is made; and the cases are uniform in holding that such a presentment at the bank is sufficient, even when the place is mentioned in the memorandum;[43] but it is settled that nothing more than the presence of the paper there is necessary.[44]

But it has been held by the United States Supreme Court, that though commercial paper be physically in the bank at which it is payable, yet if the bank is ignorant of this by reason of the fact that the letter in which it was sent slipped through a crack in the cashier's desk and disappeared before it had been seen by him, then there would be no presentment, though the acceptor had no funds there, and did not mean to pay the bill. And such a disappearance carried with it a presumption of negligence in the collecting bank, and threw upon it the burden of proof to rebut it; and that

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[40] Hayward v. Bank of England, 1 Stra. 550; Thompson on Bills (Wilson's ed.), 304.

[41] Chicopee Bank v. Philadelphia Bank, 8 Wall. 641; People's Bank v. Brooks, 31 Md. 7; Folger v. Chase, 18 Pick. 63.

[42] Hunt v. Maybee, 7 N. Y. 266.

[43] Bank of Utica v. Smith, 18 Johns. 230; Woodbridge v. Brigham, 13 Mass. 556; Saunderson v. Judge, 2 H. Bl. 509.

[44] Fullerton v. Bank of United States, 1 Pet. 604; Merchants' Bank v. Elderkin, 25 N. Y. 178.

in the absence of such proof the bank would be responsible to the holder for the amount of the bill or note.[45]

§ 343. Customary demand by notice through the mails.— In some of the States it has become customary for banks of a particular place, which are the holders of negotiable paper, to issue a notice to the promisor a few days before maturity, informing him that the paper is in bank, setting forth the date when it will become payable, and requesting him to come there and pay it. Such notice constitutes a conventional demand, and a neglect to comply with it is such a refusal as amounts to dishonor of the paper. The custom prevails where the paper is payable at the bank giving the notice,[46] and has been sustained by judicial decision, as well where it is not made so payable, but is placed there for collection.[47] In Massachusetts this custom has become so general and universal that every one who incurs the liability of maker and indorser is presumed to have contracted in reference to it, and knowledge on his part may be presumed.[48] In respect to the maker of a note or the acceptor of a bill in terms payable at a particular place, this custom to inform him that his paper is there, and that he is requested to meet it, amounts to nothing more than a reminder from creditor to debtor, which in law is a superfluous act so far as he is concerned. But in respect to the drawer or indorser, the holder's contract, when the instrument is payable generally is that he will present the instrument to the acceptor or maker; and the theory upon which the duty in this regard is considered relaxed by custom is that the party secondarily liable has, in effect, waived the formal presentment otherwise required by law, and consented to the substitution of notice through the mails.[49]

§ 344. Knowledge of conventional method of demand.— Knowledge by the drawer or indorser of the custom has

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45 Chicopee Bank v. Philadelphia Bank, 8 Wall. 641.

46 Camden v. Doremus, 3 How. 515; Lincoln & Kennebec Bank v. Page, 9 Mass. 155.

47 Jones v. Fales, 4 Mass. 245; Whitewell v. Johnson, 17 Mass. 449.

48 Grand Bank v. Blanchard, 23 Pick. 505.

49 Daniel on Negotiable Instruments, § 660.

been regarded as essential to its establishment as against him in some cases.[50] But the United States Supreme Court say that parties are bound by an established usage of a bank at which the paper is payable "whether they have a personal knowledge of it or not;"[51] and as the custom must be general, in order to obtain recognition as such, we cannot perceive that knowledge of it enters into the question any more than knowledge of any other rule of law. A custom is not a special personal contract, but a general and controlling rule. "The parties are presumed by implication to be governed by the usage of the bank at which they have chosen to make the security itself negotiable."[52]

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[50] Leavitt v. Simes, 3 N. H. 14.

[51] Mills v. Bank of United States, 11 Wheat. 431.

[52] Mills v. Bank of United States, 11 Wheat. 431.

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§ 347. What instruments must or may be protested.— When a foreign bill of exchange is presented for acceptance or payment, and acceptance or payment is refused, the holder must take what is called a protest, in order to charge the drawer or any indorser. According to the law of most foreign nations, a protest is essential in the case of the dishonor of any bill;[6] but by the custom of merchants in England,[7] and wherever the law merchant prevails in the United States, the protest is only necessary in the case of foreign bills;[8] though by statute in most of the States inland bills and promissory notes may be protested in like manner. So indispensable is the protest of a foreign bill in case of its dishonor, that no other evidence will supply the place of it, and no part of the facts requisite to the protest can be proved by extraneous testimony, and it has been said, that it is a part of the constitution of a foreign bill.[9] But, while the practice is usually followed to protest inland bills and notes, under the permissive statutes, it is not a practice which makes it incumbent to protest them; and the holder may waive the privilege if he choose to do so, and produce other evidence of dishonor.[10] Such was the convenience of evidence in this form, obviating the necessity of the attendance of witnesses, and preserving their testimony where otherwise it might be lost by death or removal, that it became common to protest inland bills, and promissory notes as well; and the holder was often disappointed in finding that such protest was not evidence of dishonor.[11] This led to a very general enactment of statutes authorizing protests in such cases; and giving them the like effect as in cases of foreign bills.

Following the reasons underlying the necessity and wisdom of the rule requiring protest of foreign bills of ex-

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6 Thompson on Bills (Wilson's ed.), 307.

7 Orr v. Maginnis, 7 East, 359; Gale v. Walsh, 5 T. R. 239.

8 Burke v. McKay, 2 How. 66; Young v. Bryan, 6 Wheat. 146; Ocean Nat. Bank v. Williams, 102 Mass. 141.

9 Union Bank v. Hyde, 6 Wheat. 572; Borough v. Perkins, 1 Salk. 121.

10 Bailey v. Dozier, 6 How. 23; Wanger v. Tupper, 8 How. 234.

11 2 Rob. Pr. 121.

change, some authorities say that foreign promissory notes, — *i. e.*, notes executed in one State or country and payable in another — must be protested;[12] but there are cases in which the opposite view has been taken.[13]

§ 348. By whom the protest should be made, and how authenticated.— As to the person by whom the protest should be made, it is necessary, as a general rule, that it should be made by a notary public in person, and by the same notary who presented and noted the bill.[14] The notary is a public officer, commissioned by the State, and possessing an official seal, and full faith and credit are given to his official acts, in foreign countries as well as his own.[15] But when no notary can be conveniently found, the protest may be made by any respectable private individual residing in the place where the bill is dishonored.[16] In England, by statute,[17] the protest of inland bills by a private person must be authenticated by the signature of the individual making the protest in the presence of two or more credible witnesses, but it does not appear to be necessary that there should be witnesses to the protest of a *foreign* bill by a private person.[18] If, however, the protest is made by a notary, the official seal of the notary attached to the certificate of protest is everywhere received as a sufficient *prima facie* proof of its authenticity. The courts take judicial notice of the seal, and it proves itself by its appearance upon the certificate. But it may be controverted as false, fictitious, or improperly annexed.[19] But if the protest is made by a

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[12] Williams v. Putnam, 14 N. H. 540; Ticonic Bank v. Stackpole, 41 Me. 302; Edwards on Bills, 584.

[13] Kirtland v. Wanzer, 2 Duer, 278.

[14] Ocean Nat. Bank v. Williams, 102 Mass. 141; Sacriber v. Brown, 3 McLean, 481; Commercial Bank v. Varnum, 49 N. Y. 269; Commercial Bank v. Barksdale, 36 Mo. 563.

[15] Daniel on Negotiable Instruments, §§ 579, 587.

[16] Burke v. McKay, 2 How. 66; Read v. Bank of Kentucky, 1 T. B. Mon. 91.

[17] 9 & 10 Will. III, chap. 17.

[18] Brook's Notary, 103; Chitty on Bills [*333]. 374, note *u*.

[19] Pierce v. Indseth, 106 U. S. 549; Nichols v. Webb, 8 Wheat. 326; Bradley v. Northern Bank, 60 Ala. 258.

notary, and the certificate is not authenticated by the notary's seal, or if it is made by a private person, it does not prove itself, and there must be extraneous evidence to show that it was duly made by the person officiating.[20] In some cases it has been held that a notary's certificate of protest is sufficient without a seal, the law giving full effect to his protestations and attestations.[21]

§ 349. Place of protest.— It is usually made at the place where the dishonor occurs.[22] If the protest be for nonacceptance, the place of protest should be the place where the bill is presented for acceptance, and a like rule obtains if the protest be for nonpayment;[23] but when the bill is drawn upon the drawee in one place, and by its terms made payable in another, there is eminent authority for the statement that the protest for nonacceptance may be made at either place.[24]

§ 350. The presentment and demand of payment; notary must have personal knowledge of.— The first step taken is the presentment of the instrument to the drawee, or acceptor, or maker, by the notary, and a demand of payment. By the law merchant, it is absolutely necessary that the notary himself should make this formal presentment and demand. And, although the holder may have already presented the bill and demanded acceptance or payment, and been refused, it is still necessary that the presentment and demand, which are to be made the basis of the notary's certificate, should be made by him in person. For otherwise his testimony contained in the protest would be hearsay and secondary, and would lack the very element of certainty which the protest is especially designed to assure. Not even his clerk, nor, unless authorized by law, his deputy, can

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[20] Carter v. Burley, 9 N. H. 558; Chanoine v. Fowler, 3 Wend. 173.

[21] Bank of Kentucky v. Pursley, 3 T. B. Mon. 240; Huffaker v. National Bank, 12 Bush, 293.

[22] Benjamin's Chalmers' Digest, 175; 2 Ames on Bills and Notes, 450; Edwards on Bills, 580.

[23] Story on Bills, § 282.

[24] Chitty on Bills [*334], 374.

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§ 352. What certificate must contain.— The protest, or, more strictly speaking, the notarial certificate thereof, should set forth: (1) The time of presentment; (2) the place of presentment; (3) the fact and manner of presentment; (4) the demand of payment; (5) the fact of dishonor; (6) the name of the party by whom presentment was made; and (7) the name of the person to whom presentment was made.[29]

§ 353. Time, place, and manner of presentment and demand. — It is essential that the time of presentment and demand should affirmatively appear upon the face of the certificate, and it has been accordingly held that if the certificate state that the bill was "this day protested," and is dated on a day previous to or after the day of maturity, it is invalid upon its face;[30] and while the certificate should state that the presentment and demand were made during the usual business hours, it is not absolutely essential, because it will be presumed that the presentment was made at the proper time of the day.[31]

If the instrument, by its terms, is payable at a specified place, the certificate is insufficient unless it state that presentment and demand were made at such place;[32] but if no place of payment is named the certificate need not state at what place it was presented.

The presentment of the bill and the demand of payment should be separately stated. The usual expression of the certificate is, that the notary "did exhibit said bill," and it is certain that there must be some expression importing *ex vi termini* that the bill was presented to the drawee or acceptor.[33] The mere statement that payment was "demanded" has been held by the United States Supreme Court to be insufficient in itself, because not necessarily implying

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29 Daniel on Negotiable Instruments, § 950.

30 Walmsley v. Acton, 44 Barb. 312.

31 Burbank v. Beach, 15 Barb. 326; Skelton v. Dunstan, 92 Ill. 49.

32 People's Bank v. Brooks, 31 Md. 7.

33 Union Bank v. Fowlkes, 2 Sneed, 555; Bank of Vergennes v. Cameron, 7 Barb. 143.

a "presentment also."[34] But there can be no legal demand without presentment, and the term "demanded" has been considered sufficient in Louisiana.[35] The mere statement of "presentment" is not in itself sufficient without also a statement of demand.[36]

§ **354. Name of person to whom presented and fact of dishonor must be stated.**— The name of the person upon whom demand was made should be stated, especially when it was not made at the place of business of the drawer or acceptor. In the latter case, it is sufficient to describe the person as a clerk or person in charge.[37] If a firm were the drawer or acceptor, it would be fatally defective in not stating the name of the person on whom demand was made, as well as that he was a member of the firm.[38]

If the bill is payable at a bank, nothing more need be stated than that the notary presented it and demanded payment at the bank, and that it was refused, without stating the name of the person or officer of the bank to whom it was presented.[39]

The dishonor of the bill must be stated, and it is usually expressed in the phrase that the person to whom it was presented "answered that it would not be accepted or paid," or that such person "refused to accept or pay it," or some such language. If it does not, in some terms, inform the party of the dishonor, it is fatally defective. But it is not material what words are used.[40]

§ **355. Protest as evidence.**— The original instrument of protest, or a duly authenticated copy, is respected by the

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[34] Musson v. Lake, 4 How. 262; Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S. 347.

[35] Nott v. Beard, 16 La. 308.

[36] Nave v. Richardson, 36 Mo. 130; Farmers' Bank v. Allen, 18 Md. 475.

[37] Nelson v. Fotterall, 7 Leigh, 179; Stainback v. Bank of Virginia, 11 Gratt. 260.

[38] Otsego County Bank v. Warren, 18 Barb. 290.

[39] Hildeburn v. Turner, 6 How. 69.

[40] Taylor v. Bank of Illinois, 7 T. B. Mon. 576; Arnold v. Kinlock, 50 Barb. 44; Littledale v. Maberry, 43 Me. 264.

courts of a foreign country, and whenever admissible in testimony is regarded as *prima facie* evidence of all the facts therein stated, so far as they come within the scope of the notary's duty in making the presentment and demand and protest.[41] But it is *prima facie* evidence only, and any statement made in the protest may be rebutted by any competent testimony to the contrary.[42] But as, by the law merchant, the protest is only necessary, or receivable as evidence of dishonor, in the case of foreign bills or of indorsed notes, which are of the nature of foreign bills and come within the reason of the law respecting them, the protest of an inland bill or of an inland promissory note is not evidence of dishonor in a foreign State, although it may be in the State where the dishonor occurred by statute.[43] And where a State statute makes the protest, when executed by a notary of that State, evidence as to demand and notice, it does not authorize the notary to act beyond its territorial limits, or accord the same effect to his act when beyond them.[44]

§ **356. Evidence only of facts that are and should be stated.** — The admission of the certificate of protest as evidence only makes it evidence of such facts as it should and does distinctly state.[45] The purpose of the certificate, as it has been seen, is to enable the plaintiff, by this species of documentary evidence, to prove all of the essential requirements of a formal and legal presentment of the instrument for acceptance or payment, and that due demand was made and that the bill or note was in fact dishonored. It follows, therefore, that the certificate of protest can be taken as evidence only as to the essentials stated, and hence the certificate is not evidence of any collateral facts which may

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[41] Townsley v. Sumerall, 2 Pet. 170; Chase v. Taylor, 4 Harr. & J. 54; Insurance Co. v. Wilson, 29 W. Va. 547.

[42] Dickens v. Beal, 10 Pet. 582; Howard Bank v. Carson, 50 Md. 27; Applegarth v. Abbott, 64 Cal. 459.

[43] Dutchess County Bank v. Ibbottson, 5 Den. 110; Kirtland v. Wanzer, 2 Duer, 278.

[44] Dutchess County Bank v. Ibbottson, 5 Den. 110.

[45] Daniel on Negotiable Instruments, § 962.

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provided it be in furtherance of, and not inconsistent with or contrary to, the statements that are made in the protest. Thus, where the protest stated a demand of the cashier, but omitted to state that the note was in, or the cashier at the bank, it was held admissible to prove these facts by parol testimony.[53]

SECTION II.

NOTICE OF DISHONOR.

§ 358. **Necessity of notice; general rule.**— When a negotiable bill or note is dishonored by nonacceptance on presentment for acceptance, or by nonpayment at its maturity, it is the duty of the holder to give immediate notice of such dishonor to the drawer, if it be a bill, and to the indorser, whether it be a bill or note. The party primarily liable is not entitled to notice, for it was his duty to have provided for payment of the paper; and the fact that he is maker or acceptor for accommodation does not change the rule.[54]

Notice is not due to any party to a bill or note not negotiable, the rules of the law merchant concerning notice and protest applying to none but strictly commercial instruments.[55]

It is regarded as entering as a condition in the contract of the drawer and indorser of a bill, and of the indorser of a note, that he shall only be bound in the event that acceptance or payment is only demanded; and he notified if it is not made. And in default of notice of nonacceptance or nonpayment, the party entitled to notice is at once discharged, unless some excuse exist which exonerates the holder.[56]

§ 359. **Failure to notify party entitled to notice discharges debt for which bill was drawn or indorsed.**— So absolute is the necessity for notice to an indorser, in order to charge

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[53] Magoun v. Walker, 49 Me. 420; Seneca County Bank v. Neass, 5 Den. 329.

[54] Hays v. N. W. Bank, 9 Gratt. 127.

[55] Pitman v. Breckenridge, 3 Gratt. 129.

[56] Rothschild v. Currie, 41 Eng. C. L. 43; Musson v. Lake, 4 How. 262.

him, that if a note has been indorsed to the holder in conditional payment of a debt, the failure to give notice to the indorser will not only discharge the indorser as a party to the note, but also a debtor upon the original consideration, even though it be secured by a mortgage or deed of trust. The note, then, is made an absolute discharge of his liability, and the indorsee must look solely to prior parties.[57] And so in respect to the drawer of a bill given in conditional payment.[58] The neglect to give notice to the drawer of a renewed bill not only discharges him from liability to pay that bill, but discharges him from liability to pay the prior bill, to satisfy which it was drawn;[59] and this although it be expressly agreed that the taking of such second bill shall not exonerate any of the parties to the first bill until actual payment.[60]

§ 360. Notice may be verbal or written.—The notice need not be in writing; it is sufficient if it be given verbally;[61] but for precision and safety written notice is preferable. Verbal notice must be necessarily confined to those cases in which notice is directly given to the party in person, or is sent by a messenger to his place of business or residence. It seems that a verbal notice is less strictly construed than a written one, especially when its sufficiency is impliedly admitted by the party's response.[62] Thus, where the holder's clerk told the drawer that the bill had been duly presented, and that the acceptor could not pay it, and the drawer replied that he would see the holder about it, this was held to be sufficient evidence to warrant the jury in finding that the fact of the dishonor of the note was sufficiently communicated to the drawer.[63]

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[57] Shipman v. Cook, 1 Green, 251; Peacock v. Purcell, 14 C. B. (N. S.) 728.

[58] Bridges v. Berry, 3 Taunt. 130; Allan v. Eldred, 50 Wis. 136; Smith v. Miller, 43 N. Y. 171.

[59] Bridges v. Berry, 3 Taunt. 130; Chitty on Bills [*433, 444], 488, 500.

[60] Reid v. Coats, Bro. P. C.; Chitty on Bills [*434], 488.

[61] Boyd's Admr. v. City Sav. Bank, 15 Gratt. 501; First Nat. Bank v. Ryerson, 23 Iowa, 508; Stanley v. McElrath, 25 Pac. 16.

[62] Phillips v. Gould, 8 C. & P. 355; Byles on Bills [*264], 211, 212.

[63] Metcalfe v. Richardson, 11 C. B. 1011.

Mere knowledge of dishonor does not constitute notice.[64] Notice signifies more; but when the fact of dishonor is communicated by one entitled to call for payment, it becomes notice, as it is then to be inferred that the intention is to hold the party notified responsible.[65]

§ 361. Form of notice.— No particular phrase or form is necessary. The object of it is to inform the party to whom it is sent: 1, that the bill or note has been presented; 2, that it has been dishonored by nonacceptance, or nonpayment; and, 3, that the holder considers him liable, and looks to him for payment. And in framing the notice, all that is necessary to apprise the party of the dishonor of the instrument is, to intimate that he is expected to pay it.

In order that a notice should answer these conditions, and duly intimate dishonor to the drawer or indorser, it should therefore, either expressly or by just and natural implication, comprise the following elements: (1) A sufficient description of the bill or note to ascertain its identity. (2) That it has been duly presented for acceptance or payment to the drawee, acceptor, or maker. (3) That it has been dishonored by nonacceptance or nonpayment. (4) That the holder looks to the party notified for payment.[66]

§ 362. Description of the bill or note dishonored.— The notice should describe the bill or note in unmistakable terms; should state where the note is, that the party notified may find it; should state who the holder is, and who gives the notice, or at whose request it is given. Such, at least in theory, are the requisites of a proper notice; and a good business man should never neglect to comply with them. But the courts are not strict in requiring this thorough description of the dishonored instrument; and the requirements of the law are considered as satisfied by any descrip-

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[64] Juniata Bank v. Hale, 16 Serg. & R. 157; Bank of Old Dominion v. McVeigh, 29 Gratt. 559.

[65] Gaunt v. Thompson, 7 C. B. 400; Miers v. Brown, 11 M. & W. 372.

[66] Bank of Old Dominion v. McVeigh, 29 Gratt. 558; Thompson v. Williams, 14 Cal. 162; Story on Notes, § 348; Daniel on Negotiable Instruments, § 973.

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has been presented for payment; and if not, why not, for the reason that the indorser has a right to be informed of the facts on which the liability depends, to the end that he may judge for himself whether or not it is his duty to pay it.[72]

§ **364. Statement that holder looks to drawer or indorser for payment; meaning of.**— An express statement in the notice to this effect was, as it might seem, formerly held necessary;[73] but the prevailing rule at the present time is, that the mere fact of giving notice to the party implies that he is looked to for payment.[74]

On this subject it has been said by the United States Supreme Court: "A suggestion has been made at the bar, that a letter to the indorser, stating the demand and dishonor of the note, is not sufficient, unless the party sending it also informs the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such responsibility over. For what other purpose could it be sent? We know of no rule that requires any formal declaration to be made to this effect. It is sufficient, if it may be reasonably inferred from the nature of the notice." [75]

§ **365. By whom notice given.**— The notice of dishonor should emanate from the holder of the instrument at the time of its dishonor, and should be communicated to all the parties whom he means to hold liable for its payment. But it is not absolutely necessary that it should come from him, for the holder is entitled to the benefit of notice given in due time by any party to the instrument who would be liable to him if he, the holder, had himself given him notice of dishonor.[76] Thus if the holder duly notifies the sixth in-

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[72] Page v. Gilbert, 60 Me. 488; Gilbert v. Dennis, 3 Metc. (Mass.) 495.

[73] Tindal v. Brown, 1 T. R. 169; Solarte v. Palmer, 7 Bing. 530.

[74] Miers v. Brown, 11 M. & W. 372; Townsend v. Lorain Bank, 2 Ohio St. 345; Townsend v. Dry Goods Co., 85 Mo. 508.

[75] Bank of United States v. Carneal, 2 Pet. 543.

[76] Chapman v. Keene, 3 Ad. & El. 193; Bank of United States v. Goddard, 5 Mason, 366; Stafford v. Yates, 18 Johns. 327.

dorser, and he the fifth, and he the fourth, and so on to the first, the latter will be liable to all the parties.[77] Where the holder has duly notified, or exercised due diligence to notify the several and successive indorsers, and an intermediate indorser who did not himself notify his predecessors, takes up the bill or note, there is no doubt that the notice sent them by the holder to whom he makes payment inures to his benefit, provided it actually reached them.[78] But it has been observed that it would seem to be still unsettled whether the notice inured to the benefit of the intermediate indorser, when the holder's diligence in sending notice did not secure its actual reception.[79] It is certain that notice from a mere stranger is insufficient,[80] and it is equally well established that a party to the bill who has been discharged by laches, and who could not in any event sue, cannot give notice for his own or another's benefit, he being then a mere stranger to the paper.[81]

§ 366. Notice by agent.— Notice given by an agent is the same as if by the holder himself, and it may be either in the agent's name, or in the name of any party entitled to give notice.[82] The notary to whom the bill or note has been given for presentment may, as the agent of the holder, give notice;[83] but it is no part of his official duty;[84] and a bank holding a bill or note for collection, or its officers or agents, should, as a matter of duty, give the notice necessary.[85] Any

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[77] Hilton v. Shepherd, 6 East, 14; Swayze v. Britton, 17 Kan. 627.

[78] Stafford v. Yates, 18 Johns. 327.

[79] 1 Parsons on Notes and Bills, 627.

[80] Stanton v. Blossom, 14 Mass. 116; Juniata Bank v. Hale, 16 Serg. & R. 157; Brailsford v. Williams, 15 Md. 150.

[81] Harrison v. Ruscoe, 15 M. & W. 231; Turner v. Leech, 4 B. & Ald. 451; Thompson on Bills, 358.

[82] Woodthorpe v. Laws, 2 M. & W. 109; Harrison v. Ruscoe, 15 M. & W. 231; Benjamin's Chalmers' Digest, 182.

