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A TREATISE

ON

COMMERCIAL PAPER

AND THE

NEGOTIABLE INSTRUMENTS LAW

INCLUDING THE

LAW RELATING TO PROMISSORY NOTES, BILLS OF EXCHANGE, CHECKS, MUNICIPAL BONDS, AND OTHER NEGOTIABLE AND NONNEGOTIABLE INSTRUMENTS, COMMONLY CLASSED AS COMMERCIAL PAPER, WITH AN APPENDIX CONTAINING THE NEGOTIABLE INSTRUMENTS LAW AND THE ENGLISH BILLS OF EXCHANGE ACT.

BY

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ALBANY, N. Y.
MATTHEW BENDER
1903

J. B. LYON COMPANY
PRINTERS AND BINDERS
ALBANY, N. Y.

PREFACE.

The Negotiable Instruments Law is the result of a concerted effort on the part of several State Legislatures to harmonize and make uniform the rules and principles governing the use of negotiable instruments. It is now in force in nineteen States and the District of Columbia and the Territory of Arizona, and is at present a controlling element in the commercial transactions of nearly forty millions of people in this country. It has been confidently asserted that it will soon become the law in all the States of the Union. The law has settled many disputed points and disposed of much confusion and conflict of authorities. It has, in many States, expressly overruled prevailing doctrines, and has modified or eliminated rules often enunciated by leading text-writers and the courts.

In view of this fact it was planned to make this work a treatise on the law of commercial paper in all its various aspects, but especially with a view of considering and treating the rules and principles relating thereto in connection with the provisions of the Negotiable Instruments Law. In consummation of this plan we have made the sections of this law a part of the text, and have extensively elaborated thereon, and carefully and exhaustively discussed correlative and supplemental principles and doctrines. But we have not confined our research to the authorities found in the reports of the States which have adopted the act. We have attempted to cover the entire field of the law of commercial paper, citing cases from every jurisdiction and using the statutes in their proper connection. It has been our aim to make this work of general use to the working lawyer and the student.

Mr. James W. Eaton, who first conceived the plan of writing this book, died before its completion. His death was a grievous personal loss to his coworker, independent of its effect upon this book. It is not fitting in this place to eulogize him; the friends that he made and the work that he did during his lifetime speak sufficiently of his greatness of heart and mind. This book would have been a better one had Mr. Eaton lived to see its completion. I have attempted to carry out his plan, and have had constantly in view his main purpose, through esteem for him and in honor of his memory.

FRANK B. GILBERT.

ALBANY, N. Y., *February* 14, 1903.

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A. IN GENERAL.

§ 1. Commercial paper defined.

Commercial paper is a term synonymous with negotiable paper. It includes bills of exchange, promissory notes, bank checks, and all other negotiable instruments. It has been defined as any negotiable instrument given in due course of business, whether the element of negotiability be given it by the law merchant or by statute.[1] This definition assumes negotiability as the essential element of commercial paper. There are, however, many other instruments of credit which are generally nonnegotiable in character, but which are so commonly used in the furtherance of commercial transactions as to be included within the term "commercial paper." Among these are warehouse receipts, bills of lading, corporate and municipal bonds, letters of credit, and due bills, which are not, by express terms or by statute, made negotiable. All these instruments should be considered in a treatise on commercial paper, and will be hereafter discussed in their proper places.

§ 2. Law merchant; when to control.

It is provided in the Negotiable Instruments Law, which has been adopted in many of the States,[2] that in any case not pro-

1. *In re* Sykes, 5 Biss. (U. S.) 113, Fed. Cas. 13,708. See also Black's L. Dict. 226; Bouvier's L. Dict. 359.

Tiedeman defines commercial paper as including all those instruments of indebtedness which are treated and used, in the commerce of the world, as the equivalents or representatives of money, or which are given the characteristics of money in the furtherance of commercial ends.

2. The Negotiable Instruments Law has been adopted in the following States: New York, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, North Carolino, Tennessee, Florida, Wisconsin, North Dakota, Colorado, Utah, Oregon, Washington, Ohio, New Jersey, Iowa, and in the Territory of Arizona and the District of Columbia. See Appendix.

vided for in that act, the rules of the law merchant shall govern.[3] The law merchant is a part of the public law; it does not rest essentially for its character and authority on the positive institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade, which general convenience and the common sense of justice have established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.[4] Before legislatures enacted statutes, and the courts decided cases which became a part of the written law, the necessities of business and the usages of trade produced a system controlling absolutely commercial intercourse.

The *lex mercatoria* became a part of the law of the land; it developed along side of the common law; it was gradually recognized by the courts until, at the present time, the principles of equity and good faith, so imperatively demanded in all commercial transactions, and which lie at the foundation of the law merchant, have, for the most part, become a part of the common law, or been placed on our statute-books by legislative enactment. As has been stated by Chief Justice Cockburn in a leading English case:[5] "The law merchant thus spoken of, with reference to bills of exchange and other negotiable instruments, though forming part of the body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade ratified by the decisions of the courts of law."

It was contended, and decided by Lord Blackburn, that usage could not have the effect of conferring the incident of negotiability on a document that was not negotiable by the ancient law merchant.[6] This decision, if followed, would have effectually checked the expansion of the law merchant in its application to negotiable instruments, and would have prevented the development of the law relating thereto by the modification of existing and the creation of new customs regulating their use. The principle declared by Lord Blackburn was fortunately disapproved and overruled in the case of Goodwin v. Robarts. It is now generally accepted as a true doctrine that general customs of trade, sufficiently ascertained and proved, become a part of the

3. Neg. Inst. Law (N. Y.), § 7. See Appendix.

4. 3 Kent's Comm. 2.

5. Goodwin v. Robarts, L. R., 10 Exch. (Eng.) 346.

6. Crouch v. Crédit Foncier, L. R., 8 Q. B. (Eng.) 374.

law merchant which the courts will recognize and enforce. As was said by Lord Cockburn, in the case of Goodwin v. Robarts: "While we quite agree that the greater or less time that a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal, it is the less entitled to prevail, because it may not have formed part of the law merchant as previously recognized and adopted by the courts."

B. BILLS OF EXCHANGE.

§ 3. Definition of bill of exchange.

A bill of exchange is an order in writing directing one person to pay another a given sum of money absolutely.[7] This definition is modeled somewhat after that of Chancellor Kent, who defines a bill of exchange as a written order or request by one person to another, for the payment of money, absolutely and at all events.[8] Since the passage of the Bills of Exchange Act of 1882 in England it may be assumed that the authorized definition of a bill of exchange in that country is that contained in that act. By section 3 of that act a bill of exchange is defined as "an unconditional order in writing, addressed by one per-

7. Chalmers defined a bill of exchange as "an unconditional order in writing for the payment of a sum of money absolutely and at all events." Chalmers' Dig. Bills & Notes (Benj. ed.). Byles, in his edition published before the English Bills of Exchange Act, defined a bill of exchange as "An unconditional written order from A. to B., directing B. to pay C. a sum certain of money therein named."

Edwards has defined a bill of exchange as "An open letter directing the person to whom it is addressed to pay the sum therein specified to a third person named in the instrument on account of the writer or person by whom it is drawn." This definition follows that of Chitty, who defines a bill of exchange as "An open letter of request from and order by one person on another to pay a sum of money therein mentioned to a third person on his account."

Daniel defines a bill of exchange as 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. Daniel's Neg. Inst., § 27.

Blackstone has defined a bill of exchange to be an open letter of request from one man to another, desiring him to pay a sum of money named therein, to a third person on his account. 2 Bl. Comm. 466.

8. Mr. Justice Story, in his work on Bills of Exchange, § 3, criticises this definition in that it omits the peculiar distinguishable quality of a bill of exchange in modern times, *i. e.*, its negotiability, which, though not by our law essential to the instrument, is still that, which, practically speaking, among merchants, constitutes its true character. The definition of Kyd (Kyd on Bills [3d ed.], p. 3) meets with Mr. Story's approval, which states a bill of exchange to be an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other, to whom that third person shall order it to be paid; or it may be payable to bearer.

son to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer." It is further provided in the same section of that act that an instrument which does not comply with the conditions therein imposed, or which orders any act to be done in addition to the payment of money, is not a bill of exchange. The definition contained in the English Bills of Exchange Act has been adopted as a part of the Negotiable Instruments Law, and is now the authorized definition in all those States which have adopted that law;[9] the fact that such definition has now become a part of the law in many important jurisdictions would seem to be sufficient to warrant its acceptance as the most authoritative of all definitions, and to justify its use by text-writers and judges, whether without or within those jurisdictions.

§ 4. Origin of bills of exchange.

a. *Where originated.*— Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and still later, and but slowly, into England.[10]

9. Neg. Inst. Law, § 210.

10. Lord Chief Justice Cockburn in Goodwin v. Roberts, L. R., 10 Exch. 346. It was stated in a law tract by Macleod, entitled "Specimen of a Digest of the Law of Bills of Exchange" that Richard Malynes, a London merchant, who published a work called *Lex Mercatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. II, chap. 3 (1379), bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in England shows that that use at the time he wrote must have been limited.

Blackstone (2 Comm. 467) says in regard to the origin of bills of exchange: "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 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."

Chitty, in his work on Bills (p. 11), says: "Other authors have attributed the invention to the Florentines when, being driven out of their country by

b. *Law merchant; customs of merchants.*— There can be no doubt but that bills of exchange, and indeed all other negotiable instruments have their origin in the law merchant. The customs of commerce established these useful mediums as the natural result of the necessities attending commercial transactions. The introduction and use of bills of exchange in England, as indeed everywhere else, seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of custom.[11]

The inconvenience of exchanging article for article gave rise to the use of money as a medium of exchange. Early in the history of the nations of antiquity the use of money became general.[12] While there is no vestige of the existence of bills of exchange among the ancients, and the precise period of their introduction is somewhat controverted, it is apparent that their first use came from the convenience of transferring the bill from one place to another rather than the money which it represented.[13]

the faction of the Gabelings, they established themselves at Lyons and other towns. On the whole, however, there is no certainty on the subject, though it seems clear foreigu 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, pt. 1, chap. 2, warrants the conclusion that foreign bills were introduced into this country previously to the year 1381."

Daniel says, in his work on Negotiable Instruments (§ 4): "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*)." Citing Anderson's History of Commerce, vol. 1, p. 361.

11. Story on Bills of Exchange, §§ 5–11.

12. **Use of money by ancients.**— When money was invented as the common medium of commerce, the exchange of money for goods, which properly constitutes a sale, and of money for money, which is but a form of exchange, can be traced distinctly in the common transactions of the same nations, as well as in the intercourse of different nations. Thus, the exchange of goods for money, and of money of one denomination for another, may be found stated in the early Hebrew Scriptures; and those who sat at the tables to exchange the one for the other were called bankers, or masters of the exchange, or money-changers. Story on Bills of Exchange, § 5.

13. **Origin as stated by Kyd.**— In the infancy of mankind, nature pointed out the simple mode of exchanging one commodity for another, by a comparative estimation of their respective values, dictated by the immediate wants of the parties to the exchange. But when the occupation of a merchant became a distinct profession, prospects of a more distant gain introduced a more exact appreciation of the value of the several articles; and a common standard, under the denomination of money, to which everything else should be referred as its measure, appears to have been adopted at a very early period in the history of mankind. It is probable, from the low state of navigation and commerce in the ancient world, that the only improvement, till long after the subversion of the Roman Empire, was the reduction of the rude pieces of antiquity to a more commodious form, under the sanction of the State. It was reserved for an oppressed people,

This convenience was threefold: it enabled a creditor to receive payment of his debt without trouble, risk, or expense; the debtor could pay his debt, if he was so disposed, without difficulty, and the person who presented the bill could find in a foreign or distant place money for his immediate needs without the danger or inconvenience of having the specie in his possession. The customs of merchants in respect to these bills made effectual as rules of law certain regulations controlling their use. The whole system of the law of commercial paper is the direct outgrowth of these customs. Statutes have been enacted and legal principles have been judicially declared, all of which have had their birth in these mercantile customs and usages.[14]

c. *Records and chronicles showing use of bills of exchange.*— For some considerable time before we meet with bills of exchange in the reports and on the statute-books, they were used by English merchants for the purposes of foreign trade; they were treated by custom as binding long before they obtained the force of law through the recognition of courts of justice. As to just when and by whom these negotiable instruments were first used it is difficult to say. Their origin is imbedded in obscurity. It seems safe to assert that they were not an invention but a development. A careful and exhaustive investigation of mediæval records and chronicles does not disclose the semblance of a bill of exchange in its modern form earlier than the middle of the thirteenth century. The work of Pegoletti of Florence (*Practica della Mercatura*), attributed to the commencement of the fourteenth century, contains unmistakable references to *scritti de cambiio* (letters of exchange), and makes use of several of the technical terms so familiar at the present day. But Salvetti, who

considered as the outcasts of mankind, in an unenlightened age, urged by the necessity of their situation, to introduce into Europe at least, if not to give birth to, a method, by which merchants, of regions the most remote from each other, could convey the reasons of procuring the value of their commodities, without the inconvenience of transporting gold or silver. About the middle, or toward the end of the thirteenth century, the Jews, driven by the exactions of the Prince, from England and France, took refuge in Lombardy, and from thence gave to merchant strangers and travelers secret letters on those to whom they had intrusted their effects in the former countries, who honorably discharged the trust reposed in them, by complying with the orders contained in the letters. In the course of time these letters received a fixed form, and had conferred on them the name of bills of exchange. Kyd on Bills of Exchange, p. 1.

14. It is to the custom of merchants that we owe the law as to bills of exchange, promissory notes, and other negotiable instruments. "Custom in the Common Law," by F. A. Greer, L. Quar. Rev. vol. 9, p. 165.

writes of the antiquities of Florence,[15] mentions a ***corpus artis cambii sanctionem*** of the year 1259, which dealt largely with the art of weighing and testing coin, but did not recognize or contain a reference to the existence of *litteræ cambii.* Mr. Jencks in his article entitled "Early History of Negotiable Instruments," [16] gives in full a letter of exchange, bearing date October 5, 1339, and states that it is the oldest bill of exchange known to him. Another example is also given, dated May 18, 1404. Both of these letters are clearly distinguishable as intended for use as bills of exchange, in the same sense and for the same purpose as such bills are used at the present time.

d. *Statutes and ordinances relating to bills of exchange.*— Early European statutes and ordinances have given still further proof of the existence of bills of exchange at a date not later than the end of the fourteenth century. Mr. Jencks also cites a Piacenza ordinance of the year 1391, which compelled *campsores* or dealers in money to give written acknowledgments of money deposited with them, and provides for a special and speedy remedy on such documents; and by an almost contemporary ordinance, adopted by the magistrates of Barcelona, March 18, 1394, it is provided that any one, to whom a letter of exchange is presented, must answer within twenty-four hours, whether he will accept or not, and must further indorse on the letter the decision to which he comes together with the exact date of the presentation. If he fails to comply with this rule, he is to be deemed to have accepted.[17] And again, an ordinance of the French King, Louis XI,[18] creating or renewing a quarterly fair in the town of Lyons, refers to the use of *lectres de change* as an established institution for merchants whose business compels them to frequent fairs.

e. *Judicial decisions involving bills of exchange.*— Not many very early cases seem to have been cited in which the courts of European countries or of England have recognized the custom of merchants in respect to bills of exchange. Mr. Jencks, in the article above referred to, has called attention to a case which he selected from a number published by Brunner in the Zeitschrift für Handelsrecht, which were discovered among manuscript copies

15. Salvetti, Antiquates Florentinæ, 1777.

16. 9 Law Quar. Rev., p. 73.

17. This ordinance is printed in full in the Appendix of Marten's Cersuch einer historischen Entwickelung, etc., p. 107.

18. Recueil General des anciennes Lois français, by Isambert, Jourdan, and De Crusy (Ed. 1825), X, 451–456. The ordinance is dated 1462.

of Protocols recorded in connection with proceedings before the town council of Bruges, in the middle of the fifteenth century. The case referred to is Spinula v. Camby, in which judgment was rendered March 29, 1448. It involved a bill of exchange given by Ricy at Avignon to Cerruche, and drawn on one Marian Rau, payable at Bruges to Camby, the defendant, and one other. Rau paid the bill to Camby, but Camby nevertheless protested for nonpayment, and sent the bill back with the protest to Avignon. Marian Rau's rights passed to her brother Odo, who assigned them to Spinula, the plaintiff, who sued Camby for the amount received by him from Marian Rau. The defendant pleaded the bankruptcy of Odo Rau, and also that Spinula was not a proper party to sue, but that the suit should have been commenced by Marian Rau. The court held that the transfer was worthless and nonsuited the plaintiff. We have here a case remarkably similar in all its aspects to one which might arise under the modern law. Enough more cases from the same source, and contemporaneous, could be described, as to leave no doubt but that early in the fifteenth century bills of exchange were common subjects of litigation in Belgium.

The first reported case in England of a suit on a bill of exchange seems to be that of Martin v. Bowie,[19] decided in the first year of the reign of James I. No new legal principle was involved in this case. The bill was stated in the declaration to have been drawn *secundem usum mercatorum*, but there does not seem to have been any evidence of what the *usus mercatorum* was, as indeed was not necessary, as the action was in assumpsit between parties between whom there was privity of contract, and the obligation was complete without proof of any custom. Another and apparently the next English case reported is that of Oaste v. Taylor.[20] The principle was declared in this case that the acceptance of a bill of exchange amounts, by the law merchant, to a promise to pay; but that it must be stated that the drawee was a merchant at the time he accepted it.[21] The custom invoked in this

19. Croke's Reports, vol. 2, p. 6 (1 Jac. I).

20. Croke's Reports, vol. 2, p. 306 (10 Jac. I).

21. The case is stated thus in the reports: "Whereas by the custom of London between merchants trafficking from London into the parts beyond seas, if any merchant commorant in London, and trafficking beyond seas, direct his bill of exchange, *bona fide*, and without covin, to another merchant commorant beyond seas, and trafficking between London and the parts beyond seas; upon such a merchant's accepting a bill, and subscribing it according to the use of merchant, it hath the force of a promise, to compel him to pay at the day appointed by the bill."

case was local to the city of London, and was only applicable to foreign bills. It would seem that at this time the use of bills of exchange had been confined to foreign trades. At a somewhat later date legal recognition was extended to inland bills between traders, and finally to all bills, whether drawn and accepted by traders for purposes of trade, or by private persons for purposes unconnected with trade.[22] This extended recognition of bills of exchange was only brought about slowly, by those tentative hesitating steps that are so characteristic of English law reform, whether legislative or judicial.

It would seem that at first the validity of inland bills of exchange depended solely on the local custom. In the earlier cases it was required to produce some evidence of the custom, but later, when the custom became general rather than local, the courts took judicial notice of it, as they did of all other parts of the common law.[23]

§ 5. Assignability of bills of exchange.

It is a very ancient rule of common law that a chose in action (which is defined to be a right not reduced into possession) could not be assigned or transferred. This rule seems to have been the result of the fear that such transfers would produce oppression of the weak by the strong, and cause endless litigation.[24] How-

22. Bromwich v. Lloyd, 1 Lutw. (Eng.) 503 (8 Wm. III). It is stated in this case by Chief Justice Treby that bills of exchange at first were extended only to merchant strangers trading with English merchants, and afterward to inland bills between merchants trading one with another in England, and after that to all traders and dealers, and of late to all persons trading or not.

23. Carter v. Downich, 1 Show. (Eng.) 124, 3 Mod. 227 (3 & 4 James II). It was held in this case that it was sufficient to allege by plea that a bill had been indorsed according to the customs of merchants without setting out the custom, because the customs of merchants were part of the common law, and the courts would take judicial notice of them.

In the case of Buller v. Crips, 6 Mod. (Eng.) 29 (2 Comm.), Chief Justice Holt says: "I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol; and it was an action against the acceptor; the defendant's counsel would put them to prove the custom; at which Hale, Chief Justice, who tried it, laughed and said they had a hopeful case of it. And in my Lord North's time, it was said, that the custom in that case was part of the common law of England; and these actions became frequent, as the trade of the nation did increase; and all the difference between foreign bills and inland bills is that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest."

In the case of Brandao v. Barnett, 3 C. B. (Eng.) 530, 6 M. & G. 665, Lord Campbell said: "When a general usage has been judicially ascertained and recognized, it becomes part of the law merchant, which courts of justice are bound to know and recognize."

24. This doctrine was based "on the ground that such alienations

ever commendable and necessary this rule seemed to be, it became apparent at an early date that the exigencies of commerce demanded that bills of exchange be excepted. Mercantile experience soon proved that the assignment of debts was, under certain circumstances, indispensable, and bills of exchange were devised as the most convenient instrument for facilitating, securing, and authenticating the transfer.[25] And while the rigidity of the common-law rule has been relaxed by statute, both in England[26] and in the States of this country, to the extent of making debts and other legal choses in action assignable in writing, yet bills and notes retain their superior convenience in being assignable by simple delivery, or by indorsement and delivery, according to the nature of the instrument.[27]

The negotiability of bills of exchange and the rules relating thereto will be hereafter considered.[28]

§ 6. Inland and foreign bills of exchange.

a. *Definitions.*— The Negotiable Instruments Law in force in many of the American States[29] has adopted the definition of an inland bill of exchange and applied it to the State adopting such law. By such definition an inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within

tended to increase maintenance and litigation, and afforded means to powerful men to purchase rights of action, and thereby enable them to oppress indigent debtors, whose original creditors would not perhaps have sued them." Chitty on Bills, p. 6. And Lord Coke says that it is one of the maxims of the common law, that no right of action can be transferred, "because, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth." Coke Litt. 214*a*.

25. On this ground, the custom of merchants, whereby a foreign bill of exchange is assignable by the payee to a third person, so as to vest in him the legal as well as equitable interest therein, was recognized and supported by our courts of justice in the fourteenth century; and the custom of merchants rendering an inland bill transferable was established in the seventeenth century. Chitty on Bills, p. 8.

26. 36 & 37 Vict., chap. 66, § 25.

27. Byles on Bills (16th ed.), p. 3. The derivative title (of a person to whom a bill has been indorsed or delivered) is a title by assignment, a title which the common law does not acknowledge, but which exists only by the customs of merchants. As it is by force of the custom of merchants that a bill of exchange is assignable at all, of necessity the custom must direct how it shall be assigned; and in respect to bills payable to order, the custom has directed that the assignment should be made by a writing on the bill called an indorsement, appointing the contents of that bill to be paid to some third person; and in respect of bills drawn payable to bearer only, that the assignment should be constituted by delivery only. This is simple and obvious; every man who can read can discover whether the holder of a bill claims to be the assignee of it as assignee or bearer. Lord Chief Baron Eyre in Gibson v. Minet, 1 H. Bl. 605.

28. *Post*, chap. III.

29. See note 2, on p. 2.

the State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.[30] Independent of this statutory rule it is now well established that a bill drawn in one State upon a person who is a resident of another State, and payable there, is a foreign bill.[31] This doctrine was controverted and was only settled after a considerable discussion by both the courts and text-writers. The reason for the rule is clear. Each State is foreign as to every other, in respect to its individual sovereignty; it is governed by separate laws, having a separate and distinct municipal jurisprudence, and exists as an independent and supreme governing power, except so far as it is controlled and limited by the supreme sovereignty conferred upon the Federal Government by the Con-

30. Neg. Inst. L. (N. Y.), § 213.

The English Bills of Exchange Act of 1882 provides (in § 4) that "an inland bill is a bill which is, or on the face of it purports to be, both drawn and payable within the British islands, or drawn within the British islands upon some person resident therein. Any other bill is a foreign bill. For the purposes of that act British islands include any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her majesty. Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill."

31. *United States.*— U. S. Bank v. Daniel, 12 Pet. 32, 9 L. Ed. 989; Buckner v. Finlay, 2 Pet. 586, 7 L. Ed. 528; Dickens v. Beal, 10 Pet. 572, 9 L. Ed. 538; Life Insurance Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; Armstrong v. Am. Exchange Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Lonsdale v. Brown, Fed. Cas. No. 8,494.

Alabama.— Donegan v. Wood, 49 Ala. 242, 20 Am. Rep. 275; Todd v. Neal, 49 Ala. 266; Turner v. Patton, 49 Ala. 406; Quigley v. Primrose, 8 Port. 247.

Florida.— Joseph v. Soloman, 19 Fla. 623.

Georgia.— Hartridge v. Wesson, 4 Ga. 101.

Illinois.— Mason v. Dousay, 35 Ill. 424, 85 Am. Dec. 368.

Indiana.— American Express Co. v. Haire, 21 Ind. 4, 83 Am. Dec. 334; State Bank of Indiana v. Hayes, 3 Ind. 400.