[83] Smedes v. Utica Bank, 20 Johns. 372; Shed v. Brett, 1 Pick. 401; Fulton v. McCracken, 18 Md. 528.

[84] Harrison v. Robinson, 4 How. 336; Insurance Co. v. Wilson, 29 W. Va. 548.

[85] Ogden v. Dobbin, 2 Hall, 112; Bank of Missouri v. Vaughan, 36 Mo. 90.

person indeed, in whose hands the bill lawfully is may give the notice as holder or agent, as the case may be, and if as agent, a verbal authority from the holder is sufficient.[86] A bank or banker with whom a bill or note is deposited to present for acceptance or payment, or any agent to whom it is indorsed for collection, is to be regarded as a distinct holder for the purposes of notice, and has the same time to notify the principal, and the principal the prior parties, as if such bank or agent were the real owner.[87]

If the holder be dead, his executor or administrator, if there be one, should give the notice; but if none be appointed at the time of maturity, notice should be sent within a reasonable time after an appointment is made.[88]

§ 367. To whom notice should be given; general rule.— Each indorser of a bill or note is entitled to notice, and so also is the drawer of a bill payable to a third party, as bills generally are.[89] The acceptor of a bill and the maker of a note are not entitled to notice, they being the primary debtors, nor are those who, from their irregular execution of the instrument, are adjudged joint makers or sureties, their contract being to pay in default of the principal, at all events.[90] Where there are several successive indorsers, the holder may, and ordinarily does, give notice to all, with a view to preserve his recourse upon all. But he is not bound to give notice to all, in order to bind those to whom he does give it. He may, if he please, give notice to any one or more of the indorsers, who are then made liable to him; and the indorser receiving notice must then notify antecedent indorsers in order to assure himself.[91] It is not, therefore, necessary for the notary to take any notice of the

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[86] Cowperthwaite v. Sheffield, 1 Sandf. 416; Story on Bills, § 303.

[87] Bank of United States v. Goddard, 5 Mason, 366; Worden v. Nourse, 36 Vt. 756; Friend v. Wilkinson, 9 Gratt. 31.

[88] White v. Stoddard, 11 Gray, 38; 1 Parsons on Notes and Bills, 444, 559.

[89] Joseph v. Salomon, 19 Fla. 623; Sweet v. Swift, 65 Mich. 91.

[90] Fitch v. Citizens' Nat. Bank, 97 Ind. 212; Hofheimer v. Losen, 24 Mo. App. 657.

[91] Cardwell v. Allen, 33 Gratt. 167; Wood v. Callaghan, 61 Mich. 402.

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And it matters not that the firm was dissolved by war, and that one of the partners was separated from the other by a hostile line.[3] If an indorser be a member of the firm, the notice to the firm is sufficient.[4] The general rule, that notice to any partner is notice to the firm, is subject to this exception: that where one member resides at a distance, and another at the place of protest, notice must be given to the latter. At least, it has been so held;[5] but if the drawers or indorsers are joint, but not partners, notice must be given to each of them, and notice to one only would not even bind him.[6]

§ 370. **Notice to indorsers for collection, and to accommodation and fixed drawers and indorsers.**— The rule requiring notice to the indorsers of bills and notes extends to all indorsers, whether they are indorsers for value or mere agents for collection. A banking-house, or other agent, merely passing title to the bill or note by indorsement for purposes of collection, stands on the same footing as any other indorser in respect to notice.[7] "In regard to notice, each branch of a bank is considered a separate establishment."[8]

But where the indorsement upon the bill or note was made before its maturity, and after the bill or note had been transferred with it upon it, and had been returned to the indorser; and he, after paying it, and after the liability of all parties had been fixed, and reissued it with their indorsements upon it, the general rule requiring demand of the maker, and notice to the indorser, where the indorsement was made after maturity, in order to charge the indorser, would not apply. For in such case the demand had

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3 Hubbard v. Matthews, 54 N. Y. 50.

4 Rhett v. Poe, 2 How. 457.

5 Hume v. Watt, 5 Kan. 34.

6 Bank of United States v. Bierne, 1 Gratt. 234; Union Bank v. Willis, 8 Metc. (Mass.) 512; Bealls v. Peck, 12 Barb. 245.

7 Seaton v. Scovill, 18 Kan. 435; Lynn Nat. Bank v. Smith, 132 Mass. 227; Butler v. Duval, 4 Yerg. 265.

8 Clode v. Bayley, 12 M. & W. 51.

been made, the notice given, and his liability determined before he reissued the instrument.[9]

An accommodation drawer or indorser is as much entitled to notice as if the drawing or indorsing was done for value;[10] but if the drawer or indorser be himself the accommodated, instead of the accommodating party, he is under obligation to take up the bill or note, has no remedy on doing so against any other party, and consequently is without legal possibility of injury, and is not entitled to notice.[11]

§ 371. If drawer or indorser be dead or bankrupt.— If the party entitled to notice be dead at the time the bill or note becomes payable, and this is known to the holder, notice should be sent to his executor or administrator, if there be any, and it can be ascertained by reasonable inquiry who or where he is; and under such circumstances notice addressed to the deceased by name would be insufficient.[12] Notice addressed to the "legal representative," in a case in which the death of the indorser was recent, and no personal representative had as yet qualified, has been deemed sufficient;[13] but it has been held that if addressed to "the estate," it would not, that term applying as well to the heirs-at-law as to the executor or administrator.[14] And where a personal representative has qualified, and is known, or could be ascertained by due diligence, it would not be sufficient to address notice through the mail to "the administrator," "executor," or "personal representative," by official designation only, as it might lead to delay. The address

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[9] Daniel on Negotiable Instruments, § 997; St. John v. Roberts, 31 N. Y. 441.

[10] Turner v. Samson, 2 Q. B. Div. 23; Thillman v. Gueble, 32 La. Ann. 260; Braley v. Buchanan, 21 Kan. 555.

[11] Daniel on Negotiable Instruments, §§ 995*h*, 1085.

[12] Oriental Bank v. Blake, 22 Pick. 206; Cayuga County Bank v. Bennett, 5 Hill, 236.

[13] Boyd's Admr. v. City Sav. Bank, 15 Gratt. 501; Pillow v. Hardeman, 3 Humphr. 538.

[14] Cayuga County Bank v. Bennett, 5 Hill, 236; Massachusetts Bank v. Oliver, 10 Cush. 557.

should be to such party by name.[15] Notice to one of several executors or administrators is sufficient.[16]

If there be no personal representative, notice sent to the family residence of the deceased will be sufficient;[17] and it is likewise sufficient if notice be addressed to the deceased, when, without negligence, the holder is not aware of his death.[18]

If the party be bankrupt, it is best to give notice to him, and to his assignee also. If there be as yet no assignee appointed, notice to him is sufficient;[19] and perhaps it might be sufficient even if one had been appointed.[20] If given to the assignee alone, it would probably be sufficient.[21]

If the bankrupt has absconded, notice should be given his assignee, if any there be; and if there be none, to any one representing his estate.[22]

§ 372. How notice must be served when parties in same place. — If the notice is to be given to a party to whom it is not necessary or allowable to transmit it by mail, it should be sent to or given at his place of domicile or place of business, and delivery of notice at either will be sufficient,[23] even when they are in different towns.[24] When the party keeps a counting-room or other business place, and has a private residence also, it is usual to send notice to the place of business rather than to the dwelling, and if notice is so sent to his place of business during hours when he or some of his people might be reasonably expected there, it is sufficient;

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15 Smalley v. Wright, 40 N. J. L. 471.

16 Bealls v. Peck, 12 Barb. 245; Lewis v. Bakewell, 6 La. Ann. 359.

17 Goodnow v. Warren, 122 Mass. 82; Merchants' Bank v. Birch, 17 Johns. 25.

18 Barnes v. Reynolds, 4 How. (Miss.) 114; Maspero v. Pedesclaux, 22 La. Ann. 227.

19 *Ex parte* Moline, 19 Ves. 216.

20 1 Parsons on Notes and Bills, 500.

21 Callahan v. Kentucky Bank, 82 Ky. 231.

22 Rhode v. Proctor, 4 B. & C. 517.

23 Williams v. Bank of United States, 2 Pet. 96; Nevins v. Bank of Lansingburg, 10 Mich. 547; Ireland v. Kip, 10 Johns. 491.

24 Bank of Geneva v. Howlett, 4 Wend. 328; Donner v. Remer, 21 Wend. 10.

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According to another class, if the party has no regular place of business in the city or town where the holder resides or the instrument is payable, and resides some distance in the country, but receives his mails in the city or town, the mere fact that he would get the letter out of the same office it was put in, instead of a distant one, would not vitiate the method of communication, every reason of convenience and certainty which apply in one case applying with equal force in the other. To hold otherwise would require the holder to give personal notice to an indorser who did not reside in the same place as himself, or to send it by mail to a post-office where the indorser did not usually receive his letters.

The Supreme Court of the United States has adopted this view in preference to the more exacting view of the authorities referred to; and has held that where the plaintiff bank at which the note was payable was located in Georgetown, and the indorser, when the note fell due, resided two or three miles distant in the country, having removed after it was made from Washington city, but received his letters through the Georgetown post-office, notice deposited in the Georgetown post-office, addressed to him at that place, was sufficient.[31]

§ 374. Exceptions to the rule.— To the rule that when the holder and the drawer or indorser live in the same place service of the notice of dishonor must be personally made, are the following exceptions: (1) If the party addressed actually receives the notice in due season, or it can be properly inferred by the jury from the facts of the case that the notice was received, the mere manner of its transmission is wholly immaterial, whether transmitted by mail, telegraph, or otherwise.[32] The distinction between the different modes of giving notice is this: that where the holder

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[31] Bank of Columbia v. Lawrence, 1 Pet. 578; Bank of United States v. Norwood, 1 Harr. & J. 423; Gist v. Lybrand, 3 Ohio, 307; Jones v. Lewis, 8 Watts & S. 14.

[32] Hyslop v. Jones, 3 McLean, 69; Dicken v. Hall, 87 Pa. St. 379; First Nat. Bank v. Wood, 51 Vt. 471.

and indorser reside in different places, the former, if he deposits the notice in the post-office in due season, has no further burden on him as to the actual receipt of it by the latter; but where both parties live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due season.[33] (2) Where letter carriers are employed in the postal service to deliver letters at the houses or places of business of parties, who usually receive their letters through them. In such cases, if the notice be deposited in the post-office early enough in the day to go by the letter-carrier, on the same day, to the party entitled to notice, it will be deemed sufficient.[34] (3) When the party entitled to notice has recently died, and no personal representative has been appointed.[35] (4) Where there are several distinct villages or post-offices in a town, between which there is a regular intercourse by mail, it may be employed for the conveyance of notice, notwithstanding the fact that the parties reside in the same general municipality.[36]

§ **375. How notice must be served when parties in different places.**— When the parties reside in different places, or the party entitled to notice resides at a place other than the particular place at which the bill or note is payable, it will, in general, be sufficient for the holder to put notice of dishonor in the post-office, addressed to the party entitled thereto, within the proper time. This done, his duty is discharged, and it is not necessary that the notice should be received — the holder not being responsible for any miscarriage of the mail.[37] But the notice must be properly addressed to the party at a distance entitled to receive it; and if it be directed to "Darcy" as indorser, instead of "Darey," the correct

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[33] Cabot Bank v. Warner, 10 Allen, 522.

[34] Shoemaker v. Mechanics' Bank, 59 Pa. St. 83; Walters v. Brown, 15 Md. 292.

[35] Boyd's Admr. v. City Sav. Bank, 15 Gratt. 501.

[36] Bell v. Hagerstown Bank, 7 Gill, 216; Shaylor v. Mix, 4 Allen, 351; Gist v. Lybrand, 3 Ohio, 307.

[37] Bussard v. Levering, 6 Wheat. 102; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177.

name, it is negligence which discharges him.[38] The notice should be directed to the post-office at, or nearest to, the party's place of residence, unless he is accustomed to receive his letters at another post-office, in which case it should be directed thereto.[39] If he live at one place and has his place of business at another, notice may be sent to either;[40] and the place where the party actually resorts to for his letters is always the appropriate one, when known, for notice to be addressed to, whether or not the party lives there or has there his place of business.[41] If the place be that of his actual residence at the time, it need not be his domicile.[42]

§ **376. Address.**— The indorser has a right to direct to what postal address, or to what place, notice shall be sent, and it will always suffice to pursue his direction although he may have a place of residence or business elsewhere.[43] Sometimes the place to which he desires notice to be sent is designated by memorandum on the instrument, as, for example, by writing the words "214 E. 18th Street," or by adding his address to his signature, as, for instance, "Memphis, Tenn.," or "Walnut Bend, Arkansas," or "13 Chambers Street, New York," or "W. Moors, Manchester," or "T. M. Barron, London," and he thereby impliedly directs notice to be sent to the place designated.[44] It is not sufficient to direct notice generally to a parish, county, or township within which there are a number of post-

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[38] Darey v. Jones, 13 Vroom, 28.

[39] Bank of Columbia v. Lawrence, 1 Pet. 582; National Bank v. Cade, 73 Mich. 449; Northwestern Coal Co. v. Bowman, 69 Iowa, 103.

[40] Bank of United States v. Carneal, 2 Pet. 549; Reid v. Payne, 16 Johns. 218.

[41] Farmers' Bank v. Gunnell, 26 Gratt. 137; Lindenberger v. Beall, 6 Wheat. 104; Munn v. Baldwin, 6 Mass. 316.

[42] Young v. Durgin, 15 Gray, 264.

[43] Bell v. Hagerstown Bank, 7 Gill, 216; Dicken v. Hall, 87 Pa. St. 379; Tyson v. Oliver, 43 Ala. 455.

[44] Bartlett v. Robinson, 39 N. Y. 187; Carter v. Union Bank, 7 Humphr. 548; Peters v. Hobbs, 25 Ark. 67; Morris v. Husson, 4 Sandf. 93; Mann v. Moors, Ryan & M. 149; Burmester v. Barron, 17 Q. B. 828.

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§ 377. **Address, continued; several post-offices, large cities, etc.**— Where there are two or three post-offices at which the indorser is in the habit of receiving his letters, notice may be sent to either;[53] and where he lives at equi-distance from two post-offices, notice addressed to one will suffice, although he was accustomed to receive his letters at the other.[54] Where the party lives in the United States, it is especially important in sending notices by mail to put the full address, town and State, as there are many cases in which the same name is applicable to towns and cities in different States. An omission to name the State, where there is more than one place bearing the name of the town, would be fatal if the notice were not duly received at the right place.[55]

It has been held in England not sufficient to address the notice to a person at a large town, as, for instance, to "W. Haynes, Bristol," without specifying in what part of it he resides, because there might be in so large a town many persons to whom so general an address might apply, the surname alone being given without any special designation that might identify him.[56] But unless the name were very common — John Smith, for instance — an address to a large city, giving the full christian name as well as the surname, would doubtless be regarded as sufficient. And in Massachusetts, where notice was addressed to "Mrs. Susan Collins, Boston," it was held sufficient to charge her as indorser, it not appearing that there was any other person of the same name.[57] The soundness of the doctrine stated in the latter case has been doubted by some courts — the latter holding that such an address would be *prima facie* insufficient, even though the town to which it should be sent was not a large one — the principle being that numerous per-

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[53] Bank of the United States v. Carneal, 2 Pet. 543; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177.

[54] Rand v. Reynolds, 2 Gratt. 171; Follain v. Dupre, 11 Rob. (La.) 454.

[55] Beckwith v. Smith, 22 Me. 125.

[56] Walter v. Haynes, Ryan & M. 149.

[57] True v. Collins, 3 Allen, 440; Morse v. Chamberlain, 144 Mass. 408.

sons with the same surname may be, and frequently are, found in the same town. If one has a fixed residence, the law presumes that it continues, and notice sent to the old address will be sufficient, unless the removal was under circumstances of peculiar notoriety.

§ **378. Time within which notice may or must be given.**— Referring to the time of the day of the dishonor at which the holder may give notice, it is well settled that as soon as the demand is made, and the dishonor has occurred, the holder need not wait until the close of business hours to send notice.[58] Mr. Chitty says: "It seems clear that notice of nonpayment may be given on the last day of grace, whenever, after due presentment and demand, the drawee makes an unqualified refusal to pay at all."[59] But it is clear that the holder is not obliged to give notice immediately on the very day of the dishonor, although he has the option so to do.[60] The settled rule is that the holder has until the expiration of the following day to give notice; and he is not confined within the business hours of the day to give the notice at the party's dwelling.[61] He may give it there at any time before the hours of rest; but if he gives it at the place of business, it must be done during the hours of business.[62]

§ **379. When the parties reside in different places.**— If the holder and the party or parties sought to be bound live in different places, and there is mail communication between them, the rule laid down by the United States Supreme Court is, that the notice should be deposited in the post in time to be sent by the mail of the day after dishonor, provided such mail is not closed before early and convenient

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[58] Bank of Alexandria v. Swan, 9 Pet. 33; Lenox v. Roberts, 2 Wheat. 373; Price v. Young, 1 McCord, 339.

[59] Chitty on Bills [*482], 544.

[60] Darbishire v. Parker, 6 East, 8: Tindall v. Brown, 1 T. R. 168; Phelps v. Stocking, 21 Nebr. 444.

[61] Jameson v. Swinton, 2 Taunt. 224; Bayley on Bills, 176.

[62] Parker v. Gordon, 7 East, 385; Adams v. Wright, 14 Wis. 408; Cayuga County Bank v. Hunt, 2 Hill, 635.

business hours of that day; in which case it must be sent by the next mail thereafter.[63]

In other words, the notice must be sent by the first mail which leaves after the day of dishonor is past, and does not close before early and convenient business hours of the day succeeding the day of dishonor; the design of the law being to afford the holder an opportunity to mail the notice on the day succeeding that of dishonor.

This rule is sanctioned by numerous and eminent authorities, either expressly or by implication, and, it seems to us, adopts the only principle which may be safely followed in all cases.[64]

What hour of the next day after dishonor may be considered as reasonably early and convenient within the meaning of this rule must depend upon the habits of the business community in each place, and no precise hour can be arbitrarily named. If the mail closes before early business hours of the day after dishonor, whether it be during the night before, or at three, four, five, or six o'clock A. M. thereof, the notice need not, under the rule, be sent thereby.[65] Seven o'clock seems debatable,[66] at least the hour is not clearly within early business hours, unless at some particular localities, and sunrise is certainly too soon.[67]

§ 380. **Each holder has a day to give notice to his predecessor on the paper.**—The party receiving the notice may desire to communicate it to parties antecedent to him, and others before him likewise to transmit it to those antecedent to them. In such cases the general rule also is, that

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[63] United States v. Barker, 12 Wheat. 559; Fullerton v. Bank of the United States, 1 Pet. 605.

[64] Farmers' Bank v. Duvall, 7 Gill & J. 78; Burgess v. Vreeland, 4 N. J. 71; Chick v. Pillsbury, 24 Me. 458; Eagle Bank v. Chapin, 3 Pick. 180.

[65] Geill v. Jeremy, 1 Moody & M. 61; Mitchell v. Cross, 2 R. I. 437; Wemple v. Dangerfield, 2 Smedes & M. 445; West v. Brown, 6 Ohio St. 542; Chick v. Pillsbury, 24 Me. 458.

[66] Stephenson v. Dickson, 24 Pa. St. 148; Commercial Bank v. King, 3 Rob. (La.) 243.

[67] Deminds v. Kirkman, 1 Smedes & M. 644.

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CHAPTER XIII.

CIRCUMSTANCES OF A GENERAL OR SPECIAL NATURE WHICH EXCUSE WANT OF PRESENTMENT, PROTEST, OR NOTICE OF DISHONOR.

SECTION I.

CIRCUMSTANCES OF A GENERAL NATURE WHICH EXCUSE WANT OF PRESENTMENT, PROTEST, OR NOTICE OF DISHONOR.

§ **382. Classification.**— The circumstances of a general nature which excuse the holder when there has been a failure on his part to make due presentment of the bill or note to the drawee, acceptor, or maker, or to convey due notice of dishonor to the drawer or indorser, may be classified as follows:

(1) The breaking out of a war between the country of the holder and that of the party to whom presentment should be made or notice given.

(2) Public and positive prohibitions of commercial intercourse between the countries of the holder and that of the party to whom presentment should be made or notice given.

(3) The occupation of the country where the parties live, or where the bill or note is payable, by a public enemy, or by military forces, which obstructs or suspends commercial intercourse.

(4) Political disturbances amounting to a virtual interruption and obstruction of the ordinary negotiations of trade.

(5) The prevalence of a malignant epidemic disease, which suspends the ordinary operations of business.

(6) Overwhelming calamity, or unavoidable accident, which obstructs the usual channels of communication.

These circumstances are of a character not affecting the individual peculiarly, but having such a general influence upon the country or the community as to impede and pre-

vent the ordinary pursuits of business, or obstruct the methods of communication, and they are recognized, almost, if not quite, universally, as exonerating those who come under their operation from the performance of the obligations in respect to negotiable instruments with which they interfere.

§ 383. When impediment ceases, duty to make demand or give notice revives.— These excuses — war, military or political disturbance, interdiction of commerce, prevalence of disease, overwhelming accidents, et cetera — do not justify a total dispensation of demand and notice, but only excuse the delay which these circumstances may occasion. As soon as the impediment ceases, the duty revives; and if demand and notice be not speedily made, the holder is in default, and drawers and indorsers are discharged.[1] Thus, where the holder of a bill in New York delayed, for several months after restoration of commercial intercourse between New York and New Orleans (the former being in the United States, and the latter in the Confederate States during the war of secession), to present the bill to the acceptor in New Orleans for payment, it was held that the drawer was discharged.[2] In Maryland, it was said by Stewart, J.: "There must be the earliest possible presentment when impediment ceased."[3]

§ 384. War, public interdiction of commerce, military disturbances, etc.— A declaration of war between the country where the holder is domiciled and that where the party to whom presentment should be made or notice given is domiciled, or the breaking out of hostilities between such countries, operates as an interdiction of all commercial intercourse; and all communication between the subjects of the belligerents, or parties on opposite sides of the belligerent line, is prohibited. This is a general principle of the law of nations, recognized and applied to all kinds of transac-

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[1] House v. Adams, 48 Pa. St. 266; Farmers' Bank v. Gunnell, 26 Gratt. 132; James v. Wade, 21 La. Ann. 548.

[2] Durden v. Smith, 44 Miss. 552.

[3] Norris v. Despard, 38 Md. 491.

tions; and it constitutes a clear and admitted justification of the omission to make due presentment of the bill or note or to give notice, during the continuance of hostilities or the suspension and prohibition of intercourse.[4] Illustrative of the proposition stated, interesting cases have arisen growing out of the war between the States, some authorities adhering to the view that as commercial intercourse between the United States and the secession States was not interdicted until August 16, 1861, by proclamation of President Lincoln, contracts between persons in the Union and the seceded States were not until that time illegal;[5] others holding that the test is the existence or nonexistence of an actual state of war, and that no express prohibition is necessary to determine that fact.[6]

The interdiction of intercourse between the countries of the holder and of the party to whom presentment should be made would excuse the holder for nonpresentment and notice as effectually as a declaration or open state of war.[7] It likewise follows that where the occupation of the country by the public enemy is of such a character as to sever the parties from each other by a hostile line, the same principle applies as if they were in fact domiciled in different countries at war with each other.[8]

§ 385. **Political disturbances, epidemics, overwhelming calamities, etc.**— When political disturbances virtually interrupt and obstruct the ordinary negotiations of trade, they constitute a sufficient excuse for want of presentment or notice, upon the same principle that controls in cases of military operations or interdictions of commerce.[9]

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[4] Harden v. Boyce, 59 Barb. 427; House v. Adams, 48 Pa. St. 261; Norris v. Despard, 38 Md. 491.

[5] Leathers v. Connecticut Ins. Co., 2 Bush, 296; Union Nat. Bank v. Marr's Admr., 6 Bush, 615.

[6] Bilgerry v. Branch, 19 Gratt. 393; McVeigh v. Bank of Old Dominion, 26 Gratt. 785. See Griswold v. Waddington, 19 Johns. 438.

[7] Story on Notes, §§ 257, 263; 1 Parsons on Notes and Bills, 461.

[8] Polk v. Spinks, 5 Coldw. 431; Blair & Hoge v. Wilson, 28 Gratt. 172; Tardy v. Boyd, 26 Gratt. 632.

[9] Story on Notes, § 261; Blair & Hoge v. Wilson, 28 Gratt. 172.

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holder to make due presentment or protest, or give notice. IV. Special circumstances arising from the conduct of the party. V. Special waivers by promises to pay and part payments after maturity. These circumstances, thus classified, will be now separately considered.

§ 387. Circumstances which show absence of right to require. — When the drawer has drawn the bill without the right to do so, or without any reasonable ground to expect that the drawee would honor it, the omission of the holder to make a due presentment of it for acceptance or payment (no acceptance intervening), or to give the drawer due notice of its dishonor by the drawee, will be excused.[12] This doctrine rests upon the ground that the drawer has committed fraud or folly in undertaking that the drawee would honor his bill, when he had no right or reasonable ground to expect it; and that he can suffer no loss or injury from the failure of the holder to make a presentment to the drawee, which would naturally be fruitless, or to give him, the drawer, notice of a dishonor which he must have known by anticipation. And if the drawer has no funds in the drawee's hands with which to meet the bill, and the drawee has not in any way or to any extent obligated himself to accept it, the drawer has no right to expect or require formal presentment of the bill for acceptance.[13] And if the bill has been accepted for the mere accommodation of the drawer, and he has undertaken to supply funds to meet it, a failure to present it to the acceptor will be excused as against the drawer, who could not suffer save from his own laches.[14]

If the drawer withdraws the funds which he had in the drawee's hands when he drew the bill, or intercepts funds which he had provided to meet the bill; or if he privately directs the drawer not to honor it, or otherwise prevents the due acceptance or payment of his draft, he commits a

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12 Chitty on Bills [*436], 490; Story on Bills, §§ 280, 375.

13 Beckerdike v. Bollman, 1 T. R. 405; Donnell v. Savings Bank, 80 Mo. 172; Compton v. Blair, 46 Mich. 1.

14 French v. Bank of Columbia, 4 Cranch, 141; Torrey v. Foss, 40 Me. 74; Ross v. Redell, 5 Duer, 462.

fraud upon the holder of the bill, and forfeits his right to require demand and notice.[15]

But the *bona fide* expectation of the drawer based upon his relations with the drawee, and the provision he has made, or intends to make, and does make, are the circumstances to be regarded. If he has no funds in the drawee's hands when he draws, and yet provides them before presentment, he should have notice.[16] If the drawer has any arrangement by which, at the time the bill is presented, he has a right to expect it to be honored (*i. e.*, running open account with drawee, with insufficient balance to his credit), we should say he should have demand and notice,[17] for it would be presumed that such arrangement was contemplated when he drew.

§ 388. Waiver; general principles.— When presentment of the bill or note at maturity has been dispensed with by prior agreement between the parties, or, in other words, has been waived by the party entitled to require it, the holder is excused for his failure to make it. It would be a fraud upon the holder to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper; and as prompt presentment is a requirement solely for the benefit of the drawer and indorser, they are themselves the sole judges to determine whether or not they will enforce it. The waiver may be either verbally or in writing; it may be expressed *in totidem verbis*, or inferred from the words or acts of the party; and it matters not what particular language may be used, so that it conveys the idea that the presentment at maturity is dispensed with. The like observations apply to the protest and notice. Where the indorser of a check wrote over his name, "waiving demand and notice," it was held that he was not entitled to re-

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[15] Dickens v. Beal, 10 Pet. 572; Rhett v. Poe, 2 How. 457; Valk v. Simmons, 4 Mason, 113; Sutcliffe v. McDowell, 2 Nott & McC. 251.

[16] Robins v. Gibson, 3 Campb. 334; Hammond v. Dufresne, 3 Gamph. 145; Grear v. McDonald, 9 Gill, 350.

[17] Thackray v. Blackett, 3 Camph. 164; Legge v. Thorpe, 12 East, 171; 1 Parsons on Notes and Bills, 548.

quire any demand of the maker, or notice to himself of non-payment, as conditions precedent to his liability. Such words have the effect of dispensing with the necessity for those formalities.[18]

§ 389. Character and effect of waiver.— The waiver may be express or implied. It may result, therefore, that the waiver may be either direct and positive, or may arise from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended;[19] but there is authority to the effect that such waivers as we are now treating of should receive a strict construction. And it has been said that to show a waiver of demand and notice there must be clear and unequivocal evidence, and that equivocal circumstances or agreements will not suffice.[20] And it is well settled that a promise to pay after maturity, or an acknowledgment of continued liability, with knowledge that the usual steps of demand, protest, and notice were not duly taken, constitutes an implied waiver, and the liability of the drawer or indorser is absolutely fixed thereby; and part payment after maturity by the drawer or indorser is presumptive evidence that the party was duly charged by demand and notice.

The waiver may be either written or verbal, and it is conceded on all sides that a verbal waiver is as effectual as a written one; and the weight of authority sustains the propositiou that a parol promise to pay the note absolutely, made by the indorser at the time he indorses it, or a promise to pay it if the maker does not, or a verbal agreement between the parties that payment should not be demanded until after maturity, is admissible to prove a waiver of demand and notice. Such evidence is not offered for the purpose of varying the written contract of indorsement, which is

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18 Daniel on Negotiable Instruments, § 1090; Emery v. Hobsen, 62 Me. 578; Woodman v. Thurston, 8 Cush. 157.

19 Fuller v. McDonald, 8 Greenl. 213; 1 Parsons on Notes and Bills, 594.

20 Bird v. Le Blanc, 6 La. Ann. 470; Gregory v. Allen, Mart. & Y. 74; Story on Bills, § 371.

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the maker has died before maturity, and there is no personal representative of whom payment could be demanded, it cannot of course be made; but it would be otherwise if a personal representative had been appointed.[25] And so in all cases, where there is an actual party bound as promisor, but no one then existing who represents him, the delay in making demand is excused. But it is no excuse for want of notice to the drawer or indorser.[26]

§ **391. When note is void, and indorser knows it.**— Where the note is void, as between the maker and payee, on account of an illegal consideration, the indorser may be held without any proof of demand or notice; and the general principle is, that whenever the principal party is not bound, the indorser is bound without demand or notice.[27] The payee, when he indorses the note, warrants, by the very act of indorsement, that the maker is legally liable to pay it, knowing, as he necessarily must, that such is not the case. The holder, in the belief of its truth, might look only to the maker, and fail to take the usual steps to charge the indorser; and if, when he became aware that the maker was not legally bound, he could not recover against the indorser, the latter would be protected by his own fraud, and the holder suffer by the confidence placed in him. Thus, in Massachusetts, where a note was void for usury between maker and payee, and the holder failed in suit against the maker on that account, it was held that he could hold the indorser without any proof of demand or notice.[28] Knowledge of the infirmity rendering the instrument void, on the part of the indorser, is considered by high authorities essential to charge them without demand or notice — the transaction amounting in such case to a fraud. The decisions on this subject, however, are not uniform.[29]

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[25] Chitty on Bills [*436, 437]; 1 Parsons on Notes and Bills, 444, 445.

[26] Price v. Young, 1 McCord, 339.

[27] Bayley on Bills, 205; 1 Parsons on Notes and Bills, 444, 445; Perkins v. White, Ohio S. C., January, 1881.

[28] Copp v. McDugall, 9 Mass. 1.

[29] Daniel on Negotiable Instruments, §§ 1113*a*, 1113*b*.

The principles herein announced with reference to indorsers are equally applicable to drawers of bills of exchange.

§ 392. Impracticability of finding party.— The want of due presentment, or due notice, will be excused when the holder, after exercising due diligence, cannot find the party to whom presentment should be made or notice given, or ascertain his place of residence or business. When this excuse is relied upon, it becomes often a question of nicety to determine whether or not the steps taken by the holder to find the party to whom presentment should be made or notice given, or to ascertain his place of residence or business, amounted to the due diligence which the law exacts, and it is therefore important to define in what such diligence consists.[30] The burden of proving due diligence will be upon him who is seeking to avail himself of that excuse.[31] Due diligence in making presentment for payment, and in communicating notice, consists, as a general rule, in making inquiries of such accessible persons, as from their connection with the transaction or place, or parties, are likely to be informed and in acting in accordance with the information derived from them.[32] The holder is not bound to inquire further than a reasonable and prudent man should, and every possible exertion is not exacted of him. In the language of the Supreme Court of the United States, "It is enough to send the notice to the place where the information received reasonably requires him to send it. If the place it reaches is the wrong one, it is not his (the holder's) fault."[33] It has been held that due diligence would necessitate an inquiry by the holder of the indorser or other party to the instrument, to ascertain the whereabouts of the acceptor or maker.[34]

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[30] Story on Bills, § 351.

[31] Martin v. Grabinsky, 38 Mo. App. 359.

[32] Lambert v. Ghiselin, 9 How. 452; Chapman v. Lipscombe, 1 Johns. 294.

[33] Harris v. Robinson, 4 How. 336.

[34] Wheeler v. Field, 6 Metc. (Mass.) 290; Grafton Bank v. Cox, 13 Gray, 505.

§ 393. When place of business, or payment, closed; party absent from home, etc.— If the doors of the business office of the acceptor or maker are closed, and there be no one there to answer the demand after repeated calls, it has been held by high authority that the bill or note may be protested without making further inquiries; for he is bound to have a suitable person there to answer inquiries and pay his bills and notes, if there demanded.[35] Or if the holder, on the day of maturity, finds the bank or other place of payment closed, he is not bound to make any further demand to charge either drawer or indorser.[36] If the paper is payable at a certain bank that has ceased to exist, or at the counting-room of a firm which has dissolved before its maturity, it will certainly be sufficient to make presentment to the bank which has succeeded the former institution, if such there be, or at the counting-room of the succeeding firm, if such there be.[37]

If the party to be notified is traveling, or is absent from home for any reason, and his present address is known to the holder, or if his absence from home is known, and the holder has any means of learning his address, or of ascertaining whom he has left behind to attend to his business, it would probably be his duty to send notice accordingly. But if a party leaves home without taking the usual and proper precautions to facilitate sending business communications to him, undoubtedly this is his fault, and he can relieve himself from no responsibility by such fault, and will be held to all parties as if duly notified, provided due diligence be used.[38]

Inability to find the maker or acceptor does not excuse want of notice to drawer or indorser; but inability to find

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35 Sulzbacher v. Bank of .Charleston, 86 Tenn. 201; Baumgarden v. Reeves, 35 Pa. St. 250; 1 Parsons on Notes and Bills, 457.

36 Hine v. Allely, 4 B. & Ad. 624; Central Bank v. Allen, 16 Me. 41; Derg v. Abbott, 83 Pa. St. 158; Faulkner v. Faulkner, 73 Mo. 336.

37 Central Bank v. Allen, 16 Me. 41; Roberts v. Mason, 1 Ala. 373; Sanderson v. Oakey, 14 La. 373.

38 Daniel on Negotiable Instruments, § 1122; 1 Parsons on Notes and Bills, 493.

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dents of a general nature prevent. The sudden illness or death of his agent is on the same footing with that of the holder himself.[43] If the excuse be illness, it must be of such a character as to prevent due presentment and notice by the exercise of due diligence.[44]

§ **396. Special circumstances arising from the conduct of the party; when party has received funds with which to pay instrument.**— The receiving by the drawer or indorser of money from the acceptor, maker, or other party for whose benefit the bill or note was made, for the avowed purpose of taking up the bill or note at its maturity, dispenses as to such drawer or indorser with the necessity of a presentment to the acceptor or maker, for the obvious reason that the indorser becomes himself the person who should meet it. And so, receiving any other property, with the agreement that he shall apply its proceeds to paying the bill or note at its maturity, has the same effect.[45] The indorser in such cases has no remedy over against any one. His arrangement with his principal substitutes him in that principal's place; and it would be a fraud for him to throw back upon him the burden which he had assumed when provided with the means to bear it.[46]

In harmony with the principle just stated, it is well settled that the receiving of security or indemnity by the indorser from the maker or other party for whose benefit the bill or note was executed will bind the indorser without demand and notice. But in order to thus hold the indorser, the security received must be full, or comprise all the maker's estate.[47]

§ **397. When maker or acceptor has absconded or removed his domicile.**— When the maker or acceptor of the instrument has actually absconded, and especially when he is notoriously

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[43] Duggan v. King, Rice, 239; *Pothier de Change*, note 144; Chitty on Bills (13th Am. ed.), 509, note *a;* Story on Bills, § 309.

[44] Turner v. Leach, Hilary Term, 1818; Chitty on Bills [*452], 509; 1 Parsons on Notes and Bills, 532.

[45] Ray v. Smith, 17 Wall. 418; Wright v. Andrews, 70 Me. 86; Bond v. Farnham, 5 Mass. 170.

[46] Daniel on Negotiable Instruments, § 1128.

[47] Daniel on Negotiable Instruments, §§ 1129, 1130.

insolvent, inquiries are unnecessary. Presentment to him personally is of course impossible, and presentment at his last place of residence or business is altogether unnecessary. The mere fact of absconding is all that it is necessary for the holder to show. This doctrine is well settled in England, and by the current of American authorities.[48] Even when he had absconded to another place in the same State or country, the excuse for nonpresentment would be sufficient, unless the holder knew where he was, in which case he should seek him.[49] But the absconding of the maker or acceptor furnishes no sufficient excuse for want of notice to the drawer or indorser.[50] When the drawer or indorser has himself absconded, notice should be left at his last place of abode or with the person representing his estate.[51] If between the time a note is made or a bill accepted and its maturity the maker or acceptor removes from the place at which he resided and transacted business to another State or country, no obligation is imposed upon the holder to go out of his own State in order to make a demand upon him personally, or at his new place of residence or business. It will be sufficient under such circumstances to make a demand at the payor's last place of residence or business, and when that has been done due diligence requires no more.[52] But when the removal is to another locality within the same State or country, it is the duty of the holder to seek and demand payment of the promisor at his new place of residence or business.[53]

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48 Bayley on Bills, 196; Chitty on Bills [*367], 412; Lehman v. Jones, 1 Watts & S. 126; Bruce v. Lytle, 13 Barb. 163; Gillespie v. Hannahan, 4 McCord, 503.

49 Reid v. Morrison, 2 Watts & S. 401; Duncan v. McCullough, 4 Serg. & R. 480.

50 May v. Coffin, 4 Mass. 341.

51 *Ex parte* Rohde, Mont. & M. 430; 1 Parsons on Notes and Bills, 528.

52 McGruder v. Bank of Washington, 9 Wheat. 598; Adams v. Leland, 30 N. Y. 309; Central Bank v. Allen, 16 Me. 41.

53 Anderson v. Drake, 14 Johns. 114; Louisiana Ins. Co. v. Shamburgh, 7 Mart. (N. S.) 260.

BOOK V.

ACTIONS AND DEFENSES.

CHAPTER XIV.

ACTIONS.

SECTION I.

WHO MAY SUE.

§ 398. Holder with legal title may sue.— Any holder of a bill or note who can trace a clear legal title to it, is entitled to sue upon it in his own name, whether he possesses the beneficial interest in its contents or not.[1] If the note be payable to A. or B., it may be sued upon by them jointly or by either one of them.[2] If there be a special indorsement, or assignment to a particular person, he is the proper person to sue; and if he is in possession he may sue although his name be indorsed on the paper, after the special indorsement or assignment. For in such case his indorsement will be presumed to be a mere memorandum, or evidence that he had negotiated the paper and then taken it up.[3]

Agents, receivers, assignees, trustees, or personal representatives, may sue on a note or bill payable to bearer, or indorsed in blank.[4] And the donee *causa mortis* of a note payable to the donor's order may use the name of his personal representative, even against his protest.[5] But a mere

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1 Caldwell v. Lawrence, 84 Ill. 161; Harpending v. Daniel, 80 Ky. 456.

2 Westgate v. Healy, 4 R. I. 524.

3 Humphreyville v. Culver, 73 Ill. 485.

4 Law v. Parnell, 7 C. B. (N. S.) 282; Bowman v. Wood, 15 Mass. 534; Haxtun v. Bishop, 3 Wend. 13; Daniel on Negotiable Instruments, § 264; 2 Parsons on Notes and Bills. 446.

5 Grover v. Grover, 24 Pick. 261; Sessions v. Mosely, 4 Cush. 87.

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indorse it, the indorsee may sue.[16] But if a note indorsed by two of three payees to a third payee and a stranger be subsequently indorsed by the third payee, the indorsee may sue in his own name.[17]

Joint parties not partners must all unite in the action, if living. On the death of one of them, the remedies for collection survive to those living, who may lawfully receive payment, and sue at law or in equity, as may be appropriate, without uniting the personal representative of the deceased joint party.[18] It has been held that one of two joint owners cannot maintain an action thereon in his own name, though the note be payable to bearer and be in his possession.[19]

§ **400. Married women.**— On a bill or note given to a single woman, who afterward marries, the husband must join her in the action.[20] If she dies, the right of action is in her personal representative, not in the husband.[21] If the husband dies, the right of action is in her, and not in the husband's personal representative.[22] So the right of action survives to the wife, upon a note payable to husband and wife, when the husband dies, and does not pass to his representative.[23]

On a bill or note made payable to a married woman after marriage the husband may sue alone as payable to him, or he may join in an action with his wife.[24] If payable to the husband, or to his wife, in the alternative, he should sue.[25]

The wife cannot sue her husband on a note made by him to her after marriage; nor on a joint and several note made

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[16] Thayer v. Buffum, 11 Metc. (Mass.) 398; Davis v. Briggs, 39 Me. 304.

[17] Goddard v. Lyman, 14 Pick. 268.

[18] Lannay v. Wilson, 30 Md. 536; Allen v. Tate, 58 Miss. 586.

[19] McNamee v. Carpenter, 56 Iowa, 276.

[20] Sherrington v. Yates, 12 M. & W. 855.

[21] Hart v. Stevens, 6 Q. B. 637.

[22] Stanwood v. Stanwood, 17 Mass. 57; Dean v. Richmond, 5 Pick. 461.

[23] May v. Boisseau, 12 Leigh, 512; Draper v. Jackson, 16 Mass. 480.

[24] Burroughs v. Moss, 10 B. & C. 558; Philliskirk v. Pluckwell, 2 Maule & S. 393.

[25] Young v. Ward, 21 Ill. 223.

to her by him and others;[26] but in this case if he dies she may sue the others.[27]

It should be observed, however, that the rights of married women, not only with reference to the acquisition of property and her contractual powers, but with reference to her right to sue, have been materially altered by remedial legislation in the different States.

§ **401. Cause of action indivisible.**— It is a general principle of law that a party cannot divide an entire demand or cause of action, and maintain several suits for its recovery; and a recovery for part of an entire demand will bar an action for the remainder, if due at the time that the first action was brought. What constitutes an entire or single demand is often difficult to determine. When a note payable at a future day carries interest payable annually or semi-annually, the holder may, before its maturity, recover the interest as it matures without barring an action as to the principal or unaccrued interest.[28] If the interest be due by a coupon or other separate security, it can be sued for as an independent cause of action.[29] Whether when the principle of a note, and its interest (not payable by separate security), are both mature, separate actions may be maintained, for each is controverted, some cases holding that they are maintainable;[30] others, the opposite.[31] The better opinion sustains the right to the separate actions.

§ **402. Agents.**— Upon the theory that the party entitled to sue is the one in whom the instrument shows the legal title to exist, it has been held that, when the bill or note is payable to a certain person by name, but describing him as agent of another person also named — as, for instance, "A. B., agent for C. D." — the suit must be brought in the

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[26] Sweat v. Hall, 8 Vt. 187; Richards v. Richards, 2 B. & Ad. 447.

[27] Richards v. Richards, 2 B. & Ad. 447.

[28] Walker v. Kimble, 22 Ill. 537; Goodman v. Goodman, 65 Ill. 497.

[29] Daniel on Negotiable Instruments, § 1509 *et seq.*

[30] Andover Sav. Bank v. Adams, 1 Allen, 28; Sparhawk v. Willis, 6 Gray, 163.

[31] Howe v. Bradley, 19 Me. 31; Parsons on Contracts, Vol. II. p. 636.

name of the agent, and cannot be brought in the name of the principal;[32] and that *a fortiori* must the suit be so brought when the instrument is simply payable to "A. B., agent," no principal being named.[33] But in either case, the better doctrine, as it seems to us, is that either the agent or the principal might sue. If suit were brought by the agent, the possession conforming to the express indication of the paper would clearly sustain the action. If suit were brought by the principal whose name is expressed in the instrument, possession by him would be evidence that he had received from his agent the instrument of which he was entitled to the beneficial interest; and there could be no good reason why it should be necessary for the principal to continue to use his agent's name, when it is clear from the face of the paper that if so used it would be as the representative of his own.[34] And where the principal is undisclosed on the face of the paper, he might also sue in his own name; but in such case mere possession of the paper would not be sufficient evidence that he was the principal intended, and it would be necessary for him to supply that element in his title to recover by parol proof.[35] In the case of instruments payable to bank cashiers it might be different. Delivery of a note to an agent without indorsement would not authorize him to sue.[36] The same principles apply to agents of corporations, public and private.

§ 403. When payable to bearer.— The law is now too well settled to admit of longer controversy that an action on a bill or note payable to bearer, or indorsed in blank, may be maintained in the name of the nominal holder who is not the owner by the owner's consent; and that possession by such nominal holder is *prima facie* sufficient evidence of his right to sue, and cannot be rebutted by proof that he has no beneficial interest, or by anything else but proof of

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32 Cocke v. Dickens, 4 Yerg. 29; Shepherd v. Evans, 9 Ind. 260.

33 Alston v. Hartman, 2 Ala. 699; Horah v. Long, 4 Dev. & Bat. 274.

34 Fairchild v. Adams, 16 Pick. 383; Johnson v. Catlin, 27 Vt. 87.

35 Rutland, etc., R. Co. v. Cole, 24 Vt. 38.

36 Nichols v. Gross, 26 Ohio St. 425.

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person, it may be sued on as payable to bearer.[46] The holder of such a paper, in transferring it, should not use the fictitious name, but pass it by delivery only, or by indorsement,[47] and even after the trial, where judgment has gone for the plaintiff under the impression that the indorsement had been filled up, the correction being made *nunc pro tunc*.[48]

But the filling up of the blank indorsement is formal merely, and it is not necessary that it should be filled up at all, for the mere act of suing upon it by the holder evidences his intention to treat the indorser as a transferrer and indorser to himself.[49] And if the plaintiff omit to state in his declaration all the indorsements after the first indorsement in blank, he may strike out the intervening indorsements, and aver that the first blank indorser indorsed immediately to himself.[50]

§ 405. When indorsement is in full.— If the bill or note be not payable to bearer or indorsed in blank, or indorsed specially to himself, the holder cannot (unless authorized by statute) sue in his own name, for although he may possess the entire beneficial interest, the legal title is still outstanding in his transferrer, and he must use his name in order to maintain the suit.[51] By leaving the instrument unindorsed, the transferrer necessitates and authorizes the use of his name to the recovery of the amount; and he cannot object to its use, or release the action when instituted.[52] If the transferrer indorses the paper, then his name cannot be used save by his own consent; for then the legal title and right to sue is vested in his indorsee.[53]

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[46] 2 Parsons on Notes and Bills, 448.

[47] Maniort v. Roberts, 4 E. D. Smith, 83.

[48] Whittier v. Hayden, 9 Allen, 408.

[49] Rees v. Conococheague Bank, 5 Rand. 329; Poorman v. Mills, 35 Cal. 118.

[50] Rand v. Dovey, 83 Pa. St. 281; Merz v. Kaiser, 20 La. Ann. 379; Byles on Bills [*149], 268.

[51] Allen v. Newbury, 8 Iowa, 65; Robinson v. Wilkinson, 38 Mich. 301; Marsh v. Hayford, 80 Me. 97.

[52] Paese v. Hirst, 10 B. & C. 123; Amherst Academy v. Cowles, 6 Pick. 427; Royce v. Nye, 52 Vt. 372.

[53] Bowie v. Duval, 1 Gill & J. 175; Mosher v. Allen, 16 Mass. 451.