Kentucky.— Rice v. Hogan, 8 Dana, 133; Chenowith v. Chamberlain, 6 B. Mon. 40, 43 Am. Dec. 145; Harmon v. Wilson, 62 Ky. 322; Gray Tie & Lumber Co. v. Farmers' Bank, 22 Ky. L. Rep. 1333, 60 S. W. 537.

Maine.— Green v. Jackson, 15 Me. 136; Warren v. Coombs, 20 Me. 139; Freeman's Bank v. Perkins, 18 Me. 292; Ticonic Bank v. Stacpole, 41 Me. 302.

Massachusetts. —Phœnix Bank v. Hussey, 12 Pick. 483

Missouri.— Linville v. Welch, 29 Mo. 203.

New Hampshire.— Carter v. Burley, 9 N. H. 558; Grafton Bank v. Moore, 14 N. H. 142; Simpson v. White, 40 N. H. 540.

New York.—Halliday v. McDougall, 20 Wend. 81; Bank of Commerce v. Rutland & W. R. Co., 10 How. Pr. 1; Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269.

Oklahoma.— Morrison v. Farmers & Merchants' Bank, 9 Okla. 697, 60 Pac. 273.

Rhode Island.— Aborn v. Bosworth, 1 R. I. 401.

South Carolina.— Duncan v. Course, 1 Const. Rep. 100; Bank of Cape Fear v. Stinemetz, 1 Hill, 44.

Tennessee.—Gardner v. Bank of Tennessee, 31 Tenn. 420.

Virginia.— Brown v. Ferguson, 4 Leigh, 37, 24 Am. Dec. 707.

stitution of the United States.[32] It follows therefore that the laws regulating the use of bills of exchange in the several States may differ, and the reasons which exist for treating as foreign a bill drawn upon a resident of another State are the same as those which exist in the case of a bill drawn upon a resident of a foreign country.

b. *Distinction between foreign and inland bills.*— The most important distinction between foreign and inland bills is that the former, if dishonored by nonacceptance, must be protested for nonacceptance, and if dishonored for nonpayment, must be protested for nonpayment.[33] It is, however, necessary for other purposes than that of protest to ascertain whether a bill is foreign or inland. In the case of an inland bill the laws regulating its validity are the same notwithstanding the residence of the parties; but in the case of a foreign bill the validity, interpretation, and effect of the instrument will be determined by the laws of the State or country where the obligations of the several parties thereto are to be performed.

c. *Determination of question as to what constitutes a foreign bill.*— The face of the bill will generally indicate its character. Under the Negotiable Instruments Law and the English Bills of Exchange Act a bill may be treated by the holder as an inland bill unless the contrary appears on its face.[34] As a result of this provision, which is apparently new in the English Act of 1882

32. Sir William Blackstone, in his Commentaries (vol. II, p. 467), distinguishes foreign from inland bills by defining the former as bills drawn by a merchant residing abroad upon his correspondent in England, or *vice versa;* and the latter as those drawn by one person on another, when both drawer and drawee reside within the same kingdom. Chitty (p. 16) and other writers (Bayley and Kyd) on bills of exchange are to the same effect; and all of them agree that, until the statutes of 8 & 9 Wm. III, chap. 17, and 3 & 4 Anne, chap. 9, which placed these two kinds of bills on the same footing, and subjected inland bills to the same law and custom of merchants which governed foreign bills, the latter were much more regarded in the eye of the law than the former, as being thought of more public concern in the advancement of trade and commerce. Applying this definition to the political character of the several States of the Union in relation to each other, we are clearly of the opinion that bills drawn in one of these States upon persons living in any other of them partake of the character of foreign bills and ought so to be treated. For all national purposes embraced by the Federal Constitution, the States and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the States are necessarily foreign to and independent of each other. Their Constitutions and forms of government being, though republican, altogether different, as are their laws and institutions. Buckner v. Finley, 2 Pet. (U. S.) 586, 7 L. Ed. 528.

33. Neg. Inst. Law (N. Y.), § 260. See also as to protest of bills of exchange, *post*, chap. XV.

34. Neg. Inst. Law (N. Y.), § 213; English Bills of Exchange Act of 1882, § 4, subd. 2.

and in the Negotiable Instruments Law, the presumption in each case will be in favor of treating bills of exchange as inland, and the holder of a bill, which, upon its face, does not show its character as a foreign bill, may treat it as inland. It is a well-settled principle of law, independent of the provisions of the statute, that the courts will not take judicial notice of the fact that a city, village, or town, mentioned in a bill as the place where it was drawn or made payable, is located in a foreign country or State.[35]

Testimony may be admitted to show that a bill which on its face purports to be a foreign bill is in reality an inland bill, and therefore subject to the Stamp Act.[36] But, on the other hand, as against a *bona fide* purchaser without notice, it cannot be shown that a bill purporting to be foreign is an inland bill, or *vice versa*.[37]

It has been held in Kentucky that when a bill did not indicate on its face the place where it was drawn, but the evidence and circumstances showed that the drawer resided in Kentucky and the drawee in Ohio, the legal presumption is that it was drawn at the drawer's residence.[38]

§ 7. Parties to bills of exchange.

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed and determinable future time, a sum certain in money to, or to the order of, a specified person or bearer. This is the definition contained in the English Bills of Exchange Act,[39] and also in the Negotiable Instruments Law.[40] No particular form of

35. Kearney v. King, 18 E. C. L. (Eng.) 28; s. c., 1 Chitty, 28; Cook v. Crawford, 4 Tex. 420; Yale v. Ward, 30 Tex. 17; Riggin v. Collier, 6 Mo. 568.

36. Jordaine v. Lashbrooke, 7 T. R. (Eng.) 601; Bire v. Moreau, 2 C. & P. (Eng.) 376; Bartlett v. Smith, 11 M. & W. (Eng.) 483.

37. Towne v. Rice, 122 Mass. 67; Lennig v. Ralston, 23 Pa. St. 137.

A bill of exchange drawn in Michigan in favor of a Michigan payee on a person residing and having his place of business in Illinois, and which was accepted in Illinois, is a foreign, and not an inland bill, notwithstanding the drawee also had a place of business in Michigan, where he spent a portion of his time; and it must be governed by the law of the State of Illinois in respect to its acceptance. Mason v. Dousay, 35 Ill. 424, 85 Am. Dec. 368.

In the case of Towne v. Rice, 122 Mass. 67, it was held that the maker or indorser of a promissory note cannot, as against an indorsee of the same in the State of Massachusetts for value before maturity and without notice, show that the note, although dated at Boston with intent that it should be a Massachusetts contract, was actually made in New York, and, on account of illegal interest, was void under the usury laws of that State.

38. Harmon v. Wilson, 62 Ky. 322.

39. Eng. Bills of Exch. Act, 1882, § 3.

40. Neg. Inst. L. (N. Y.), § 210.

words is necessary to a bill of exchange provided it is made clear that it directs one person to pay a certain sum of money to, or to hold that sum at the disposal of another.[41] The parties to a bill of exchange are (1) the drawer, the person who signs the instrument; (2) the drawee, the person to whom it is addressed, and (3) the payee, the person to receive the money.[42] When the drawee has undertaken to pay the bill he is called the acceptor. Sometimes a bill is drawn payable to the drawer, in which case he is the payee, and there are then but two parties to the bill.[43] It is provided in both the English Bills of Exchange Act and the Negotiable Instruments Law, which also seems declaratory of the general rule, that where a bill is drawn by the drawer payable to himself, or payable to a fictitious person, or a person not having capacity to contract, the holder may, at his option, treat it either as a bill or note.[44] And a bill drawn by the drawer upon himself as drawee, and made payable to himself, but indorsed to another person, may be treated as a bill of exchange by the indorsee in a suit against the drawer as an acceptor, or it may be treated as the promissory note of the drawer.[45] It seems conclusively established

41. Ellison v. Collingridge, 9 B. & C. 570.

42. Byles on Bills (16th ed.), p. 2.

43. Story on Bills of Exchange, § 35.

44. Where in a bill, the drawer and drawee are the same person, or the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat it at his option, either as a bill or a note. English Bills of Exchange Act, 1852, § 5 (2); Neg. Inst. L. (N. Y.), § 214.

As an illustration.—A firm carries on business in London and Liverpool. The London house draws a bill on the Liverpool house. The holder may treat it as a note made by the London house payable in Liverpool; and if it be not paid the omission to give notice of dishonor to the London house is immaterial. Chalmers on Bills of Exchange, § 4, p. 17.

An order drawn by the president of a railroad corporation upon its treasurer, directing the latter to pay to A. B., or order, a specified sum, stated as being the amount due A. B. for work done by him as contractor, in building a section of the corporation's railroad, is in effect a promissory note, and may be declared on as such. It is not a bill of exchange because it lacks the essential elements of two parties; *i. e.*, a drawer and drawee. Fairchild v. Ogdensburgh, etc., Ry. Co., 15 N. Y. 337.

45. *England.*— Miller v. Thomson, 3 M. & G. 576, in which case Lord Tindal said: "There is an absence of the circumstance of there being two distinct parties, as drawer and drawee, which is essential to the constitution of a bill of exchange. See also *Ex p.* Parr, 18 Ves. 69; Shuttleworth v. Stephens, 1 Campb. 407; Allan v. Manson, 4 Campb. 115; Harvey v. Kay, 9 B. & C. 356, 364; Dehers v. Harriott, 1 Show. 159; Starke v. Cheesman, Carth. 509; Robinson v. Bland, 2 Burr. 1077.

Alabama.— Brazelton v. McMurray, 44 Ala. 323; Hart v. Shorter, 46 Ala. 453; Capital City Ins. Co. v. Quinn, 73 Ala. 558. But such a bill in the hands of an indorsee is a bill of exchange Randolph v. Parish, 9 Port. (Ala.) 76.

Georgia.— Patillo v. Mayer, 70 Ga. 715; Lewis v. Harper, 73 Ga. 564; De Vaughn v. Hangabook, 73 Ga. 809.

Indiana.— Wardens, etc., of St. James Church v. Moore, 1 Ind. 289.

Kentucky.— Rice v. Hogan, 8 Dana (Ky.), 133; Bradley v. Mason, 6 Bush (Ky.), 603.

as a general rule, independent of statutory provision, that an instrument may be a bill of exchange although the drawer and drawee are the same persons;[46] and that such an instrument may be sued on either as an accepted bill or as a promissory note.[47]

§ 8. Bills in a set.

a. *When made.*— There is usually but one copy made of an inland bill; but foreign bills are often made in sets. The Negotiable Instruments Law provides that "where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill." [48] The reason for making foreign bills in sets is that the danger of miscarriage is thus decreased; if one or more of the bills is not delivered some one of the others may arrive at its proper destination. The custom of making foreign bills in sets has become so common that in some cases the purchaser or person in whose favor they are made may demand, as a matter of right, that they be made in sets.[49]

b. *Form of parts.*— The parts of a bill of exchange in a set are made on separate pieces of paper, each part being numbered and referring to the other parts.[50] Each part should contain a condition, that it shall be paid, provided the others remain unpaid, and is generally in the following form: "Pay to A. B. or order, for value received, this my first of exchange (the second and third

Maine.— Cunningham v. Wardwell, 12 Me. 466.

Massachusetts.— Com. v. Butterick, 100 Mass. 12, 97 Am. Dec. 65.

Michigan.— Hasey v. White Pigeon Beet Sugar Co., 1 Doug. (Mich.) 193.

New York.— Fairchild v. Ogdensburgh, etc., Ry. Co., 15 N. Y. 337.

South Carolina.— McCandlish v. Cruger, 2 Bay (S. C.), 377.

Texas.— Planters' Bank of Tennessee v. Evans, 36 Tex. 592.

46. Harvey v. Kay, 9 B. & C. 356, 364 (*per* Bayley, J.); Wildes v. Savage, 1 Story (U. S.), 22, Fed. Cas. No. 17,653; Randolph v. Parish, 9 Port. (Ala.) 76.

47. Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166. See also Bunting v. Mick, 5 Ind. App. 289, 31 N. E. 378, 1055.

48. Neg. Inst. L. (N. Y.), § 310. See Appendix, *post*. See also English Bills of Exchange Act of 1882, § 71.

49. Chalmers says that in England the obligation to give a set is presumably a matter of bargain. Chalmers on Bills of Exchange, (5th ed.), p. 235.

Chitty says: "If a person has engaged to deliver a foreign bill, it seems that he is bound, on request, to deliver as many parts of it as may be applied for; but if the drawer only give one bill, he will, if it should be lost, be obliged to give another of the same date to the loser." Chitty on Bills, p. 154.

The German Exchange Law, art. 66, provides that the payee is entitled to demand a set from the drawer; and if a bill issued singly be destroyed or lost, the indorsee can obtain a second of exchange by addressing himself to his immediate indorser, who applies to the indorser before, and so on up to the drawer.

50. Byles on Bills (16th ed.), p. 137.

of the same date and tenor remaining unpaid)." [51] A cancellation or payment of any one of the parts extinguishes all the rest.[52] The rights and liabilities of holders and acceptors of bills in a set will be considered hereafter.[53]

C. PROMISSORY NOTES.

§ 9. Definition of promissory note.

A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer. A negotiable promissory note is payable to the order of a specified person or to the bearer.[54] No precise form of words is necessary to constitute a valid promissory note, provided all statutory requirements are complied with.[55] It has been held that an instrument containing a promise to do anything more than to pay a certain sum of money at a certain time, and at all events, is not a promissory note, but a special agreement.[56]

51. Story on Bills of Exchange, § 28.

52. Neg. Inst. L. (N. Y.), § 315. See Appendix, *post*.

53. See chap. XII, §§ 138–140, *post*.

54. See Byles on Bills (16th ed.), p. 6.

The Negotiable Instruments Law defines a negotiable promissory note within the meaning of that act as "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." And under this act, "where a note is drawn to the maker's own order, it is not complete until indorsed by him." Neg. Inst. L. (N. Y.), § 320. See Appendix.

The definition in the text is that contained in the English Bills of Exchange Act of 1882, § 83. It is more appropriate to our purposes because it defines promissory notes without regard to their negotiability.

A promissory note has also been defined as a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein. Drake v. Markle, 21 Ind. 433, 83 Am. Dec. 358; Brown v. First Nat. Bank, 115 Ind. 572, 18 N. E. 56; Maryland Fertilizing & Mfg. Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750; Cayuga County Nat. Bank v. Purdy, 56 Mich. 6, 22 N. W. 93.

The following cases may also be cited as containing definitions of a promissory note: Walters v. Short, 10 Ill. 252; Coolidge v. Ruggles, 15 Mass. 387; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845.

55. Hooper v. Williams, 2 Exch. 20; Peto v. Reynolds, 9 Exch. 410, affd. in 11 Exch. 418; Pepoon v. Stagg, 1 Nott & McC. (S. C.) 102; Woodlock v. Leslie, 2 Nott & McC. (S. C.) 585; Hitchcock v. Cloutier, 7 Vt. 22. See also Hunt v. Devine, 37 Ill. 137, in which the court held that any form of expression containing an absolute promise to pay a certain amount at a time certain constitutes a promissory not.

56. Lane v. Gobbold, Fed. Cas. No. 8,051; Austin v. Burns, 16 Barb. (N. Y.) 643; Barnes v. Gorman, 9 Rich. Law (S. C.), 297.

§ 10. Negotiability of promissory note.

A promissory note is not essentially negotiable,[57] although under the Negotiable Instruments Law it must have this characteristic in order to be subject to the provisions of that statute.[58] Although negotiability is not essential to the validity of a promissory note, "it is this quality which gives it its principal importance, and makes it a circulating credit, so extensively used and so generally resorted to in the commerce of the world." [59] The requirements of a negotiable instrument will be considered hereafter.[60]

§ 11. Development and early use of promissory notes.

a. *Origin and development.*— It seems likely that, as long as money has been in use and men have expressed themselves in writing, simple promissory notes, or written promises to pay money, have been used for the purpose of promoting trade and commercial transactions.[61] The Roman law mentions such promises,[62] and there is no reason to believe that they were not used by the even more ancient nations. The negotiability of these instruments was unknown among the Romans and is evidently the development of modern times. It is difficult to definitely state when promissory notes first came into use as negotiable instruments. They were evidently known and used on the continent long before they became common in England. The time of their introduction into England can only be conjectured; it has been stated that they appear to have been introduced therein, about thirty years (1670) before the reign of Queen Anne.[63] However

57. *Alabama.*— Bowie v. Foster, Minor (Ala.), 264.
Georgia.— Reed v. Murphy, 1 Ga. 236.
Maine.— Bates v. Butler, 46 Me. 387.
Maryland.— Duncan v. Maryland Sav. Inst., 10 Gill & J. (Md.) 299.
Massachusetts.— Sibley v. Phelps, 6 Cush. (Mass.) 172.
Missouri.—Finney v. Shirley, 7 Mo. 42; McGowen v. West, 7 Mo. 569, 38 Am. Dec. 468; Brady v. Chandler, 31 Mo. 28.
New York.— Downing v. Backenstoes, 3 Caines (N. Y.), 137; Goshen & M. Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403; Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845.
Pennsylvania.— Withers v. Deane, 21 Leg. Int. (Pa.) 300.
Tennessee.— Cummings v. Freeman, 22 Humph. (Tenn.) 143.
Vermont.—Arnold v. Sprague, 34 Vt. 402.

58. Neg. Inst. Law (N. Y.), § 320.

59. Story on Promissory Notes (7th ed.), p. 4.

60. See chap. III, *post.*

61. 1 Parsons on Bills and Notes, p. 9.

62. Dig. Liber 22, tit. 1, L. 41, s. 2.

63. Kyd on Bills, p. 18, where it is said: "As commerce advanced in its

this may be, it is certain that such notes were within the custom of merchants for a long time prior to the time when they became the subject of litigation or legislation. Malynes, in his work on *Lex Mercatoria,* first published in 1622, describes promissory notes, calling them bills obligatory or bills of debt.[64] In speaking of these bills, he says: "The sincerity of plain dealing hath been hitherto inviolable in the making of said bills, which every man of credit and reputation giveth of his own handwriting, or made by his servant, and subscribed by him, without any seal or witness thereto; and is made payable to such a merchant or person, or to the bearer of the bill, at such times of payment as is agreed." It cannot be doubted but that the antiquity of promissory notes is as great as that of inland bills of exchange; and indeed it would seem that the foreign custom of merchants respecting promissory notes was gradually and imperceptibly engrafted into the English law merchant at the same time, and under the same sanction as inland bills.[65] No distinction seems to have been made in the

progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment than by bills of exchange. A trader, whose situation and circumstances rendered credit from the merchant or manufacturer who supplied him with goods, absolutely necessary, might have so limited a connection with the commercial world at large, that he could not easily furnish his creditor with a bill of exchange on another man; but his own responsibility might be such, that his simple promise to pay, reduced to writing for the purpose of evidence, might be accepted with equal confidence as a bill on another trader; hence, it may reasonably be conjectured, were at first introduced; and the period of their introduction appears to have been about thirty years before the reign of Queen Anne."

64. Bills obligatory, bills of debt.— Promissory notes were called bills obligatory, or bills of debt, and are described with great accuracy by Malynes in his *Lex Mercatoria*, pp. 71, 72 *et seq.*, where he gives the form of such a bill, which will be found in substance exactly like a modern promissory note. "I, A. B., merchant of Amsterdam, do by these presents, acknowledge to be indebted to the honest C. D., English merchant, dwelling at Middleborough, in the sum of £500, current money, for merchandise, which is for commodities received of him to my content; which sum of £500 as aforesaid, I do hereby promise to pay unto the said C. D. (or the bringer hereof) within six months after the date of these presents. In witness whereof, I have subscribed the same at Amsterdam, this day of July, ."

This is nothing more than a verbose promissory note, which stripped of its redundancies is simply this: For value received, I promise to pay to C. D., or bearer, £500, in six months after date. See Appendix, 1 Cranch (U. S.), 386.

65. Inland bills and promissory notes "both came into use at the same time, were of equal benefit to commerce, depended upon the same principles, and were supported by the same law." Appendix, 1 Cranch (U. S.), 386.

Comyns (Lord Chief Baron), in his Digest, under the title "Merchant," in abridging the substance of what Malynes had said upon the subject of bills of debt, or bills obligatory, stated the law as follows: "Payment by a merchant shall be made in money or by bill. Payment by bill is by bill of debt, bill of credit, or bill of exchange. A bill of debt, or bill obligatory, is, when a merchant by his writing acknowledges himself in debt to another earlier cases between inland bills of exchange and promissory notes.[66] As a result we find considerable confusion existing as to the origin of the legal principles involving the rights and obligations of the parties to promissory notes.

b. *Statute of 3 & 4 Anne, chap. 9.*— The continued and obstinate refusal of some of the common-law judges to accord to promissory notes, made payable to order or to bearer, the element of negotiability, and to permit them to be assigned and indorsed, led to the enactment of the statute of 3 & 4 Anne, chap. 9, which expressly and specifically conferred upon such notes the same quality of assignability and negotiability as was possessed by inland bills of exchange.[67] Lord Chief Justice Holt was the most obstinate of all these judges. He appears to have been most vehement in his opposition and to have persistently contended against the recognition by the courts of the assignability of promis-

in such a sum, to be paid at such a day, and subscribes it at a day and place certain. Sometimes a seal is put to it. But such bill binds by the custom of merchants, without seal, witness or delivery. So it may be made payable to bearer and upon demand. So it is sufficient if it be made and subscribed by the merchant's servant. So a bill of debt may be assigned to another *toties quoties*." And he then quotes at length the statute of Anne, hereafter cited. Lord Comyns was either at the bar or on the bench during the reigns of William, Anne, and George I and George II, and must have known how the law stood before the statute referred to, and it can be readily inferred that in his opinion the statute was enacted to confirm as law the custom of merchants in vogue prior to that time.

66. Confusion in reports of early cases.— There was apparently no distinction made, either by the bench, by the bar, or by merchants, between a promissory note and an inland bill, and this is the cause of that obscurity in the reports of mercantile cases during the reigns of Charles II, James II, and William III, of which Lord Mansfield complained so much in the case of Grant and Vaughn, 3 Burr. 1525, and 1 W. Bl. 488, where he says that in all cases in King William's time "there is great confusion; for, without searching the record, one cannot tell whether they arose from promissory notes, or inland bills of exchange; for the reporters do not express themselves with sufficient precision, but use the words "note" and "bill" promiscuously."

67. Statute of 3 & 4 Anne, chap. 9, provided as follows: "All notes made and signed by any person or persons, whereby such person or persons shall promise to pay to any other person, his, her, or their order, or to bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons to whom the same is made payable; and also, every such note shall be assignable or indorsable over in the same manner as inland bills of exchange, and the person or persons to whom such sum is by such note made payable, may maintain an action for the same in the same manner as they might do on an inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons who signed the same; and any person or persons to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, may maintain an action for such sum of money, either against the person or persons who signed such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange."

sory notes. In one case[68] he says: "The notes in question are only an invention of the Goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them; and sure to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty; and besides, it would impower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it?"[69] It seems certain that the statute in question was the direct result of the pertinacious refusal of Lord Holt to yield to the custom of merchants in vogue as to the assignability of promissory notes. The preamble of a statute infers this,[70] and there is a considerable of contemporary testimony to the same effect.[71] It is apparent that Parliament recognized the injustice of Lord Holt's views, and deemed it important for the interests of commerce and business transactions that the true status of promissory notes, as already established by the custom of merchants, should become fixed, in fact, as a part of the law of the land.[72]

68. Buller v. Crips, 6 Mod. (Eng.) 29.

69. In the case of Clerk v. Martin, 1 Salk. (Eng.) 129, also reported by Lord Raymond in 2 Ld. Raym. 757 (decided in 1702), Chief Justice Holt also said: "That the maintaining of these actions upon such notes were innovations upon the rules of the common law; and that it amounted to a new sort of specialty unknown to the common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded upon obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent." See also Williams v. Cutting, 2 Ld. Raym. 825, 7 Mod. 154, and Bouton v. Souter, 2 Ld. Raym. 774, in both of which cases similar sentiments were expressed by Chief Justice Holt.

70. The preamble of 3 & 4 Anne, chap. 9, is as follows: "Whereas it has been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money mentioned therein, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action by the custom of merchants against the person who first made and signed the same; and that any person to whom such note should be assigned, indorsed or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: Therefore, to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner."

71. Lord Hardwicke in Walmsley v. Child, 1 Ves. 346 (1749).

72. Mr. F. A. Greer says, in his valuable article on "Custom in the Common Law," 9 Law Quar. Rev. 169: "The only permanent result of Holt's opposition was that Parliament was constrained to do what the judges, through his influence, declined to do. Holt was a great lawyer, but his petulant opposition to actions on promissory notes is not to be reckoned among the acts that constitute his title to a great reputation. His view was con-

§ 12. Parties to a promissory note.