But if suit is commenced without his consent, he may subsequently assent to it.[54]

§ 406. Possession prima facie evidence of ownership.— Possession is in itself *prima facie* evidence of the right of the party to sue and receive the money when he holds under a legal title, and also that the title, although not expressly, is actually vested in him. And therefore in order to defeat his suit, it must be shown that he is a *mala fide* holder.[55] As said in a Maryland case by Chambers, J.: "A bill payable to bearer, or a bill payable to order and indorsed in blank, will pass by delivery, and bare possession is *prima facie* evidence of title; and for that reason possession of such a bill would entitle the holder to sue."[56] And possession of the note or bill is *prima facie* evidence that the same was indorsed by the person by whom it purports to be indorsed;[57] and production at the trial is *prima facie* evidence that it remains unpaid. But possession of the instrument is not always necessary in order to institute a suit. If the holder has indorsed a note in blank and pledged it as collateral security, he may negotiate it to a third person, while still pledged, and such person may sue as indorsee while it is still in pledge, and maintain an action by discharging the lien and producing the note at the trial.[58]

SECTION II.

WHO MAY BE SUED.

§ 407. General principles.— As a general rule, the holder may sue all the prior parties on the bill or note, but not any subsequent party. Thus a payee may sue the acceptor or maker. An indorsee may sue the acceptor or maker, and all prior indorsers. At common law the holder might commence and prosecute several actions against each of the

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[54] Golder v. Foss, 43 Me. 364.

[55] Wheeler v. Johnson, 97 Mass. 39; Wilson Sewing Machine Co. v. Spears, 50 Mich. 534; Union Nat. Bank v. Barber, 56 Iowa, 562.

[56] Whiteford v. Burckmyer, 1 Gill, 127.

[57] Bank v. Malian, 37 Minn. 404.

[58] Fisher v. Bradford, 7 Greenl. 28.

prior parties at the same time; and an action instituted against one would not preclude any other remedy against the others.[59] But satisfaction by any one would discharge all to the plaintiff from liability as to principal sum.[60] Where a party was liable in the two characters of joint drawer and of acceptor, he might be sued jointly with the other drawers and separately as acceptor.[61]

But by statute in many of the States an action may be maintained and judgment given jointly against all the parties to a negotiable instrument, whether drawers, indorsers, or acceptors, or against any one, or any intermediate number of them.

§ 408. **When indorser can sue acceptor or maker.**— The indorser of a bill or note cannot sue the acceptor or maker until he has paid or satisfied it. But as soon as he does this he may sue the acceptor or maker.[62] And if one indorser sues a prior party, it is not necessary for him to show that he had received notice, provided it was duly received by such prior party.[63] Where there are a number of indorsers, any one may sue, by arrangement between them, all indorsements subsequent to his being stricken out.[64]

§ 409. **When drawer can sue acceptor and vice versa.**— "The drawer," says Mr. Chitty, "may maintain an action on the bill against the acceptor, in case of a refusal to pay a bill already accepted, but not on a refusal to accept, in which latter case the action must be special on the contract to accept."[65] Certainly the drawer may sue the acceptor if he has had to pay the bill, or may leave it in the hands of the indorsee to sue for his benefit;[66] but it has been held

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[59] Chitty on Bills [*538, 539], 610, 611; Williams v. Jones, 79 Ala. 119.

[60] *Ex parte* Wildman, 2 Ves. Sr. 115; Farwell v. Hilliard, 3 N. H. 318.

[61] Wise v. Prowse, 9 Price, 393.

[62] Hoyt v. Wilkinson, 10 Pick. 31; McDonald v. Magruder, 3 Pet. 470.

[63] Ellsworth v. Brewer, 11 Pick. 316.

[64] Walwyn v. St. Quintin, 1 Bos. & P. 652.

[65] Chitty on Bills [*537], 608.

[66] Louviere v. Laubray, 10 Mod. 36; Thurman v. Van Brunt, 19 Barb. 410; Williams v. James, 15 Ad. & El. (N. S.) 69.

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ciple, that as soon as payment is refused, the action may be commenced. The view announced in the text is clearly stated by the Supreme Court of Massachusetts (Chief Justice Shaw delivering the opinion): "The rule in regard to notes like the one in question is, that the note is payable at any time, on actual demand, on the last day of grace; and if such actual presentment and demand is so made, and payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no presentment or demand is made by the holder upon the maker, the latter is not in default until the end of the business day." [73]

§ 411. Due-bills.— A due-bill, which is regarded in many States as a promissory note, is payable immediately, and upon principle there is no doubt, we think, that in such States action may be brought immediately on the very day of its date. The due-bill is predicated upon, and evideuces the fact that the debt is then due — not to be due on that day (which in ordinary contracts means the same as within that day), nor to be due in business hours of that day if demanded, as is the case with respect to negotiable paper which has a period of time to mature. It is true that the due-bill could not be sued upon during that fractional part of the day preceding its making; but it does not follow that during the remainder of the day it is not mature for suit. For its very language and nature purport that it is instantly due; and as a breach of contract occurs by failure to pay it instantly, the creditor may sue instantly, indulgence for any time being mere matter of his discretion and pleasure. This view is sustained by well-considered authorities,[74] though not without dissent.

§ 412. Action lies against indorser as soon as notice is put in train of transmission.— In respect to the indorser, it has been held in a number of cases that suit against him cannot be commenced until time has elapsed for notice to be

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73 Pierce v. Gate, 12 Cush. 190.

74 Cammer v. Harrison, 2 McCord, 246; Dews v. Eastham, 2 Yerg. 403; Hill v. Henry, 17 Ohio, 9; Daniel on Negotiable Instruments, § 1211.

actually received by him, upon the theory that the holder's title is not complete until the indorser is actually notified that he is looked to for payment, or at least that time for him to receive such notice has transpired.[75] But this is a misconception, as we think, of the law of notice. The holder must exercise due diligence to give the indorser notice. That duty is fulfilled when he puts it in train to reach him, by sending it to his business or dwelling-house, or depositing it in the post-office, as the case may be. And for him to be delayed until time for its actual reception had gone by would subject him to the hazards, vexations, and uncertainties of various circumstances which do not legitimately enter into the consideration of the indorser's liability.[76]

But in suits commenced on the last day of grace against an indorser, the plaintiff must prove that before the writ was sued out notice was deposited in the post-office, when he lives in a different place, or sent to his residence or place of business when he lives in the same.[77] If the notice precedes the suit ever so short a time, it suffices;[78] but if it does not, it seems the irregularity cannot be cured by the sending and reception of notice afterward.[79]

§ **413.** Action **upon dishonor for** nonacceptance.— When a bill is dishonored for nonacceptance, right of action accrues at once against the drawer, and also against the indorsers as soon as the protest is made and notice put in train to reach the party, without waiting for the maturity of the bill.[80] And if a note be payable in respect to principal or interest, in instalments, action will lie for each instalment as it falls due.[81]

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[75] Smith v. Bank of Washington, 5 Serg. & R. 318; Wiggle v. Thomason, 11 Smedes & M. 452; McFarland v. Pico, 8 Cal. 626.

[76] Shedd v. Brett, 1 Pick. 401; Dennie v. Walker, 7 N. H. 201.

[77] Manchester Bank v. Fellows, 8 Post. 302.

[78] N. E. Bank v. Lewis, 2 Pick. 125.

[79] N. E. Bank v. Lewis, 2 Pick. 113; Stanton v. Blossom, 14 Mass. 116.

[80] Robinson v. Ames, 20 Johns. 146; Lenox v. Cook, 8 Mass. 460; Ballingalls v. Gloster, 3 East, 481.

[81] Tucker v. Randall, 2 Mass. 283; Cooley v. Rose, 3 Mass. 221.

SECTION IV.

WHEN RIGHT OF ACTION EXPIRES.

§ 414. Origin of Statute of Limitations.— At common law, when once a right of action accrued, it was immortal. But the disadvantages of permitting remedies to be sought at remote periods from the time the transactions occurred, and the desirability of having settlements while evidence was readily obtainable, led at an early date to the adoption of statutes fixing a limitation to actions. As early as 1270 an act was passed relating to limitation of actions concerning real estate; but personal property, and especially choses in action, were at that time of so little consequence that no limitation of personal actions was prescribed until 1623. In this modern period, choses in action constitute a vast portion of the property of the country; and the time at which the right to reduce them into possession expires is a matter of prime importance. It is to be observed, in the first place, that statutes of limitation do not destroy the debt, but only bar the remedy. Therefore they must be specially pleaded, and cannot be given in evidence under a general issue.[82] And as they do not enter into the essence of the contract, they must be regulated entirely by the laws of the country where suit is brought.[83]

§ 415. When Statute of Limitations begins to run.— The statute of limitations begins to run from the very day the right of action accrues. Thus upon a bill or note payable at so many days from the date, it begins to run from the day of payment, and not from the day of date, but the day of maturity is excluded in the computation of time. If payable at sight, the statute runs from sight. If so many days after sight, or after certain events, then from the time named after sight, or after the events have happened.[84] If the instrument be payable on demand, the

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[82] Chapple v. Durston, 1 C. & J. 1.

[83] Daniel on Negotiable Instruments, § 884.

[84] Byles on Bills [*331], 499.

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CHAPTER XV.

DEFENSES.

§ 416. Classification.— The defenses that may be interposed to an action upon a negotiable contract may be grouped or arranged into five classes: (1) That the defendant did not make the instrument; (2) that the contract sued upon is in law nonenforceable; (3) that the plaintiff is not entitled to sue thereon; (4) that the obligation created has been discharged; (5) that the action upon the instrument is barred by the statute of limitations.

§ 417. Classification elaborated.— Under the first head, to wit, the defendant did not make the instrument, will be discussed and disposed of: (*a*) Forgery; (*b*) material alterations. Under the second, to wit, that the contract sued upon is in law nonenforceable: (*a*) Incapacity of the party; (*b*) want, failure, or illegality of consideration; (*c*) that the paper was obtained by fraud; (*d*) that it was obtained by duress. Under the third, to wit, that the plaintiff is not entitled to sue: That the legal title to the instrument is not vested in the plaintiff. Under the fourth, to wit, that the obligation created has been discharged: (*a*) By payment; (*b*) by bankruptcy, or assignment under insolvent laws; (*c*) by accord and satisfaction; (*d*) by release; (*e*) by covenant not to sue; (*f*) by substitution of another obligation; (*g*) by set-off; (*h*) under what circumstances a surety or guarantor is discharged when the principal is not. Under the fifth, that the action upon the instrument is barred by the statute of limitations.

It will be seen that many of the defenses enumerated in this classification have been elaborately treated and disposed of in other portions of this volume, and they are mentioned here for the sole purpose of enabling the student to properly appreciate the place they occupy in a treatise on the subject of defense.

SECTION I.

THE DEFENDANT DID NOT MAKE THE INSTRUMENT.

§ 418. Forgery.— Forgery is the counterfeit making or altering of any writing with the intent to defraud. The most usual species of forgery is fraudulently writing the name of an existing person; but where one is in possession of a paper containing a genuine signature, and fraudulently fills it up so as to make it appear to be signed as maker, or indorser, or other party to a bill or note, it is as much a forgery as if the signature itself had been forged.[1] So where one has authority to fill up a bill or note in blank, with a particular sum, and he fraudulently inserts a larger sum, it is as much a forgery as if he had acted without any authority at all.[2]

§ 419. Illustrations of forgery.— Passing a note signed by one person in his own name, as the note of another person of the same name, if done with intent to defraud, is a forgery;[3] and so appending to one's own name a false addition of description, as by residence or occupation, of another person of the same name; or indorsing a note by another person of the same name with the real payee, or special indorser.[4] So, one who, with intent fraudulently to utter a promissory note as the note of a person other than the signer, procures to it the signature of an innocent party, who does not thereby intend to bind himself, is guilty of forgery.[5] But where a person falsely represents himself to be the indorser of a bill, but writes nothing falsely himself, if there be a real person who did indorse the bill in his own proper name, the offense will not be forgery, but obtaining

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[1] Rex v. Hales, 17 St. Trials, 161; Powell v. Commonwealth, 11 Gratt. 822.

[2] Regina v. Wilson, 17 L. J. M. C. 82; Rex v. Hart, 7 Car. & P. 652.

[3] Rex v. Parke, 2 Leach Cr. L. 614.

[4] Rex v. Webb, Russ & R. C. C. 72; Rex v. Rogers, 8 Car. & P. 629; Mead v. Young, 4 T. R. 28.

[5] Commonwealth v. Foster, 114 Mass. 311.

goods or money upon false pretences.[6] And so as to any other genuine signature, though it be passed for another; yet if there be nothing upon the bill or note to apply it to that person, it is not a forgery.[7]

The signature of a fictitious name or firm, if made with intent to defraud, constitutes forgery. Thus uttering a forged order for the payment of money, signed "Rt. Venest," there being no such person in existence, is a forgery. So indorsing a bill in the fictitious name of "John Williams."[8]

§ 420. Alteration is forgery.—The alteration of a completed instrument, by a material change in its terms, with intent to defraud, is as plain a forgery as the making of it altogether; for it fraudulently assumes to bind the parties to a contract to which their consent is wanting.[9] Thus, where a clerk broke the seal of a letter, and altered a check which it contained to a larger amount, it was deemed a forgery;[10] and so any fraudulent material change in the terms of the paper, whether in amount, place of payment, or time of payment.[11] The making of the bill or note must be counterfeit and false in order to amount to a forgery, and if real, though fraudulently procured, it will be a fraud, but not a forgery. Thus, where a person writes a note for a certain sum, and procures another to sign it as maker, under the false representation that it is for a smaller sum, it is not a forgery.[12]

§ 421. Intent to defraud, and "uttering," essential.— An intent to defraud is essential to constitute forgery, and although a bill or note will not be binding upon those whom

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6 Hevey's Case, 1 Leach, 229; Chitty on Bills [*780].

7 Chitty on Bills [*782].

8 Commonwealth v. Chandler, Thatcher Crim. Cas. 187; Chitty on Bills [*782]; Lockett's Case, 1 Leach, 94; Taft's Case, 1 Leach, 172.

9 Wheelock v. Freeman, 13 Pick. 165.

10 Belknap v. National Bank, 100 Mass. 379.

11 Rex v. Post, Russ. & R. 101; Rex v. Treble, 2 Taunt. 328; Rex v. Atkinson, 7 Car. & P. 669.

12 Commonwealth v. Sankey, 22 Pa. St. 390; People v. Getchell, 6 Mich. 496.

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corrects it, and before the holder has changed his relation to the paper, or anyone has dealt with it upon the faith of his admission, forgery can be successfully pleaded.[17]

In the third place, it may be stated that where the party, knowing his signature to be a forgery, deliberately and understandingly adopts it as his own, he would be bound, because ratification thus made is equivalent to a previous authority, provided, however, that an innocent third party has been induced to act upon the faith of the adoption in such a way as to suffer loss by its repudiation. This is based upon the familiar principles of estoppel. But whether such deliberate adoption of a forgery, without the consequent loss to a third party, acting on the faith thereof, would be binding is a mooted question, both in England and America.[18]

§ 423. When one party is estopped to deny the genuineness of another's signature.— The relation of one party to a negotiable instrument is often such that he cannot deny the genuineness of another's signature, for, having treated it himself as genuine, it would be a fraud to permit him to assert the contrary. Having issued or transferred the instrument as genuine in all respects, he would not only be bound by his guaranty that it is genuine, but it would be unjust to and fraudulent upon others to permit him to deny it; and proof of his having so issued or used it would be sufficient to entitle the holder to recover against him.[19]

§ 424. The position of drawer, indorser, drawee, acceptor, and transferrer in this respect.— The position of the drawer of a bill before acceptance, in his relation to other parties, is ordinarily that of the maker of a note. If he issues the bill, as is generally the case, without any other name upon it but his own, he cannot be made responsible for the subsequent forgery of an indorsement or acceptance; and if

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[17] Daniel on Negotiable Instruments, § 1352; Woodruff v. Monroe, 33 Md. 158.

[18] Daniel on Negotiable Instruments, §§ 1352*a*, 1352*b*, and cases cited.

[19] Hortsman v. Henshaw, 11 How. 177; Meacher v. Fort, 3 Hill (S. C.) 227; Alleman v. Wheeler, 101 Ind. 144.

the name of the payee to whose order the bill is payable, or of a special indorsee, be forged, no recovery can be had against him.[20] But if the drawer puts the bill in circulation with the name of the payee indorsed upon it, he will be understood, by so doing, as affirming that the indorsement is in the handwriting of the payee, or written by his authority.[21] In respect to the drawee or acceptor of a bill, it is obvious that his relation to the instrument is very different from that of the parties who issued it. He should know his own correspondent's handwriting; and therefore the doctrine is laid down by numerous authorities that if he accepts the bill, or pays it, he cannot afterward, on discovering that the signature of the drawer was a forgery, revoke the acceptance, or recover back the amount paid under mistake from the holder to whom he paid it.[22]

In respect to the indorser of a negotiable instrument upon which the name of the drawer, maker, acceptor, or of a prior indorser is forged, he, by indorsing it, warrants that he has clear legal title thereto, and that the instrument is the genuine article it purports to be, and he is, therefore, bound by his indorsement to all parties subsequent to him, even though the paper has been discounted for a prior party.[23] He is like the drawer of a bill who issues it with such names upon it. But if all the names of parties antecedent to his own are genuine, he is then like the drawer of a bill who issues it without any names upon it; and if he pays it to anyone holding under a forged indorsement subsequent to his own, he may recover back the amount.[24] If the instrument be transferred by delivery simply, the act of transfer by delivery of a negotiable instrument falls under the general rule of law, that in every sale of personal

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[20] Daniel on Negotiable Instruments, §§ 735, 1356, 1361.

[21] Hortsman v. Henshaw, 11 How. 177; Meacher v. Fort, 3 Hill (S. C.), 227.

[22] Byles on Bills [*324], 491; 2 Parsons on Notes and Bills, 590, 591; Story on Bills, § 411.

[23] MacGregor v. Rhodes, 6 El. & Bl. 266; Story on Notes, § 380; Star Ins. Co. v. Bank, 60 N. H. 445; State Bank v. Fearing, 16 Pick. 533.

[24] Daniel on Negotiable Instruments, §§ 1225, 1355, 1357.

property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title or right to transfer it.[25] Therefore, if the signature of the indorser be forged, the bank discounting the bill or note offered for discount with such indorsement upon it may recover back the amount from the party from whom it received it.[26]

§ **425. Acceptance no admission of indorser's signature.**— But the drawee who accepts or pays a bill is never regarded as thereby admitting the genuineness of the signature of an indorser; for although it is true that every indorser is in respect to his liability the same as a new drawer to the bill, yet the acceptor cannot be presumed to have any such knowledge of this signature as he has of the drawer's, and therefore he is not presumed to admit it.[27] If the drawee or acceptor of a bill were to pay it, and it turned out that the indorsement of the payee or a special indorsee were forged, the result would be that he could not charge the amount in account against the drawer, and that the payment would be invalid; but as his act implies no admission of the genuineness of the indorser's signature, he could recover back the amount from the holder to whom he paid it.[28]

§ **426. When money paid on forged instrument can, and when it cannot, be recovered.**— It is a general principle of law that money paid under a mistake of fact may be recovered back.[29] And accordingly, where one pays money on forged paper by discounting or cashing it, he can always recover it back, provided he has not himself contributed materially to the mistake by his own fault or negligence,

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[25] Daniel on Negotiable Instruments, §§ 731, 1358; Smith v. McNair, 19 Kan. 330.

[26] Burgess v. Northern Bank of Kentucky, 4 Bush, 600; Cabot Bank v. Morton, 4 Gray, 157.

[27] White v. Continental Nat. Bank, 64 N. Y. 320; Story on Bills, §§ 262, 412; Edwards on Bills, 190, 290, 400.

[28] United States v. National Park Bank, 59 Hun, 495; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Smith v. Chester, 1 T. R. 654.

[29] Louisiana v. Wood, 102 U. S. 298; Moses v. McTerlar, 2 Burr, 1005; Carpenter v. Northboro Nat. Bank, 123 Mass. 69.

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made by any party to the contract, is an alteration thereof, unless all the other parties to the contract gave their express or implied consent to such change. And the effect of such alteration is to nullify and destroy the altered instrument as a legal obligation, whether made with fraudulent intent or not.[35] If the alteration be material, and made with a fraudulent intent, it is forgery; and if innocently made, and yet material, it vitiates the instrument, although it falls short of being forgery.[36]

§ 428. In what material alteration consists.— In order to constitute an alteration material, it must have the legal effect of changing the legal status or relationship of the parties to the instrument. This is true, without regard to the question whether it injures or benefits either the debtor or creditor. Hence, a material alteration may consist in changing its date, or the time or place of payment, or the amount of principal or interest to be paid, or the medium or currency in which payment is to be made, or the number or the relations of the parties, or the character and effect of the instrument as matter of obligation or evidence.[37] And the alteration may be effected by adding to the instrument some new provision, or by substituting one provision for another, or by obliterating or subtracting from it some provision incorporated in it. As has been indicated, it will be no answer to a plea of alteration that its operation is favorable to the parties affected by it, whether in lessening or increasing the amount to be paid, or in enlarging or abbreviating the time of payment, or otherwise. No man has a right to vary another's obligations at his discretion, whether for his good or ill. It ceases, when thus varied, to be that other's act, and it is sufficient for him to say: "*This* is not my contract."[38]

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[35] Mersman v. Werges, 112 U. S. 141; Angle v. Insurance Co., 92 U. S. 330; Heath v. Blake, 28 N. C. 406.

[36] Daniel on Negotiable Instruments, § 1373.

[37] Daniel on Negotiable Instruments, § 1375; Drexler v. Smith, 30 Fed. 757.

[38] Weir v. Walmsley, 110 Ind. 246; Warden v. Ryan, 37 Mo. App. 466; Wager v. Brooks, 37 Minn. 392.

Even a decrease of the amount destroys the identity, and confuses the traces of his obligation, and every reason of policy and principle forbid that the laws should tolerate tampering with the rights and engagements of others.

§ 429. Changing date of instrument and time of payment.—Any change in the date imparts a new legal effect and operation to it, and is a material alteration, which avoids it as against prior parties and sureties even in the hands of a *bona fide* holder without notice.[39] The time the instrument became a subsisting contract, and the time when the contract is to be performed in many cases, and a thousand circumstances may arise which may add consequence to the question when the instrument was issued. It matters not that the time of payment by relation to the date, may be prolonged, for suffice it to say it was not the time agreed on. Thus, in a case before the United States Supreme Court, where the maker of the note, drawn payable one year from date, changed "September 11" to "October 11" before delivery, without consent of his surety, it was held that the note was avoided as to him.[40]

The alteration may be in the year, or the month, or the day of the month, or in all three.[41]

Even where a note was altered in date to one day previous, and the effect as to its time of maturity remained unchanged, because of the circumstance that originally it would have fallen due, as its face imported, on Sunday, and therefore would have been legally due on Saturday, and by the change of date it fell due on Saturday, so that in point of fact Saturday in either case was its day of payment, it was held that it was avoided by the alteration.[42] And the decision seems clearly right. And accordingly, an insertion of a date in a blank left for that purpose in a note intrusted

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[39] Master v. Miller, 4 T. R. 320; Crawford v. West Side Bank, 100 N. Y. 56; Britton v. Dierker, 46 Mo. 592.

[40] Wood v. Steele, 6 Wall. 80.

[41] Thompson on Bills, 111; Jacob v. Hart, 2 Stark. 45; Outhwaite v. Luntley, 4 Campb. 179; Walton v. Hastings, 4 Campb. 223.

[42] Stevens v. Graham, 7 Serg. & R. 505.

to the maker by the indorser, has been held not an alteration, as an authority to fill the blank will be implied from the relations of the parties.[43]

A change in the time of payment is obviously of the same nature as a change in the date, identical in principle and effect; and whether such change delays, accelerates, or preserves in legal effect the time specified or implied for payment, it constitutes a material alteration.[44]

§ 430. Changing place of payment.— When the instrument has been drawn payable at a particular place, the obliteration of such place, so as to make it payable generally, constitutes a material alteration as against all the parties not consenting;[45] and likewise where no place is designated, it is a material alteration to insert one.[46] And *a fortiori* it is a material alteration to obliterate one place and insert another; as, for instance, to erase an acceptance payable at "Bloxham & Co.'s," and insert the name of "Esdaile & Co." in lieu.[47] Where the drawer of a bill, after acceptance and without acceptor's consent, wrote after the acceptance "payable at Mr. B.'s, Chiswell street," it was held a material alteration and the acceptor discharged;[48] though in England it was formerly held otherwise.[49] So, striking out "in London," and thus making the bill payable generally. So, adding to a note "payable at the Bank of Smyrna."[50] Even a *bona fide* holder cannot recover upon an acceptance so altered, nor upon a note so altered against parties prior to the one making the alteration.[51] Changing the place of

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[43] Mitchell v. Culver, 7 Cow. 336.

[44] Bathe v. Taylor, 15 East, 412; Miller v. Gilleland, 19 Pa. St. 119.

[45] McCurbin v. Turnbull, Thompson on Bills, 112.

[46] Nazro v. Fuller, 24 Wend. 374; Townsend v. Star Wagon Co., 10 Nebr. 615; Whitesides v. Northern Bank, 10 Bush, 501.

[47] Tidmarsh v. Grover, 1 Maule & S. 735; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392.

[48] Cowie v. Halsall, 4 B. & Ald. 197.

[49] Trapp v. Spearman, 3 Esp. 57.

[50] Burchfield v. Moore, 25 Eng. L. & Eq. 123; Sudler v. Collins, 2 Houst. 538; Bullard v. Insurance Co., 81 Ind. 239.

[51] Nazro v. Fuller, 24 Wend. 374; Sudler v. Collins, 2 Houst. 538.

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is of the same character as if it changed the principal.[56] If the rate of interest be left blank, authority is not implied to the holder to fill in an amount greater than the legal rate, and he would effect a material alteration in doing so.[57] But he may insert the legal rate.[58] Where the words "with lawful interest" were written on the corner of the note; where "with interest from date" were incorporated in it; and where "with interest" were written by the maker after it had been indorsed, but before delivery to the payee, it was alike held to be material, and to avoid the note as against nonconsenting parties;[59] where "with interest payable semi-annually" were inserted before delivery to payee, and where they were inserted afterward, the surety was discharged;[60] and where "with interest" was added, but without fraudulent intent, and "interest to be paid annually."[61] So adding, "eight per cent. interest;" or "bearing ten per cent. interest from maturity;" or "with half legal interest until maturity;" and so where "after maturity" was added to interest clause; and so where the like words in the interest clause were erased.[62] A change of percentage is of like effect. Thus, where "nine per cent." was added to the words of a note "on demand and interest;" and where twelve per cent. was changed to ten.[63]

§ 432. Change in medium of payment.— A change of the kind of currency, as by the addition of the words "in specie" to a bond after the sum; or the word "gold" after the term "dollars" in a note; or of the denomination, as "from

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[56] Harsh v. Klepper, 28 Ohio St. 200; Woodworth v. Anderson, 63 Iowa, 503; Davis v. Henry, 13 Nebr. 500.

[57] Hoopes v. Collingwood, 10 Colo. 107.

[58] First Nat. Bank v. Carson, 60 Mich. 437.

[59] Warrington v. Early, 2 El. & Bl. 763; Brown v. Jones, 3 Port. (Ala.) 420; Waterman v. Vose, 43 Me. 504.

[60] Neff v. Horner, 63 Pa. St. 327; Dewey v. Reed, 40 Barb. 16.

[61] Fay v. Smith, 1 Allen, 477; Boalt v. Brown, 13 Ohio N. S. 364.

[62] Hart v. Clouser, 30 Ind. 210; Lee v. Starbird, 55 Me. 491; Lamar v. Brown, 56 Ala. 157; Coburn v. Webb, 56 Ind. 96; Dietz v. Harder, 72 Ind. 208.

[63] Ivory v. Michael, 33 Miss. 398; Whitmer v. Frye, 10 Mo. 348.

pounds into dollars; from sterling pounds into current pounds," even though it could do no possible injury, would avoid the instrument,[64] and there might be cases in which positive or possible injury would result. And so the erasure of such words would equally amount to alteration.[65] In a recent case before the United States Supreme Court, the words in an order which made it payable "in drafts to the order of H. G. A." were erased with a pen, and "in current funds" inserted in their stead; and the paper was held avoided thereby.[66] So, if the instrument be payable in goods, on the same principle, if the style or character of the goods were changed, it would be vitiated. It was so held where a note was payable "in merchantable meat stock," and the word "young" was interpolated after merchantable;[67] so, adding "good hard" before "wood," or writing "good" before "merchantable wool."[68]

§ 433. Change as to parties.— Any alteration in the personality, number, or relations of the parties is, as a general rule, a material alteration. Thus, where C., member of the firm of C. & Co., obtained an accommodation indorsement to his individual note, and then added "& Co." to his signature, thus making it his firm's note, it was held a material alteration.[69] When there are several makers or cosureties, the addition of another maker or cosurety constitutes a material alteration; for the addition of another maker destroys the integrity of the original contract; and the addition of another cosurety changes the right of the sureties in respect to the proportion of contribution for which each is liable to the others.[70] And the erasure of the

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[64] Darwin v. Rippey, 63 N. C. 318; Bogarth v. Breedlove, 39 Tex. 561; Stevens v. Graham, 7 Serg. & R. 505.

[65] Church v. Howard, 16 Hun, 5.

[66] Angle v. N. W., etc., Ins. Co., 92 U. S. 330.

[67] Martendale v. Follett, 1 N. H. 95.

[68] Schwalm v. McIntyre, 17 Wis. 232.

[69] Haskell v. Champion, 30 Miss. 136.

[70] Hamilton v. Hooper, 46 Iowa, 516; Houck v. Graham, 106 Ind. 195; McVean v. Scott, 46 Barb. 379; Sullivan v. Rudisill, 63 Iowa, 158; Monson v. Drakeley, 40 Conn. 552.

name of one of two drawers or makers, or payees, who have indorsed the paper, or of one of several cosureties, or the name of the payee and inserting another, is likewise a material alteration.[71] So the substitution of one drawer or drawee, or maker or comaker for another, is of like effect.[72] Whether or not the addition of another name to that of the maker (when there is but one) is a material alteration, which discharges him, is a question upon which the authorities are divided. Applying sound principle to the controversy, it would seem that the alteration should be regarded as immaterial. The addition does not vary the original maker's liabilities in any respect. There could be no motive of fraud upon him or others to induce the addition. And while it would come within the letter of those declarations of courts that maintain anything which affects the integrity of the instrument to be a material alteration, it does not seem to come within their spirit.[73]

§ 434. Change affecting the character of the obligation.— A change in the character or effect of the instrument, whether in respect to its obligation or to its weight in evidence, is a material alteration. Thus, the addition of a seal to the signature of the maker of a note converts it into a bond, against which no plea of want of consideration can be made, and thus invests his contract with attributes which he declined to impart to it.[74] Consequently the note is avoided. So a bond is avoided by detaching the seal.[75]

So when a seal is added to the name of one of several comakers of a note, all are discharged, because the holder could not have the same recourse against the three which he held before; one would be estopped from denying a

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[71] Mason v. Bradley, 11 M. & W. 590; Cumberland Bank v. Hall, 1 Hals. 215; McCramer v. Thompson, 21 Iowa, 244; Robinson v. Berryman, 22 Mo. App. 510; Horn v. Bank, 32 Kan. 521.

[72] Davis v. Coleman, 7 Ired. 424; State v. Polk, 7 Blackf. 27.

[73] Daniel on Negotiable Instruments, §§ 1388, 1389, and cases cited.

[74] United States v. Linn, 1 How. 104; Marshall v. Gougler, 10 Serg. & R. 164.

[75] Piercy v. Piercy, 5 W. Va. 199.

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alteration when they were intended to have been inserted, and were accidently left out.[82] But where the effect of such addition is to impart negotiability to an instrument not designed to be negotiable, it is a most material alteration in the nature of the contract, and the bill or note is thereby avoided.[83] So the interlineation of "or bearer" in a negotiable note, payable to a certain person or order, is an alteration of it, because it materially changes the manner of its negotiability.[84]

§ 437. **Immaterial alterations.**— If the legal effect be not changed, the instrument is not altered, although some change may have been made in its appearance, either by the addition of words which the law would imply, or by striking out words of no legal significance.[85] Thus, writing out the name of the bank after the name of the signature "cashier," which was intended to bind the bank, is merely expressing more clearly the legal effect of the signature, and is not an alteration.[86] So the insertion of a dollar mark before the numerals expressing the amount in dollars; or insertion of the word "annually" after the interest clause in a note payable on or before a certain time; or changing the marginal figures so as to conform them to the written amount; or the addition in full of the christian names of the drawers whose surnames had been affixed before the acceptance; the interlineation of the surname of the payee, after delivery; the running of a pen through the words "Providence Steam-Pipe Co.," which was one name under which a firm did business, and writing over it their style in the copartners' names, were likewise adjudged immaterial.[87] So also where

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[82] Kershaw v. Cox, 3 Esp. 246; Byrom v. Thompson, 11 Ad. & El. 31.

[83] Bruce v. Westcott, 3 Barb. 274; Johnson v. Bank of the United States, 2 B. Mon. 310.

[84] Booth v. Powers, 56 N. H. 30; Union Nat. Bank v. Roberts, 45 Wis. 373.

[85] Tutt v. Thornton, 57 Tex. 35; Fuller v. Green, 64 Wis. 164.

[86] Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Folger v. Chase, 18 Pick. 63.

[87] Houghton v. Francis, 29 Ill. 244; Leonard v. Phillips, 39 Mich. 182; Smith v. Smith, 1 R. I. 398; Blair v. Bank of Tennessee, 11 Humphr. 84; Manchet v. Cason, 1 Brev. 307; Arnold v. Jones, 2 R. I. 345.

a bill was addressed to a firm by the style of "A. B. & Co.," and on being accepted by them in the name of "A. & B.," and the address was changed to conform to the acceptance, there being no question as to the identical firm intended, and the acceptors being liable either way.[88] It may be generally stated that no change in the phraseology of the instrument is material when it does not essentially change its legal effect.[89]

§ **438. Change authorized.**—It is quite obvious that where all the parties to a bill or note expressly agree to a change in any of its terms they cannot complain of such change as an alteration.[90] They have as much right to change as to make a contract. And where all do not consent, those consenting are bound, while the rest are discharged.[91]

Consent may be given before the change is made, or it may be given afterward by ratification.[92] It may be express, or it may be implied from custom, or from the acts of the parties.[93] Where one indorses for accommodation of the maker, a note in which the place of payment is left blank, authority to the maker to fill the blank will be presumed, that being indispensable to the negotiability of the instrument, and the use of it for the purpose intended.[94]

§ **439. Rights of bona fide holder of altered instrument.**—As a general rule, the material alteration of an instrument will vitiate it, even in the hands of a *bona fide* holder without notice. But when the drawer of the bill or the maker of the note has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion or erasure, without defacing it, or exciting the

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88 Farquhar v. Southey, Moody & M. 14.

89 Holland v. Hatch, 15 Ohio St. 464.

90 Wardlow v. List, 41 Ohio St. 414.

91 Grimstead v. Briggs, 4 Iowa, 559; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392.

92 National State Bank v. Rising, 4 Hun, 793; Cannon v. Grigsby, 116 Ill. 151.

93 Woodworth v. Bank of America, 19 Johns. 391; Clute v. Small, 17 Wend. 238.

94 Wessell v. Glenn, 108 Pa. St. 105.

suspicions of a careful man, he will be liable upon it to any *bona fide* holder without notice when the opportunity which he has afforded has been embraced, and the instrument filled up with a larger amount or different terms than those which it bore at the time he signed it.[95] The true principle applicable to such cases is that the party who puts his paper in circulation, invites the public to receive it of any one having it in possession with apparent title, and he is estopped to urge an actual defect in that which, through his act, ostensibly has none.[96] "It is the duty of the maker of the note to guard not only himself, but the public, against frauds and alterations by refusing to sign negotiable paper made on such a form as to admit of fraudulent practices upon them with ease, and without ready detection."[97] The inspection of the paper itself furnishes the only criterion by which a stranger to whom it is offered can test its character, and when the inspection reveals nothing to arouse the suspicions of a prudent man, he will not be permitted to suffer when there has been an actual alteration, to which the payor by his negligence contributed.[98]

If the alteration were made without any fault on the part of the maker, drawer, or acceptor, neither will then be bound, although the alteration were so skilfully made as to escape notice upon careful observation. Thus, where a banker's check had been dexterously altered by a chemical process, the original sum being expunged, and a larger inserted, the banker was not allowed to recover of the drawer more than the sum for which the draft actually called when he drew it.[99]

§ **440. Effect of material alteration fraudulently made.**— When a party to a bill or note fraudulently alters its legal

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[95] Garrard v. Haddan, 67 Pa. St. 82; Johnston Harvester Co. v. McLean, 57 Wis. 258; Lowden v. National Bank, 38 Kan. 533.

[96] Van Duzer v. Howe, 21 N. Y. 538.

[97] Zimmerman v. Rote, 75 Pa. St. 188; Brown v. Reed, 79 Pa. St. 370.

[98] Daniel on Negotiable Instruments, § 1405; Blakey v. Johnson, 13 Bush, 204.

[99] Hall v. Fuller, 5 B. & C. 750.

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avoided, and the original consideration forfeited, regardless of the intention with which the alteration was made.[8]

§ **442. Effect of immaterial change with fraudulent intent.**— It is said by some of the authorities, and by Greenleaf in his treatise on Evidence, that if the alteration be fraudulently made by the party claiming under the instrument, it does not seem important whether it be in a material or an immaterial part; for in either case, he has brought himself under the operation of the rule established for the prevention of fraud; and having fraudulently destroyed the identity of the instrument, he must take the peril of all the consequences.[9] There are cases that support the conclusion just announced, but it seems to be at variance with correct principle. If the change destroys the identity of the instrument, it is material; but it has been well said, "an immaterial alteration may be treated as no alteration;" and accordingly held that if the act itself is immaterial and can work no injury, it is irrelevant to inquire into the motives with which it was committed. Intent not manifested in a material respect is nugatory, and this we conceive to be the true doctrine.[10]

§ **443. Burden of proof of alteration.**— The question as to the burden of proof in respect to alterations is generally affected by all the surrounding circumstances; and one fact or another shifts it to and fro, the jury being left to weigh the testimony and determine the issue with all the lights that can be thrown upon it.[11] Very slight circumstances may operate to shift the burden of proof, and it has been well said by Horton, C. J., in Kansas, that "it is impossible to fix a cast-iron rule to control in all cases."[12] The au-

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[8] Bigelow v. Stephens, 35 Vt. 525; Martendale v. Follett, 1 N. H. 99; Savings Bank v. Shaffer, 9 Nebr. 1.

[9] Greenleaf on Evidence, vol. I, p. 568.

[10] Daniel on Negotiable Instruments, § 1416; Moge v. Herndon, 30 Miss. 120.

[11] Admrs. of Beaman v. Russell, 20 Vt. 210; Bailey v. Taylor, 11 Conn. 531; Kountz v. Kennedy, 63 Pa. St. 190.

[12] Neil v. Case, 25 Kan. 510.

thorities are every way upon the proposition, and from the resulting confusion the most that can be generally said is that each case must rest largely upon its own peculiar surroundings. Chief Justice Horton, in the Kansas case referred to, stated the conflict of the cases on this subject as follows: "This is a vexed question, and the books are full of diverse decisions. Four different rules are generally stated. (1) That an alteration on the face of the writing raises no presumption either way, but the question is for the jury. (2) That it raises a presumption against the writing, and requires, therefore, some explanation to render it admissible. (3) That it raises such a presumption when it is suspicious, otherwise not. (4) That it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance. * * * Generally the instrument should be given in evidence, and in a jury case should go to the jury upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before, or at the time of, the execution of the instrument. Perhaps there might be cases when the alteration is attended with manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation."

SECTION II.

THE CONTRACT SUED UPON IS IN LAW NONENFORCEABLE.

§ 444. Incapacity of the party.—This subject has been heretofore fully and extensively treated in Book II, under the head of "Parties to the Instrument,"[13] and repetition is unnecessary. If the party sued labor under a legal disability, whether the disability exists for the sake and pro-

[13] *Ante*, §§ 116–167.

tection of the incapacitated party, or grows out of a settled public policy, the obligation is a nonenforceable one. This defense is available not only as between immediate parties, but also as against a *bona fide* holder for value.

§ **445. Want, failure, or illegality of consideration.**— While consideration is presumed in all cases of negotiable contracts, and the plaintiff can rely upon this presumption, and thus cast the burden of showing its absence upon the defendant, the presumption is rebuttable, and when the want or failure of a sufficient consideration is attacked and substantial evidence is offered to sustain this defense, the burden shifts, and it rests with the plaintiff upon the whole case to show by a preponderance of the evidence a consideration sufficient to support the instrument sued on. The defense of absence or failure of consideration is good only between immediate parties.

The consideration is presumed to be legal, and, so far as presumptions and burden of proof are concerned, is governed by the same principles that apply to want or failure of consideration; but if in consequence of the illegality of consideration, the instrument is by law declared void, this defense avails not only as between the immediate parties, but also against the *bona fide* holder for value.

These general observations are sufficient in this place and connection — the entire subject having been heretofore treated in a separate chapter.[14]

§ **446. Fraud.**— Bishop, in his work on Contracts, defines fraud to be: "Any spoken or acted falsehood, whereby one is induced to enter into what in form is a contract, under the belief that it is a different thing from what it is, or that there is for it a motive which does not in truth exist."[15] In the sharp phrase of Lord Chief Baron Pollock, in a leading English case,[16] "Fraud cuts down everything." There seems to be no assignable limit beyond which fraud

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[14] *Ante*, §§ 90–115.

[15] Bishop on Contracts, § 643.

[16] Rogers v. Hadley, 32 L. J. Exch. (N. S.) 248.

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original owner. But the transfer of a negotiable contract carries with it the legal title thereto, and the owner thereof must bring action in his own name. It follows that if the plaintiff is not the legal owner of the instrument, he cannot maintain suit thereon in his own name. Any defense which attacks the method and manner of transferring the legal title to a negotiable instrument, or that would invalidate the transfer, or any denial of the existence of a transfer to the plaintiff, either by delivery, or by indorsement and delivery, as the case may be, would, if made out, constitute a legal bar to an action brought thereon. What has been heretofore said on the subject of transfer by indorsement and delivery, and of the steps that may be necessary in detail to effectuate a change of legal ownership from one person to another, need not be repeated here. As to when one can maintain suit in his own name, and when he must sue in the name of another, was fully discussed in the chapter on the subject of actions. It is generally sufficient here to say that if the plaintiff is not the owner or the agent or trustee of the owner, a defense successfully setting up the fact will defeat recovery.

SECTION IV.

THE OBLIGATION CREATED HAS BEEN DISCHARGED.

§ 449. Payment, nature of.— By payment is meant the discharge of a contract to pay money by giving to the party entitled to receive it, the amount agreed to be paid by one of the parties who entered into the agreement. Payment is not a contract. It is the discharge of a contract in which the party of the first part has a right to demand payment, and the party of the second part has a right to make payment. A sale is altogether different. It is a contract which does not extinguish a bill or note, but continues it in circulation as a valid security against all parties. And it is necessary to constitute a transaction a sale that both parties should then expressly or impliedly agree, the one

to sell, and the other to purchase the paper.[19] Whether the transaction is a purchase or payment, is a question for the jury where the facts are in dispute, to be resolved according to the intention of the parties, and looking to the substance of the matter rather than its form.[20]

Credit given by the drawee of a bill, or by a party to a bill or note, who is liable for its payment to the holder at his request, is equivalent to payment.[21] But if a bill accepted for the drawer's accommodation be sent to bank for collection, and be credited to the holder at maturity, it has been held that the bank, as its holder, may sue the acceptor.[22] "Payment of a debt is not necessarily a payment of money; but that is payment which the parties contract shall be accepted as payment," or which the law recognizes as such.[23] When a party to the instrument pays to the holder the amount due upon it, he cannot show that he was acting as the secret agent of another, and convert the payment thus made into a purchase.

§ 450. Who may make payment.— Any party to a bill or note may pay it, and an indorser who has been discharged by failure of notice may still sue a prior indorser or other parties who were not discharged, because, although not compelled to pay it, he acquires the right of the holder from whom he took the instrument, or is remitted to his own rights as indorsee.[24] But it seems that if the indorser has another note given him to secure and indemnify him for his indorsement, and, not being notified, waives the defense, and voluntarily pays the bill or note, he cannot enforce the note given him as indemnity.[25] And a stranger has no right to pay or discharge the contract of another, and cannot

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19 Lancey v. Clark, 64 N. Y. 209; Eastman v. Plumer, 32 N. H. 238.

20 Dougherty v. Deeney, 45 Iowa, 443; Rand v. Barrett, 66 Iowa, 735; Swope v. Leffingwell, 72 Mo. 348.

21 Savage v. Merle, 5 Pick. 83.

22 Pacific Bank v. Mitchell, 9 Metc. (Mass.) 297.

23 Huffmanns v. Walker, 26 Gratt. 315; Lionberger v. Kincaly, 13 Mo. App. 4.

24 Ellsworth v. Brewer, 11 Pick. 316.

25 Bachellor v. Priest, 12 Pick. 399.

pay a bill or note so as to acquire the rights of a holder, except *supra protest*, as hereinafter indicated.[26] But a stranger may always purchase a bill or note with the consent of the holder. Where the drawer, when discharged by the failure of the collecting agent of the holder to present in due time, nevertheless took up and paid his draft, but under protest, to protect his credit, he was held a mere volunteer with no right to recover against the collecting agent of the holder through whose default he was discharged from payment.[27]

§ 451. Payor should see that holder traces legal title.— The maker of a note or the acceptor of a bill must satisfy himself, when it is presented for payment, that the holder traces his title through genuine indorsements; for if there is a forged indorsement, it is a nullity, and no right passes by it. And payment to a holder under a forged indorsement would be invalid as against the true owner, who might require it to be paid again.[28] But the maker or acceptor might recover back the money as paid under a mistake of fact.[29] When, however, the signature of the drawer is forged, should the drawee accept or pay the bill, he becomes absolutely bound, because it is his duty to know the drawer's handwriting; and if he pays the money he cannot recover it back.[30] But acceptance does not admit the signature of the drawer as indorser also; nor the authority of an agent to indorse a bill drawn by him as agent of the drawer.[31] If an indorser pays a bill or note upon which there is a prior forged indorsement, he cannot recover back the amount, because his indorsement was in itself a warranty that the

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[26] Edwards on Bills, 535; Burton v. Slaughter, 26 Gratt. 919.

[27] Harvey v. Girard Nat. Bank, 119 Pa. St. 212.

[28] Smith v. Chester, 1 T. R. 654; Goddard v. Merchants' Bank, 2 Sandf. 247.

[29] Daniel on Negotiable Instruments, § 1369 *et seq.*

[30] Bank of the United States v. Bank of Georgia, 10 Wheat. 333; Johnson v. Bank, 27 W. Va. 343.

[31] Robinson v. Yarrow, 7 Taunt. 455; Story on Bills, § 412; Daniel on Negotiable Instruments, §§ 538, 539.

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and also that he has paid it to him.[39] The possession of the note by the maker is presumptive evidence that he has paid it;[40] and so, likewise, is the possession of the bill by the acceptor, provided it can be shown that it passed out of his hands after he accepted it, though otherwise it would seem not.[41]

In addition to the surrender of the instrument, the fact that it has been paid should be indorsed upon the paper itself. This at once advertises the fact of payment to every person who might subsequently come into possession of the instrument by accident or fraud. This precaution is especially wise and necessary if the instrument has been paid before maturity. When an indorser makes payment, it is especially desirable that he should take a receipt as well as require delivery of the instrument.[42] If there be a general receipt of payment on the back of the instrument, it will be presumed that it was made by the maker or acceptor, who was primarily liable; and this presumption would exist even when the drawer had possession and sued the acceptor upon a bill indorsed with such a receipt.[43]

§ **454. To whom payment may be made.**— Payment of a bill or note should be made to the legal owner or holder thereof, or some one authorized by him to receive it.[44] If it be payable to bearer or indorsed in blank, any person having it in possession may be presumed to be entitled to receive payment, unless the payor have notice to the contrary;[45] and a payment to such person will be valid, although he may be a thief, finder, or fraudulent holder.[46]

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[39] Otisfield v. Mayberry, 63 Me. 197.

[40] Dugan v. United States, 3 Wheat. 172; Norris v. Badger, 6 Cow. 449.

[41] Pfiel v. Vanbatenberg, 2 Camph. 439; Barring v. Clark, 19 Pick. 220.

[42] Story on Notes, § 452.

[43] Scholey v. Walsby, Peake Cas. 24; Jones v. Fort, 9 B. & C. 764.