There are two original parties to a promissory note — the maker and the payee. The person who makes the note is the maker, and the person to whom it is payable is the payee. The note, when made payable to the payee or his order, may be transferred by indorsement accompanied by delivery to another person, in which case the payee becomes an indorser and the person to whom the note is transferred becomes the indorsee. The holder of a note is the payee or indorsee thereof who is in possession of it, or the bearer thereof when such note is made payable to bearer.[73] Where the note is made payable to the order of the maker and by him indorsed and delivered to another, it is, in legal effect, the same as an ordinary promissory note, in which the indorser is the maker and the indorsee is the payee.[74] And where a note signed by two

trary to that of the whole of Westminster Hall, and there can be no doubt that promissory notes had exactly the same claim to legal recognition as bills of exchange, namely, the general custom of merchants throughout England."

Opinion of Chief Justice Cockburn in the case of Goodwin v. Robarts, L. R., 10 Exch. (Eng.) 337 (1878), in commenting upon the case of Williams v. Williams, Carth. 269 (1692), continues as follows: "Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or to bearer, on the same footing as bills of exchange, had received the sanction of the courts; but Holt having become chief justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or bearer, the chief justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of successive cases, persisted in holding them not to be negotiable by indorsement or delivery. The inconvenience of trade arising therefrom led to the passing of the statute of 3 & 4 Anne, chap. 9, whereby promissory notes were made capable of being assigned by indorsement or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty. It is obvious from the preamble of the statute, which merely recites that 'it had been held that such notes were not within the custom of merchants,' that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that, by the usage prevalent among merchants, these notes had been treated as securities negotiable by the customary method of assignment, as much as bills of exchange properly so called. The statute of Anne may, indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt."

73. English Bills of Exchange Act, 1882, § 2. See also Neg. Inst. Law (N. Y.), § 2.

What constitutes a holder.—A person must be in actual or constructive possession of a note to become the legal holder thereof, and it must be shown that he was in legal possession. Lysaght v. Bryant, 9 C. B. (Eng.) 46; Jenkins v. Tongue, 29 L. J. Exch. (Eng.) 147; Ancona v. Marks, 7 H. & N. (Eng.) 686. It is not necessary that the indorsee should be in the personal possession of the note; possession by his agent is sufficient. Richardson v. Lincoln, 5 Metc. (Mass.) 201. The holder, even if not the owner, may maintain, in his own name, an action on the note, with the owner's consent. Wheeler v. Johnson, 97 Mass. 39.

74. Scull v. Edwards, 13 Ark. 24, 56 Am. Dec. 294. In this case it was held that the indorsee acquires a prim-

or more persons is made payable to one of them, who in turn indorses it, he is liable thereon as maker.[75] In many of the States the rule has been declared, by statute or by the courts, that a promissory note made payable to the order of the maker, if issued for a valuable consideration without indorsement, has the same effect against the maker as if payable to bearer.[76]

D. OTHER FORMS OF COMMERCIAL PAPER.

§ 13. Bank notes; definition and use.

A bank note may be defined as a promissory note, made by a bank or a banker, payable to bearer on demand.[77] Bank notes are

itive title and not derivative, and the indorsement to him is not technically such, but is a part of the instrument itself. See also Towne v. Smith, Fed. Cas. No. 14,115; Winona Bank v. Wofford, 71 Miss. 711, 14 South. 262.

75. Schmidt v. Archer, 113 Ind. 365, 14 N. E. 543. An instrument signed by two persons is not invalid as a promissory note because it is payable to the order of "myself." Jenkins v. Bass, 88 Ky. 397, 11 S. W. 293, 21 Am. St. Rep. 344.

The statutes of Kentucky provide (Gen. Stats., chap. 22, § 13), that where a note is made payable to the maker's order, and is indorsed by him, and then delivered, such signature and delivery operates as a promise to pay the face of the note at maturity to the person to whom the same shall be delivered. Under this statute it has been held that where a note, signed by the defendant and M., was made payable to the order of M, and the latter signed his name on the back of the note, and delivered it to the plaintiff, that the defendant became liable to the plaintiff. Jenkins v. Bass, 88 Ky. 397, 11 S. W. 293, 21 Am. St. Rep. 344. See, generally, Pitcher v. Barrows, 34 Mass. 361, 28 Am. Dec. 306; Heywood v. Wingate, 14 N. H. 73; Rombo v. Metz, 5 Strobh. (S. C.) 108, 53 Am. Dec. 694; Woods v. Ridley, 30 Tenn. 194; Norton v. Downer, 15 Vt. 569.

Notes signed by firm payable to member.— Where a note signed by all the members of a firm is made payable to the order of one of them, the legal disability of the payee to maintain an action thereon, because he would be both plaintiff and defendant, does not disqualify him from indorsing the note to a third party for value, nor prevent the indorsee from maintaining suit thereon. Ormsbee v. Kidder, 48 Vt. 361.

Where the instrument is given by one firm to another, both having a common member, it is not a promissory note until it is assigned by the latter firm; the assignee in such case is to be regarded, as between himself and the makers, as the real payee, and may maintain an action against the makers. Murdock v. Caruthers, 21 Ala. 785. Where the name of a firm is signed by one of two partners to a note payable to the other, it is, in effect, merely the note of the former to the latter. Morrison v. Stockwell, 39 Ky. 172.

76. *California.*— Code, § 3102. And see Main v. Hilton, 54 Cal. 110.

Mississippi.—Columbus Ins. & Bank. Co. v. First Nat. Bank, 73 Miss. 96, 15 South. 138.

Missouri.—Lowrie v. Zankel, 49 Mo. App. 153.

New York.— The statute of New York formerly provided that a note made payable to the order of the maker "shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker and all persons having knowledge of the funds, as if payable to the bearer." (Rev. Stat., pt. 2, chap. 4, tit. 2, § 5.) This statute was repealed in 1897 by the Negotiable Instruments Law, and under section 27 of that law it is now provided that a note made payable to the maker is payable to order. See the following cases which arose under the former act: Irving Nat. Bank v. Alley, 79 N. Y. 536; Turnbull v. Bowyer, 40 N. Y. 456; Shipman v. Bank of New York, 126 N. Y. 318, 27 N. E. 371.

77. Byles on Bills (16th ed.), p. 10,

generally issued for circulation as money.[78] The laws of many States authorize the issue of circulating notes by banks and bankers and provide for their redemption by the deposit with the State of ample security.[79] The National Banking Act expressly provides for the issue of circulating notes by national banks organized under that act, to be secured by the deposit of United States bonds.[80] The United States statutes do not prohibit the issue of circulating notes by State banks, under the sanction of State authority, but they impliedly discourage it by imposing a tax on all notes "of any person, or of any State bank or State banking association, used for circulation" and paid out by any national or State bank.[81] It follows, therefore, that the bank notes in use in this country are those issued by national banks, under the direct control of Federal authority. These notes are a most important part of our circulating medium. Their payment being secured by the deposit of government bonds, and the banks issuing them being so closely supervised by the governmental departments having them in charge, they circulate without regard to the banks which

contains the following definition of a bank note: "A bank note is a promissory note, made by a banker, payable to bearer on demand, and intended to circulate as money."

Edwards defines a bank note as "a species of promissory note drawn payable to bearer on demand, and for many purposes treated and considered as cash." Edwards on Bills, etc., § 20.

Parsons defines a bank note as a "promissory note of a bank payable on demand to bearer and therefore negotiable by delivery." 2 Parsons on Notes and Bills, 2, 88.

78. Byles on Bills (16th ed.), p. 10.

79. **States authorizing circulating notes** are Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, West Virginia. In the States of Arkansas, California, Mississippi, Nevada, Oregon, Texas, and Washington the issue of circulating notes is prohibited by the Constitution; and in the States of Alabama, Colorado, Florida, Idaho, Illinois, and Michigan such notes are prohibited by statute.

80. U. S. Rev. Stat., §§ 5157–5189.

81. U. S. Rev. Stat., § 3412, which provides that: "Every national banking association, State bank, or State banking association shall pay a tax of ten per centum on the amount of notes of any person, or of any State bank or State banking association, used for circulation and paid out by them."

Object of tax; power to impose.— This section does not lay a direct tax. Congress having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, may secure the benefit of it to the people by appropriate legislation, and to that end may restrain, by suitable enactments, the circulation of any notes not issued under its authority. Veazie Bank v. Fenno, 8 Wall. (U. S.) 533.

The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The taxation is no doubt intended to destroy the use; but that, as has just been seen, Congress has the power to do. Merchants' Nat. Bank v. U. S., 101 U. S. 1.

gave them life. The rules relating to negotiable instruments are not often applied to these notes.

§ 14. Due bills and I O U's.

It has been generally held in this country that a due bill,— a paper whereby the maker acknowledges his indebtedness to the payee in form substantially as follows: "Due B. one hundred and fifty dollars, payable to his order. (Signed) A.,"— is a promissory note.[82] This is upon the theory that the acknowledgment of indebtedness on its face implies a promise to pay.[83] As

82. **Forms of due bills.**— "Due A. B. $325, payable on demand" held a promissory note. Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590. See also Carver v. Hayes, 47 Me. 257.

A paper as follows: "$525. Conger, Aug. 23, 1865. Due G. S. W., on corn, five hundred and twenty-five dollars. (Signed) A. B." is a promissory note. Jacquin v. Warner, 40 Ill. 459. But a writing as follows: "I owe the estate of Zenas Warden, $190.15. May 13, 1863" was held to import a mere statement of balance, and not to be a promissory note. Bowles v. Lambert, 54 Ill. 237. See Lincoln v. Butler, 18 Gray (Mass.), 129; McGowen v. West, 7 Mo. 569.

An instrument in these words: "Good to Robert Cochran, or order, for $30, borrowed money" is a valid promissory note. Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462. But a similar instrument, in which the payee was not named, was held not to be a promissory note. Brown v. Gilman, 13 Mass. 157.

See also in general on this proposition:

Alabama.— Johnson v. Johnson, Minor (Ala.), 263; Bowie v. Foster, Minor (Ala.), 264; Fleming v. Burge, 6 Ala. 373.

Arkansas.— Huyck v. Meador, 24 Ark. 191.

Connecticut.— Smith v. Allen, 5 Day (Conn.), 337; Currier v. Lockwood, 40 Conn. 349, 16 Am. Rep. 40.

Georgia.— Mitchell v. Rome R. Co., 17 Ga. 574; Brewer v. Brewer, 7 Ga. 584; Lowe v. Murphy, 9 Ga. 338; Hart v. Conner, 21 Ga. 384.

Illinois.— Bilderback v. Burlingame, 27 Ill. 337; Sears v. Wesleyan University, 28 Ill. 183.

Kentucky.—Kalfus v. Watts, 16 Ky. 197.

Louisiana.— Spearing v. Zacharie, 26 La. Ann. 496.

Maine.— Carver v. Hayes, 47 Me. 257.

Massachusetts.— Lincoln v. Butler, 14 Gray (Mass.), 129.

Missouri.— Finney v. Shirley, 7 Mo. 42; McGowen v. West, 7 Mo. 569, 38 Am. Dec. 468; Brady v. Chandler, 31 Mo. 28.

New York.— Luqueer v. Prosser, 1 Hill (N. Y.), 256; Sackett v. Spencer, 29 Barb. (N. Y.) 180; Russell v. Whipple, 2 Cow. (N. Y.) 536; Sheldon v. Heaton, 88 Hun (N. Y.), 535, 34 N. Y. Supp. 856.

Pennsylvania.— Potts v. Coal Co., 6 Phila. (Pa.) 249.

South Carolina.— Pepoon v. Stagg, 1 Nott & McC. (S. C.) 102.

South Dakota.— Schmitz v. Hawkeye Gold Min. Co., 8 S. D. 544, 67 N. W. 618.

Tennessee.— Read v. Wheeler, 10 Tenn. 50; Cummings v. Freeman, 21 Tenn. 143; Marrigan v. Page, 23 Tenn. 247.

Texas.— Hopson v. Brunwankel, 24 Tex. 607, 76 Am. Dec. 124.

See 7 Century Digest, "Bills and Notes," § 61.

83. Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590. See also Elder v. Rouse, 15 Wend. (N. Y.) 220; Sackett v. Spencer, 29 Barb. (N. Y.) 184; Woodward v. Genet, 37 Barb. 527.

But in Connecticut it has been held that while the law implies a promise to pay from a mere due bill or acknowledgment of debt, if the promise is simply implied and not expressed, the instrument cannot be classed with promissory notes. Currier v. Lock-suggested by the foot-note, there is some conflict of authority as to effect of the promise to pay implied in a due bill; many nice distinctions have been drawn, none of which are entirely satisfactory. A mere acknowledgment of debt evidenced by an I O U is held not to be a promissory note in England,[84] and many authorities in this country are to the same effect.[85] It seems well settled, however, that if the due bill or I O U contains words which would import a promise to pay and render the instrument negotiable it should be treated as a promissory note.[86] If an I O U contains an agreement that it is to be paid on a given day, or on demand, it will be a promissory note.[87] Some of the States have, by statute, extended the law of bills and promissory notes to all instruments in writing whereby any person acknowledges any sum of money to be due to any other person.[88]

wood, 40 Conn. 349, 16 Am. Rep. 40. And in Louisiana a due bill is a mere acknowledgment of debt, and, the promise to pay money being only implied, it does not fall within the definition of a promissory note. Garland v. Scott, 15 La. Ann. 143. But this case seems overruled by Spearing v. Zacharie, 26 La. Ann. 496.

And in Missouri it has been held that a memorandum stating that a certain sum is due, with interest, but containing no express promise or time of payment, and naming no payee, is not a promissory note. Biskup v. Oberle, 6 Mo. App. 583.

Story says (Promissory Notes, § 14) that "to constitute a good promissory note, there must be an express promise on the face of the instrument to pay money; for a mere promise implied by law, founded upon an acknowledged indebtedness will not be sufficient." But this declaration of the rule is not upheld by the weight of authority either of the decisions as above cited, or of the text-writers. See Byles on Bills, p. 8; Parsons on Notes and Bills, § 24; Chitty on Bills, p. 428.

84. Most of the English cases arose under the Stamp Act and they held that such paper did not require a stamp as it was only an evidence of indebtedness. Israel v. Israel, 1 Campb. 499; Gould v. Coombs, 1 C. B. 543; Childers v. Boulnois, Dowl. & R. 8; Smith v. Smith, 1 Fost. & F. 539; Beeching v. Westbrook, 8 Mees. & W. 411; Melanotte v. Teasdale, 13 Mees. & W. 216; Fesenmayer v. Adcock, 16 Mees. & W. 449.

85. *In Massachusetts* it has been held that a mere promise implied by law, founded on an acknowledgment of indebtedness, is not sufficient to constitute a promissory note; as where the instrument was in the following form:

"Marlboro', Sept. 23, 1881.

"I O U, E. A. Gay, the sum of seventeen dolls. 5/100, for value received. JOHN R. ROOKE."

Gay v. Rooke, 151 Mass. 115, 23 N. E. 835, 21 Am. St. Rep. 434, 7 L. R. A. 392. In this case the court said: "While in a few States it has been held otherwise, the law as generally understood in this country is, that in the absence of any statute, a mere acknowledgment of a debt is not a promissory note, and such is, we think, the law of this Commonwealth." The following cases are cited: Gray v. Bowden, 23 Pick. (Mass.) 282; Commonwealth Ins. Co. v. Whitney, 1 Metc. (Mass.) 21; Daggett v. Daggett, 124 Mass. 149; Almy v. Winslow, 126 Mass. 342; Carson v. Lucas, 13 B. Mon. (Ky.) 213.

86. Russell v. Whipple, 2 Cow. (N. Y.) 536; Wardwell v. Sterne, 22 La. Ann. 28.

87. Byles on Bills (16th ed.), p. 35. See Brooks v. Elkins, 2 Mees. & W. 74; Waithman v. Elsee, 1 C. & K. 35; Brown v. Gilman, 13 Mass. 158.

88. Gay v. Rooke, 151 Mass. 115, 23 N. E. 835, 21 Am. St. Rep. 434, 7

§ 15. Certificates of deposit.

A certificate of deposit is a receipt given by a bank or banker or any other person for money deposited whereby it is agreed to pay the person named therein, or order, the amount of money specified, in the manner agreed upon between the parties. If negotiable the certificate is a promissory note.[89] But a certificate which states that a certain sum is subject to the depositor's order, but contains no express promise to pay is not a promissory note.[90]

L. R. A. 392, citing Colo. Gen. Stat. (1883), chap. 9, § 3; Ill. Rev. Stat. (1884), chap. 98, § 3; Ind. Rev. Stat. (1881), § 5501; Iowa Code (1873), § 2085; Miss. Rev. Code (1880), §§ 1123, 1124.

89. **Certificate as promissory note.** — A certificate of deposit of a certain sum of money, payable at a future day, with interest until due, for the use of a person named, and to his order, upon the return of a certificate, is a negotiable promissory note. Miller v. Austen, 13 How. (U. S.) 218, 14 L. Ed. 119. There are a number of other cases cited in the Century Digest (Bills and Notes, § 62), in support of this proposition, among which are:

Alabama.— Renfro v. Merchants & Mechanics' Bank, 83 Ala. 425, 3 South. 776.

California.— Welton v. Adams, 4 Cal. 37, 60 Am. Dec. 579; McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Coye v. Palmer, 16 Cal. 158; Mills v. Barney, 22 Cal. 240; Brummaghim v. Tallant, 29 Cal. 503, 89 Am. Dec. 61.

Connecticut.— Kilgore v. Bulkley, 14 Conn. 362.

Florida.— Maxwell v. Agnew, 21 Fla. 154.

Georgia.— Carey v. McDougald, 7 Ga. 84; Lynch v. Goldsmith, 64 Ga. 42.

Illinois.—Peru Bank v. Farnsworth, 18 Ill. 563; Laughlin v. Marshall, 19 Ill. 390; Swift v. Whitney, 20 Ill. 144; Hunt v. Divine, 37 Ill. 137.

Indiana.— National State Bank v. Ringel, 51 Ind. 563; Gregg v. Union Co. Nat. Bank, 87 Ind. 238; Drake v. Market, 21 Ind. 433, 83 Am. Dec. 358.

Iowa.— Bean v. Briggs, 1 Iowa, 488, 63 Am. Dec. 464.

Maryland.—Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603.

Michigan.— Cate v. Patterson, 25 Mich. 191; Tripp v. Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Birch v. Fisher, 51 Mich. 36, 16 N. W. 220; Beardsley v. Webber, 104 Mich. 88, 62 N. W. 173.

Minnesota.— Cassidy v. First Nat. Bank, 30 Minn. 86, 14 N. W. 363; Mitchell v. Eastman, 37 Minn. 335, 33 N. W. 910.

New York.—Orleans Bank v. Merrill, 2 Hill (N. Y.), 295; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Frank v. Wessels, 64 N. Y. 155; Baker v. Adams, 9 App. Div. 365, 41 N. Y. Supp. 399.

North Carolina.— Johnson v. Henderson, 76 N. C. 227.

Ohio.— Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799.

Texas.— First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40.

Wisconsin.— Ford v. Mitchell, 15 Wis. 304; Lindsey v. McClelland, 18 Wis. 481, 86 Am. Dec. 786; Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773; Curran v. Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827.

90. Shute v. Pacific Nat. Bank, 136 Mass. 487. This case seems to stand somewhat alone among a great number of cases which are all to the effect that the ordinary certificate of deposit is a promissory note. But the case arose under a statute (Gen. Stat., chap. 53, § 10; Pub. Stat., chap. 77, § 14), providing that in an action on a promissory note payable on demand, brought by indorsee against the promisor, any matter shall be deemed a legal defense which would be a defense to a suit on such note brought by the promisee, except that no matter arising after notice of the indorsement or transfer of such note has been given to the promisor shall constitute a defense; and the court held that since certificates of deposit were not commonly known in the community as promissory notes, to include them

And it has been held that where the certificate does not designate any time for payment, but is payable on the return of the certificate, it is not a promissory note payable on demand.[91] The negotiability of a certificate of deposit depends upon the wording of the instrument, and is governed by the same rules that control promissory notes.[92]

§ 16. Checks.

a. *Definition.*— A check is a bill of exchange drawn on a bank payable on demand. This is the definition contained in the English Bills of Exchange Act of 1882,[93] and also in the Negotiable Instruments Law recently adopted in many of the States.[94] But in so far as these acts define a check as a bill of exchange, they are declaratory of the law as it existed at the time of their passage.[95]

within the statute above cited would defeat entirely the purpose for which they are given. See also Hunt, Appellant, 141 Mass. 515, 6 N. E. 554; O'Neil v. Bradford, 1 Pinn. (Wis.) 390, 42 Am. Dec. 574; Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554.

91. Shute v. Pacific Nat. Bank, 136 Mass. 487; Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554; Charnley v. Dulles, 8 Watts & S. (Pa.) 353; Lebanon Bank v. Mangan, 28 Pa. St. 452; London Sav. Fund Soc. v. Hagerstown Sav. Bank, 36 Pa. St. 498, 78 Am. Dec. 390.

92. Negotiability.—A certificate of deposit may be made payable to A. B. when it is not negotiable. It may be made payable to A. B. or order, when it is negotiable by indorsement. It may be made payable to A. B. or bearer, when it is negotiable by simple dělivery. If it be expressed as payable in currency or in current funds, or the like phraseology, it is not negotiable, because it is not made payable in money. Morse on Banks and Banking, p. 65.

See also for particular instances of negotiable and nonnegotiable certificates for deposit, Welton v. Adams, 4 Cal. 37; Mills v. Carney, 22 Cal. 240; Poorman v. Mills, 35 Cal. 118; Carey v. McDougald, 7 Ga. 84; Lynch v. Goldsmith, 64 Ga. 42; Lafayette Bank v. Ringel, 51 Ind. 393; Bellows Falls Bank v. Rutland, 40 Vt. 377.

On return of receipt.—A written instrument acknowledging the receipt of a specified sum of money in paper currency for account of a person named, and promising to pay the same to such person or order "on return of this receipt," with interest, is a negotiable promissory note. The words "on return of this receipt" do not make it payable upon a contingency, or constitute a condition precedent; and its being payable in paper currency will be taken as meaning legal tender paper currency. Frank v. Wessels, 64 N. Y. 155.

Current funds.—A certificate payable in "current funds" is not negotiable. Lafayette Nat. Bank v. Ringel, 51 Ind. 393. This case does not seem to be in accord with other cases involving certificates of deposit payable in current funds. See Citizens' Nat. Bank v. Brown, 45 Ohio St. 526, 11 N. E. 799, 4 Am. St. Rep. 526.

93. English Bills of Exchange Act, 1882, § 73 (see Appendix); Chalmers on Bills of Exchange, p. 245.

94. Neg. Inst. L. (N. Y.), § 321. See Appendix.

95. M'Lean v. Clydesdale Bank, L. R., 9 App. Cas. 95, per Lord Blackburn, who says that a check is an unconditional order in writing addressed to a banker requiring him to pay a sum certain in money at a fixed or determinable future time, that is to say, on presentation; and coming within this definition it would clearly be a bill of exchange.

In considering the above definition, which is now more authoritative than any of those used by the text-writers, the definition of a bill of exchange should also be borne in mind.[96] With the definition of a bill of exchange in view, a check may be defined as an unconditional order in writing addressed by a person to a bank[97] or banker, signed by the person giving it, requiring the bank or banker to whom it is addressed to pay on demand a sum certain in money to order or bearer.[98]

The United States Supreme Court in discussing the similarity of checks and bills of exchange used the following language: "Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer." Merchants' Nat. Bank of Boston v. State Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008. See Bull v. Kasson Nat. Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97.

A bank check is substantially the same as an inland bill of exchange. It passes by delivery, when payable to bearer, and the rules as to presentment, diligence of the holder, etc., which are applicable to the one, are generally applicable to the other. Rogers v. Durant, 140 U. S. 298, 11 Sup. Ct. 754, 35 L. Ed. 481.

The following decisions of the State courts are to the effect that checks are substantially the same as bills of exchange (see Century Digest, Bills and Notes, § 20):

Alabama.— First Nat. Bank v. Nelson, 105 Ala. 180, 16 South. 707.

Illinois.— Bickford v. First Nat. Bank of Chicago, 42 Ill. 238; Rounds v. Smith, 42 Ill. 245.

Indiana.— Glenn v. Noble, 1 Blackf. (Ind.) 104; Henshaw v. Root, 60 Ind. 220.

Kentucky.— Shrieve v. Duckham, 11 Ky. 194; Humphries v. Bicknell, 12 Ky. 296.

Maryland.—Moses v. Franklin Bank, 34 Md. 574; Hawthorn v. State, 56 Md. 530; Laird v. State, 61 Md. 309.