[44] Stevenson v. Woodhull, 19 Fed. 575; Draper v. Rice, 56 Iowa, 114.

[45] Chappelear v. Martin, 45 Ohio St. 132; Brennan v. Merchants' Bank, 62 Mich. 343.

[46] Bank of the United States v. United States, 2 How. 711; Dugan v. United States, 3 Wheat. 172; Bank of Utica v. Smith, 18 Johns. 230.

It has been held that a payment to any person in actual possession will still be valid, because, although he may have no legal title, he may be the agent of the actual owner;[47] but this is unsound doctrine, and is not supported by the weight of authority.[48] But payment may be safely made to one who is a special indorsee, although there may be subsequent uncanceled indorsements of himself and others on the paper;[49] or to the assignee of a bankrupt;[50] or to the representative of a dead owner;[51] or to the guardian of an infant or insane person,[52] or to the husband whose wife is payee.[53] If the instrument be payable to A. for the use of B., payment must be made to A.[54] Payment to one of two joint payees will extinguish the debt,[55] and likewise if made to a member of a partnership, or a duly constituted officer of a corporation.[56]

§ 455. When payment may be made.—Payment can only be made before maturity by consent of both debtor and creditor.[57] And it can only be made with perfect safety at or after the maturity of the instrument, unless the payor receives it in his hands and cancels it; for a payment before maturity is not in the usual course of business; and should the bill or note afterwards, and before maturity, reach the hands of a *bona fide* holder for value without notice, such holder could enforce a second payment.[58] If,

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47 Bachellor v. Priest, 12 Pick. 406.

48 Daniel on Negotiable Instruments, § 1230; Porter v. Cushman, 19 Ill. 572; Doubleday v. Kress, 50 N. Y. 413.

49 Dugan v. United States, 3 Wheat. 172.

50 Bayley on Bills, 320; 2 Parsons on Notes and Bills, 211.

51 Bayley on Bills, 320; 2 Parsons on Notes and Bills, 211; Chitty on Bills [*393], 444.

52 Bayley on Bills, 320; 2 Parsons on Notes and Bills, 211; Chitty on Bills [*393], 444.

53 Chitty on Bills [*393, 394], 444.

54 Cramlington v. Evans, 2 Vent. 307.

55 Lyman v. Gedney, 111 Ill. 406.

56 Daniel on Negotiable Instruments, § 1231.

57 Ebersole v. Ridding, 22 Ind. 232.

58 Burbridge v. Manners, 2 Campb. 193; Wheeler v. Guild, 20 Pick. 545.

however, the instrument be paid at or after maturity to the holder, the case is different. The instrument is not only extinguished, but should the holder fail to deliver it up, and transfer it to another party, such party would receive it with notice upon its face that it was overdue, and he could acquire no better right or title than his transferer; and the plea that it was paid before the transfer would be available against him. Still, the payor, in making payment after maturity, must be sure that it is made to the then holder. For, if it should have been transferred after maturity, and before payment, to a third party, a payment to the transferrer would be invalid, and the transferee holding the instrument could himself enforce payment.[59]

§ **456. Time of day when payment may be made.**— Payment may be demanded at any time after the commencement of business hours on the day of maturity of the bill or note. And if payment be then refused, or if the house at which the instrument is payable be shut up, and no one is there to answer, it may be treated as dishonored, notice given, and resort taken upon the drawer and indorsers.[60] But the maker or acceptor has the whole day in which he is privileged to make payment, and though he should in the course of the day refuse payment, yet if he subsequently on the same day makes payment, it is good, and the notice of dishonor becomes of no avail.[61]

§ **457. In what medium payment may be made.**— The party bound to make payment has no right to do so in any other medium than that expressed on the face of the instrument — that is, he must make payment in money.[62] And an agent holding the instrument for payment can take

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[59] Davis v. Miller, 14 Gratt. 1; Adair v. Lenox, 15 Greg. 493; Coppman v. Bank of Kentucky, 41 Miss. 212.

[60] *Ex parte* Moline, 1 Rose, 303; Burbridge v. Manners, 1 Campb. 193; Hine v. Allely, 4 B. & Ad. 624.

[61] Hartley v. Case, 1 Car. & P. 555; Citizens' Bank v. Lay, 80 Va. 440.

[62] Story on Bills, § 419; Edwards on Bills, 550; Corbett v. Hughes, 75 Iowa, 282.

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make any counterclaim for the value of the coin in excess of the value of the medium of payment expressed in the contract.[67]

§ **459. Appropriation of payment.**— When a debtor is indebted to the same creditor in several items of account, and pays him a sum of money in part liquidation of his entire indebtedness, it often becomes a nice and important question, not only between debtor and creditor, but also as to third parties, to what item the credit shall be applied. With certain limitations and exceptions, the following general principles apply in such cases: (1) The debtor making payment may appropriate it to whatever item he pleases when the payment is not under compulsion of law.[68] (2) If the debtor do not make application of payment, the creditor may apply it as he pleases;[69] and the silence of the debtor is construed as leaving the matter to the payee, provided it is not an application peculiarly injurious to him, or against his implied intention.[70] This right in the creditor does not apply to debts not due if there are debts already due, nor to compulsory payments, nor to unlawful demands, as for usurious interest; nor to a debt denied or disputed by the debtor, to the exclusion of the one acknowledged.[71] (3) When neither party appropriates the payment, the law will apply it according to equitable principles, and with regard to the probable intention of the parties.[72] Hence, the law will apply payment to the debt more burdensome to the debtor, especially to one bearing interest, or subjecting him to a penalty or criminal charge, rather than to those which are less burdensome.[73] In accordance

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67 Bush v. Baldrey, 11 Allen, 367.

68 Tayloe v. Sandiford, 7 Wheat. 13; United States v. January, 7 Cranch, 572; Lingle v. Cook, 32 Gratt. 272.

69 Pattison v. Hull, 9 Cow. 747; Bennell v. Wilder, 67 Ill. 327.

70 Smith v. Screven, 1 McCord, 368; Blair v. Carpenter, 75 Mich. 167.

71 Bobe v. Stickney, 36 Ala. 482; Blackstone Bank v. Hill, 10 Pick. 129; Brown v. Lacy, 83 Ind. 436; Tayloe v. Sandiford, 7 Wheat. 13.

72 Chitty on Bills [*403, 404], 455, 456; Lingle v. Cook, 32 Gratt. 272.

73 Wright v. Laing, 3 B. & C. 165; Spiller v. Creditors, 16 La. Ann. 292; Stone v. Seymour, 15 Wend. 29.

with these principles, the law will impute the payment to interest before principal; and where the interest itself bears interest, it will impute it, first, to interest on interest; second, to interest on principal; and third, to the principal.[74] It will also impute payment to those debts which are prior in date;[75] and to unsecured in preference to secured debts, unless the latter are secured by a surety, in which case the appropriation will be made for his relief.[76]

§ 460. Payments by partners and joint debtors.— If a partner owes a debtor, of whom his firm is debtor also, and pays the money of the firm, it will be appropriated by law to the debt of the firm;[77] and if he pays such debtor his own money, it will be appropriated to his own debt.[78] And no appropriation will be allowed which has the effect of paying one man's debt with another man's money.[79] When a person owes the same debtor on joint and on individual account, and simply pays an amount, without appropriating it specifically, or it appearing whether it came from his individual or his joint funds, the creditor may apply it to either account.[80] "Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and new firms in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt."[81]

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74 Lash v. Edgerton, 13 Minn. 210; Starr v. Richmond, 30 Ill. 276; Monroe v. Fohl, 72 Cal. 568; Anketel v. Converse, 17 Ohio St. 11.

75 United States v. Kirkpatrick, 9 Wheat. 720; Mills v. Fowlkes, 5 Bing. N. C. 461; Bobe v. Stickney, 36 Ala. 482.

76 Lash v. Edgerton, 13 Minn. 210; Cole v. Withers, 33 Gratt. 204; Plain v. Roth, 107 Ill. 594; Marryatts v. White, 2 Stark. 101.

77 Thompson v. Brown, Moody & M. 40.

78 Fairchild v. Holly, 10 Conn. 175.

79 Thompson v. Brown, Moody & M. 40.

80 Van Rensselaer's Exrs. v. Roberts, 5 Den. 570; Baker v. Stackpole, 9 Cow. 420.

81 Simon v. Ingham, 2 B. & C. 72; Hooper v. Keay, 2 Q. B. Div. 178.

§ 461. Payment supra protest.— When the bill has been protested for nonpayment, and not before,[82] a stranger may pay it for the honor of the drawer, or acceptor (if it has been accepted), or of any indorser, or he may pay it for the honor of all the parties — for honor generally, as such a payment is termed. And such a payment does not, like a simple payment by the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying, unless the party paying limits and narrows them.[83] If the payment is made for the honor of a particular indorser, the party paying may sue such indorser, and all parties prior to him whom he could have resorted to, but not subsequent indorsers, for it stands like a payment made at the request of the indorser, for whose honor it is made, and the payor *supra protest* narrows and limits his right to recover against them only.[84] But if he pays for honor of the bill generally, it is the same as payment for the honor of the last indorsee, and he may recover against all parties to the bill.[85]

The privilege of payment *supra protest* is not extended by the law merchant to promissory notes, which are not designed for such general circulation as bills of exchange, and the party making such payment acts at his peril.[86]

§ 462. Payor supra protest is subrogated to rights of party for whose honor he pays.— As the party paying *supra protest* becomes substituted, as against parties anterior to the one for whose honor he pays, to the rights and remedies which such party for whose honor he pays would have had against them, had he himself paid, it follows that the right of one who pays for the honor of the drawer to sue the acceptor depends upon whether or not the acceptance was

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[82] Vandewall v. Tyrrell, 1 Moody & M. 87; Chitty on Bills [*508, 509], 575.

[83] Chitty on Bills [*509], 576.

[84] Mertens v. Withington, 1 Esp. 112; Chitty on Bills [*509], 577.

[85] Fairley v. Roch, Lutw. 891; Edwards on Bills, 441; Byles on Bills [*261], 408.

[86] Byles on Bills [*262]; Story on Notes, § 453.

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legal tender, *money* must have been offered, and the offer must have been absolute and unconditional.

§ **465. Bankruptcy and insolvency laws; power of Congress and of the States to enact.**— The Constitution of the United States gives Congress the power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States." Congress at different periods in the country's history has enacted bankrupt laws in accordance with the provision of the Federal Constitution just quoted, the acts referred to having been enacted in the years 1800, 1841, 1867, and 1898, respectively. At one time it was contended that the clause of the Federal Constitution giving Congress power to establish uniform laws on the subject of bankruptcy throughout the United States operated to exclude the right of the States to legislate on the same subject, and there are decisions which support that contention, but the Supreme Court of the United States has decided that there is no such exclusion, except where the power has actually been exercised by Congress; and subject to the modification just stated, the right of the States in this respect is now well established. In other words, so long as Congress does not exercise its constitutional power in this regard, the States have the right to enact bankrupt or insolvent laws for themselves, and if it should happen that an act on that subject is passed by Congress while State statutes exist, as long as the former continues in force on the statute books, the latter are suspended.

§ **466. Discharge by bankruptcy or insolvency laws.**— The right of a debtor to a discharge, when it exists at all, exists only by virtue of the statute enacting the law; and to determine whether, in any case, a debtor has such a right, reference must be had to the statute governing the matter. One of the principal objects of all bankruptcy laws is to discharge from liability debtors who are unable to pay their debts in full. In England, discretionary power is lodged with the courts to grant or refuse an absolute or a conditional discharge, while in the United States the courts are

generally compelled to discharge the debtor from all liability, once he is adjudged a bankrupt.

§ 467. Accord and satisfaction.— The giving by the maker or acceptor and the acceptance by the holder of some collateral thing in discharge of the instrument is an accord and satisfaction, and utterly extinguishes the obligation.[95] For whatever amounts to satisfaction of a bill or note by the acceptor or maker is satisfaction as to all parties who are collaterally liable. Satisfaction made by one partner of a firm, which are either makers or indorsers, discharges all the partners; and so where a person is partner in two firms, one of which are the makers, and the other indorsers of the note, satisfaction by him discharges both firms.[96] If an executory contract is the consideration of another executory contract, both may be mutually rescinded, the giving up one being the consideration for giving up the other.[97]

But a contract upon an executed consideration cannot be discharged either before or after the breach, save by a release, or by satisfaction for a valuable consideration.[98] If the holder of a bill or note renounces his claim and gives up the instrument, the drawer and indorsers are as much discharged as by payment, and he cannot sue the maker or acceptor upon it. And having voluntarily relinquished the evidence of the debt, it may be doubted if he could sue the maker or acceptor at all.[99]

§ 468. Part payment is ordinarily only payment pro tanto.— A part payment of a bill or note which has fallen due only extinguishes it *pro tanto*, and an agreement that it shall be in full discharge of the debt does not make such part payment any more effectual as to the residue, there being no sufficient consideration for the discharge of the whole.[1]

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95 Shade v. Creviston, 93 Ind. 592.

96 Atkins v. Owens, 4 Nev. & Man. 123.

97 King v. Gillet, 7 M. & W. 55.

98 Byles on Bills [*224, 225], 367, 368; 2 Parsons on Notes and Bills, 235.

99 Daniel on Negotiable Instruments, § 1288.

1 Fitch v. Sutton, 5 East, 230; Bender v. Been, 78 Iowa, 283; Carroway v. Odeneal, 56 Miss. 223.

But any agreement by way of compromise, or composition, into which any new element entered, would be sustained, and if the claim were disputed, agreement to receive part payment in full would discharge it.[2] After a smaller amount than the existing debt has been accepted in full satisfaction by way of compromise, there is no consideration for a note afterward executed for the amount released by the creditor.[3] But if the part payment were before maturity, or were made by a stranger, or was made by a bill or note with a surety, or collateral security, or were in any way more advantageous to the creditor, it would suffice to support any agreement based upon it.[4] The same rule would apply if a number of notes, some of which were due and some of which were not due, were delivered up for less than face value; and also if the old note were by agreement surrendered up for a new one, the contract then being executed.[5] Where suit had been brought on a note, and a compromise was effected, the holder agreeing to indorse on the note a credit of $50, if defendant would pay balance on a certain day, and under this agreement suit was dismissed, it was held, that on failure of defendant to pay the balance the payee might erase the credit given.[6]

§ 469. **Release.**— A release is technically an instrument under seal, the seal importing a consideration. But the release of a party to a bill or note by any agreement, upon a valuable consideration, is as effectual as if made under seal.[7] And it discharges a joint party, and all parties who are subsequent to the one released, and might have looked to him on making payment for reimbursement. It is not

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[2] Sibree v. Tripp, 15 M. & W. 23; Cumber v. Wane, 1 Stra. 425; Wells v. Morrison, 91 Ind. 62; Murray v. Snow, 37 Iowa, 410.

[3] Rasmussen v. State Nat. Bank, 11 Colo. 304.

[4] Bowker v. Childs, 3 Allen, 434; Welby v. Drake, 1 Car. & P. 557; Hardman v. Bellhouse, 9 M. & W. 596; Lewis v. Jones, 4 B. & C. 506.

[5] Bowker v. Childs, 3 Allen, 434; Draper v. Hill, 43 Vt. 439; Ellsworth v. Fogg, 35 Vt. 255.

[6] Chamberlin v. White, 79 Ill. 549.

[7] Benjamin v. McConnell, 4 Gilm. 536; Milliken v. Browne, 1 Rawle, 391.

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doctrine of substitution and the legal effect thereof depend, after all, upon the agreement between the parties, and are governed by the general law of contracts.[17]

§ 472. Set-off; meaning and nature of.— By set-off is meant the discharge of one claim by another, which is "set off" against it. It was formerly sometimes called "stoppage," because the amount sought to be set off was "stopped" or deducted from the cross-demand.

Set-off was unknown to the common law, it being considered inconvenient to try two opposing claims in one suit. But still greater inconvenience arose from disallowing it; and courts of equity first introduced it, the want of it at law being productive of great mischief.

Set-off has been made the subject of legislation both in England and in most, if not all, of the United States, a statute with reference to the setting off of cross demands having been enacted in Virginia as early as the year 1644.

In England, and generally in the United States, actions *ex contractu* are the only suits to which matters of set-off may be pleaded, and they must be actions for definite ascertainable amounts. Actions sounding in damages, such as trespass, trover, etc., are not subject to the defense of set-off, because the sums recoverable are unliquidated; and actions *ex contractu* for unliquidated damages follow the same rule.[18]

§ 473. Its applicability to negotiable instruments.— The doctrine of set-off has but a limited application to negotiable paper, it being a distinguishing characteristic of negotiable securities that when they have passed into the hands of third parties for value, no set-off admissible in pleadings between original parties is available. Between the original parties, however, or parties between whom there is a privity — that is, between maker and payee, drawer and acceptor, indorser

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[17] Daniel on Negotiable Instruments, § 1292.

[18] 2 Parsons on Notes and Bills, 616; Vancleave v. Beach, 110 Ind. 269; Gordon v. Brown, 2 Johns. 150.

and immediate indorsee — a set-off may be pleaded to negotiable securities as well as to any other kind.[19]

§ **474. Purchaser of overdue negotiable instrument not subject to set-off that would apply to his transferrer.**— The rule that a party taking an overdue bill or note takes it subject to the equities to which the transferrer is subject, does not extend so far as to admit set-offs which might be available against the transferrer. A set-off is not an equity; and the general rule stated is qualified and restricted to those equities arising out of the bill or note transaction itself,[20] and the transferee is not subject to a set-off which would be good against the transferrer, arising out of collateral matters.[21]

This is the English rule on the subject, while in the United States there is a conflict of decisions. In some of the States the English rule, excluding set-offs which existed at the time of the transfer of the overdue paper, is followed. In others such set-offs are admitted.[22] But it seems to be the uniform ruling everywhere, that, although the paper be transferred after maturity, no set-offs between antecedent parties, which arose after the transfer, will be available against the indorsee.[23] In some of the States this question is settled by express statute on the subject. In New York, for instance, the statute admits set-offs existing at the time of transfer of the overdue note or bill.[24]

The right to plead an equitable set-off is a personal privilege of the principal, and does not extend to the surety, unless the defense amounts to total want or failure of consideration.[25]

§ **475. What discharges a surety; general principles of surety's liability.**— The acceptor of a bill and the maker of a note, when the acceptance is made or note executed upon a

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[19] Daniel on Negotiable Instruments, § 1435.

[20] Barnes v. McMullins, 78 Mo. 260; Drexler v. Smith, 30 Fed. 958.

[21] Chitty on Bills [*220], 251; Story on Bills, § 220; 2 Parsons on Notes and Bills, 603, 604.

[22] See cases cited in Daniel on Negotiable Instruments, § 1437.

[23] Davis v. Miller, 14 Gratt. 8.

[24] Edwards on Bills, 260.

[25] Osborn v. Bryce, 23 Fed. 177.

valuable consideràtion, are undoubtedly principals as to all the parties thereto. And the drawer of such a bill, and the indorsers of such a bill or note, are sureties of the acceptor or maker to the holder.[26] But though all the parties to such a bill are sureties of the acceptor, they are not as between themselves cosureties, liable for contribution to each other in the event that anyone should pay the amount for the acceptor; but each prior party is a principal as between himself and each subsequent party. Thus, if the bill were payable to the drawer's order, and accepted, and then indorsed by the drawer and two subsequent indorsers successively, to the holder, the drawer and indorsers would be sureties of the acceptor to the holder. But as between the holder and the drawer, the drawer is principal debtor, and the indorsers sureties. As between the holder and second indorser, the second indorser is principal, and the third indorser is surety.[27]

The fact that the liability of the drawer or indorser is fixed by due demand and notice, does not alter their relation as sureties of the debt; it simply fixes their liability as sureties for its payment, provided nothing is done by the creditor to exonerate them. This view is established by great weight of authority, and may be regarded as settled.[28]

§ 476. Whatever discharges acceptor or maker discharges drawer and indorsers.— As a general rule, whatever discharges the acceptor of a bill or maker of a note discharges the drawer and indorsers who are sureties, for the contract which they undertook to assure thus passes out of existence by the act of the beneficiary. He cannot discharge the party primarily bound for the performance of an engagement, and then insist that another shall stand responsible for its performance. Besides, the drawer or indorser, on making payment for the maker or acceptor, would be en-

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26 Wallace v. McConnell, 13 Pet. 136; Gunnis v. Weigley, 114 Pa. St. 194; Blair v. Bank of Tennessee, 11 Humphr. 84.

27 Newcomb v. Raynor, 21 Wend. 108; Byles on Bills [*236], 379.

28 Gould v. Robson, 8 East, 576; Bank of United States v. Hatch, 6 Pet. 250; Hubbly v. Brown, 16 Johns. 70.

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treated.[37] And, as has been seen, a tender of payment made at the maturity of the instrument discharges the drawer and indorsers.[38]

§ 478. **Parting with security discharges surety.**— Upon making payment of the debt, the surety is undoubtedly entitled to all the rights, remedies, and securities which the creditor could have enforced.[39] And while the creditor may not only abstain from active measures, but may even relinquish steps already commenced,[40] he must do nothing which can impair the rights and remedies of the surety. Therefore, if any collateral security which the creditor held be released, or a judgment lien given up, or a levy withdrawn, the surety is discharged.[41] But the withdrawal of an execution from the hands of the sheriff before a levy will not discharge the surety. Nor will an omission to revive a judgment, by means of which the lien and the land are lost; nor discontinuance of steps to foreclose a mortgage.[42] But neglect to record a mortgage, whereby its value is lost, would discharge the surety, and this even though the original mortgage would have been worthless, if recorded, by reason of prior liens.[43]

But the surety will not be discharged in any case where it can be clearly proved that the act of the creditor has worked no real injury. And he is discharged only to the extent that he would be injured if held bound.[44] Thus with-

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[37] *Ante*, §§ 427–443.

[38] *Ante*, § 464.

[39] Treanor v. Yingling, 37 Md. 491; King v. Baldwin, 2 Johns. Ch. 317; Humphrey v. Hitt, 6 Gratt. 509.

[40] Bellows v. Lovell, 5 Pick. 307; Lawson v. Sayder, 1 Md. 171; Montpelier Bank v. Dixon, 4 Vt. 399.

[41] Shutts v. Fingar, 100 N. Y. 539; Allen v. O'Donald, 23 Fed. 573; Commonwealth v. Haas, 16 Serg. & R. 252; Mayhew v. Boyd, 5 Md. 102.

[42] Lenox v. Frout, 3 Wheat. 520; Humphrey v. Hitt, 6 Gratt. 509; Farmers' Bank v. Reynolds, 13 Ohio, 84; Butler v. Gambs, 1 Mo. App. 466.

[43] Barr v. Boyer, 2 Nebr. 265; Atlanta Nat. Bank v. Douglass, 51 Ga. 205.

[44] Payne v. Commercial Bank, 6 Smedes & M. 24; Neff's Appeal, 9 Watts & S. 36.

drawal of a levy on property only entitles the surety to a credit for the value of the property levied on.[45]

§ **479. Extension of time will discharge surety.**— The principle that whatever discharges the principal discharges the surety is of extended application, and it is operative whenever anything is done which relaxes the terms of the exact legal contract by which the principal is bound, or in anywise lessens, impairs, or delays the remedies which the creditor may resort to for its assurance or enforcement. For, whenever the creditor relaxes his hold upon the principal debtor, he impairs the hold upon him which the surety would acquire by substitution in his place on making payment; and good faith and fair dealing require that the surety should not be exposed to the injuries which might thus be inflicted upon him.[46] In the immense majority of cases the act done does not actually damage the surety a shilling, yet the doctrine is so firmly established that only legislative enactment can change it.[47]

Extension of time for payment is the most frequent form in which the creditor so deals with the principal as to discharge the surety; and whenever such indulgence is granted in pursuance of a binding legal contract, the surety is at once released from his obligations.[48] And the same effect follows (the discharge of the surety) if time is given to one of the joint makers of a note of which the surety is indorser.[49] If the creditor takes a time draft, or a renewal note from the principal, the presumption is that right of action is suspended, and time of payment extended to its maturity, and an indorser of the original bill or note is thereby presumptively discharged.[50]

§ **480. Elements in indulgence necessary to discharge surety.** —The following elements or circumstances must unite in

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[45] Ward v. Vass, 7 Leigh, 135.

[46] Daniel on Negotiable Instruments, § 1312; Thompson on Bills, 390.