Nebraska.— Wood River Bank v. First Nat. Bank, 36 Neb. 744, 55 N. W. 239.

New Hampshire.— Barnet v. Smith, 30 N. H. 256.

New York.— Murray v. Judah, 6 Cow. 484; Smith v. Jones, 20 Wend. 192; Risley v. Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Duncan v. Berlin, 60 N. Y. 153.

South Carolina.— Sutcliffe v. McDowell, 2 Nott & McC. 251.

Tennessee.— Planters' Bank v. Merritt, 54 Tenn. 177.

Virginia.— Purcell v. Allemong, 22 Gratt. 739.

Contra.— The following cases contain statements to the effect that checks are not bills of exchange, although the similarity is not denied:

Indiana.— Griffin v. Kemp, 46 Ind. 172; Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805.

Iowa.— Roberts v. Austin, 26 Iowa, 315.

Kentucky.— Lester v. Given, 71 Ky. 357.

Maryland.— Exchange Bank v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173.

Massachusetts.—Bullard v. Randall, 67 Mass. 605, 61 Am. Dec. 433; Way v. Towle, 155 Mass. 374, 29 N. E. 506.

Missouri.— Hays v. Lathrop Bank, 75 Mo. App. 211.

96. Neg. Inst. L. (N. Y.), § 210. See Appendix.

97. A bank is defined by the Negotiable Instruments Law (§ 2) as including any person or association of persons carrying on the business of banking whether incorporated or not. See Wieland's Admr. v. State Nat. Bank, 23 Ky. L. Rep. 1517, 65 S. W. 617; s. c., 66 S. W. 26.

98. Daniel defines a check as "a "draft or order upon a bank or banking-house, purporting to be drawn "upon a deposit of funds for the

b. *Distinction between checks and bills of exchange.*— Notwithstanding the statement contained in the Negotiable Instruments Law, that a check is a bill of exchange, there are differences between checks and bills which must be recognized. "The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the Statute of Limitations runs only from that time. It is, by its face, the appropriation of so much money of the drawer in the hands of the drawee, to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such a case would be a fraud." [99] It is provided in the Negotiable Instru-

"payment at all events of a certain "sum of money, to a certain per- "son therein named, or to him or "his order, or to bearer, and pay- "able instantly on demand." (Daniel on Neg. Inst., § 1566.) In the note to this definition Mr. Daniel calls attention to the insufficiency of the definition employed by many of the text-writers. Among these are the following: Parsons on Notes and Bills (vol. 2), p. 57: "A check is a brief draft or order on a bank or banking-house, directing it to pay a certain sum of money." Edwards on Bills, 396: "A check drawn on a bank is a bill of exchange payable on demand." Story on Promissory Notes, § 487: "A check is a written order or request addressed to a bank, or to persons carrying on the business of bankers, by a party having money in their hands, requesting them to pay on presentment to another person, or to him or bearer, or to him or order, a certain sum of money specified in the instrument." In view of the legislative declaration as to what constitutes a check, contained in the Negotiable Instruments Law, in force in many of the States, as well as the decisions of the courts in most of the States, it would seem that the definition in the text is accurate and sufficiently comprehensive.

Pay check issued by the paymaster of a railroad company, drawn on the treasurer, payable at a bank named therein, is not a check on such bank. Chicago, B. & Q. R. R. Co. v. Burns, 61 Neb. 793, 86 N. W. 483.

An indorsement on an architect's certificate reciting that a certain amount is due to the contractor, viz.: "P. H. & Co., pay to the order of E." (contractor), and signed by the owner of the building, P. H. & Co. having in their hands funds of the owner to be paid out as required for the construction of the building, is a check and not a bill of exchange. Industrial Bank of Chicago v. Bowes, 165 Ill. 70, 46 N. E. 10.

99. Merchants' Nat. Bank of Boston v. State Bank, 10 Wall. (U. S.) 647, 19 L. Ed. 1019; *Re* Brown, Fed. Cas. No. 1,985 (2 Story, 502).

Distinction between check and bill. — Mr. Justice Story, in stating the distinction in point of law between checks and bills of exchange, refers to the rule that a bill of exchange taken after the day of payment subjects the holder to all the equities attaching to it in the hands of the party from whom he receives it, and adds: "This rule does not apply to a check, for it is not treated as overdue, although it is taken by the holder some days after its date, and it is payable on demand. On the contrary, the holder, in such a case, takes it, subject to no equities of which he has not, at the time, notice: for a check is not treated as overdue merely because it has not been presented as early as it might be, or as a bill of exchange is required to be, to ments Law and in the English Bills of Exchange Act that except as otherwise provided therein, the provisions thereof applicable to a bill of exchange payable on demand apply to a check.[1]

c. *Checks payable after date.*— The great weight of authority in this country upholds the doctrine that a draft or order upon a

charge the drawer, or indorser, or transferrer. One reason for this seems to be, that, strictly speaking, a check is not due until payment is demanded. *Re* Brown, Fed. Cas. 1,985; 2 Story, 502, 513; Story on Promissory Notes, § 491.

In Massachusetts the distinction has been thus expressed: "A check differs from a bill of exchange in this, that it is drawn upon a bank, or on the house of a private banker, is payable on presentment, and the bank or banker is not entitled to days of grace upon it, although payable on some other day than its date. It may also be passed from hand to hand, and a reasonable time is allowed to each party receiving the same to present it for payment. Taylor v. Wilson, 11 Metc. (Mass.) 44, 52. See also Daly v. New Jersey Steel & Iron Co., 155 Mass. 374, 29 N. E. 506.

In New York it has been held that a bill of exchange is not necessarily payable on demand, but a check is. Both may be drawn on a bank or banker. Bowen v. Newell, 8 N. Y. 190.

In Ohio it has been held in a leading case that checks and bills of exchange are to be distinguished in the following particulars: (1) "A check is drawn upon an existing fund, and is an absolute transfer or appropriation to the holder, of so much money in the hands of the drawee; whereas a bill of exchange is not always or necessarily drawn upon actual funds in the hands of the drawee, but very frequently drawn in anticipation of funds, or upon a previously arranged credit. (2) The drawer of a check is always the principal; whereas the drawer of a bill frequently stands in the position of a mere surety. (3) As between the holder of a check and an indorser, demand of payment within due time is essential to the liability of the letter. But days of grace being allowed to bills of exchange, the time for demanding payment of a bill is different. (4) As between the holder and drawer, however, mere delay in presenting a check in due time for payment would not discharge the latter, unless he had been injured thereby, and then only to the extent of his loss; but a different rule in this respect prevails in case of a bill of exchange. (5) A check requires no acceptance, and when presented, the presentment is for payment. (6) It is not protestable, or in other words, protest is not requisite to hold either the drawer or an indorser." Morrison v. Bailey, 5 Ohio St. 632, 64 Am. Dec. 632. And see Andrews v. Blachly, 11 Ohio St. 89.

In England it has been held that "a check is clearly not an assignment of money in the hands of a banker:— it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor the check, when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. Hopkinson v. Forster, L. R., 19 Eq. 74, 76, per Jessel, M. R.

Byles in his work on Bills (16th ed., p. 33), summarizes the chief points of difference between checks and bills as follows: "Checks are not accepted, hence the holder cannot sue the bank. The drawer is not discharged by the holder's failure to present in due time, unless the bank fail. Notice of dishonor to the drawer is rarely legally necessary, as absence of effects in the drawee's hands, the almost universal cause of dishonor, excuses it, as does countermand of payment. They must be drawn on a banker, and payable on demand, and are generally, though not necessarily, inland. And finally the banker is protected against a foreign or unauthorized indorsement of a draft on him to order on demand."

1. Neg. Inst. Law (N. Y.), § 321. See Appendix: English Bills of Exchange Act, 1882, § 73. See Chalmers on Bills of Exchange, p. 245.

bank payable after its date and subsequent to its issue is not a check, but a bill of exchange.[2]

d. *Drafts by one bank upon another bank in another State.*— It is customary in the transaction of banking business for one bank to issue drafts upon a bank located in another State. In such cases it is often important to ascertain whether such drafts are to be considered as checks or bills of exchange. But few cases have

2. **In general.**— Treating generally of an instrument dated on a certain day, and by some form of words made payable at a day certain thereafter, it is probable that between the array of opposing authorities, the preponderance will be considered to lie in favor of the doctrine that such paper is not to be considered as a check, but as an inland bill of exchange, and therefore entitled to days of grace. Morse on Banks and Banking, p. 262.

Forms of drafts declared bills of exchange.—An instrument addressed to a bank: "Pay to M. C. J. & Co., or order, five hundred dollars, on 22nd October.
$500. (Signed) E. W. & Co.," dated October 12, is a bill of exchange, and as such entitled to grace. Ivory v. State Bank, 36 Mo. 475, 88 Am. Dec. 150. As is also a draft in the following form: "W. & B.: Pay to L. L. B. on the 13th of July, 1853, or order, three hundred dollars." Morrison v. Baily, 5 Ohio St. 13, 64 Am. Dec. 632.

So also is a draft in the following form:

"$199.92.
Minneapolis, Minn., Mch. 27, 1888.
On April 14th, pay to the order of E. Harrison, One Hundred and ninety-nine, and 92-100 dollars.
J. T. HARRISON.
To Citizens Bank,
Minneapolis, Minn." Harrison v. Nicollet Nat. Bank, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746.

Conflict of authority.— The question as to whether an instrument so dated is a check or a bill of exchange has given rise to considerable discussion and some conflict of opinion. The two principal authorities holding such an instrument a check are *Re* Brown, 2 Story, 502, Fed. Cas. 1,985 and Champion v. Gordon. 70 Pa. St. 474. Both of these are entitled to great weight, but they stand almost alone, the Supreme Courts of Rhode Island (Westminster Bank v. Wheaton, 4 R. I. 30) and perhaps of Tennessee, being, so far as we know, the only ones which have adopted similar views. All other courts which have passed upon the question, as well as the text-writers, have almost uniformly laid it down that such an instrument is a bill of exchange, and that an essential characteristic of a check is that it is payable on demand. Harrison v. Nicollet Nat. Bank, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746.

The following Massachusetts cases may also be cited in favor of the proposition that such instruments are checks: Taylor v. Wilson, 11 Metc. 44; Way v. Towle, 155 Mass. 374, 29 N. E. 506.

Bills of exchange and not checks.— The following cases are to the effect that such instruments are bills of exchange:

United States.— Ogden v. Saunders, 25 U. S. 213, 6 L. Ed. 606; Bank of Washington v. Triplett, 26 U. S. 25, 7 L. Ed. 37; Bell v. First Nat. Bank, 115 U. S. 373, 29 L. Ed. 409.

California.— Minturn v. Fisher, 4 Cal. 36.

Delaware.— Work v. Tatman, 2 Houst. 304; Bradley v. Delaplaine, 5 Harr. 305.

Georgia.— Henderson v. Pope, 39 Ga. 361, reaffd. *sub nom.* Georgia Nat. Bank v. Henderson, 46 Ga. 496.

Illinois.— Cutter v. Reynolds, 64 Ill. 321.

New York.— Murray v. Judah, 6 Cow. 484; Woodruff v. Merchants' Bank, 25 Wend. 673; Bowen v. Newell, 8 N. Y. 190; Pope v. Bank of Albion, 57 N. Y. 126.

Ohio.— Morrison v. Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

Oregon.— Hawley v. Jette, 10 Ore. 31, 45 Am. Rep. 129.

arisen where this question has been discussed. The settled opinion seems to be, however, that such drafts are checks and the parties thereto are subject to the same liabilities and possess the same rights as though such drafts were drawn upon a particular bank or banker by an individual.[3]

§ 17. Bills of lading.

a. *Definition.*— It is customary to treat bills of lading as commercial paper. They have many of the characteristics of such paper, and many of the general rules and principles affecting the rights and liabilities of parties to such paper are applicable to them. A bill of lading has been defined as an instrument issued by a common carrier to the consignor of goods, consisting of a receipt therefor, and an agreement to carry them from the place of shipment to the place of destination.[4] A paper signed only by the consignor, stating the shipment, and intrusted to the master of a vessel, is not a bill of lading.[5]

b. *Negotiability.*— Bills of lading are sometimes called *quasi*-negotiable because they are transferable by indorsement, although they do not call for the payment of money.[6] But it is also well

3. A check drawn by a bank in one State on a bank in another, in duplicate, is not a bill of exchange. Merchants' Nat. Bank v. Ritzinger, 118 Ill. 484, 8 N. E. 834. See also Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805; Roberts v. Corbin, 26 Iowa, 315, 96 Am. Dec. 146; First Nat. Bank of Cincinnati v. Coates, 3 McCrary, (U. S.), 9; Bull v. First Nat. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; Morrison v. Farmers & Merchants' Bank, 9 Okl. 697, 60 Pac. 273; Bowen v. Needles Nat. Bank, 87 Fed. 430.

4. Freeman v. Graemer, 63 Minn. 242, 65 N. W. 455.

Daniel (Neg. Inst., Vol. 2, § 1728) defines a bill of lading as "a written "acknowledgment by the master of a "ship, or the representative of any "common carrier, that he has re-"ceived the goods therein described "for the voyage or journey stated, to "be carried upon the terms and de-"livered to the persons therein speci-"fied. It is at once a receipt for the "goods which renders the carrier re-"sponsible as their custodian, and an "express written contract for their "transportation and delivery."

5. Covill v. Hill, 4 Den. (N. Y.) 323, affd. in 6 N. Y. 374; Gage v. Jacqueth, 1 Lans. (N. Y.) 207; Babcock v. Orbison, 25 Ind. 75.

Where vendors of corn, with the intention of sending it in their boats to the vendee, executed an instrument containing a recital of the shipment of the corn, its quantity, the freight due upon it, the terms of payment of the purchase money, and the name of the boat by which it was sent, and stating that the corn was to be delivered as addressed, viz., to M., the vendee, care of D. & C., without delay, it was held that this constituted a bill of lading. Dows v. Rush, 28 Barb. (N. Y.) 157.

6. Merchants' Bank v. Union, etc., Co., 69 N. Y. 373. A bill of lading is negotiable to this extent: that it is transferable by assignment or indorsement, and that the transferee takes all the rights against the carrier that it conferred on the consignee, or the person to whose assigns or order the goods are to be delivered. Hunt v. Mississippi Cent. R. R. Co., 29 La. Ann. 446. See also Tison v. Howard, 57 Ga. 410; Robinson v. Stuart. 68 Me. 61; Balt. & Ohio R. R. Co. v. Wilkens,

settled that goods shipped by a bill of lading drawn to the order of the shipper may be transferred by delivery of the bill without indorsement.[7] The assignment of a bill of lading passes title to the goods described therein, if made in good faith and for a valuable consideration.[8] The bill is symbolic of the goods described, and when so assigned confers upon the assignee all the rights of the assignor in such goods;[9] and it has also been held that the *bona fide* transferee for value of a bill of lading, indorsed by the shipper or his consignee, and put into circulation by the authority of the shipper or his consignee, has an absolute title to the goods, freed from the equitable rights of the unpaid vendor to stop *in transitu* as against the purchaser.[10] Generally speaking, however, the *quasi*-negotiability of such bills does not extend to allowing the possessor thereof to transfer property in the chattels, except by virtue of a title or authority from the true owner.[11] The rule that a *bona fide* purchaser of a lot or stolen bill or note, indorsed in

44 Md. 11, 22 Am. Rep. 26; Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193.

7. Merchants' Bank v. Union, etc., Co., 69 N. Y. 373; Emery v. Irving Nat. Bank, 25 Ohio St. 360, 18 Am. Rep. 299, in which last case the court said: "By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bills by one having an interest in or a right to control the property, is equivalent to a delivery of the property itself. * * * Being symbolical of the property described therein, it may be transferred, like the property itself, by delivery merely, and this is so without regard to the presence or absence of words of negotiability on its face. It is unlike commercial paper in this — the assignee cannot acquire a better title to the property thus symbolically delivered, than his assignor had at the time of the assignment." See also Strauss v. Wessel, 30 Ohio St. 211.

8. The Mary Ann Guest, Fed. Cas. 9,197; Newhall v. Central Pac. R. R. Co., 51 Cal. 345; Midland Nat. Bank v. Missouri, K. & T. Ry. Co., 62 Mo. 531; Chandler v. Belden, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; Dows v. Greene, 24 N. Y. 638; McCants v. Wells, 4 S. C. 381.

The delivery of the bill of lading, as between the vendee and third persons, is a delivery of the goods themselves. Lickbarrow v. Mason, 2 Term R. (Eng.) 63, 6 East, 21, 1 Smith's Lead. Cas. 879.

9. **Bill of lading as evidence of title. — An assignment and delivery of a bill of lading is equivalent in legal force to the sale and delivery of the goods. It is documentary evidence of title in and to the property specified in it, and conclusive as against all the parties to it in the hands of a *bona fide* holder. Such is the rule of the common law as settled in numerous cases, and recognized since the celebrated case of Lickbarrow v. Mason,** 2 Term R. 63, 6 East, 21. Dows v. Greene, 24 N. Y. 638, 644. See Stollenwerck v. Thacher, 115 Mass. 224.

10. Dows v. Greene, 24 N. Y. 638, 641.

11. Barnard v. Campbell, 55 N. Y. 456. And see Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446.

Bona fide purchaser.— The purchase of a bill of lading of one who obtained it through fraud confers upon the purchaser no title to the goods described, though he purchased it in good faith and for a valuable consideration. Blossom v. Champion, 37 Barb. (N. Y.) 554. See also Bank v. Shaw, Fed. Cas. No. 843, affd. in 101 U. S. 557; Winslow v. Morton, 29 Me. 419, 50 Am. Dec. 601. The purchaser of a bill of lading, who has reason to believe that his vendor was not the owner thereof, blank, or payable to bearer, is not bound to look beyond the instrument, has no application to the case of a lost or stolen bill of lading.[12]

§ 18. Letters of credit.

a. *Definition and nature.*— Letters of credit are sometimes called bills of credit. They are to be classed as commercial paper, although they are not negotiable and lack many of the essential characteristics of bills and notes.[13] The definition of a letter of credit which is most commonly used is that given by Justice Story, as follows: A letter of credit (sometimes called a bill of credit) is an open letter of request, whereby one person (usually a merchant or a banker) requests some other person or persons to advance moneys, or give credit to a third person named therein, and promises that he will repay the same to the person advancing the same, or accept bills drawn upon himself for a like amount.[14] These letters have been introduced for the convenience of travelers and agents, to obviate the trouble and risk of carrying about coin or other money. In such cases, they are generally in the nature of circular notes issued by the banker; these notes are unsigned drafts, to be signed and used by the bearer of the letter of credit in his discretion. A deposit is made by the bearer of the letter with the banker as an indemnity, in which case the bearer may recover the balance to his credit upon the return of the letter and the unused circulating notes.

b. *Classification.*— Letters of credit are either special or general. They are special when they are addressed to a particular individual directing him to advance the sums specified therein to

or that it was held to secure an outstanding draft, is not a *bona fide* purchaser, nor entitled to hold the merchandise covered by the bill as against the true owner. Shaw v. Merchants' Nat. Bank, 101 U. S. 557, 25 L. Ed. 892.

12. Shaw v. Merchants' Nat. Bank, 101 U. S. 557, 25 L. Ed. 892.

13. Edwards on Bills and Notes, p. 239.

14. Story on Bills of Exchange, § 459. This definition is substantially the same as that used by Daniel in his work on Negotiable Instruments (4th ed.), § 1790, and is the same as that contained in 18 Am. & Eng. Encyc. of Law (2d ed.), p. 831, which was adopted in the case of Johanessen v. Munroe, 84 Hun, 594, 32 N. Y. Supp. 1144.

A letter requesting one person to make advances to a third person on the credit of the writer is a letter of credit. Mechanics' Bank v. N. Y. & N. H. R. R. Co., 4 Duer (N. Y.), 480, 13 N. Y. 599; Brickhead v. Brown, 5 Hill (N. Y.), 634.

Byles defines a letter of credit as an authority, or rather request, by a banker to his foreign correspondent named therein, to discount bills drawn on him by the bearer. Byles on Bills (16th ed.), p. 111.

the persons named; they are general when addressed to all persons requesting such advances to the persons named therein.[15]

c. *Effect of letters of credit.*— The effect of a letter of credit is to place the issuer under a contract binding probably at law, but certainly so in equity, to pay, even without acceptance, all bills drawn in conformity with the letter of credit; and the holders are not to be prejudiced by any set-off or cross-claim by the drawee against the drawer.[16] They sometimes have the effect of guaranties, although a pure letter of credit is an absolute and independent promise which binds the drawer without regard to the failure of any other person.[17] They are often promises to honor bills of

15. **Characteristics of letter of credit.**— Marius in his work on Bills, pp. 35, 36, written at the end of the eighteenth century, describes letters of credit in the following language: "Now letters of credit, for the furnishing of moneys by exchange, are of two sorts, the one general, the other special; the general letter of credit is, when I write my open letter directed to all merchants, and others, that shall furnish moneys unto such and such persons, upon this my letter of credit, wherein and whereby I do bind myself, that what moneys shall be by them delivered unto the party, or parties, therein mentioned, within such a time, at such and such rates (or in general terms at the price current), I do hereby bind myself for to be accountable and answerable for the same, to be repaid according to the bill or bills of exchange, which, upon the receipt of the money so furnished, shall be given or delivered for the same. And if any money be furnished upon such, my general letter of credit, and bills of exchange therefor given, and charged, drawn, or directed to me, although, when the bills come to hand, and are presented to me, I should refuse to accept thereof, yet (according to the custom of merchants), I am bound and liable to the payment of those bills of exchange, by virtue and force of such my general letter of credit; because he or they, which do furnish the money, have not so much if any respect unto the sufficiency or ability of the party, which doth take up the money, as unto me, who have given my letter of credit for the same, and upon whose credit, merely, those moneys may be properly said to have been delivered. The special letter of credit is, when a merchant, at the request of any other man, doth write his open letter of credit, directed to his factor, agent or correspondent, giving him order to furnish such or such a man, by name, with such or such a sum of money, at one or more times, and charge it to the account of the merchant that gives the letter of credit, and takes bills of exchange or receipts for the same."

Form of letter of credit.— The following is a form of a special letter of credit, which was under consideration in the case of Johanessen v. Munroe, 84 Hun (N. Y.), 594, 32 N. Y. Supp. 1144:

No. 5,687.

OFFICE OF JOHN MUNROE & Co.,
Bankers, 32 Nassau St.,
NEW YORK, *Feb.* 26, 1892.

Messrs. MUNROE & Co., *Paris:*

GENTLEMEN.— We hereby open a credit with you in favor of Captain J. A. Johanessen, SS. "Raylton Dixon," for fifteen thousand francs (Fcs.15,000), available in bills at ninety days' date; on acceptance of any bill or bills drawn under this credit you are to draw on Corsten Boe, New York, at seventy-five days' date, payable at the current rate of exchange for first-class bankers' bills on Paris on day of maturity. Commission is arranged. Bills under this credit to be drawn at any time prior to May 1, 1892.

Truly yours,
JOHN MUNROE & Co.

16. Byles on Bills (16th ed.), p. 111.

17. Scribner v. Rutherford, 65 Iowa, 551, 22 N. W. 670.

exchange, drawn for any amount which may be advanced to the letter-bearer.[18] In such a case the promisor will be bound and any person who takes a bill on the credit of the letter will have his remedy against the person upon whom the bill is drawn in the same manner and to the same extent as though the bill had been regularly presented and accepted.[19]

§ 19. Bonds and coupons.

Bonds issued by the Federal government and by States, municipalities, corporations, and individuals have many of the attributes of commercial paper and are properly classified and treated as such. They are obligations issued to secure the payment of the sums named at the places and dates specified therein. They are generally drawn in negotiable form, are under seal, and pass by a mere delivery.[20] They are sometimes issued with coupons connected therewith, which represent the interest due on the sums named in the bonds, and are payable at the times and places stated therein. Each coupon is in itself a separate instrument containing a distinct and independent promise to pay the sum named, and bears a closer analogy to a promissory note than does the bond. Coupon bonds payable to bearer possess all the qualities of negotiable paper.[21] It is not necessary that the holder of coupons, in order to recover on them, should own the bonds from which they

18. See Daniel on Negotiable Instruments (4th ed.), § 1795.

19. Coolidge v. Payson, 2 Wheat. (U. S.) 66, 4 L. Ed. 185; Schimmelpennich v. Bayard, 1 Pet. (U. S.) 264, 7 L. Ed. 138; Townsley v. Sumrail, 2 Pet. (U. S.) 181, 7 L. Ed. 386; Boyce v. Edwards, 4 Pet. (U. S.) 111, 7 L. Ed. 799; Bayard v. Lathy, Fed. Cas. No. 1,131; Russell v. Wiggin, Fed. Cas. No. 12,165; Cassel v. Dows, Fed. Cas. No. 2,502; Kennedy v. Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289; Second Nat. Bank v. Diefendorf, 90 Ill. 396; Beach v. State Bank, 2 Ind. 488; Vance v. Ward, 32 Ky. 95; Scott v. McLellan, 2 Me. 199; Wilson v. Clements, 3 Mass. 1; Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17; Woodward v. Griffits-Marshall Co., 43 Minn. 260, 45 N. W. 433; Ulster County Bank v. McFarline, 5 Hill (N. Y.), 432.

20. Reid v. Bank of Mobile, 70 Ala. 199; Carr v. Le Fevre, 27 Pa. St. 413; Craig v. Vicksburg, 31 Miss. 216; Morris Canal & Bank. Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423; Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. R. Co., 41 Barb. (N. Y.) 9.

The bond of a railroad corporation, payable to A. B., or his assigns, is in the nature of commercial paper, negotiable by delivery under an assignment in blank, and is not a specialty, subject to equities between the corporation and the person named in the bond as the primary payee. Brainerd v. N. Y. & H. R. R. Co., 25 N. Y. 496.

21. Thompson v. County of Lee, 3 Wall. (U. S.) 327, 18 L. Ed. 177; Mercer v. Hackett, 1 Wall. (U. S.) 83, 17 L. Ed. 548; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520; New Albany, L. & C. Plankroad Co. v. Smith, 23 Ind. 353; Strauss v. United Tel. Co., 164 Mass. 130, 41 N. E. 57; Mason v. Frick, 105 Pa. St. 162, 51 Am. Rep. 191; Langston v. So. Car. R. Co., 2 S. C. 248.

were detached.[22] The coupons are drawn so that they can be separated from the bonds, and like the bonds are negotiable;[23] and the owner of them can sue without the production of the bonds to which they were attached, or without being interested in them.[24] It has been held, however, in New York, that where coupons payable to bearer, refer to the bonds for the interest for which they are issued, and the bonds refer to the mortgage securing them, for conditions limiting or explaining them, the coupons are not negotiable.[25]

§ 20. Certificates of stock.

Certificates of stock of corporations are not contracts or promises for the payment of money, but are rather the evidence of the holder's title to his share in the franchises and assets of the corporation of which he is a member.[26] As Daniels says: "A share in the capital stock of a corporation is not a debt, nor money, nor a security for money, but is a species of incorporeal personal property."[27] Such certificates, being mere evidences of title,

22. Thompson v. County of Lee, 3 Wall. (U. S.) 83, 18 L. Ed. 177.

23. Ketchum v. Duncan, 96 U. S. 659, 24 L. Ed. 868; Johnson v. Stark County, 24 Ill. 75; International Improvement Fund Trustees v. Lewis, 34 Fla. 424, 16 South. 325, 43 Am. St. Rep. 209; Evertsen v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9, affg. 4 Hun (N. Y.), 692; County of Beaver v. Armstrong, 44 Pa. St. 63; Philadelphia & R. R. R. Co. v. Smith, 105 Pa. St. 195; Nashville v. First Nat. Bank, 60 Tenn. 402.

24. Thompson v. County of Lee, 3 Wall. U. S.) 83, 18 L. Ed. 177; Mason v. Frick, 105 Pa. St. 162, 51 Am. Rep. 191.

Where the bond on its face says that the interest is to be paid on presentation of the coupons annexed, it is equivalent to making the coupons payable to bearer. Rockmuhl v. Pittsburgh, Fed. Cas. No. 11,982. But where the coupons are in the hands of a person who took them after maturity, they are subject to all equities which properly attached to them in the hands of the first holder. Union Bank v. New Orleans, Fed. Cas. No. 14,351.

In Maine it has been held that a coupon disconnected from the bond is not negotiable, where no intention to that effect, on the part of the party issuing it, appears on the face thereof, unless authorized by legislative enactment. Myers v. York & C. R. Co., 43 Me. 232; Jackson v. York & C. R. Co., 48 Me. 147; Augusta Bank v. Augusta, 49 Me. 507.

25. McLelland v. Norfolk So. R. Co., 110 N. Y. 469, 18 N. E. 237, 6 Am. St. Rep. 397, 1 L. R. A. 299.

26. Edwards on Notes and Bills, p. 61.

27. Daniel on Negotiable Instruments (4th ed.), § 1708*a*. See Allen v. Pegram, 16 Iowa, 173.

A share in capital stock is a species of incorporeal, intangible property, in the nature of a chose in action. Vanstone v. Goodwin, 42 Mo. App. 39.

And see generally the cases cited in Century Digest (Vol. 12, "Corporations," § 166), among which are the following:

United States.— Tappan v. Merchants' Nat. Bank, 19 Wall. (U. S.) 490, 22 L. Ed. 189.

California.— Mattingly v. Roach, 84 Cal. 207, 23 Pac. 1117.

Connecticut.— North v. Forest, 15 Conn. 400.

Indiana.— Seward v. City of Rising Sun, 79 Ind. 351.

Kentucky.— Field v. Montlinan, 68 Ky. 455.

are not negotiable in the same sense as other commercial paper, and the assignee thereof takes them subject to all equities existing against the assignor.[28] They are sometimes termed *quasi*-negotiable instruments; but this term does not define their nature and is unsatisfactory,[29] although the customs of stockbrokers and bankers, the manner in which they are framed, and the method used to transfer them, give them some of the characteristics and effects of negotiable instruments.[30]

Pennsylvania.— McKeen v. Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515.

28. Chicago, R. I. & Pac. R. R. Co. v. Havard, 7 Wall. (U. S.) 392, 19 L. Ed. 117. In this case the court said: "Written contracts are not necessarily negotiable, simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates of stock were assignable, and they would have been so if the word "bearer" had been omitted, but they were not negotiable instruments in the sense supposed by the appellants. Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owner." Citing Mechanics' Bank v. Railroad Co., 13 N. Y. 599.

Usages of stockbrokers to the contrary, notwithstanding, a certificate of shares of stock is not a negotiable instrument. East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836. See generally Sherwood v. Meadow Valley Min. Co., 50 Cal. 412; Bridgeport Bank v. N. Y. & N. H. R. R. Co., 30 Conn. 231; Hall v. Rose Hill & Evanston Road Co., 70 Ill. 673; Clark v. American Coal Co., 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557; State v. Bank of the State, 45 Mo. 528; Watson v. Sidney F. Woody Co., 56 Mo. App. 145.

In New York it has been held that certificates of stock in a business corporation, indorsed in blank, do not possess the quality of complete negotiability accorded to commercial paper, to the extent of making a transfer to a purchaser in good faith for value equivalent to actual title, although there was no agency in the transferrer, and the certificate had been lost without the fault of the true owner, or had been obtained by theft or robbery. Knox v. Eden Musee Co., 145 N. Y. 441, 42 N. E. 998.

29. Daniel on Negotiable Instruments (4th ed.), § 1708; Lewis on Stocks, § 82.

30. While corporation stock certificates do not possess all the qualities of commercial paper, they do possess some of them, and innocent parties dealing in them will be protected upon analogous principles, and, in a proper case, will be entitled to compel recognition as stockholders, where power exists to issue new certificates, or to indemnity if there is not. Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 43 N. E. 68.

CHAPTER II.

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A. INCAPACITY OF PARTIES.

§ 21. General statement.

a. *Early restriction on parties.*— Bills of exchange and promissory notes were originally strictly commercial instruments, confined in their use to transactions between merchants and traders.[31] But this limited use was soon extended, and bills of exchange were early recognized as binding upon all parties thereto, having power to contract, without regard to their vocation.[32] And the language of the Statute of 3 & 4 Anne, chapter 9, giving negotiability to promissory notes, included all persons within its terms without reference to whether they were merchants or traders.[33]

b. *Power to contract.*— The capacity to incur liability as a party to a bill or note is coextensive with capacity to contract.[34] The exceptions to the capacity of natural persons to bind themselves by contract, are infancy, coverture, and insanity.[35] To these may also be added the total or partial incapacity of alien enemies and bankrupts. There are many and various principles affecting the rights and obligations of parties under an incapacity which will be hereafter discussed in their proper places. There may be a total incapacity of a person to make or draw a note or bill, and

31. Story on Promissory Notes (7th ed.), § 62. It was anciently supposed that, the negotiability of bills of exchange being due to the custom of merchants, only a merchant or one engaged in some trade could be liable as the drawer of such an instrument to the indorsee thereof. Fairley v. Roch, 1 Lutw. 891; Bromwich v. Lloyd, 2 Lutw. 1685.

32. Sarsfield v. Witherly, 2 Vent. 292; Hodges v. Steward, 1 Salk. 125, 12 Mod. 36.

33. Story on Promissory Notes (7th ed.), § 62.

34. English Bills of Exchange Act, 1882, § 22. See Appendix; Chitty on Bills, p. 13.

Chalmers, in his work on Bills of Exchange (5th ed.), p. 60, distinguishes between capacity and authority in the following language: "Capacity must be distinguished from authority. Capacity means power to contract so as to bind oneself. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of law. Authority is derived from the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact. Again, capacity to incur liability must be distinguished from capacity to transfer. An executed contract is often valid where an executory contract cannot be enforced. An indorsement usually consists of two distinct contracts, one executed and the other executory. It transfers the property in the bill, and it also involves a contingent assumption of liability on the part of the indorser."

35. Pollock on Contracts, p. 34.

yet the same person may be capable of transferring, under certain conditions, such note or bill by indorsement or delivery. Every person, regardless of his incapacity, may be the recipient of the benefits of a note or bill as payee or indorsee; although payment thereof should doubtless be made to the person legally representing such payee or indorsee.[36] It is only important to consider how far and under what conditions persons under legal or natural incapacities may bind themselves as makers or indorsers of commercial paper.

§ 22. Infants.

a. *Validity of contracts.*— By the common law a contract made by an infant is generally voidable at the infant's option, such option to be exercised either upon his attaining his majority or in a reasonable time afterward.[37] It has been stated that the declared rule in this country is, that contracts of an infant caused by his necessities, or manifestly for his advantage are valid and binding, while those manifestly to his hurt are void. Contracts falling between these classes are voidable.[38] It is doubtful whether any contract made by an infant is absolutely void even if it is manifestly to his hurt. Many cases can be cited where the rule has been stated, but in nearly all of them the contracts in question were declared voidable, and the rule as so stated was not necessarily applied.[39] The object of the law, which is the protection of

36. Parsons on Notes and Bills, p. 66.

37. Pollock on Contracts, p. 34. And see Bozeman v. Browning, 31 Ark. 364; Strain v. Wright, 7 Ga. 568; Bryan v. Walton, 14 Ga. 185; Breckenridge's Heirs v. Ormsbee, 24 Ky. 236, 19 Am. Dec. 71; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229.

38. Philpot v. Bingham, 55 Ala. 435, 438.

When the court can pronounce the contract to be to the infant's prejudice it is void, and when to his benefit, as for necessaries, it is good; and when the contract is of an uncertain nature, as to benefit or prejudice, it is voidable only at the election of the infant. Keane v. Baysott, 2 H. Bl. 511; Wheaton v. East, 5 Yerg. 41. See also Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Green v. Wilding, 59 Iowa, 679, 13 N. W. 761, 44 Am. Rep. 696; Fridge v. State, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463; Ridgely v. Crandall, 4 Md. 435; Baker v. Lovett, 6 Mass. 88, 4 Am. Dec. 88; Oliver v. Houdlett, 13 Mass. 237, 7 Am. Dec. 134; Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229; Robinson v. Weeks, 56 Me. 102.

39. Pollock, in his work on Contracts (p. 35), says: "It is commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable, but absolutely void; though in general his contracts are only voidable at his option. This distinction, it is submitted, is in itself unreasonable, and is supported by little or no real authority, while there is considerable authority against it. The unreasonableness of it seems hardly to need any demonstration. The object of the law, which is the protection of the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm

the infant, is amply secured by not allowing the contract to be enforced against him during his infancy, and leaving it in his option to affirm or repudiate it at his full age. In any event the acts of an infant which have been declared by judicial authority to be absolutely void are very few, and many of the decisions on the subject have been overruled or modified by subsequent adjudications.[40] Mr. Tyler summarizes his discussion on this subject in the following language: "The only clear and definite proposition which can be extracted from the authorities is, that all acts of an infant which are incapable of being legally ratified, that is, all such acts as cannot be for the benefit of the infant, are

or repudiate it at his full age. Moreover the distinction is arbitrary and doubtful, for it must always be difficult to say whether a particular contract cannot possibly be beneficial to the party. As for the authorities the word *void* is no doubt frequently used; but then it is likewise to be found in cases where it is quite settled that the contract is in truth only voidable. The fact is, that there is a constant confusion in the books, and sometimes even in recent books, between void and voidable, so that the language of text-writers, of judges, and even of the Legislature, is no safe guide apart from actual decisions."

Chancellor Kent (2 Comm. 234) says: "It is held that a negotiable note given by an infant, even for necessaries, is void, and his acceptance of a bill of exchange is void; and a bond with a penalty, though given for necessaries, is void. It must be admitted, however, that the tendency of the modern decisions is in favor of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election, when they become of age, either to affirm or disallow them. If their contracts were absolutely void, it would follow as a consequence that the contract could have no effect, and the party contracting with the infant would be equally discharged."

40. Bingham, in his work on Infancy (13–16), maintains that few of the acts of an infant were absolutely void upon the ground, among others, that it is a principle of the law to protect the infant against his own weakness; "and if this protection can be effectually secured to him by any means short of inflicting a detriment on innocent persons, it is argued that such infliction must be unnecessary and unjust. To consider any acts of an infant absolutely void might operate to his own protection, but it would in many cases seriously affect the rights of persons in no wise implicated in the infant's transactions, and might frequently be prejudicial to himself. It is thought, therefore, that it would rarely be a greater indulgence to the infant, and more for his advantage, to allow him, when he comes of age, and is capable of reconsidering what he has done, either to ratify or affirm all his deeds and contracts, or to break through and avoid them; and it is contended that this power should be extended, as well to those acts which may turn out to the infant's disadvantage, as to those which are apparently beneficial. The giving infants such power in general over all their acts will sufficiently secure them against the danger of being over-reached by others; for when the power is general, and all persons who deal with an infant know they are to be at his mercy, this will take off from the temptation of imposing on him; yet, since the infant is at liberty to rescue himself by avoiding the injurious contract, it seems no possible mischief could arise by suffering it in the meantime to hang *in equilibrio*, and deferring to pronounce any sentence upon it, since that would curtail the infant's privilege, and take off from his freedom of judging at all." This reasoning of Mr. Bingham has the approval of Mr. Tyler, in his work on Infancy and Coverture, § 10.

absolutely void, and these at the present day are reduced to a very small number." [41]

b. *Obligation of persons dealing with infants.*— Persons dealing with an infant are bound, at their peril, to inquire and ascertain the real circumstances of the infant, and whether he is in a situation to bind himself by his contract, even for necessaries.[42] And even where the infant has falsely represented his age, and thereby induced another to enter into a contract with him, he is not estopped from pleading his infancy and avoiding the contract; the obligation would seem to rest, in every case, upon the person dealing with a probable or possible infant to satisfy himself as to the legal capacity of such infant.[43] The doctrine above expressed has not gone without refutation; there are many cases holding that in equity an infant, who falsely and fraudulently represented himself to be of full age, was bound to pay the obligation entered into on the faith of his representation.[44]

41. Tyler on Infancy, § 13.

42. Story v. Pery, 4 Car. & P. 526, 19 Eng. C. L. 508; Cook v. Deaton, 3 Car. & P. 114, 14 Eng. C. L. 232; Perrin v. Wilson, 10 Mo. 451; Kline v. L'Amoureux, 2 Paige (N. Y.), 419. Persons are affected with constructive notice of the incapacity of infants to convey. Gray v. Turley, 110 Ind. 254, 11 N. E. 410.

43. Wieland v. Kobick, 110 Ill. 16, 51 Am. Rep. 676; Price v. Jennings, 62 Ind. 111; Carpenter v. Carpenter, 45 Ind. 142; Bush v. Linthicum, 59 Md. 344; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Baker v. Stone, 136 Mass. 405; Slayton v. Barry, 175 Mass. 513, 56 N. E. 574; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412; Ferguson v. Bobo, 54 Miss. 121; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Studwell v. Shafter, 54 N. Y. 249; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678.

In the case of Slayton v. Barry, *supra*, it was held that an infant cannot be held liable in tort for deceit or conversion the proof of which requires the plaintiff to show that a contract, which by the infant's false representations relative to his age he was induced to make and perform, was part and parcel of the fraudulent transaction.

44. *Ex parte* Unity, etc., Assn., 3 De Gex & J. (Eng.) 63.

In the case of Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 422, the court says: "Our judgment, however, is that, where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from the tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract; for the recovery is not upon the contract, as that is treated of no effect, nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability; for it concedes this, but affirms that he must answer for his positive fraud."

Judge Pomeroy says, in his Equity Jurisprudence (Vol. 2, p. 465): "If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were an adult, and may cancel a conveyance or executed contract obtained by fraud." See also Pittsburgh, etc., Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Dil-

c. *Contracts for necessaries.*— An exception exists as to infants' contracts for necessaries. An infant is liable upon his contracts for necessaries for himself, or his family, if he have one, suitable to his or their condition.[45] It must appear in all cases that the things furnished were actually necessary, of reasonable prices, and suitable to the infant's degree and estate, considerations which regularly must be left to the jury.[46] When an infant is at home under the care of his father, and supported by him, he cannot be made liable for necessaries.[47] It must appear that the infant has no other means of obtaining such necessaries, except by the pledge of his own personal credit.[48] If the necessaries were furnished on

lon v. Burnham, 43 Kan. 77, 22 Pac. 1016; Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176; Eaton v. Hill, 50 N. H. 235; Hall v. Butterfield, 59 N. H. 354; Pemberton Building & Loan Assn. v. Adams, 53 N. J. Eq. 258, 31 Atl. 28; Eckstein v. Frank, 1 Daly (N. Y.), 334.

45. *Indiana.*— Hobbs v. Godlove, 17 Ind. 359; Wright v. McLarinan, 92 Ind. 103; Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146.

Iowa.— Green v. Wilding, 59 Iowa, 679, 13 N. W. 76, 44 Am. Rep. 696.

Kentucky.— Bonney v. Reardin, 69 Ky. 34.

Maryland.— Levering v. Heighe, 2 Md. Ch. 81; Anderson v. Smith, 33 Md. 465.

Massachusetts.— Stone v. Dennison, 13 Pick. 1, 23 Am. Dec. 654.

Michigan.— Squier v. Hydliff, 9 Mich. 274.

New York.— Gay v. Ballou, 4 Wend. 403, 21 Am. Dec. 158.

Pennsylvania.— Rundel v. Keeler, 7 Watts, 237; Watson v. Hensel, 7 Watts, 344; Appeal of Werner, 91 Pa. St. 222.

Tennessee.— McMinn *v.* Richmonds, 6 Yerg. 9; McGan v. Marshall, 7 Humph. 121.

The reason for the rule.— It has been stated by Parsons (Contracts [3d ed.], 244, 245): "It is permitted for his own sake that an infant may make a valid contract for these things; or otherwise, whatever his need, he might not be able to obtain food, shelter, or raiment. And the principles which govern this rule show plainly that it is intended only for his benefit, and is regarded and treated as an exception to a general rule."

Tyler quotes from Matthew Bacon who lays it down that infants are absolutely bound by their contracts in benignity to themselves, "for if they were not allowed to bind themselves for necessaries, no person would trust them, in which case they would be in worse circumstances than persons of full age." Tyler on Infancy, § 57.

46. Ive v. Chester, Cro. Jac. (Eng.) 560; Jordan v. Coffield, 70 N. Y. 110; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274.

Question for jury.— The following cases are to the effect that the question as to whether certain articles are suitable to the condition and estate of the infant is for the determination of the jury. Stanton v. Willson, 3 Day (Conn.), 37, 3 Am. Dec. 255; Henderson v. Fox, 5 Ind. 489; Garr v. Haskett, 86 Ind. 373; Bonney v. Reardin, 6 Bush (Ky.), 34; Swift v. Bennett, 10 Cush. (Mass.) 436; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Davis v. Caldwell, 12 Cush. (Mass.) 512; Lynel v. Johnson, 109 Mich. 640, 67 N. W. 908; Ducell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449; Cobbey v. Buchanan, 48 Neb. 391, 67 N. W. 176; Johnson v. Lines, 6 Watts (Pa.), 80, 40 Am. Dec. 542; Glover v. Ott's Admr., 1 McCord (S. C.), 572; Bent v. Manning, 10 Vt. 225.

47. Perrin v. Willson, 10 Mo. 451; Angel v. McLellan, 16 Mass. 28, 8 Am. Dec. 118; Smith v. Young, 19 N. C. 26; Hyman v. Cain, 48 N. C. 111.

48. Tyler on Infancy, etc., § 58; Bradley v. Pratt, 23 Vt. 378; Brent v. Williams, 79 Miss. 355, 30 South. 713.

the credit of the parent or guardian with whom the infant lives, he cannot be held liable therefor;[49] and the fact that the parent of an infant is poor and unable to pay for necessaries will not warrant a recovery against the infant.[50] Contracts for the purchase of articles used by the infant in carrying on his business are not necessaries for which he may be held liable.[51] But a husband, though an infant, is liable for necessaries furnished his wife.[52] And when an infant borrows money to purchase necessaries, or procures another to pay for him a debt contracted for necessaries, he is liable.[53]

d. *Commercial paper of infants.*— There are a number of early cases in this country which lay down the rule that a negotiable instrument executed by an infant is void, and that no power exists in the infant by ratification or affirmance to give effect to such an instrument.[54] This doctrine seems to have been discarded and in its place is substituted the rule that the negotiable instrument of an infant is merely voidable and not void,[55] and that a promise to pay, made by the infant after he attains his full age, renders the instrument valid.[56] An infant cannot be bound by his acceptance of a bill of exchange, but having accepted such a bill, he may

49. Tharp v. Connelly, 48 Mo. App. 59.

50. Hoyt v. Casey, 114 Mass. 397, 19 Am. Rep. 371.

51. Articles purchased by an infant for business, agricultural, or commercial purposes are not necessaries, and upon restoration of the property he may recover the consideration paid for it. House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189.

In the case of Ryan v. Smith, 165 Mass. 303, 43 N. E. 109, it was held that articles of furniture designed for use in furnishing a barber shop, purchased by a minor having no means of support, except what he earned, are not necessaries, and he may therefore repudiate his contract. See also Decell v. Lawrence, 57 Miss. 331, 34 Am. Rep. 449; Wood v. Losey, 50 Mich. 475, 15 N. W. 557; Paul v. Smith, 41 Mo. App. 275. As to recovery of money paid on contract for conditional sale of bicycle to an infant, see Gillis v. Goodwin, 188 Mass. 140, 61 N. E. 813; Rice v. Butler, 160 N. Y. 518, 55 N. E. 275.

52. Cantine v. Phillips' Admr., 5 Harr. (Del.) 428; Nicholson v. Wilborn, 13 Ga. 467; Price v. Sanders, 60 Ind. 310; Cole v. Seeley, 25 Vt. 220.

53. Guthrie v. Morris, 22 Ark. 411; Hickman v. Hall's Admrs., 15 Ky. 338; Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L. R. A. 859; Swift v. Bennett, 64 Mass. 436; Smith v. Oliphant, 4 N. Y. Super. Ct. 306; Randall v. Sweet, 1 Den. (N. Y.) 460.

54. Beeler v. Young, 1 Bibb (Ky.), 519; Wentworth v. Wentworth, 5 N. H. 410; Fenton v. White, 4 N. J. L. 100; McMinn v. Richmonds, 14 Tenn. 9; Swasey v. Vanderheyden's Admr., 10 Johns. (N. Y.) 33; Nichols & Shepard Co. v. Snyder, 78 Minn. 461, 81 N. W. 516.

55. Everson v. Carpenter, 17 Wend. (N. Y.) 419; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Best v. Givens, 42 Ky. 72; Wright v. Steele, 2 N. H. 51; Jeffords v. Ringgold, 6 Ala. 544; Fant v. Cathcart, 8 Ala. 725; Little v. Duncan, 9 Rich. L. (S. C.) 55, 64 Am. Dec. 760; Stokes v. Brown, 4 Chandl. (Wis.) 39.