[47] Swire v. Redman, 1 Q. B. Div. 536.

[48] Siebeneck v. Anchor Sav. Bank, 111 Pa. St. 187; Parmelee v. Williams, 72 Ga. 43; Shutts v. Fingar, 100 N. Y. 539.

[49] Story on Notes, § 414.

[50] Pomeroy v. Tanner, 70 N. Y. 547; Buck v. Smiley, 64 Ind. 431.

order to constitute an indulgence which will discharge the surety: (1) A valid consideration, for without it the promise would not be binding. (2) A promise or agreement to indulge, for without it the hands of the creditor are not tied, although he may have received collateral security for the debt. (3) The promise must not be altogether indefinite, for an indefinite promise of forbearance is void and nugatory, since it might be for an hour, which would be of no advantage to the debtor. (4) The indulgence must be without the surety's assent, for if he assents he is a party to it. (5) The indulgence must be without reservation of remedy against the surety, for that would reserve the surety's recourse on his principal. (6) The agreement must be with the principal, and not with a stranger.[51]

SECTION V.

STATUTE OF LIMITATIONS.

§ 481. Part payment by joint maker, joint and several maker, or cosurety.—In the chapter on "Actions," the subject of the statute of limitations, with special reference to the obligation of the principal debtor, was disposed of.[52] The problems presented when only one debtor is involved are not difficult of solution, whether the answer to the plea of the statutory bar is a new promise or a partial payment; but when the new promise or partial payment was made by one of two or more joint or joint and several makers or by a cosurety, and it is sought to hold a party other than the new promisor or the one making the partial payment, the questions presented are much more complex. There are many authorities which sustain the view that the statutory bar is removed upon the principle of mutual agency;[53]

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[51] Daniel on Negotiable Instruments, § 1315.

[52] See *ante*, §§ 414, 415.

[53] Whitcomb v. Whiting, 2 Doug. 652; Sheply v. Waterhouse, 22 Me. 497; Woonsocket Inst. for Sav. v. Ballou, 16 R. I. 351, 16 Atl. 144; Elliott v. Nichols, 7 Gill, 85; Schindel v. Gates, 46 Md. 604, 24 Am. Rep. 526; Turner v. Ross, 1 R. I. 88; Perkins v. Barstow, 6 R. I. 505; Carpenter v. McLaughlin, 12 R. I. 270, 34 Am. Rep. 638; Joslyn v. Smith, 13 Vt. 353; Bissell v. Adams, 35 Conn. 299.

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CHAPTER XVI.

CONFLICT OF LAWS.

§ 483. **Importance of subject.**— No treatise, however brief, on the subject of negotiable instruments, and especially with reference to actions thereon and defenses thereto, would be complete without a general summary of the law that governs and controls. Of all kinds of contracts, there is none other quite so perambulatory as negotiable instruments. One of the very purposes of the law merchant is to relieve all negotiable contracts of luggage, and thus, so to speak, to encourage them to travel without regard to State or national boundary lines. It not infrequently happens, therefore, that a negotiable contract is made in one jurisdiction, payable in another, and indorsed in still another; and when it is considered that every indorsement is a new, separate, and independent contract, the question as to what law governs as to each and every of the contracts that may be entered into and built upon the original obligation becomes a subject of peculiar importance. And it should also be remembered that each one of the United States is, in contemplation of its own and of the Federal Constitution, a distinct and independent sovereignty, with its own peculiar code of laws and system of judicature. And while, in the aggregate, they compose one integral confederacy, which is itself an independent nation, paramount in certain respects to the States, in all other respects the States retain their separate autonomies, and are deemed as much foreign to each other as if not in anywise associated together. The regulation of contracts comes peculiarly within the province of the States, and, therefore, contracts between citizens of the different States, while they may be enforced by process in the Federal courts, nevertheless are to be construed and effectuated not by a general system of laws which overspread the whole country, but in accordance with the principles of interna-

tional law which govern transactions between parties of different nations.

§ 484. General principles.— The following may be regarded as established:

(1) Every contract is in respect to its formalities and authentication to be regulated by the laws of the State or country in which it is entered into; and it is also regulated by the laws of the State or country in which it is made, in respect to its nature, validity, interpretation, and effect, except when it is to be performed in another State or country.

(2) When a contract is made in one State or country to be performed in another State or country, it is to be regulated by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, validity, interpretation, and effect.

(3) In determining the place where a contract is made, the place where it was delivered, as consummating the bargain, controls; and not the place where it was written, signed, or dated.

(4) If a party contracts while *in transitu,* and without identity with any other place, the place of his domicile is deemed the place of the contract.

(5) If a contract be illegal and void at the place where it is made, it is void everywhere.

(6) The laws of a State or country have no extra-territorial force, *proprio vigore;* and are only executed by other States and countries from considerations of courtesy or policy, termed the comity of nations.

(7) The laws of a State or country being only executed in another by comity, they will be executed only so far as they may be consistent with religion, good morals. and with the public rights and interests of the State or country in which the remedy is sought.

(8) The courts of a State or country cannot take judicial notice of the laws of a foreign State or country;

and when such laws are sought to be applied, they must be alleged and proved.

(9) The law of the place where suit is brought, the *lex fori*, as it is termed, regulates the form of the action and the nature and extent of the remedy.[1]

§ **485. The comity of nations.**— It results from the principle that the laws of a country have no binding force beyond its own boundaries, that the appeal for their enforcement addresses itself entirely to the comity and discretion of the forum in which suit is brought. That comity is freely exercised by civilized countries, which look for and receive reciprocal courtesies from other nations; and the close relations of the several States of the Union with each other, the family likeness of their institutions, and the homogeneity of their people, are powerful incentives to the exercise between them of a comity peculiarly liberal and expansive.[2] But, nevertheless, a State must be just before it is generous; and therefore no State should exercise comity in favor of contracts which violate its own laws, or the law of nature, or the law of God.[3] It must consult sound morals and the interests and public policy of its own people, and if to enforce the laws of another State or country would lead to their infringement, it would be treacherous to its own duties to lend aid to their execution.[4]

SECTION I.

LEX LOCI CONTRACTUS.

§ **486. To what extent lex loci contractus governs.**— The rule is of general acceptation that the law of the place where the contract is made regulates the formalities of its execution and authentication and the consideration necessary to

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1 Daniel on Negotiable Instruments, § 865.

2 Lathrop v. Commercial Bank, 8 Dana, 118.

3 Forbes v. Cochrane, 2 B. & C. 448.

4 Armstrong v. Toler, 11 Wheat. 258; Pearsall v. Dwight, 2 Mass. 84; Daniel on Negotiable Instruments, § 866.

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acceptance is thereupon vacated. It was held that the law of Leghorn should prevail.[9]

By obligation of the contract is meant the legal existence or nonexistence of a promise to pay, and the extent thereof. For instance, if by the law of the country where the contract is made the legal effect is to bind the *rem* (*i. e.*, land mortgaged), and not to create a personal obligation, the law of that jurisdiction will govern. Again, the question whether or not the promise or obligation is primary or secondary, absolute or conditional, is governed by the *lex loci contractus*. Following that principle, the extent and character of the obligations of sureties, indorsers, and guarantors are fixed and determined.[10]

§ 488. What constitutes place of execution; presumptions.—The place where a contract is made depends not upon the place where it is written, signed, or dated, but upon the place where it is delivered as consummating the bargain.[11] Thus, the law of the place where a bill or note is written, signed, or dated does not necessarily control it, but the law of the place where it is delivered from drawer or maker to payee, or from indorser to indorsee. A note drawn and dated in Maryland, but delivered in New York, in payment of goods there purchased, or money loaned, is payable in and governed by the laws of New York.[12] And if a note be dated and signed in blank in Virginia, and sent to Maryland, and there filled up and negotiated, it is a Maryland, and not a Virginia, note.[13]

It should be further observed that where the parties acquiring a bill for value, and in the usual course of business, have no knowledge that it was not issued and delivered as a subsisting instrument at the place where it bears date, it

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[9] Daniel on Negotiable Instruments, § 872; Burrows v. Jemimo, 2 Stra. 733.

[10] Daniel on Negotiable Instruments, § 873.

[11] Freese v. Brownell, 35 N. J. L. 286; Lawrence v. Bassett, 5 Allen, 140.

[12] Cook v. Moffat, 5 How. 295; Hyde v. Goodnow, 3 N. Y. 266.

[13] Fant v. Miller, 17 Gratt. 47.

is but just that they should be entitled to regard its ostensible as its real character, and should at least not be permitted to suffer by reason of the after-discovered fact that it was not there delivered.[14] In the absence of evidence to the contrary, it will be presumed that a note was executed and delivered at the place where it bears date.[15]

§ **489. Lex domiciliæ.**— After all, the question as to what law governs in the interpretation, construction, etc., is one of intention; and if the instrument does not specify the place of payment or execution, the domicile of the maker or acceptor may be invoked for the sole purpose of ascertaining the intention of the parties as to the place of execution. If one be a sojourner in a State or country other than his home or place of domicile, and the instrument does not specify the place of performance, the law presumes that the *lex domicilæ* determines the *loci contractus.* In other words, that the contract was made and intended to be performed at the place of residence of the obligor, and that such place, presumably being the place where the contract was made, will govern in the construction of the instrument, the formalities of its execution, and the nature and character of the obligation entered into. As has been indicated, however, this is a mere presumption, which may be rebutted by the circumstances attendant upon the execution of the contract, or by the nature of the transaction out of which the contract grew. Thus, if it were a debt for board at a hotel, or articles of personal subsistence or necessity, it would be payable by usage before the sojourner left the place, and therefore payable there. and controlled by its laws.[16]

§ **490. Lex loci solutionis; exception to rule.**— But the law of the place where the contract is made yields in certain respects to that of the place of performance; for it is in

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[14] 1 Parsons on Notes and Bills, 57; Quaker City Bank v. Showacre, 26 W. Va. 52; Nat. Bank v. Smoot, 1 MacArth. 371.

[15] Parks v. Evans, 5 Del. 576.

[16] Daniel on Negotiable Instruments, § 876; Wharton on Conflict of Laws, §§ 414–416, 426.

view of, and in reference to, the laws of the place of performance, that it is to be presumed the terms of the contract were selected, and its stipulations entered into.[17] "The general principle as to contracts made in one place to be performed in another," says Chief Justice Taney, "is well settled. They are to be governed by the law of the place of performance."[18] Thus, in Massachusetts, a note payable to A. or order at any or either bank in a city, is negotiable; but if such a note were made in Massachusetts, and were payable in Virginia, it would not be negotiable, because not payable at a particular bank, as the Virginia statute requires.[19] Where a part of the contract is to be performed in one country, and a part in another, each part is to be governed by the law of the place where it is performable.[20]

And whenever it is alleged that a bill is payable by the acceptor, or a note by the maker, at a place different from that at which such acceptance or making took place, it is necessary to show it, either by the express language of the instrument itself, or by intendment and construction of law arising from the attendant circumstances. And if the note be dated at a particular place and payable generally — that is, without designation of a particular place — the law attaches to it the presumption that it is to be paid where made.[21] So it is to be presumed that an acceptance of a bill, naming no place of payment, is to be paid where made; and the address of the drawee generally indicates where such place of acceptance is.[22]

§ 491. **Lex loci rei sitæ; further exceptions.** — Of course real estate is controlled, in respect to the validity and form of the conveyance, by the *lex loci rei sitæ* — that is, by the

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[17] Andrews v. Pond, 13 Pet. 65; Pierce v. Indseth, 106 U. S. 546; Shoe & Leather Nat. Bank v. Wood, 142 Mass. 567.

[18] Andrews v. Pond, 13 Pet. 65.

[19] Freeman's Bank v. Ruckman, 16 Gratt. 126.

[20] Pomeroy v. Ainsworth, 22 Barb. 118; Young v. Harris, 14 B. Mon. 556.

[21] Wilson v. Lazier, 11 Gratt. 477; Thompson v. Ketchum, 8 Johns. 189.

[22] Todd v. Bank of Kentucky, 3 Bush, 626.

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where the bill was drawn or the contract indorsed. Thus, if a merchant in New York draw a bill on another in Richmond, Virginia, requiring him to pay a certain amount without specifying any place of payment, the drawee will, if he accepts, be bound to pay the amount in Richmond, that being implied by the address of the bill to him at that place. But it does not follow that the drawer would be himself bound to pay the amount of the bill in Richmond in the event of dishonor for nonpayment by the acceptor.[28] His undertaking is not to pay it in Richmond himself, but a guaranty that it (the bill) shall be paid there by the drawee, and a further undertaking that if not so paid by the drawee, he will pay the amount in New York, provided the bill be duly presented, and he has received due notice of its dishonor. In other words, the drawer of a bill does not bind himself to pay it specially where the acceptor is impliedly or expressly called on to pay it; but his contract is to pay generally, and is consequently construed to be a contract to pay at the place where the bill is drawn.[29] The same principle, as thus illustrated, is equally applicable to the contract of indorsement. As has been stated, an indorsement constitutes a wholly new, separate, and independent obligation, and as such the party that enters into it must be taken to have contracted with reference to the law of the place where it was entered into, just as unequivocally as the maker of a promissory note or the acceptor of a bill of exchange. This doctrine, that the drawer and indorser are bound according to the law of the place of drawing or indorsing, although sustained by great weight of opinion and an overwhelming current of authorities, has not escaped criticism and dissent.[30]

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[28] Daniel on Negotiable Instruments, §§ 898, 899.

[29] Bank of United States v. United States, 2 How. 711; Freese v. Brownell, 35 N. J. L. 286; Everett v. Vendryes, 19 N. Y. 436.

[30] See Daniel on Negotiable Instruments, §§ 899–902.

SECTION II.

LEX FORI.

§ 493. General principles.— It is a settled principle of law that the remedies for breach of any contract must be pursued according to the law of the place where suit is brought. Those remedies are devised by the State in consonance with its own views of justice, public. policy, and convenience; and comity does not require that it should depart from the courses of procedure which it applies to its own inhabitants, and extend greater or different privileges to strangers.[31] The foreigner who sues must take the law as he finds it.[32]

This doctrine extends to the determination of (1) the parties who may sue and be sued; (2) the time within which suit may be brought; (3) the form of action; and (4) the nature, effect, and extent of the remedy applied.

§ 494. Who may sue.— Who may sue is generally a question of the remedy; and the mere designation of the plaintiff is always made by reference to the *lex fori*. And as a general rule, if allowed by the *lex fori*, an assignee may sue in his own name, although he cannot so sue at the place of the assignment.[33] And if not allowed by the *lex fori*, he cannot sue in his own name, although he might do so at the place of assignment.[34] But we think this doctrine should not be pushed farther than to indicate the mere nominal parties to the suit when it is purely a question of remedy. Thus, if a note were non-negotiable in Virginia, and could not be there indorsed or assigned, yet if negotiable and actually indorsed in Kentucky, so as to completely vest title in the indorsee, the holder would then have an absolute right to recover the amount, and the *lex loci contractus*

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31 Bank of United States v. Donally, 8 Pet. 372; Scoville v. Canfield, 14 Johns. 338; Wharton on Conflict of Laws, § 747.

32 De la Vega v. Vianna, 1 B. & Ad. 284.

33 Foss v. Nutting, 14 Gray, 484; Wharton on Conflict of Laws, § 457.

34 Fisk v. Brackett, 32 Vt. 798; Wharton on Conflict of Laws, § 735; 2 Parsons on Notes and Bills, 368.

should govern.[35] So if by the law of the place of transfer, an executor or administrator may indorse or assign a note, so as to vest title and right to sue completely in his transferee, the latter should be permitted to sue anywhere.[36] This is due to a liberal comity. But the authorities predominate in number the other way.[37]

§ **495. Time within which suit may be brought.**— The time within which suit may be brought is purely a question of the forum. Thus suit may be brought immediately in one State by attachment, although at the time no action would lie in the State where the cause of action arose.[38] And in like manner the statute of limitations of the forum prevails; and no suit can be maintained if it be barred there, although by the law of the contract there was no limitation, or a less restricted limitation.[39] And suit may be maintained where the limitation of the *lex fori* has not attached, although by the *lex loci contractus* action has been formally barred.[40] This doctrine rests upon the ground that the time of suit is purely a matter for local municipal regulation. It may be different in cases where the right, in contradistinction to the remedy, is held by foreign law to be extinguished. Such extinction might operate by comity everywhere.[41]

§ **496. Form of action, remedy, and questions of evidence.**— The necessity of selecting the form of action according to the law of the forum has been well illustrated in the United States in a number of cases where the instrument

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35 Lee v. Selleck, 33 N. Y. 615; Story on Bills, § 173; Trimbey v. Vigmer, 1 Bing. N. C. 159.

36 Harper v. Butler, 2 Pet. 239; Owen v. Moody, 29 Miss. 79; Barrett v. Barrett, 8 Greenl. 353.

37 Goodwin v. Jones, 3 Mass. 514; Thompson v. Wilson, 2 N. H. 291; Stearns v. Burnham, 5 Greenl. 261.

38 Clark v. Conner, 2 Strobh. 346; 1 Rob. Pr. 317.

39 Mineral Point R. Co. v. Barron, 83 Ill. 367; Nicolls v. Rodgers, 2 Paine C. C. 437; Jones v. Hook, 2 Rand. 303; British Linen Co. v. Drummond, 10 B. & C. 903.

40 Power v. Hathaway, 43 Barb. 214; Bulger v. Roche, 11 Pick. 36.

41 Williams v. Jones, 13 East, 439.

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petency and credibility of witnesses, but not as to the number of attesting witnesses necessary to the validity of a writing.[46]

§ **497. Whether party is bona fide purchaser for value.**— So the effect of the transaction in fixing the relations of the parties is, as between them, determined by the *lex loci contractus.* Thus, if by the *lex loci contractus* the purchaser acquires the note as a *bona fide* holder, not subject to the defense of a prior payment, such payment cannot be pleaded, although the *lex fori* would permit it.[47] And whether or not the proprietor of the bill or note is a *bona fide* holder, is to be determined by the *lex loci contractus* — that is, the place of payment.[48] The mode and measure of recovery would, however, seem to be a question of the forum.[49]

§ **498. In respect to set-off,** it is laid down by text writers, and by the courts of common law, that a set-off to any action allowed by the local law is to be treated as a part of the remedy; and that, therefore, it is admissible in claims between persons belonging to different States or countries, although it may not be admissible by the law of the country where the debt which is sued was contracted.[50] The same principle applies to the mode of attacking consideration. When the *lex fori* allows a plea of want of consideration in a suit on an obligation, which by the *lex loci contractus* was sealed, and to which by such latter law no such plea could be offered, the *lex fori* controls.[51] So as to other legal and equitable defenses, where the very contract itself does not exclude them, they are to be controlled by the *lex*

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46 Wharton on Conflict of Laws, § 769.

47 Harrison v. Edwards, 12 Vt. 651.

48 Allen v. Bratton, 47 Miss. 129; Woodruff v. Hill, 116 Mass. 310.

49 Woodruff v. Hill, 116 Mass. 310; 2 Ames on Bills and Notes, 306.

50 Mineral Point R. Co. v. Barron, 83 Ill. 366; Gibbs v. Howard, 2 N. H. 296.

51 Wharton on Conflict of Laws, § 788.

fori.[52] Statutes providing certain exemptions from levy and sale upon execution affect the remedy, and those of the forum prevail.[53]

§ **499. The courts can take no judicial notice of the laws of another country.**— When relied upon, they must be proved as facts, and otherwise it will be presumed that they are the same as the laws of the forum in which suit is brought;[54] or what is the same in effect, when the laws of the foreign country are not put in proof as facts, the court will apply to the transaction in suit the laws of the forum. Thus the law as to the rate of damages will be presumed to be the same where the bill is drawn in one country, and is sued on in another;[55] so it will be presumed, where the law of the forum authorizes an indorsee to sue before exhausting recourse against the maker, that the law of the place of the contract is likewise;[56] and so, where by the law of the forum a party signing in a certain way is regarded as an indorser, the foreign law will be presumed to be likewise.[57] But where the question is one relating to the law merchant, which is of general application, as, for instance, the number of days of grace, it would be presumed that they were fixed by the law merchant, that is, that three days of grace were allowed — the law merchant being regarded as part of the common law.[58] Bonds and coupons in form negotiable according to the law merchant as now recognized would be presumed in one State to be negotiable in another.[59]

§ **500. What law governs as to presentment, protest, and notice of dishonor.**— In order to charge the drawer or indorser, the holder must exercise due diligence in presenting

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[52] Bliss v. Houghton, 13 N. H. 126.

[53] Mineral Point R. Co. v. Barron, 83 Ill. 366.

[54] Foulke v. Fleming, 13 Md. 392; Hunt v. Johnson, 44 N. Y. 27; Whidden v. Seelye, 40 Me. 247.

[55] Kuenzi v. Elvers, 14 La. Ann. 391.

[56] Bean v. Briggs, 4 Iowa, 467.

[57] Daniel on Negotiable Instruments, §§ 891, 895.

[58] Lucas v. Ladew, 28 Mo. 342.

[59] Tyrell v. Cairo & St. L. R. Co., 7 Mo. App. 294.

the bill to the drawee, or acceptor, and the note to the maker; and as the acts necessary to constitute a due presentment are to be done at the place upon which the bill is drawn, or at which the bill or note is payable, they must be governed by the law of the place upon which it is drawn, or at which it is payable, as the case may be. Accordingly, the question whether or not the bill should have grace would be determined by the law of the place of payment; and also, if allowable, in how many days grace should consist. In France no grace is allowable, while in England and the United States it is generally three days. But it ranges in different places from three to thirty days, and in each case the law of the particular place would determine.[60]

When a foreign bill is dishonored, it is necessary that it should be protested, and the protest should be made at the time, in the manner, and by the persons prescribed in the place where the bill is refused acceptance or payment, as the case may be.[61]

In respect to notice, it has been distinguished from the presentment and protest in an often quoted American case,[62] in which it is held that it must conform to the law of the place where the drawing or indorsement occurs, in order to charge the drawer or any particular indorser, on the ground that the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, and that the mode and time of notice constitute an implied condition of the contract.[63]

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[60] Bank of Washington v. Triplett, 1 Pet. 25; Aymar v. Sheldon, 12 Wend. 439; Jewell v. Wright, 30 N. Y. 264.

[61] Daniel on Negotiable Instruments, § 909.

[62] Aymar v. Sheldon, 12 Wend. 439.

[63] Lee v. Selleck, 33 N. Y. 815; Williams v. Putnam, 14 N. H. 543; Story on Bills, § 285.

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APPENDIX.

THE NEGOTIABLE INSTRUMENTS LAW.

Mr. Daniel, in the year 1876, concluded the first edition of his work on "Negotiable Instruments" with the following expression of hope for a uniform system of commercial law throughout the country: "'We will never immolate truth, justice, and the law because a State tribunal has erected the altar and decreed the sacrifice.'* And for the facilitation of trade, and the fair understanding of mercantile negotiations among all mercantile men, it is to be hoped that the day is not far distant when it may be truly said (in the language of Cicero, approvingly quoted by Mansfield and Story), respecting the law of our subject, wherever industry turns a wheel or commerce sets a sail, '*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*'"

Appreciating the necessity for revision and uniformity, the English Parliament in the year 1882 passed the "English Bills of Exchange Act," and on May 19, 1897, the Legislature of New York enacted "An act in relation to Negotiable Instruments." This law was first recommended at the conference of the Commissioners on Uniformity of Laws in 1895, and was based upon the "English Bills of Exchange Act." In 1897 the States of Connecticut, Colorado, and Florida adopted the New York statute; in 1898 Massachusetts, Maryland, and Virginia followed; in 1899, Rhode Island, Tennessee, North Carolina, Wisconsin, North Dakota, Utah, Oregon, Washington, and the District of Columbia; in 1901, Pennsylvania and Arizona; and in 1902, Ohio, New Jersey, and Iowa.

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* Swift *v.* Tyson, 16 Pet. 1.

PROVISIONS OF THE ACT.

ARTICLE I.*

General Provisions.

SECTION 1. Short title.
2. Definitions and meaning of terms.
3. Person primarily liable on instrument.
4. Reasonable time, what constitutes.
5. Time, how computed; when last day falls on holiday.
6. Application of chapter.
7. Rule of law merchant; when governs.

§ **1. Short title.**— This act shall be known as the negotiable instruments law.

§ **2. Definitions and meaning of terms.**— In this act, unless the context otherwise requires:

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

"Action" includes counterclaim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

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

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

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, 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.