56. Tyler on Infancy, etc., § 16; Tafft v. Sergeant, 18 Barb. (N. Y.) 320.

render it valid by a new promise or by ratification after he comes of age.[57] Where a person of full age accepts a bill which was drawn on him while an infant, he is liable thereon.[58]

e. *Note or bill for necessaries.*— It has been held that a negotiable note given by an infant, even for necessaries, was void.[59] The reason given was that if the note was valid in the first instance as a negotiable instrument, the consideration could not be inquired into when it is in the hands of a *bona fide* holder, and the infant would thereby be precluded from questioning the consideration.[60] If the note for necessaries was nonnegotiable and in the hands of the payee, an action against the infant might be maintained thereon by the payee, and an inquiry into the value of the necessaries might be had and judgment rendered therefor.[61] And this is also true in respect to a note or bill negotiable in form so long as it remains in the hands of the payee.[62] Infants are liable for necessaries, and they may bind themselves therefor provided they

57. Williams v. Harrison, 3 Salk. (Eng.) 197; Hunt v. Massey, 5 Barn. & A. (Eng.) 902; Edwards on Bills and Notes, p. 67.

Byles says (Byles on Bills [16th ed.], p. 68): "The acceptance of an infant was at all events invalid and could not be confirmed by a promise to pay made after he was of age, and after action brought. And all his contracts made in the course of trade were formerly considered absolutely void and incapable of confirmation, though the moral obligation to fulfil them would support an express promise to pay after full age, and before action brought."

58. Byles on Bills (16th ed.), p. 69; Stevens v. Jackson, 4 Campb. (Eng.) 164.

English Infants' Relief Act (37 & 38 Vict., chap. 62) is to the effect that all contracts, whether by specialty or simple contract, entered into by infants to repay money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void; provided that the act shall apply to such contracts as were voidable at the time of its passage. The act further provides that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, with or without new consideration for such promise or ratification after full age.

59. Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33.

60. Beeler v. Young, 1 Bibb (Ky.), 519; McMinn v. Richmonds, 6 Yerg. (Tenn.) 9.

61. 1 Parsons on Notes and Bills, p. 69.

62. Earle v. Reed, 10 Metc. (Mass.) 387, in which case it was held that a negotiable note given by an infant was not void in the hands of the promisee; and in a suit thereon by the promisee, he may show that it was given, in whole or in part, for necessaries, and may recover thereon as much as the necessaries for which it was given were reasonably worth and no more. Shaw, C. J., said: "Under these views we consider this note, in the hands of the promisee, as the simple contract of the defendant for the payment of money; and there being no consideration expressed, the infancy of the promisor being shown is *prima facie* a bar to the action. But as the consideration is open to inquiry, we think it is competent for the plaintiff to show that it was given for the price of necessaries, in which he will recover only so much of the note as shall appear to have been given for necessaries at their fair value, without regard to the price stipulated to be paid by the minor."

do not agree to pay more than they are reasonably worth.[63] The payee of a note, given for such necessaries, whether negotiable or otherwise, may recover thereon to the extent of the value of such necessaries. If the payee transfers such note by indorsement to an innocent indorsee the indorsee has his remedy against the payee, although he may be prevented from recovering from the maker who pleads his infancy. This would seem to be the rule deduced from the weight of authority, both of the courts and of text-writers.[64] The doctrine is not without its opponents. There are a few cases to the effect that an infant is bound by his note or bill

63. Locke v. Smith, 41 N. H. 346.

64. **Rights of indorsee against infant.**—Chitty says (Chitty on Bills, p. 19): "And though it has been considered that a single bill or bond for the exact sum due, and not in penalty, given for necessaries, is obligatory upon an infant, yet an indorsee of a bill or note cannot sue an infant upon either of these instruments, though given for such consideration; and as an infant cannot state an account, it seems to be the better opinion that these instruments are not in any case available against infants, even between the original parties."

In Kyd on Bills it is urged, that if a simple bill for necessaries be valid, there seems no reason why a bill or note for the same consideration should not be binding; and it has been observed that this circumstance of a single bill for necessaries being valid, seems to afford an argument from analogy to show that a promissory note given by an infant for necessaries would be binding, if payable only to the person who supplied them, though he cannot be bound by his signature to a negotiable bill or note, as that not only *prima facie* admits the debt, and operates as an account stated, but, if valid, would render him liable to an action at a suit of an indorsee, in which the amount of the original debt could not be disputed. Williams v. Watts, 1 Campb. (Eng.) 522 (notes).

1 Parsons on Bills and Notes (p. 69) has the following: "If, however, the action were on a simple promissory note, not negotiable, or even on a negotiable note which had not been negotiated, an inquiry into the consideration might be made, which would seem to open the whole question; and the reason for denying the validity of such a note, while admitting a liability for the value of the necessaries, might seem technical rather than substantial. Not so, however, if the note were negotiable and negotiated, for now it might pass for value into the hands of innocent third parties, and either its character would protect it from all inquiry into consideration, which might injure the infant, or for his protection this inquiry might be made, and then the document would lose the chief peculiarity and characteristic of negotiable paper."

Story on Bills of Exchange (§ 84) states the rule as follows: "And even a bill of exchange given for necessaries would seem to be invalid; for an infant is not capable of binding himself to pay a specific sum, even for necessaries; but only what they are worth; and *a fortiori*, he is not liable, according to many authorities, on a bill of exchange, given for necessaries, which is negotiable; for that might involve him in liability to third persons."

Edwards on Bills and Notes (p. 65) contains the following: "During his minority, the infant cannot make a contract waiving the privilege accorded to him by law. Though he gives his negotiable note for necessaries, the holder in an action upon it must show that it was so given, and he can then recover only so much as the things furnished were reasonably worth. But here the recovery is not through the force of the terms used in the note; on the contrary it proceeds upon due original consideration, thus destroying the negotiability of the instrument so far as that depends upon the legal presumption that it has been given for value, or upon the obligation of the promise."

given for necessaries in the hands of an indorsee.[65] And among text-writers, Mr. Daniels has quite emphatically dissented.[66] And indeed it is somewhat incongruous to permit a payee, who has had more opportunity to ascertain the age and circumstances of the infant, to recover from him upon such a note and to restrict a similar right of the indorsee, who may be in entire ignorance of the facts attending the transaction. A more reasonable rule would be to permit the indorsee the privilege accorded the payee, of showing the value of the necessaries and recovering the amount thereof. The infant would be amply protected by such a course, since the law does not require that he should be afforded more protection than for an amount in excess of the actual value of the necessaries furnished.

f. *Rights of infant as payee and indorsee.*— An infant may become the payee of a note or the drawee of a bill; he may recover thereon, and his rights in respect thereto are the same as though he were an adult. Since the consideration moves from another to himself, it must be for his benefit.[67] The law conferring upon an infant the special privilege of immunity from his contracts, is solely for his benefit and protection; to deny him the privilege of enforcing obligations from others to himself would be an injury and a hardship. An infant to whom a note or bill is payable or to whom it has been transferred by indorsement may himself transfer such note or bill to another person, who will take and hold the same as against all parties prior to the infant.[68] The infant would be injuriously affected by the existence of any other rule; if notes and bills of which he is the holder were incapable of transfer their value would be materially impaired.[69] The English Bills of Ex-

65. Du Bois v. Wheddon, 4 McCord (S. C.), 221; Haine v. Tarrant, 2 Hill (S. C.), 400.

66. Daniel on Neg. Insts. (4th ed.), § 226.

67. Story on Promissory Notes, § 79; Nightingale v. Withington, 15 Mass. 272.

68. **Indorsement by infant.**— That an infant may indorse a negotiable promissory note, or bill of exchange, made payable to him, so as to transfer the property to an indorsee, for a valuable consideration, seems to be well settled in the law merchant; and is no ways repugnant to the principles of the common law. Such indorsement is not like one made by a *feme covert;* for a note payable to her becomes the property of her husband; and, further, her acts are absolutely void, whereas those of an infant are voidable only. It would be absurd 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; and it would impair the value of such contracts in the hands of infants, if they were unable to raise money on them, as others may do. Nightingale v. Withington, 15 Mass. 272, *per* Parker, C. J.

69. Nightingale v. Withington, 15 Mass. 272. And see also Grey v.

change Act of 1882, in recognition of the justice of this rule, has declared that "where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto." [70] A similar provision is contained in the Negotiable Instruments Law in force in many of the American States.[71] The infant may avoid the effect of his indorsement, "or by giving sufficient notice to all antecedent parties of his avoidance, furnish to them a valid defense against the claim of the indorsee." [72] The indorsement is to be treated as a voidable contract, subject to the avoidance by the infant. But until it is avoided, it is to be deemed, in respect to all antecedent parties, as a good and valid transfer.

g. *Ratification after infant becomes of age.*— As has already been said the contracts of infants are not generally void, but can be made valid by them when they become of full age.[73] The note or bill of an infant is subject to ratification by him as an adult.[74] When duly ratified, the bill or note may be negotiated, and possesses in all respects the same qualities as if executed by an adult.[75]

Cooper, 3 Doug. (Eng.) 655; Drayton v. Dale, 2 B. & C. (Eng.) 293, 299; Pitt v. Chappelow, 8 Mees. & W. (Eng.) 616; Frazier v. Massey, 14 Ind. 382; Garner v. Cook, 30 Ind. 331; Hardy v. Waters, 38 Me. 450; Burke v. Allen, 29 N. H. 116, 61 Am. Dec. 642.

70. English Bills of Exchange Act, 1882, § 22 (2).

71. Neg. Inst. Law (N. Y.), § 41, which is as follows:

§ 41. **Effect of indorsement by infant or corporation.**— The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability therein.

72. Story on Promissory Notes, § 80.

73. Hyer v. Hatt, Fed. Cas. No. 6,977; Vaugh v. Parr, 20 Ark. 600. And see cases cited in note 37, p. 43, *ante*.

74. Wright v. Steele, 2 N. H. 51; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Stokes v. Brown, 4 Chandl. (Wis.) 39.

75. Hunt v. Massey, 5 B. & Ad. (Eng.) 902; Fant v. Cathcart, 8 Ala. 725; West v. Penny, 16 Ala. 186; Goodsell v. Myers, 3 Wend. (N. Y.) 379; Cheshire v. Barrett, 4 McCord (S. C.), 241.

Effect of ratification.— The case of Reed v. Batchelder, 1 Metc. (Mass.) 559, is a leading case in respect to the effect of ratification by an adult of a negotiable note executed by him as an infant. The note was made by the defendant as an infant payable to R. & D., and by them transferred to the plaintiff. The court said: "The question is, whether, as this was a negotiable note payable to R. & D. or bearer, and ratified by a new promise to them whilst they remained the holders, they could make a good title by delivery to the plaintiff, Robert Reed, so as to enable him to bring the action in his own name. The new promise to pay was made to H. R. of the firm of R. & D. The effect of this was to ratify and confirm the contract, and give it the same legal effect as if the promisor had been of legal capacity to make the note when it was made. This made it a good negotiable note from

h. *What constitutes ratification.*— Statutes frequently provide that the ratification of an infant's contract in order to bind him when he becomes of age must be in writing.[76] Under such statutes any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of an agent, will, in the case of an infant, who has attained his majority, amount to a ratification.[77] Nor is it necessary that the writing should be addressed or dated, or that the sum for which the promisor is to be bound should be shown therein.[78] But at common law, which is in force in almost all of the United States, a verbal promise or ratification is sufficient.[79] The ratification must be the free and voluntary act of the former infant;[80] and it has been frequently held, although there are conflicting authorities,

that time, according to its tenor, transferable by delivery; of course, when transferred to Robert Reed, the plaintiff, he took it as a negotiable note, and may maintain an action on it. This deprives the promisor of none of his immunities as an infant, because the law considers him as having full capacity when the ratification was made, and without such ratification no action would lie."

A reply to a plea of infancy, in an action upon a note, which alleges that, after the defendant came of age, and before suit brought, he ratified his execution of such note by entering into an agreement with the plaintiff and his authorized agent, in which he promised to pay the same, is not demurrable, since the note of an infant is merely voidable, and may be ratified without a new consideration. Heady v. Boden, 4 Ind. App. 475, 30 N. E. 1119.

76. By the English Infants' Relief Act (37 & 38 Vict., chap. 62, § 1), it is provided that all contracts, whether by specialty or simple contract, entered into by infants to repay money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely void. The effect of this section is limited by a proviso to such as are now by law voidable.

Section 2 of this act is to the effect that no action shall be brought whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, with or without new consideration for such promise or ratification after full age.

This act in effect repeals Lord Tenterden's Act (9 Geo. IV, chap. 14, § 5), which enacted, "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, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

Many of the American States, such as Arkansas, Kentucky, Maine, Mississippi, Missouri, New Jersey, South Carolina, Virginia, and West Virginia, have statutes containing substantially the same provisions.

77. Harris v. Wall, 1 Exch. (Eng.) 122.

78. Hartley v. Wharton, 11 Ad. & El. (Eng.) 934. Under the American statutes, see Thurlow v. Gilmour, 40 Me. 378; Bird v. Swain, 79 Me. 529, 11 Atl. 421; Stern v. Freeman, 4 Metc. (Ky.) 309.

79. West v. Penny, 16 Ala. 186; Vaugh v. Parr, 20 Ark. 600; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Hoit v. Underhill, 10 N. H. 220, 34 Am. Dec. 148; Halsey v. Reid, 4 Hun (N. Y.), 777.

80. Ford v. Phillips, 1 Pick. (Mass.) 202; Pitcher v. Turin Plank Road Co., 10 Barb. (N. Y.) 436; McCormick v. Walker, Fed. Cas. No. 8,728.

that when the ratification was made, it must have been known to the person making it, that he was not liable by law under his contract.[81]

It seems well settled at the present time that a mere acknowledgment of a debt by the infant after majority is insufficient as a ratification. There must be an express confirmation or new promise, voluntarily and deliberately made.[82] It is probable, however, that the act of the infant, after attaining his majority, may be of such a nature as to raise an inference against him and in favor of the contract.[83] His tacit assent under such circum-

81. Pesto v. Roberts, 7 Bush (Ky.), 410; Smith v. Mayo, 9 Mass. 62; Ford v. Phillips, 1 Pick. (Mass.) 202; Curtin v. Patton, 11 Serg. & R. (Pa.) 305; McCormick v. Walker, Fed. Cas. No. 8,728.

Contra are the following: American Mortg. Co. v. Wright, 101 Ala. 658, 14 South. 399; Morse v. Wheeler, 4 Allen (Mass.), 570; Anderson v. Soward, 40 Ohio St. 325, 48 Am. Rep. 687. The infant is chargeable, upon becoming of age, with knowledge of the legal effect of his deed, previously made. Bentley v. Greer, 100 Ga. 35, 27 S. E. 974.

82. Greenleaf, in his work on Evidence (§ 367), says: "There is a distinction between those acts and words which are necessary to ratify an executory contract and those which are sufficient to ratify an executed contract. In the latter case any act amounting to an explicit acknowledgment of liability will operate as a ratification; as in the case of the purchase of land or goods, if, after coming of age, he continues to hold the property and treat it as his own. But in order to ratify an executory agreement, made during infancy, there must not only be an acknowledgment of liability, but an express confirmation or new promise voluntarily and deliberately made by the infant upon his coming of age, and with the knowledge that he is not legally liable. An explicit acknowledgment of indebtment, whether in terms or by a partial payment, is not alone sufficient; for he may refuse to pay a debt which he admits to be due."

The following cases uphold this doctrine:

Connecticut.— Wilcox v. Roath, 12 Conn. 550.

Georgia.— Martin v. Byrom, Dud. (Ga.) 203.

Indiana.— Conklin v. Ogborn, 7 Ind. 553.

Massachusetts.— Smith v. Mayo, 9 Mass. 62; Martin v. Mayo, 10 Mass. 137; Whitney v. Dutch, 14 Mass. 457; Ford v. Phillips, 1 Pick. (Mass.) 202; Thompson v. Lay, 4 Pick. (Mass.) 48; Proctor v. Lears, 4 Allen (Mass.), 95.

Mississippi.—Edmunds v. Mister, 58 Miss. 765.

Missouri.—Baker v. Kennett, 54 Mo. 82.

New York.— Millard v. Hewlett, 19 Wend. (N. Y.) 301.

North Carolina. — Alexander v. Hutcheson, 9 N. C. 535; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574; Bresee v. Stanley, 119 N. C. 278, 25 S. E. 870.

Pennsylvania.— Hinely v. Margaritz, 3 Pa. St. 428.

83. **Ratification inferred.**— The case of Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526, was an action in assumpsit brought by the indorsee against the maker of a note. The defense was infancy. The case was submitted to the court on these facts: The note was given by the defendant while an infant, for a yoke of oxen purchased by him. On coming of age after the maturity of the note, he converted the oxen to his own use, and received the avails. The court said: "It seems to be a well-settled principle that such contracts of an infant as the court can pronounce to be to his prejudice are void; such as are of an uncertain nature, as to benefit or prejudice, are voidable, and may be confirmed or avoided at his election, and such as are for his benefit, as for necessaries, instruction, and the like,

stances as will not excuse his silence has also been held to amount to a ratification of the contract.[84] In the case of Lawson v. Lovejoy, an extract from the opinion therein being contained in the note, the retention by an infant, after becoming of age, of the avails of the sale of a pair of oxen, for the purchase price of which the infant had given his promissory note, was considered as sufficient to imply a ratification of the validity of the note, and the plea of infancy was set aside.[85] There are many other cases holding that a retention of the property after a notice to return it would be a ratification of the contract.[86] But if the infant had

are valid. The law so far protects him, in the second class of contracts, as to afford him an opportunity, when arrived at full age, to consider his bargain, its probable tendency and effect, to review the circumstances under which it was made, and, having weighed its advantages and disadvantages, to ratify or avoid it. If it be ratified, the original contract becomes binding, and may be enforced. The ratification gives life and validity to the old promise, and, if the contract be enforced at law, it will be by an action on the original agreement, and not on the ratification. But a ratification must, on the one hand, be something more than a mere acknowledgment of the debt; while, on the other, it need not be a direct promise to pay or perform. A direct promise is, indeed, evidence of a ratification, but not the only evidence. The contract of an infant may be rendered as valid when he arrives at full age, by his mere acts, as by the most direct and unequivocal promise. His confirmation of the act or deed of his infancy may be justly inferred against him, after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his tacit assent, under circumstances not to excuse his silence. * * * The law wisely protects youth from the impositions of those who might be disposed to take advantage of their inexperience, and compels them to the performance of no engagements, or the payment of no debts contracted within age, except such as are for necessaries suited to their condition in life. But, while it affords this protection as a shield, it will not sanction its use as an offensive weapon of injustice, by which the unsuspecting and honest community are to be defrauded of their property. The privilege is afforded for no such purpose. The law requires of the infant the strict performance of his engagement, if, subsequent to his arrival at age, it has been ratified and confirmed, either by a new promise, or by any act by which an acquiescence is implied. But if there has been no such ratification and he repudiate the contract, common honesty will not and legal principles ought not to permit him to retain the consideration which was the foundation of the promise he thus avoids. He should place himself and the person with whom he contracted in the same situation as if no contract had been made. Surely he ought not to be permitted to keep all and pay nothing." It was then held that the conversion into cash of the property for which the note was given, after the infant became of age, and the retention of the avails thereof, were a sufficient ratification of the validity of the note. See also Hilton v. Shepard, 92 Me. 160, 42 Atl. 387.

84. Means v. Robinson, 7 Tex. 502. And see Green v. Green, 69 N. Y. 553; Davis v. Dudley, 70 Me. 256; Wise v. Loeb, 15 Pa. Super. Ct. 601.

85. Lawson v. Lovejoy, 8 Me. 405. 23 Am. Dec. 526.

86. Thomasson v. Boyd, 13 Ala. 419; Manning v. Johnson, 26 Ala. 446, 62 Am. Dec. 734, in which the court said: "If an infant after he arrives at age is shown to be possessed of the consideration paid him, and either disposes of it so that he cannot restore it, or retains it for an unreasonable length of time after attaining his majority, this amounts to an affirmance of the contract. So likewise if it is

disposed of the consideration before arriving at his majority, as where the money paid to him under the contract had been spent or wasted by him,[87] or the property had been sold and the proceeds of the sale squandered or invested in other property,[88] the failure to return the property or repay the money would not be deemed a ratification.[89] And where a promissory note was given by an infant for money loaned, he may avoid the note without returning the amount of the loan unless it appears that the money loaned is still in his possession.[90]

§ 23. Persons of unsound mind.

a. *In general*— Persons of unsound mind are either lunatics, idiots, or other persons *non compotes mentis* from age, imbecility, or personal infirmity.[91] Since every contract presupposes that it is founded in the free and voluntary consent of each of the parties, which a person *non compos mentis* is unable to give, it was formerly the rule that the contracts of such a person were utterly

shown that he has power to restore the thing that he received he cannot be allowed to rescind without first making restoration. But if the consideration so paid was money, and there is no proof that he was possessed of the money so obtained after he attained his majority so as to be able to restore it to the purchaser, the infant should not be required in a court of law to repay the amount he received as a prerequisite to the avoidance of his deed in a suit for the land."

See also Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; Curry v. St. John Plow Co., 55 Ill. App. 82; Burgett v. Barrick, 25 Kan. 527; Jenkins v. Jenkins, 12 Iowa, 195; Middleton v. Hoge, 5 Bush (Ky.), 478; Dana v. Combs, 6 Me. 86, 19 Am. Dec. 194; Boyden v. Boyden, 9 Metc. (Mass.) 519, in which case it was held that if an infant, after coming of age, retains property received by him for his own use, or sells or otherwise disposes of it, such action will be held to be an affirmance of the contract, and he cannot defeat an action on the note for the purchase price; Aldrich v. Grimes, 10 N. H. 194; Stern v. Freeman, 61 Ky. 309; *In re* Kimmel, 1 Walk. (Pa.) 290; Weed v. Beebe, 21 Vt. 495.

87. Chandler v. Simmons, 97 Mass. 514, 93 Am. Dec. 117; Miller v. Smith, 26 Minn. 248, 37 Am. Rep. 407; Walsh v. Powers, 43 N. Y. 23, 3 Am. Rep. 654; Allen v. Lardner, 78 Hun (N. Y.), 603; Reynolds v. Curry, 100 Ill. 356; Dill v. Bowen, 54 Ind. 204.

88. Leacox v. Griffith, 76 Iowa, 89; Robbins v. Eaton, 10 N. H. 506; Nichol v. Steger, 2 Tenn. Ch. 328, affd. in 6 Lea (Tenn.), 393; Hangen v. Hachmeister, 17 Jones & S. (N. Y.) 34; Petrie v. Williams, 68 Hun (N. Y.), 589, 23 N. Y. Supp. 237.

89. Walsh v. Young, 110 Mass. 396; Price v. Furman, 27 Vt. 271, 65 Am. Dec. 194; Wiser v. Lockwood's Estate, 42 Vt. 720; Bedinger v. Wharton, 27 Gratt. (Va.) 857.

90. Miller v. Smith, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; Pemberton Bldg. & Loan Assn. v. Adams, 53 N. J. Eq. 258, 31 Atl. 280.

91. Story on Promissory Notes, § 101. Coke has enumerated four different classes of persons who are deemed in law to be *non compotes mentis:* First, an idiot or a fool natural; second, he was of good and sound mind and memory, but by the act of God has lost it; third, a lunatic, *lunaticus qui gaudet lucidis intervallis*, who sometimes is of good, sound mind and memory, and sometimes *non compos mentis;* fourth, one who is *non compos mentis* by his own act, as a drunkard. Coke Litt. 247*a;* 4 Coke, 124. See Black L. Dict., p. 821.

void.[92] This rule no longer obtains, at least not to the same extent; and it seems now to be generally agreed that the contracts of an insane person before office found are voidable only, and not absolutely void,[93] and may, upon the removal of the disability, or by the act of a lawfully appointed guardian, be disaffirmed or ratified.[94]

b. *Presumption of sanity; notice.*— Every person is presumed to be of sound mind and capable in that respect of making a contract until the contrary appears. If a person enters into a contract with a person whom he knows to be insane, there is no valid contract; for unsoundness of mind would be a good defense to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it.[95] But

92. Story on Promissory Notes, § 101; Byles on Bills (16th ed.), p. 72. *Furiosus nullum negotium gere potest, quia non intelligit quid agit.* Inst. Lib. 3, tit. 20, § 8; Digest, Lib. 50, tit. 7, pp. 5, 40, 124.

93. Chattel mortgage made by an insane person, apparently sane and not judicially pronounced insane, vests title, and, after default, the right of possession in the innocent mortgagee, and the mortgagee having acquired possession, the chattels cannot be recovered from the mortgagee without disaffirmance. Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142, in which the court said: "It is now the well-settled doctrine of this court, that the contracts of the unsound in mind, whose incapacity has not been judicially determined, are not void, but only voidable, and may, upon the removal of the disability, or by the act of a lawfully appointed guardian, be disaffirmed or ratified." Citing Musselman v. Cravens, 47 Ind. 1; Nichol v. Thomas, 53 Ind. 42; Freed v. Brown, 55 Ind. 310; Wray v. Chandler, 64 Ind. 146; Hardenbrook v. Sherwood, 72 Ind. 403; Schuff v. Ransom, 79 Ind. 458.

Generally, see *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67; Wetter v. Habbersham, 60 Ga. 194; Bunn v. Postel, 107 Ga. 490, 33 S. E. 707; Orr v. Equitable Mortg. Co., 107 Ga. 499, 33 S. E. 708; Emery v. Hoyt, 46 Ill. 258; Burgess v. Pollock, 53 Iowa, 273, 36 Am. Rep. 218; Mead v. Stegall, 77 Ill. App. 679; Hovey v. Holson, 55 Me. 256; Flach v. Gottschalk Co., 88 Md. 368, 41 Atl. 908; Townsend v. Pepperill, 99 Mass. 40; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Odell v. Buck, 21 Wend. (N. Y.) 142; Jackson v. Gumaer, 2 Cow. (N. Y.) 552; Haynes v. Scott, 35 App. Div. (N. Y.) 515, 54 N. Y. Supp. 844; Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573; Dodds v. Wilson, 3 Brev. (S. C.) 389; Sims v. McLure, 8 Rich. Eq. (S. C.) 286, 70 Am. Dec. 196; Ætna L. Ins. Co. v. Sellers, 154 Ind. 370, 56 N. E. 97; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249.

94. The next friend of a *non compos mentis* is wholly without authority to make a contract that is binding upon her or her estate, and it is only by a guardian regularly appointed that contracts can be made bind upon a person *non compos mentis.* Page v. Louisville & Nash. R. R. Co. (Ala.), 29 South. 676.

95. Molton v. Camroux, 2 Exch. (Eng.) 501; Browne v. Joddrell, 3 Car. & P. (Eng.) 30; Dane v. Kirkwall, 8 Car. & P. (Eng.) 679; Gore v. Gibson, 13 Mees. & W. (Eng.) 623.

Implied notice.— If one contract with a lunatic, and under such a contract furnish him money, and render him services, which, however, prove of no benefit to him, he cannot recover of the lunatic therefor, even though he in good faith supposed him to be sane, provided the circumstances known to him in regard to the other's mental condition were such as to convince a reasonable and prudent man of his insanity, or even to put him on an in-where a person in good faith contracts with another, without notice of any such insanity as affects his capacity to contract, the ordinary presumption of sanity prevails, and the contract is valid, unless it appears that the consideration is grossly inadequate and unfair to the lunatic.[96] This rule does not apply to contracts with a person who has been declared judicially to be of unsound mind and for whom a committee has been appointed to care for his interests; such contracts are invalid and cannot be enforced if disaffirmed or avoided.[97] And conversely it has been frequently declared that if the insanity of a party to a contract is known, the contract is absolutely void.[98]

c. *Contracts for necessaries.*— Where a contract of an insane person was for necessaries supplied to him or his family, in good faith and suitable to their condition in life, it is valid and binding.[99] The fact that a person dealing with the insane person had

quiry by which he might, if reasonably prudent, have learned that fact. Lincoln v. Buckmaster, 32 Vt. 652. See also Rhoades v. Fuller, 139 Mo. 179, 40 S. W. 760.

96. Leake's Law of Contracts (3d ed.), p. 501.

General rule.— The general rule that controls all cases of this kind is, that the contract of a lunatic made before office found will not be set aside where it is entered into in good faith by the other party, without fraud or imposition, for a valuable consideration, without notice of the infirmity, and has been so far executed that the parties cannot be restored to their original position, or there has been restoration, or offer to restore, or a refusal to restore. Note to 71 Am. St. Rep. 428, citing More v. Calkins, 85 Cal. 177, 24 Pac. 729; Strodder v. So. Granite Co., 99 Ga. 595, 27 S. E. 174; Ronan v. Bluhm, 173 Ill. 277, 50 N. E. 694; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; Abbott v. Creal, 56 Iowa, 175, 9 N. W. 115; Alexander v. Haskins, 68 Iowa, 73, 25 N. W. 935; Harrison v. Otley, 101 Iowa, 652, 70 N. W. 724; Youngs v. Stephens, 48 N. H. 133, 97 Am. Dec. 592; Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788. See also Knight v. Knight (Ala.), 21 South. 407.

Pollock, in his work on Contracts (p. 89), says: "The rule is now settled, however, that the contract of a lunatic or drunken man, who, by reason of lunacy or drunkenness, is not capable of understanding its terms or forming a rational judgment of its effects on his interests, is not void, but only voidable at his option; and this only if his state is known to the other party."

Restoration of consideration.—If the contract be fair and *bona fide*, and there is no element of fraud or imposition in it, and if the other party does not know of the insanity, and the parties cannot be placed in the position they occupied before the contract was executed by the same party, there is no reason why the lunatic should be allowed to retain what he has acquired under the contract, and at the same time be permitted to escape from all liability arising out of it. Flach v. Gottschalk Co., 88 Md. 368, 41 Atl. 908, 71 Am. St. Rep. 418. See also Morris v. Great Northern Ry. Co., 67 Minn. 74, 69 N. W. 628.

97. Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 15 Am. St. Rep. 386; Rannels v. Gerner, 80 Mo. 474; Lamoreaux v. Crosby, 2 Paige (N. Y.), 422, 22 Am. Dec. 655; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235; Wadsworth v. Sharpstein, 8 N. Y. 388, 59 Am. Dec. 499. But see Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

98. Helberg v. Schuman, 150 Ill. 12, 37 N. E. 99, 41 Am. St. Rep. 339; Fecel v. Guinault, 32 La. Ann. 91.

99. Fitzgerald v. Reed, 17 Miss. 94;

knowledge of his mental unsoundness, will not of itself vitiate a contract for necessaries, where it appears that they are furnished in good faith.[1] It is now well established that the executed contract of a *non compos mentis* for necessaries *bona fide* supplied stands on the footing of an infant's contract for necessaries.[2] But where a contract, even for necessaries, is unexecuted, it cannot be enforced because it wants the essential properties of a legal contract.[3]

d. *Bills and notes by persons of unsound mind.*— A person of unsound mind, being incapable of contracting, or of doing any other valid and binding act, will be allowed to plead his disability in an action brought against him upon a promissory note.[4] Textwriters have frequently declared that no matter though the transaction be free from all imputation of unfairness, an insane person cannot bind himself or his estate by a promissory note or bill of exchange.[5] Thus, an insane man cannot make a valid pledge of a promissory note, even when the pledgee is ignorant of his infirmity, and practices no sort of management in obtaining the security.[6] It has been frequently held that a note given for necessaries by an insane person is invalid, although in such a case the person who furnished the necessaries may recover therefor from the estate of the insane person.[7] This is not by any means a

Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430; Stannard v. Burn's Admr., 63 Vt. 244, 22 Atl. 460; Manghan v. Burn's Estate, 64 Vt. 316, 23 Atl. 583. See Reando v. Misplay, 90 Mo. 251, 2 S. W. 405, 59 Am. Rep. 13. The law implies a contract by an insane person to pay for necessaries furnished him in good faith. Sceva v. True, 33 N. H. 627; Borum v. Bell (Ala.), 31 South. 454.

1. Buswell on Insanity, § 279.

2. La Rue v. Gilkyson, 4 Pa. St. 375.

3. Edwards on Bills and Promissory Notes, p. 63.

4. Mitchell v. Kingman, 5 Pick. (Mass.) 431.

5. Edwards on Bills and Promissory Notes, p. 63. See also Taylor v. Dudley, 35 Ky. 308; Schmidt v. Ittman, 46 La. Ann. 888, 15 So. 310. The mental incapacity of the maker of a note is, *prima facie*, a complete defense to an action on the note. Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161. In the case of McKee v. Ward, 18 Ky. L. Rep. 987, 38 S. W. 704, it was held that a note given by an insane person for services performed by an attorney in a proceeding for the appointment of a committee is not enforceable as a contract.

6. Seaver v. Phelps, 11 Pick. (Mass.) 304; Van Patten v. Beals, 46 Iowa, 62.

7. Davis v. Tarver, 65 Ala. 98. In this case the court said: "The note may have been invalid, because of the incapacity of the intestate to contract at the time of its execution; yet, if its consideration was necessaries furnished the intestate, a legal liability would rest on him to pay for them, which would be a debt chargeable to his estate." Citing *Ex p.* Northington, 37 Ala. 496; Westmoreland v. Davis, 1 Ala. 299; Harris v. Davis, 1 Ala. 259. And in the case of Milligan v. Pollard, 112 Ala. 465, 20 South. 620, it was held that a note in the hands of the payee, executed by an insane person, though given for necessaries, and without the payee's being aware of his

universal rule. Many cases may be cited upholding a contrary doctrine.[8] Indeed at the present time the doctrine supported by the weight of authority would seem to be that the note or other contract of an insane person is valid and binding when the note was obtained or the contract entered into in good faith, in ignorance of the want of capacity of the insane person to contract, and for a full and adequate consideration of money paid, or property delivered to him.[9]

e. *Indorsement by insane person; rights of innocent holder.*— For the same reason and in recognition of the same rule as in the case of the making of a promissory note by an insane person, an

insanity, is not binding on his estate. See also McKee v. Purnell, 18 Ky. L. Rep. 879.

8. **Note for necessaries held valid.** —A person who had been adjudged insane, but over whom no conservator had been appointed, and who continued in the management of his business, with nothing in his appearance to indicate his mental unsoundness, purchased goods necessary and useful in his business, at a reasonable price, and executed his note therefor. The seller had no knowledge of his having been adjudged insane, or of his being a lunatic. It was held that the purchaser was liable on the note, and that payment of a judgment recovered therefor would not be enjoined. McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610. See also Allen v. Berryhill, 27 Iowa, 534, in which the court says: "Justice and sound policy concur in requiring this court to hold, as it does, that where a contract has been entered into (under circumstances which would ordinarily make it binding) by a sane man with one who is insane, and that contract has been adopted, and is sought to be enforced by the representatives of the latter, it is no defense to the sane party to show that the other party was *non compos mentis* at the time the contract was made."

9. **Notice of insanity.**— In the case of Lancaster County Bank v. Moore, 78 Pa. St. 407, 21 Am. Rep. 24, it appeared that the defendant, desiring to borrow money, gave S. his note, which S. procured to be discounted at plaintiff's bank, and the money deposited to the defendant's order. Afterward a petition *de lunatico inquirendo* was presented against the defendant, and he was found to be a lunatic, and to have been a lunatic from a time anterior to the making of the note. The plaintiff had no notice of defendant's lunacy. It was held that the defendant's insanity was not a defense to an action on the note. But under a Georgia statute (Civ. Code, § 3652), which provides that an insane person cannot contract, it was held that a bank was liable in paying a check of a person who had been judicially declared to be insane, in another State, and which fact was unknown to the bank. American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250.

Statement of rule.— The general rule is that contracts with lunatics and insane persons are invalid, subject to the qualification that a contract made in good faith with a lunatic for a full consideration which has been executed without knowledge of the insanity, or such information as would lead a prudent person to the belief of the incapacity, will be sustained. Matthiesen v. McMahon, 38 N. J. L. 536. See also Yanger v. Skinner, 14 N. J. Eq. 389; Youngs v. Stevens, 48 N. H. 133.

As a general rule, the promissory note of a person *non compos mentis* is invalid; but the rule is subject to the qualification that, when such a note is given for necessaries or for other adequate consideration of benefit, furnished to the maker in good faith, without knowledge of his unsound mental condition, it may be enforced to the extent of the value of the consideration so furnished. Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

indorsement thereof by such a person is invalid and does not convey a legal title to the note. The principle applicable to commercial paper, that when in the hands of a *bona fide* holder for value, the consideration cannot be inquired into, does not apply to cases of commercial paper made by insane persons.[10] An indorsement of a promissory note by the payee is a contract which an insane person cannot make, because he lacks the power to give that consent which the contract requires.[11] It has been held, therefore, that the insanity of the indorser may be pleaded by the maker of a note in an action brought against him by the indorsee.[12] But the doctrine has also been declared that the contract of indorsement by an insane person is voidable and not void, and such contract is binding upon all prior parties to the instrument who are of sound mind until it is avoided by the insane person or his guardian or legal representatives.[13] No action will lie on an ac-

10. Moore v. Herschey, 90 Pa. St. 196; Hosler v. Beard, 54 Ohio St. 398, 42 N. E. 1040, 56 Am. St. Rep. 720, 35 L. R. A. 161.

11. Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642.

12. Defense of insanity of indorser. — The leading case in favor of the sufficiency of such a defense is Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642, in which the court says: "An insane person understands not the effect of indorsing the note, nor whether he is receiving a valuable consideration for the same or not. He may not even know that he is parting with his property; and an indorsee who should take a note under such circumstances would be guilty of fraud. If at the time the note is given the payee should be insane, and the maker should be aware of the fact, he would be bound in equity and good conscience not to pay it to an indorsee till he had ascertained that he was the rightful and legal holder. Or if when it is given he should not be aware of the existence of the insanity, or if after it should be given the payee should become insane, the reason is equally strong why he should not pay it without due inquiry, if he had notice of the insanity. And if, under such circumstances, he ought not to be protected in paying the note to the indorsee, then it would seem to follow as a legitimate consequence that he should be permitted to show the existence of insanity at the time of the indorsement, in defense of an action brought by the indorsee. * * * And it appears to us that the due protection of the rights of an insane person requires that this defense should be permitted; for, unless it is, then payment to an indorsee must be good, and a judgment in his favor upon the note must be a valid bar to any suit upon the same by the insane person or his representatives. * * * So if the maker cannot show insanity in the indorser at the time of the transfer, in defense of a suit by the indorsee, then insanity cannot be shown by the indorser or his representatives as a reason why the note should be paid to him instead of the indorsee, and the act of indorsement would be made legal, and the *non compos* would be unprotected from the effects of his indorsement." See also Hannahs v. Sheldon, 20 Mich. 278, where it was held that evidence that the payee of a negotiable instrument, payable to order, was insane during all the time from the issuing of the paper until the death of the payee, is admissible to disprove the validity of the transfer. See also Jeneson v. Jeneson, 66 Ill. 259.

13. Carrier v. Sears, 4 Allen (Mass.), 336, 81 Am. Dec. 707, which was an action by an indorsee of a promissory note against the maker, and it was held that it was no defense to prove that the plaintiff procured the indorsement by undue influence from the payee, when he was of unsound mind and incapable of making a valid incommodation indorsement of a promissory note by a lunatic, even in favor of an innocent holder.[14]

§ 24. Intoxicated persons.

a. *Contracts generally.*— A person who has deprived himself of reason by intoxication is in a condition, as regards the capacity of contracting, analogous to that of mental insanity, and the same rules may in general be applied; he is "*non compos mentis* by his own act." [15] If a person enter into an agreement with another, knowing him to be then so far intoxicated as to be incapable of understanding the matter of the agreement, the contract is voidable by the party so incapacitated.[16] It must appear, however, in order to avoid a contract on the ground of intoxication, that it is such as deprives the party of his reason and understanding, or is brought about by the party seeking to take advantage of such intoxication, and for the purpose of so doing.[17] Where a person has been judicially declared an habitual drunkard he cannot enter into a contract which will bind his estate,[18] except for necessaries.[19]

b. *Promissory notes and bills of exchange.*— A note or bill made or drawn by a person while so intoxicated as to be deprived of his understanding cannot be enforced as against him by the payee.[20]

dorsement, if the payee or his legal representatives have never disaffirmed it; or that the payee, for a valuable consideration, had agreed to give up the note at his death to the maker, reserving meanwhile the right to collect the interest thereon.

It is a general rule that the contract of an insane person is voidable only at the election of the insane person. Atwell v. Jenkins, 163 Mass. 362, 40 N. E. 178, 28 L. R. A. 694; Allen v. Berryhill, 27 Iowa, 534, 1 Am. Rep. 309; Warfield v. Warfield, 76 Iowa, 633, 41 N. W. 383; Arnous v. Lesassier, 10 La. 592, 29 Am. Dec. 470; Ingraham v. Baldwin, 9 N. Y. 45.

14. Wirebach v. Easton Bank, 97 Pa. St. 543, 39 Am. Rep. 821.

15. 4 Coke's Litt. 124*b;* Leake's Law of Contracts (3d ed.), p. 505.

16. Gore v. Gibson, 13 Mees. & W. (Eng.) 623; Butler v. Mulvihill, 1 Bligh (Eng.), 137; Pitt v. Smith, 3 Campb. (Eng.) 33; Hamilton v. Grainger, 5 H. & N. (Eng.) 40; Bowen v. Clark, Fed. Cas. No. 1,721; Cummings v. Henry, 10 Ind. 109; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; English v. Young, 49 Ky. 141; Broadwater v. Darne, 10 Mo. 277; Prentice v. Achorn, 2 Paige (N. Y.), 30; Hyman v. Moore, 48 N. C. 416; Bush v. Breining, 113 Pa. St. 310, 6 Atl. 86, 57 Am. Dec. 469.

17. Wilcox v. Jackson, 51 Iowa, 208, 1 N. W. 513; Jones v. Fritchy, 39 Md. 258; Curtis v. Hall, 4 N. J. L. 412; Burroughs v. Richman, 13 N. J. L. 233, 23 Am. Dec. 717; Birdsong v. Birdsong, 39 Tenn. 289. A drunkard is incompetent to contract only on proof that, at the time of making the contract, his understanding was clouded, or reason dethroned, by actual intoxication. Wright v. Fisher, 65 Mich. 275, 32 N. W. 605; Reynolds v. Dechaums, 24 Tex. 174.

18. Devin v. Scott, 34 Ind. 67; L'Amoureux v. Crosby, 2 Paige (N. Y.), 422, 22 Am. Dec. 655; Imhoff v. Witmer's Admr., 31 Pa. St. 243.

19. Darby v. Cabanne, 1 Mo. App. 126; Brockway v. Jewell, 52 Ohio St. 187, 39 N. E. 470.

20. Taylor v. Purcell, 60 Ark. 606; Reinskopf v. Rogge, 37 Ind. 207; Newell v. Fisher, 19 Miss. 431, 49 Am.

Partial intoxication would not be sufficient as a defense.[21] To render the instrument invalid it must appear that at the time of its signature the party was so drunk as to have drowned reason, memory, and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being. This is so especially when the other parties connected with the transaction have not aided in, or procured his drunkenness.[22] There are some authorities to the effect that a note signed by the maker while in a state of intoxication cannot be avoided when in the hands of a *bona fide* purchaser before maturity.[23] An indorsement made by a person while so intoxicated as not to realize the result of his acts will not bind him, in favor of the indorsee who had knowledge of such intoxication.[24]

§ 25. Married women.

a. *Under the common law.*— Under the common law a married woman is incapable of entering into a contract of any nature; for during her marriage, her very being, or legal existence, as a distinct person, is suspended, or, at least, is incorporated and consolidated with that of her husband.[25] It follows, therefore, independent of any statute, that the promissory notes, bills of exchange, or other commercial paper executed by a married woman are, at common law, absolutely void.[26] There are, however, certain exceptions to this rule: (1) Where the husband is legally dead, or where he has been absent and not heard from for seven years,

Dec. 66; McClure v. Mansell, 4 Brewst. (Pa.) 119.

21. Where the maker of a promissory note was not so intoxicated at the time he made the note but that he remembered the act and accompanying circumstances the next morning, held that he could not set up as a defense, in an action on the note by a *bona fide* holder, the plea of intoxication. Caulkins v. Fry, 35 Conn. 170; Miller v. Finlay, 26 Mich. 249.

22. Bates v. Ball, 72 Ill. 108.

23. Smith v. Williamson, 8 Utah, 219, 30 Pac. 753. On the grounds of public policy and the necessities of commerce, the defense of drunkenness in the maker cannot be set up against the innocent holder of a negotiable note. State Bank v. McCoy, 69 Pa. St. 204, 8 Am. Rep. 246; McSparran v. Neeley, 91 Pa. St. 17.

24. Gore v. Gibson, 13 Mees. & W. (Eng.) 623, where the defendant pleaded, in an action by an indorsee against the indorser of a bill of exchange, that when he indorsed the bill he was so intoxicated and thereby so deprived of sense, understanding, and the use of his reason, as to be unable to comprehend the meaning, nature, or effect of the indorsement, or to contract thereby; of which the plaintiff, at the time of the indorsement, had notice. Held to be a good answer to the action.

25. Story on Promissory Notes (5th ed.), § 85; 1 Bl. Comm. 442; Bayley on Bills, chap. 2, § 3.

26. Vance v. Wells, 6 Ala. 737; Mudge v. Bullock, 83 Ill. 22; Howe v. Wildes, 34 Me. 566; Waterbury v. Andrews, 67 Mich. 281, 34 N. W. 575; Bauer v. Bauer, 40 Mo. 61; Shannon v. Canney, 44 N. H. 592; Wilson v. Cheshire, 1 McCord Eq. (S. C.) 239.

so that the law presumes him to be dead, the wife may make contracts that will bind her at law.[27] And in many States in this country this exception is carried still further, and it is held that where the husband was never in the State, or has left it and wholly renounced his marital rights and duties, and deserted his wife, she may make contracts and sue and be sued in her own name as *feme sole*.[28] (2) If a married woman have a separate estate and

27. Edwards on Bills of Exchange and Promissory Notes, p. 68.

Civiliter mortuus.— The wife of a man *civiliter mortuus*, or banished, or convicted of a crime and sentenced for life, may contract, sue, and be sued as a *feme sole*. 2 Kent's Comm. 154; Robinson v. Reynolds, 1 Aikens (Vt.), 174, 15 Am. Dec. 673; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Young v. Pollak, 85 Ala. 439, 5 South. 279. So the wife of a convict sentenced to transportation for a term of years may enter into a contract, even after the expiration of his term, if he continues beyond seas, for this is to be deemed an abjuration of the realm. Carroll v. Blenco, 4 Esp. (Eng.) 27. And it has been held that the wife of a convict sentenced to transportation, but remaining on prison hulks within the realm, may be declared a bankrupt where she carries on business as a *feme sole*. *Ex p.* Franks, 7 Bing. (Eng.) 762. As to absence from State and no knowledge of husband's existence for seven years, see King v. Paddock, 18 Johns. (N. Y.) 141.

28. **Desertion.**— It was formerly held in England and in some of the American States that a wife of a citizen who has deserted her and left the country without having abjured the realm, or who remains out of the country for the purpose of looking after certain property interests, cannot sue or be sued as a *feme sole*. Bogget v. Frier, 11 East (Eng.), 301; Walford v. De Pienne, 2 Esp. (Eng.) 554; Marsh v. Huntington, 2 Bos. & P. (Eng.) 226; Boyce v. Owens, 1 Hill (S. C.), 8; Rogers v. Phillips, 8 Ark. 336. But the law seems well settled in most of the States where the question has arisen, that where a husband has deserted his wife, or driven her from home by abuse, and permanently left the State, his wife may contract, sue, and be sued as a *feme sole*. James v. Stewart, 9 Ala. 855; Mead v. Hughes, 15 Ala. 141; Krebs v. O'Grady, 23 Ala. 726; Clark v. Valentine, 41 Ga. 143; Love v. Moynehan, 16 Ill. 277; Prescott v. Fisher, 22 Ill. 390; Burger v. Belsley, 45 Ill. 74; City of Peru v. French, 55 Ill. 317; Anderson v. Jacobson, 66 Ill. 522; Smith v. Silence, 4 Iowa, 321; Gregory v. Pierce, 4 Metc. (Mass.) 478; Benadum v. Pratt, 1 Ohio St. 403; Bean v. McCord, 4 McCord (S. C.), 148. It must, however, conclusively appear that the desertion is complete and absolute, amounting to an entire renunciation by the husband of his marital rights and relations. Ayer v. Warren, 47 Me. 217; Smith v. Silence, 4 Iowa, 321; Gregory v. Pierce, 4 Metc. (Mass.) 478. In the latter case the court said (Shaw, C. J.): "The principle is now to be considered as established in this State, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the Commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights, and deserted his wife, she may make and take contracts, and sue and be sued in her own name as a *feme sole*. * * * But to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and so far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign State or country, which is held to operate like an abjuration of the realm."

In some States it has been held that a departure from the State by the de-make a promissory note, or accept a bill of exchange, she is liable.[29] (3) Where a married woman has been divorced *a vinculo matrimonii* she may bind herself as a *feme sole,* because such a divorce annuls the marriage to all intents and purposes and consequently removes her disability.[30] But it is generally held that a limited divorce, or a divorce *a mensa et thoro* will not have such an effect;[31] and when the wife is living apart from her husband under articles of agreement, providing for a separate maintenance, the common-law disability continues,[32] unless it appears that the husband has left the State to permanently reside elsewhere.[33]

serting husband is not necessary to remove the disability of the wife. In the case of Love v. Moynehan, 16 Ill. 277, Justice Skinner says: "We hold the law to be, that where the husband compels the wife to live separate from him, either by abandoning her, or forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent, and without expectation of again living together, and the wife is unprovided for by the husband, in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue, and be sued in relation to them, as a *feme sole,* during the continuance of such condition."