§ **3. Person primarily liable on instrument.**— The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable.

§ **4. Reasonable time, what constitutes.**— In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

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*The numbers of the sections of this article in other States than New York are as follows: Colorado, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Pennsylvania, Utah, Virginia, and Washington, 190–196; Maryland, 13–19; Ohio, 3178–3178*e*; Oregon, 190–192; Rhode Island, 1–7; Wisconsin, 1675. In Arizona, Connecticut, District of Columbia, Florida, and Tennessee, these sections are not numbered.

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§ 21. Certainty as to sum; what constitutes.— The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or
2. By stated instalments; or
3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

§ 22. When promise is unconditional.— An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promises* to pay out of a particular fund is not unconditional.

§ 23. Determinable future time; what constitutes.— An instrument 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; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

§ 24. Additional provisions not affecting negotiability.— An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal.

§ 25. Omissions; seal; particular money.— The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

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* Error in engrossing.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

§ 26. When payable on demand.— An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or

2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

§ 27. When payable to order.—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or

2. The drawer or maker; or

3. The drawee; or

4. Two or more payees jointly; or

5. One or some of several payees; or

6. The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

§ 28. When payable to bearer.— The instrument is payable to bearer:

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last indorsement is an indorsement in blank.

§ 29. Terms when sufficient.— The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

§ 30. Date, presumption as to.— Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

§ 31. Ante-dated and post-dated.— The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

§ 32. When date may be inserted.— Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

§ 33. Blanks; when may be filled.— Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable

instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion is negotiated* to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

§ 34. **Incomplete instrument not delivered.**— Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

§ 35. **Delivery; when effectual; when presumed.**— Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

§ 36. **Construction where instrument is ambiguous.**— Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount;

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued;

4. Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail;

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election;

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

§ 37. **Liability of person signing in trade or assumed name.**— No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who

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* The word "negotiated" substituted for "negotiable" by Laws of N. Y. 1898, c. 336.

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§ **52. What constitutes holder for value.**— Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

§ **53. When lien on instrument constitutes holder for value.**— Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

§ **54. Effect of want of consideration.**— Absence of failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise.

§ **55. Liability of accommodation party.**— An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

ARTICLE IV.*

Negotiation.

SECTION 60. What constitutes negotiation.
61. Indorsement; how made.
62. Indorsement must be of entire instrument.
63. Kinds of indorsement.
64. Special indorsement; indorsement in blank.
65. Blank indorsement; how changed to special indorsement.
66. When indorsement restrictive.
67. Effect of restrictive indorsement; rights of indorsee.
68. Qualified indorsement.
69. Conditional indorsement.
70. Indorsement of instrument payable to bearer.
71. Indorsement where payable to two or more persons.
72. Effect of instrument drawn or indorsed to a person as cashier.
73. Indorsement where name is misspelled, et cetera.
74. Indorsement in representative capacity.
75. Time of indorsement; presumption.
76. Place of indorsement; presumption.
77. Continuation of negotiable character.
78. Striking out indorsement.
79. Transfer without indorsement; effect of.
80. When prior party may negotiate instrument.

§ **60. What constitutes negotiation.**— An instrument is negotiated when it is transferred from one person to another in such manner as

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3333–3353; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 30–50; Maryland, 49–69; Ohio, 3172*b*–3172*v*; Rhode Island, 38–58; Wisconsin, 1676 to 1676–20.

to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

§ 61. Indorsement; how made.— The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

§ 62. Indorsement must be of entire instrument.— The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsers severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

§ 63. Kinds of indorsement.— An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

§ 64. Special indorsement; indorsement in blank.— A special indorsement specifies the person to whom, or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

§ 65. Blank indorsement; how changed to special indorsement. — The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

§ 66. When indorsement restrictive.— An indorsement is restrictive, which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

§ 67. Effect of restrictive indorsement; rights of indorsee.— A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

§ 68. Qualified indorsement.*— A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

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* The dash and the words "a qualified indorsement" omitted in the original act through error were added by Laws N. Y. 1898, c. 336.

§ 69. Conditional indorsement.— Where an indorsement is conditional, a party required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

§ 70. Indorsement of instrument payable to bearer.— Where an instrument, payable to bearer, is indorsed specially, it may, nevertheless, be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

§ 71. Indorsement where payable to two or more persons.— Where an instrument 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.

§ 72. Effect of instrument drawn or indorsed to a person as cashier.— Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

§ 73. Indorsement where name is misspelled, et cetera.—Where the name of a payee or indorsee is wrongfully designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

§ 74. Indorsement in representative capacity.— Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

§ 75. Time of indorsement; presumption.— Except where an instrument bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

§ 76. Place of indorsement; presumption.— Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated.

§ 77. Continuation of negotiable character.— An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

§ 78. Striking out indorsement.— The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

§ 79. Transfer without indorsement; effect of.— Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

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or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

§ 95. **What constitutes notice of defect.**— To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

§ 96. **Rights of holder in due course.**— A holder in due course holds the instrument free from any defect of title of prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

§ 97. **When subject to original defenses.**— In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

§ 98. **Who deemed holder in due course.**— Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

ARTICLE VI.*

Liabilities of Parties.

SECTION 110. Liability of maker.
111. Liability of drawer.
112. Liability of acceptor.
113. When person deemed indorser.
114. Liability of irregular indorser.
115. Warranty; where negotiation by delivery, et cetera.
116. Liability of general indorsers.
117. Liability of indorser where paper negotiable by delivery.
118. Order in which indorsers are liable.
119. Liability of agent or broker.

§ 110. **Liability of maker.**— The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse.

§ 111. **Liability of drawer.**— The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3363–3372; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington. 60–69; Marvland, 79–88; Ohio, 3173*e*–3173*n*; Rhode Island, 68–77; Wisconsin, 1677 to 1677–9.

accepted and* paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

§ **112. Liability of acceptor.**— The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse.

§ **113. When person deemed indorser.**— A person placing his signature upon an instrument otherwise than to maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

§ **114. Liability of irregular indorser.**— Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.

§ **115. Warranty where negotiation by delivery, et cetera.**— Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be;
2. That he has a good title to it;
3. That all parties had capacity to contract;
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

§ **116. Liability of general indorser.**— Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. The matter and things mentioned in subdivisions one, two, and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that, on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

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* Error in engrossing. The word in the Commissioners' draft is "or." The mistake was not corrected by Laws N. Y. 1898, c. 336. It occurs only in the New York statute.

§ 117. Liability of indorser where paper negotiable by delivery. — Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

§ 118. Order in which indorsers are liable.— As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

§ 119. Liability of agent or broker.— Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section one hundred and fifteen* of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

ARTICLE VII.†

Presentment for Payment.

SECTION 130. Effect of want of demand on principal debtor.
131. Presentment where instrument is not payable on demand.
132. What constitutes a sufficient presentment.
133. Place of presentment.
134. Instrument must be exhibited.
135. Presentment where instrument payable at bank.
136. Presentment where principal debtor is dead.
137. Presentment to persons liable as partners.
138. Presentment to joint debtors.
139. When presentment not required to charge the drawer.
140. When presentment not required to charge the indorser.
141. When delay in making presentment is excused.
142. When presentment may be dispensed with.
143. When instrument dishonored by non-payment.
144. Liability of person secondarily liable, when instrument dishonored.
145. Time of maturity.
146. Time; how computed.
147. Rule where instrument payable at bank.
148. What constitutes payment in due course.

§ 130. Effect of want of demand on principal debtor.— Presentment for payment is not necessary in order to charge the person primarily liable‡ on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity and has funds there available for that purpose, such ability

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*Amended by Laws of N. Y. 1898, c. 336, so as to give correct number.

† The numbers of the sections of this article in other States than New York are as follows: Arizona, 3373–3391; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 70–88; Maryland, 89–107; Ohio, 3173*o*–3174*f*; Rhode Island, 78–96; Wisconsin, 1678 to 1678–18.

‡ The word "liable" omitted in the New York Act of 1897 supplied by Act of 1898, c. 336. In the Wisconsin act all of the first sentence after the words "primarily liable on the instrument" is omitted.

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§ 138. Presentment to joint debtors.— Where there are several persons not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

§ 139. When presentment not required to charge the drawer.— Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

§ 140. When presentment not required to charge the indorser. — Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented.

§ 141. When delay in making presentment is excused.— 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.

§ 142. When presentment may be dispensed with.— Presentment for payment is dispensed with:

1. Where, after the exercise of reasonable diligence, presentment as required by this act cannot be made;
2. Where the drawee is a fictitious person;
3. By waiver of presentment, express or implied.

§ 143. When instrument dishonored by non-payment.— The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

§ 144. Liability of person secondarily liable, when instrument dishonored.— Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder.

§ 145. Time of maturity.—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due or becoming payable* on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

§ 146. Time; how computed.—Where the instrument 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 date of payment.

§ 147. Rule where instrument payable at bank.— Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

§ 148. What constitutes payment in due course.— Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

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* The words " or becoming payable" were added by Laws N. Y. 1898, c. 336. They are not in the statute in the other States.

ARTICLE VIII.*

Notice of Dishonor.

SECTION 160. To whom notice of dishonor must be given.
161. By whom given.
162. Notice given by agent.
163. Effect of notice given on behalf of holder.
164. Effect where notice is given by party entitled thereto.
165. When agent may give notice.
166. When notice sufficient.
167. Form of notice.
168. To whom notice may be given.
169. Notice where party is dead.
170. Notice to partners.
171. Notice to persons jointly liable.
172. Notice to bankrupt.
173. Time within which notice must be given.
174. Where parties reside in same place.
175. Where parties reside in different places.
176. When sender deemed to have given due notice.
177. Deposit in post-office, what constitutes.
178. Notice to subsequent parties, time of.
179. Where notice must be sent.
180. Waiver of notice.
181. Whom affected by waiver.
182. Waiver of protest.
183. When notice dispensed with.
184. Delay in giving notice; how excused.
185. When notice need not be given to drawer.
186. When notice need not be given to indorser.
187. Notice of non-payment where acceptance refused.
188. Effect of omission to give notice of non-acceptance.
189. When protest need not be made; when must be made.

§ 160. To whom notice of dishonor must be given.—Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

§ 161. By whom given.—The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3392–3421; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 89–118; Maryland, 108–137; Ohio, 3174*g*–3175*i*; Rhode Island, 97–126; Wisconsin, 1678–19 to 1678–48.

up, would have a right to reimbursement from the party to whom the notice is given.

§ 162. Notice given by agent.—Notice of dishonor 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.

§ 163. Effect of notice given on behalf of holder.—Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

§ 164. Effect where notice is given by party entitled thereto.—Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

§ 165. When agent may give notice.—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, 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 the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

§ 166. When notice sufficient.—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

§ 167. Form of notice.—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

§ 168. To whom notice may be given.—Notice of dishonor may be given either to the party himself or to his agent in that behalf.

§ 169. Notice where party is dead.—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

§ 170. Notice to partners.—Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

§ 171. Notice to persons jointly liable.—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

§ 172. Notice to bankrupt.—Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

§ 173. Time within which notice must be given.—Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

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§ 182. Waiver of protest.— A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

§ 183. When notice is dispensed with.— Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

§ 184. Delay in giving notice; how excused.— Delay in giving notice of dishonor 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, notice must be given with reasonable diligence.

§ 185. When notice need not be given to drawer.— Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the 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 instrument is presented for payment;
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
5. Where the drawer has countermanded payment.

§ 186. When notice need not be given to indorser.— Notice of dishonor is not required to be given to an indorser in either of the following cases:

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 instrument;
2. Where the indorser is the person to whom the instrument is presented for payment;
3. Where the instrument was made or accepted for his accommodation.

§ 187. Notice of non=payment where acceptance refused.—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

§ 188. Effect of omission to give notice of non=acceptance.— An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

§ 189. When protest need not be made; when must be made.— Where any negotiable instrument has been dishonored it may be protested for non acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.

ARTICLE IX.*

Discharge of Negotiable Instruments.

SECTION 200. Instrument; how discharged.
201. When person secondarily liable on, discharged.
202. Right of party who discharges instrument.
203. Renunciation by holder.
204. Cancellation; unintentional; burden of proof.
205. Alteration of instrument; effect of.
206. What constitutes a material alteration.

§ 200. Instrument; how discharged.†— A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

§ 201. When person secondarily liable on, discharged.— A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;

2. By the intentional cancellation of his signature by the holder;

3. By the discharge of a prior party;

4. By a valid tender of payment made by a prior party;

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument,‡ unless the right of recourse against such party is expressly reserved.

§ 202. Right of party who discharges instrument.— Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3422–3428; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 119–125; Maryland, 138–144; Ohio, 3175*j*-3175*p*; Rhode Island, 127–133; Wisconsin, 1679 to 1679–6.

† Through an error in engrossing the words in the headnote have been transposed. It was intended to read, "How instrument discharged." The error was not corrected by the Act of 1898.

‡ By an error in engrossing, the words "unless made with the assent of the party secondarily liable, or" after the word "instrument" are omitted in the New York Act. They were not supplied by Laws 1898, c. 336.

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

§ 203. Renunciation by holder.— The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

§ 204. Cancellation; unintentional; burden of proof.— A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

§ 205. Alteration of instrument; effect of.—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

§ 206. What constitutes a material alteration.— Any alteration which changes:

1. The date;
2. The sum payable, either for principal or interest;
3. The time or place of payment;
4. The number or the relations of the parties;
5. The medium or currency in which payment is to be made;

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

ARTICLE X.*

Bills of Exchange; Form and Interpretation.

SECTION 210. Bill of exchange defined.
211. Bill not an assignment of funds in hands of drawee.
212. Bill addressed to more than one drawee.
213. Inland and foreign bills of exchange.
214. When bill may be treated as promissory note.
215. Referee in case of need.

§ 210. Bill of exchange defined.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3429–3434; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 126–131; Maryland, 145–150; Ohio, 3175*q*–3175*v*; Rhode Island, 134–139; Wisconsin, 1680 to 1680*e*.

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the drawer. The acceptance must be in writing and signed by the drawee.* It must not express that the drawee will perform his promise by any other means than the payment of money.

§ 221. Holder entitled to acceptance on face of bill.— The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.

§ 222. Acceptance by separate instrument.—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it was shown and who, on the faith thereof, receives the bill for value.

§ 223. Promise to accept; when equivalent to acceptance.— An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

§ 224. Time allowed drawee to accept.— The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance if given dates as of the day of presentation.

§ 225. Liability of drawee retaining or destroying bill.— Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

§ 226. Acceptance of incomplete bill.— A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored 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 the first presentment.

§ 227. Kinds of acceptances.—An acceptance is either general or qualified. 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.

§ 228. What constitutes a general acceptance.— 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.

§ 229. Qualified acceptance.— An acceptance is qualified which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
3. Local, that is to say, an acceptance to pay only at a particular place;
4. Qualified as to time;
5. The acceptance of some one or more of the drawees, but not of all.

§ 230. Rights of parties as to qualified acceptance.— The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-

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* The word "drawee" substituted for "drawer" by Laws N. Y. 1898, c. 336.

acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or an indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

ARTICLE XII.*

Presentment of Bills of Exchange for Acceptance.

SECTION 240. When presentment for acceptance must be made.
241. When failure to present releases drawer and indorser.
242. Presentment; how made.
243. On what days presentment may be made.
244. Presentment; where time is insufficient.
245. When presentment is excused.
246. When dishonored by non-acceptance.
247. Duty of holder where bill not accepted.
248. Rights of holder where bill not accepted.

§ 240. When presentment for acceptance must be made.— Presentment for acceptance must be made:

1. Where the bill is payable after sight or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

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

§ 241. When failure to present releases drawer and indorser.— Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

§ 242. Presentment; how made.— Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee† or some person authorized to accept or refuse acceptance on his behalf; and

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has au-

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3446–3454; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 143–151; Maryland, 162–170; Ohio, 3176*g*–3176*o*; Rhode Island, 151–159; Wisconsin, 1681 to 1681–8.

† The word "drawee" substituted for "drawer" by Laws N. Y. 1898, c. 336.

thority to accept or refuse acceptance for all, in which case presentment may be made to him only;

2. Where the drawee is dead, presentment may be made to his personal representative;

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

§ 243. On what days presentment may be made.— A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections one hundred and thirty-two* and one hundred and forty-five† of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

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

§ 245. Where presentment is excused.— Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead or has absconded, or is a fictitious person or a person not having capacity to contract by bill;

2. Where after the exercise of reasonable diligence, presentment cannot be made;

3. Where, although presentment has been irregular, acceptance has been refused on some other ground.

§ 246. When discharged by non-acceptance.—A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When presentment for acceptance is excused and the bill is not accepted.

§ 247. Duty of holder where bill not accepted.—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

§ 248. Rights of holder where bill not accepted.—When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.

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* Number "one hundred and thirty-two" substituted for seventy-two by Laws 1898, c. 336.

† Number "one hundred and forty-five" substituted for eighty-five. (*Id.*)

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§ 265. Protest both for non-acceptance and non-payment.— A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

§ 266. Protest before maturity where acceptor insolvent.— Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

§ 267. When protest dispensed with.— Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when 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.

§ 268. Protest where bill is lost, et cetera.— 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.

ARTICLE XIV.*

Acceptance of Bills of Exchange for Honor.

SECTION 280. When bill may be accepted for honor.
281. Acceptance for honor; how made.
282. When deemed to be an acceptance for honor of the drawer.
283. Liability of acceptor for honor.
284. Agreement of acceptor for honor.
285. Maturity of bill payable after sight; accepted for honor.
286. Protest of bill accepted for honor, et cetera.
287. Presentment for payment to acceptor for honor; how made.
288. When delay in making presentment is excused.
289. Dishonor of bill by acceptor for honor.

§ 280. When bill may be accepted for honor.— Where a bill of exchange has been protested for dishonor 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 honor of any party liable thereon or for the honor of the person for† whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3464–3473; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 161–170; Maryland, 180–189; Ohio, 3176*y*–3177*g*; Rhode Island, 169–178; Wisconsin, 1681–18 to 1681–27.

† The word "for" omitted in the original New York Act supplied by Laws 1898, c. 336.

§ **281. Acceptance for honor; how made.**— An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

§ **282. When deemed to be an acceptance for honor of the drawer.**— Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

§ **283. Liability of acceptor for honor.**— The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

§ **284. Agreement of acceptor for honor.**— The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.

§ **285. Maturity of bill payable after sight; accepted for honor.** — Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

§ **286. Protest of bill accepted for honor, et cetera.**— Where a dishonored bill has been accepted for honor 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 honor or referee in case of need.

§ **287. Presentment for payment to acceptor for honor; how made.**— Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and seventy-five.*

§ **288. When delay in making presentment is excused.**— The provisions of section one hundred and forty-one† apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

§ **289. Dishonor of bill by acceptor for honor.**—When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

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* Number one hundred and seventy-five substituted for one hundred and four by Laws N. Y. 1898, c. 336.

† Number one hundred and forty-one substituted for eighty-one by Laws N. Y. 1898, c. 336.

ARTICLE XV.*

Payment of Bills of Exchange for Honor.

SECTION 300. Who may make payment for honor.
301. Payment for honor; how made.
302. Declaration before payment for honor.
303. Preference of parties offering to pay for honor.
304. Effect on subsequent parties where bill is paid for honor.
305. Where holder refuses to receive payment supra protest.
306. Rights of payer for honor.

§ 300. Who may make payment for honor.—Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

§ 301. Payment for honor; how made.—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor, which may be appended to the protest or form an extension to it.

§ 302. Declaration before payment for honor.—The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

§ 303. Preference of parties offering to pay for honor.—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

§ 304. Effect on subsequent parties where bill is paid for honor.—Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

§ 305. Where holder refuses to receive payment supra protest.—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

§ 306. Rights of payer for honor.—The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3474–3480; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 171–177; Maryland, 190–196; Ohio, 3177*h*–3177*n*; Rhode Island, 179–185; Wisconsin, 1681–28 to 1681–34.

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ARTICLE XVII.*

Promissory Notes and Checks.

SECTION 320. Promissory note defined.
321. Check defined.
322. Within what time a check must be presented.
323. Certification of check; effect of.
324. Effect where holder of check procures it to be certified.
325. When check operates as an assignment.

§ 320. Promissory note defined.—A negotiable promissory note within the meaning of this act 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 order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

§ 321. Check defined.—A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

§ 322. Within what time a check must be presented.—A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

§ 323. Certification of check; effect of.—Where a check is certified by the bank on which it is drawn the certification† is equivalent to an acceptance.

§ 324. Effect where the holder of check procures it to be certified.—Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

§ 325. When check operates as an assignment.—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

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* The numbers of the sections of this article in other States than New York are as follows: Arizona, 3487–3491; Colorado, Connecticut, District of Columbia, Florida, Iowa, Massachusetts, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington, 184–189; Maryland, 203–208; Ohio, 3177*u*–3177*z*; Rhode Island, 192–197; Wisconsin, 1684 to 1684–5.

† The word "certification" substituted for "certificate" by Laws N. Y. 1898, c. 336.

ARTICLE XVIII.*

Notes Given for Patent Rights and for a Speculative Consideration.

SECTION 330. Negotiable instruments given for patent rights.
331. Negotiable instruments given for a speculative consideration.
332. How negotiable bonds are made non-negotiable.

§ 330. Negotiable instruments given for patent rights.— A promissory note or other negotiable instrument, the consideration of which consists wholly or partly of the right to make, use or sell any invention claimed or represented by the vendor at the time of sale to be patented, must contain the words "given for a patent right" prominently and legibly written or printed on the face of such note or instrument above the signature thereto; and such note or instrument in the hands of any purchaser or holder is subject to the same defenses as in the hands of the original holder; but this section does not apply to a negotiable instrument given solely for the purchase price or the use of a patented article.

§ 331. Negotiable instruments for a speculative consideration. — If the consideration of a promissory note or other negotiable instrument consists in whole or in part of the purchase price of any farm product, at a price greater by at least four times than the fair market value of the same product at the time, in the locality, or of the membership and rights in an association, company or combination to produce or sell any farm product at a fictitious rate, or of a contract or bond to purchase or sell any farm product at a price greater by four times than the market value of the same product at the time in the locality, the words, "given for a speculative consideration," or other words clearly showing the nature of the consideration, must be prominently and legibly written or printed on the face of such note or instrument above the signature thereof; and such note or instrument, in the hands of any purchaser or holder, is subject to the same defenses as in the hands of the original owner or holder.

§ 332. How negotiable bonds are made non-negotiable.— The owner or holder of any corporate or municipal bond or obligation (except such as are designated to circulate as money, payable to bearer), heretofore or hereafter issued in and payable in this State, but not registered in pursuance of any State law, may make such bond or obligation, or the interest coupon accompanying the same, non-negotiable, by subscribing his name to a statement indorsed thereon that such bond, obligation or coupon is his property; and thereon the principal sum therein mentioned is payable only to such owner or holder, or his legal representatives or assigns, unless such bond, obligation or coupon be transferred by indorsement in blank, or payable to bearer, or to order, with the addition of the assignor's place of residence.

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* This article appears only in the statute as enacted in New York and Ohio.

ARTICLE XIX.

Laws Repealed; When to Take Effect.

SECTION 340. Laws repealed.
341. When to take effect.

§ 340. Laws repealed.— The laws or parts thereof specified in the schedule hereto annexed are hereby repealed.

§ 341. When to take effect.— This chapter shall take effect on the first day of October, eighteen hundred and ninety-seven.

Schedule of Laws Repealed.

Revised Statutes.	Sections.	Subject-matter.
R. S., pt. II., ch. 4, tit. II..	All.....	Bills and notes.

Laws of	Chap.	Sections.	Subject-matter.
1835.....	141.....	All.....	Notice of protest; how given.
1857.....	416.....	All.....	Commercial paper.
1865.....	309.....	All.....	Protest of foreign bills, etc.
1870.....	438.....	All.....	Negotiability of corporate bonds; how limited.
1871.....	84.....	All.....	Negotiable bonds; how made non-negotiable.
1873.....	595.....	All.....	Negotiable bonds; how made negotiable.
1877.....	65.....	1, 3.....	Negotiable instruments given for patent rights.
1887.....	461.....	All.....	Effect of holidays upon payment of commercial paper.
1888.....	229.....	All.....	One hundredth anniversary of the inauguration of George Washington.
1891.....	262.....	1.....	Negotiable instruments given for a speculative consideration.
1894.....	607.....	All.....	Days of grace abolished.

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