Husband's insanity.— Where husband is insane and confined in an asylum without the State, the wife may contract. Gustin v. Carpenter, 51 Vt. 585; Harris v. Bohle, 19 Mo. App. 529.

29. *England.*— Bullpin v. Clarke, 17 Ves. 566; Hulme v. Tenant, 1 Bro. C. C. 16; Stewart v. Kirkwall, 3 Madd. 387; Johnson v. Gallagher, 30 L. J. Ch. 298; McHenry v. Davies, L. R., 10 Eq. 88; Davies v. Jenkins, L. R., 6 Ch. Div. 728.

Alabama.— Collins v. Rudolph, 19 Ala. 616; McMillan v. Peacock, 57 Ala. 127; Helmetag v. Frank, 61 Ala. 67.

Connecticut.— Imlay v. Huntington, 20 Conn. 146; Hitchcock v. Kieley, 41 Conn. 611; Williams v. King, 43 Conn. 569.

Florida. — Maiben v. Bobe, 6 Fla. 381.

Georgia.— Wylly v. Collins, 9 Ga. 223; Dallas v. Heard, 32 Ga. 604; Saulsbury v. Weaver, 59 Ga. 254.

Illinois.— Swift v. Castle, 23 Ill. 209; Conkling v. Doul, 67 Ill. 355.

Kansas.— Deering v. Boyle, 8 Kan. 525; Wicks v. Mitchell, 9 Kan. 80.

Maryland.— Cooke v. Husbands, 11 Md. 492; Koontz v. Nabb, 16 Md. 549; Wilson v. Jones, 46 Md. 349.

Missouri.— Coats v. Robinson, 10 Mo. 757; Whitesides v. Cannon, 23 Mo. 457; Schafroth v. Amos, 46 Mo. 114; Kinnon v. Weippert, 46 Mo. 532, 2 Am. Rep. 541; Miller v. Brown, 47 Mo. 504, 4 Am. Rep. 345; Metropolitan Bank v. Taylor, 62 Mo. 338.

New Jersey.— Leaycraft v. Hedden, 18 N. J. Eq. 512.

New York.— Yale v. Dederer, 18 N. Y. 265, 22 N. Y. 450, 68 N. Y. 329; Manhattan Brass Co. v. Thompson, 58 N. Y. 80; Gosman v. Cruger, 69 N. Y. 87; Eisenlord v. Snyder, 71 N. Y. 45.

Ohio.— Maclin v. Burroughs, 14 Ohio St. 519; Phillips v. Graves, 20 Ohio St. 371, 5 Am. Rep. 675; Williams v. Urmston, 35 Ohio St. 296.

30. Byles on Bills (16th ed.), p. 73; Story on Promissory Notes, § 85. Parsons on Notes and Bills, p. 78; Chase v. Chase, 6 Gray (Mass.), 159; Piper v. May, 51 Ind. 283.

31. Lewis v. Lee, 3 B. & C. (Eng.) 291; s. c., 5 D. & R. (Eng.) 90. But see Dean v. Richmond, 5 Pick. (Mass.) 461, where it was held that a wife divorced *a mensa et thoro,* and living apart from her husband could sue and be sued as a *feme sole.* See also Pierce v. Burnham, 4 Metc. (Mass.) 303.

32. Marshall v. Rutton, 8 T. R. (Eng.) 845; Lord St. John v. Lady St. John, 11 Ves. (Eng.) 526; Parker's Exr. v. Lambeil's Exr., 31 Ala. 89; Fuller v. Bartlett, 41 Ill. 241; Harris v. Taylor, 3 Sneed (Tenn.), 536.

33. Rose v. Bates, 12 Mo. 30.

b. *Enabling statutes.*— In many of the States of the Union, and also in England many statutes have been enacted entirely removing or greatly modifying the disability to contract imposed upon married women by the common law. Indeed in recent years there has been a rapidly growing tendency in legislation to abrogate the common-law rules restricting and limiting the rights and liabilities of married women, and to place them in respect thereto in the same condition as unmarried women.[34] It is not the purpose of this work to dwell at length upon the difficult questions involved in the consideration of the effect of the statutes of the several States upon the prior existing common-law rules. Married women are still subject to common-law rules in those States where the common law has been unchanged by statute; if a special or limited power to contract is given them, they are still deemed *prima facie* unable to contract, and the burden is on the persons relying on the validity of their contracts to bring them within the statutory rule;[35] and where State statutes have abrogated all disabilities, the contracts of married women are no longer subject to special rules, and they have hence become subject in all respects to the same law as other persons.[35a] The laws of the several States differ

34. Canal Bank v. Partee, 99 U. S. 331, 25 L. Ed. 390.

35. Troy Fertilizer Co. v. Zachry, 114 Ala. 177, 21 South. 471; Way v. Peck, 47 Conn. 23; Rodemeyer v. Rodman, 5 Iowa, 426; West v. Laraway, 28 Mich. 464; Lewis v. Perkins, 36 N. J. L. 133.

English Married Women's Property Act (33 & 34 Vict., chap. 93) permitted married women to keep for their own use their wages and earnings gained independently of their husbands and to sue and be sued upon their contracts in respect to their separate estates. The act of 45 & 46 Vict., chap. 75, repealed the former act and provides that a married woman can acquire, hold, and dispose of property, real or personal, including choses in action, without the intervention of a trustee; and she may sue and be sued, both in contract and tort, to the extent of her separate property, whether held at the time or subsequently acquired, just like a *feme sole*. All her contracts *prima facie* relate to and bind her separate property, subject to any restraint on anticipation, and if trading separately she may be made bankrupt. The English cases under these acts are very numerous. The general result of all of them seems to be "that a married woman having a separate estate enjoys an independent legal existence so far as as it is concerned, but those dealing with her should take care to see that she possesses it at the time, and is contracting in respect to it, and not as agent for her husband. Her acceptance *prima facie* binds her and not her husband, and in case of an instrument payable to her, she alone can indorse, or receive the money or give a valid discharge." Byles on Bills (16th ed.), p. 78.

The laws of many of the States follow closely the English acts above referred to, and the remarks of Mr. Byles appended thereto are equally applicable to such States.

Those who deal with a married woman are bound to inquire as to whether a contract, or the consideration thereof, is for her benefit, or the benefit of her estate, and therefore one which, under the statute, she may lawfully make. Cupp v. Campbell, 103 Ind. 213, 2 N. E. 565.

35a. The liability of a married woman on a contract made within the materially in their methods of treating the disabilities of married women. To determine what these disabilities are it will be necessary to consult the statutes of such States and the cases arising thereunder. There will only be space in this work for a consideration of a few of the more important common-law rules which are generally applicable in all jurisdictions to the rights and liabilities of married women in respect to commercial paper, unless modified by statute.

c. *Bills and notes of married women generally.*— Under the common law negotiable instruments executed by a married woman are absolutely void,[36] subject of course to the exceptions noted above. If such an instrument be executed by a married woman in respect to her separate estate it is in most jurisdictions a valid and binding obligation payable out of such estate.[37] This exception is founded in equity. The cases upon which it was based were those where the liability to pay was dependent upon considerations that did not recognize the married women's legal obligations as arising out of their contracts, but rather upon the fact that credit was given or the debts contracted on the faith of their separate estates and to be paid out of them.[38] Where the wife had no separate estate or business, a note signed by her, given for sup-

scope of her statutory capacity is to be determined by the same rules as those applied to persons of full capacity. McKell v. Merchants' Nat. Bank, 62 Neb. 608, 87 N. W. 317.

36. *Alabama.*— Vance v. Wells, 6 Ala. 737.

California.— Butler v. Baber, 54 Cal. 178.

Florida.— Dollner v. Snow, 16 Fla. 86.

Indiana.— Higgins v. Willis, 35 Ind. 371; Brick v. Scott, 47 Ind. 299.

Kentucky.— Stevens v. Deering, 9 S. W. 292.

Missouri.— Bauer v. Bauer, 40 Mo. 61.

Nebraska.— State Sav. Bank of St. Joseph v. Scott, 10 Neb. 83, 4 N. W. 314.

New Hampshire.— Shannon v. Canney, 44 N. H. 592.

New York.— Vansteenburgh v. Hoffman, 15 Barb. 28; Bogert v. Gulick, 65 Barb. 322; Lenderman v. Farquarson, 101 N. Y. 434, 5 N. E. 67.

North Carolina.— Wilcox v. Arnold, 116 N. C. 708, 21 S. E. 434.

South Carolina.— Wilson v. Cheshire, 1 McCord Eq. 233; Goodhue v. Barnwell, Rice Eq. 198; Howard v. Kitchens, 31 S. C. 490, 10 S. E. 224.

Tennessee.— Yeatman v. Bellmain, 1 Tenn. Ch. 589; Snodgrass v. Hyder, 95 Tenn. 568, 32 S. W. 764.

Wisconsin.— O'Malley v. Ruddy, 79 Wis. 147, 48 N. W. 116.

As to validity of notes given or indorsed by a married woman to her husband under a statute prohibiting contracts between husband and wife, see National Granite Bank v. Tyndale, 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447; First Nat. Bank v. Albertson (N. J. Ch.), 47 Atl. 818.

37. Nispel v. Laparle, 74 Ill. 306; Wright v. Dresser, 110 Mass. 51; Nelson v. Miller, 52 Mass. 410; Harris v. Gates, 121 Mich. 163, 79 N. W. 1098; State Savings Bank of St. Joseph v. Scott, 10 Neb. 83, 4 N. W. 314; Shannon v. Canney, 44 N. H. 592.

38. Edwards on Bills and Notes, p. 69; Darwin v. Moore, 58 S. C. 164, 36 S. E. 539.

plies for the support of the family, is the debt of the husband alone, he being bound to furnish such supplies.[39]

d. *Indorsement by married woman.*— At common law, where a promissory note is made to a *feme sole,* and she afterward marries, being possessed of the note, the title vests in the husband, and he alone can indorse it for transfer.[40] And where a note is made payable to a married woman, the legal interest in it vests in the husband.[41] Such negotiable paper, being part of her personal estate, payable to her order, is in legal effect, under the common law, payable to her husband.[42] The husband may authorize his wife to indorse bills of exchange and promissory notes; and where he permits her to carry on business and pass under an assumed name, such an authority may be presumed.[43] If he permits her to carry on business in her own name, and she indorses a note payable to her in the course of her business, using the name of her husband, it seems the circumstances may be left to the jury to

39. O'Malley v. Ruddy, 79 Wis. 147, 48 N. W. 116.

40. Parsons on Notes and Bills, p. 85; Conner v. Martin, 1 Stra. (Eng.) 516, 3 Wils. 5.

Byles on Bills (16th ed., p. 75), says: "Formerly, where a bill or note was given to a single woman, and she married, the property vested in her husband, and he alone could indorse it; and husband and wife must join in the action upon it; but if payable to order, marriage might operate as an indorsement, so as to enable the husband to sue alone. If not recovered upon or reduced into possession during their joint lives, it reverted to the woman, if she survived, or went to her husband as her administrator, if he survived."

41. Barlow v. Bishop, 1 East (Eng.), 432; Roland v. Logan, 18 Ala. 307; Krebs v. O'Grady, 23 Ala. 726, 58 Am. Dec. 312; Mudge v. Bullock, 83 Ill. 22; Savage v. King, 17 Me. 301; Hancock Bank v. Joy, 41 Me. 568; Stevens v. Beals, 10 Cush. (Mass.) 291, 57 Am. Dec. 108. In the latter case the court said: "In the leading case of Barlow v. Bishop, 1 East (Eng.), 432, which decides that a married woman cannot indorse a note made payable to her in her own name, so as to pass a valid title thereto, proof of the authority or assent of the husband was wanting." See Walton v. Bristol, 125 N. C. 419, 34 S. E. 544.

42. Edwards on Bills and Notes, p. 71.

43. **Assent of husband.**— It is now a well-settled rule of law that the assent or authority of the husband gives validity to the wife's indorsement and enables her to pass a good title to choses in action made payable to her during coverture. The principle upon which this rule rests is this: the coverture of the wife creates an incapacity and disability in her to make a valid contract. The assent of the husband removes this disability or supplies the want of capacity. She then becomes, to a certain extent, the agent of the husband, who is bound by her acts when done in pursuance of the authority conferred by him. Stevens v. Beals, 10 Cush. (Mass.) 291, 57 Am. Dec. 108, citing Coates v. Davis, 1 Campb. (Eng.) 485; Miller v. Delameter, 12 Wend. (N. Y.) 433.

In the case of Allen v. Wilkins, 3 Allen (Mass.), 321, the doctrine that a note made to a married woman during coverture belongs to her husband is explained to mean that the husband has the *jus disponendi* so long as they both live, but it is held that if the husband dies without reducing the chose to possession, or doing any act indicating an intent to appropriate presume or infer an authority from him to indorse.[44] So, where she drew a bill of exchange payable to her own order, and indorsed it with the assent of her husband, it was held that this indorsement carried the title to her indorsee, so as to enable him to recover thereon against the acceptor.[45] But where no authority is shown, her act is a nullity, and her indorsement transfers no property in the bill or note.[46] But it has been held that notes payable to bearer may be passed by delivery by a *feme covert* who owned them.[47] The rules here laid down are derived solely from the common law, unaffected by statute. They have been more or less affected by the statutes of the several States and cannot now be said to be in full force and effect.

e. *Reduction into possession.*— A promissory note is not a personal chattel in possession but is a chose in action; and the common-law rule is that when a chose in action, such as a bond or note, is given to a *feme covert,* the husband may elect to let his wife have the benefit of it, or he may take it himself and reduce it into possession at any time during the coverture.[48] It was always a question of considerable nicety to determine what amounted to a reduction of the wife's chose of action into possession.[49] If the note was negotiable it could be reduced into possession by indorsing and transferring it; if nonnegotiable, it could only be reduced to possession by a suit at law, like any other thing in action. If he omitted to bring such an action, and he survived his wife, the

it during the wife's life, her administrator may sue on it.

44. Barlow v. Bishop, 1 East (Eng.), 432. As to what will constitute implied authority, see Russ v. George, 45 N. H. 467; George v. Cutting, 46 N. H. 130, 88 Am. Dec. 195.

45. Prestwick v. Marshall, 5 Car. & P. (Eng.) 594.

46. Savage v. King, 17 Me. 301; Vann v. Edwards, 128 N. C. 425, 39 S. E. 66.

47. Cobb v. Duke, 36 Miss. 60, 72 Am. Dec. 157.

48. Edwards on Bills and Notes, p. 72; Gaters v. Maderly, 6 Mees. & W. (Eng.) 422; Betts v. Kimpton, 2 Barn. & Adol. (Eng.) 273; Hart v. Stephens, 14 L. J. Q. B. (Eng.) 148.

49. Byles on Bills (16th ed.), p. 76, in which it is said: "It is conceived that indorsing a note over was such a reduction. But the bankruptcy of the husband was not a reduction of the wife's choses of action into possession; and therefore the assignees of a bankrupt could not maintain an action in their own names alone on a promissory note made by the wife of the bankrupt before her marriage. (Sherrington v. Yates, 12 Mees. & W. [Eng.] 855.) Nor was the receipt of interest by the husband a reduction into possession, nor a direction by a husband to his banker to keep it separate from other monies, followed by a bequest in his will. (Hart v. Stephens, 6 Q. B. 937; Scrutton v. Pattillo, L. R., 19 Eq. 369; Nicholson v. Drury Building Co., L. R., 7 Ch. Div. 49.)" In the case of James v. Groff, 157 Mo. 402, 57 S. W. 1081, it was held that the mere indorsement of a note by a wife to her husband does not reduce such note to his possession, so as to convey title thereto to him.

action was required to be brought in the name of her personal representatives.[50] If no action was taken to reduce into possession, the note survived to the wife after the death of the husband.[51]

f. *Joint notes of husband and wife.*— Under the common law a joint and several note made by both husband and wife binds the husband only.[52] But where the note was made by them for the purpose of aiding the wife in the transaction of her separate business, the note will be binding upon the wife.[53] The same is doubtless true where such a note is for the sole benefit of the wife's separate estate.[54] The name of the wife being found on a note does not raise a legal presumption that she is either jointly or severally liable on it.[55]

50. Edwards on Bills and Notes, p. 72; 1 Parsons on Notes and Bills, p. 85.

51. Allen v. Wilkins, 3 Allen (Mass.), 321; Clark v. Clark, 76 Wis. 306, 45 N. W. 121.

Parsons, in his work on Notes and Bills (Vol. 1, p. 85), says: "Bills and notes possessed by a single woman before and at her marriage are her choses in action, which the husband may reduce to his possession and so make his own, or may not. If he does not and dies, her right and interest to or in them are the same as before marriage. If she dies, they are now assets in the hands of her administrator; the husband has a right to be her administrator; and having in that capacity collected the notes or bills, he will retain the proceeds for his own benefit and as his own property. And if he dies, the right of taking out letters of administration upon her unsettled estate goes to his next of kin and not to hers. If she leaves debts contracted when single, for which the husband is no longer liable as such, he is still liable as her administrator to the extent of her bills and notes or other choses in action which he has reduced to possession after her death, but not for those which he reduced as husband, while she lived."

52. Luning v. Brady, 10 Cal. 265; Brown v. Orr, 29 Cal. 120; Durnford v. Gross, 7 Mart. (La.) O. S. 466; Sprigg v. Boissier, 5 Mart. (La.) N. S. 54; Davidson v. Stuart, 10 La. 146; Smith v. Wilson (Tex.), 32 S. W. 434.

53. A note given by a married woman and her husband for property purchased by her as a sole trader is valid in law, and the amount of such note may be recovered against the husband and wife in an action of assumpsit. Barnes v. De France, 2 Colo. 294. In the case of Schofield v. Jones, 85 Ga. 816, 11 S. E. 1032, it was held that where a wife joins with her husband in taking a lease of property for the purpose of carrying on the hotel business, their joint notes, executed for the rent, are binding on the wife. See also Wyatt v. Walton, 114 Ga. 375, 40 S. E. 237; Thornton v. Lemon, 114 Ga. 155, 39 S. E. 943; Smith v. Smith, 10 Ohio S. C. & C. P. Dec. 439; Noel v. Clark (Tex. Civ. App.), 60 S. W. 356.

54. Colonial & U. S. Mtge. Co. v. Bradley, 4 S. D. 158, 55 N. W. 1108.

55. Harris v. Finberg, 46 Tex. 79; Way v. Peck, 47 Conn. 23. In the latter case it was held that where a married woman has signed a note with her husband, it will not be presumed, but must be shown, that the circumstances were such as to bring the case within the statute making married women liable on their contracts, and the husband's declarations, made in the absence of the wife and without her authority, will not bind her, nor will the fact that a part of the loan for which the note was given was deposited by the husband to the wife's credit, and drawn by her in payment of bills for an addition to her house, though significant as evidence, be equivalent to a finding of facts creating a statute liability. See also Crenshaw v. Collier, 70 Ark. 5, 65 S. W. 709.

§ 26. Alien enemies.

A state of war operates to suspend and interdict all intercourse and correspondence with the enemy; it prohibits all commerce, and contracts between the citizens and subjects of the belligerent nations are unlawful and void.[56] The reason for this rule is found in the fact that every man is a party to the acts of his own government; and when one government declares or enters upon war against another, the two nations become enemies, and all the subjects of the one are the enemies of the subjects of the other.[57] It follows, therefore, that a promissory note made by a citizen of one country payable to a citizen of another, when such countries are at war with each other, is invalid and cannot be collected; and

56. **Reason for rule.**— Matthews v. McStea, 91 U. S. 7, 23 L. Ed. 188, in which Justice Strong uses the following language: "It must be conceded, as a general rule, to be one of the immediate consequences of a declaration of war and the effect of a state of war, even when not declared, that all commercial intercourse and dealing between the subjects or adherents of the contending powers is unlawful, and is interdicted. The reasons for this rule are obvious. They are, that, in a state of war, all the members of each belligerent are respectively enemies of all the citizens of the other belligerent; and were commercial intercourse allowed, it would tend to strengthen the enemy, and afford facilities for conveying intelligence, and even for traitorous correspondence. Hence it has become an established doctrine that war puts an end to all commercial dealing between the citizens or subjects of the nations or powers at war, and 'places every individual of the respective governments, as well as the governments themselves, in a state of hostility.'" See also Briggs v. United States, 143 U. S. 346, 12 Sup. Ct. 391; Alexandria Sav. Bank v. McVeigh, 84 Va. 48, 51, 3 S. E. 889, where it is held that an indorser of a note is not bound by a notice left at his house which he had abandoned during the war. Hershaw v. Kelsey, 100 Mass. 561.

Application to civil war.— The principles of the public law relating to the rights of citizens of belligerent nations are applicable in nearly every respect to a civil war existing between different portions of the same nation. See Mitchell v. United States, 21 Wall. (U. S.) 350: Brig Mary Warwick, 2 Black (U. S.), 635.

It was held that during the Civil War two citizens of the United States, residing in loyal States, could make a valid contract for the sale or mortgage of cotton growing on a plantation within one of the insurgent States, and such a contract would pass existing cotton on the plantation, and also crops to be subsequently raised thereon. Briggs v. United States, 143 U. S. 346, 12 Sup. Ct. 391.

57. Edwards on Bills and Notes, p. 75.

Reason as stated by Chancellor Kent.— Chancellor Kent says, in Griswold v. Waddington, 16 Johns. (N. Y.) 438: "I think I may venture to hazard the assertion, that there is no authority in law, whether that law be national, maritime, or municipal, for any kind of private, voluntary, unlicensed business, communication, or intercourse with an enemy. It is all noxious, and in a greater or less degree it is all criminal. Every attempt at drawing distinctions has failed; all kinds of intercourse, except that which is hostile, or created by the mere exigency of war and necessity of the case, is illegal. The law has put the sting of disability into every kind of voluntary communication and contract with an enemy, which is made without special permission of the government. There is wisdom and policy, patriotism and safety, in this principle, and every relaxation of it tends to corrupt the allegiance of the subject, and prolong the calamities of war."

it has been held that a bill drawn by an alien enemy on a British subject in England, and indorsed to a British subject abroad, cannot be enforced even after the restoration of peace.[58] The rule applies, not only to citizens and native-born subjects, but to all persons voluntarily domiciled in either country.

The place of the transaction does not make it illegal; the material question is, whether it renders assistance to an alien enemy in the time of war. For example, it has been held in England that an action may be sustained there by a neutral on a promissory note given to him by a British subject in an enemy's country for goods sold there.[59] If the contract be in favor or for the benefit of an alien enemy not domiciled in the country, it is void both at law and in equity; but it is not void where it is made for the benefit of a neutral, and it seems that although a bill be drawn by an alien enemy, it may be valid in the hands of a neutral who received the same without any previous understanding or knowledge of any intended illegal use to be made of it.[60]

B. PERSONS ACTING IN FIDUCIARY CAPACITY.

§ 27. Executors and administrators.

a. *In general.*— Executors and administrators, as the legal representatives of their decedents, succeed to all the interests of such decedents; and all the rights and remedies of such decedents in respect to their contracts and instruments, negotiable or otherwise, pass to their executors and administrators. So far as the assets of the estates under their control will admit, they also succeed to all the obligations of their decedents. This is subject, however, to the important exception in respect to those contracts, whether express or implied, which are so entirely personal to the deceased, that no one can fill his place or become his substitute; so that all the rights and obligations arising under such contracts die with him.[61]

58. Williams v. Patteson, 7 Taunt. (Eng.) 439, 1 Moore, 333; Brandon v. Nesbit, 6 T. R. (Eng.) 23.

But where two British subjects were detained prisoners in France, and one of them drew a bill in favor of the other on a third British subject, resident in England, and such payee indorsed the same in France to an alien enemy, it was decided that the alien's right of action was only suspended during the war, so that on the return of peace he might recover the amount from the acceptor; and the decision was placed on the ground that otherwise such persons would sustain greater privations during their detention. Centoine v. Morshead, 6 Taunt. (Eng.) 237.

59. Houriet v. Morris, 3 Campb. (Eng.) 803.

60. Story on Bills, §§ 103, 104.

61. Parsons on Notes and Bills, p. 154: Petrie v. Voorhees, 18 N. J. Eq.

b. *Bills and notes by executors and administrators.*— It may be stated as a general rule that an executor or administrator cannot bind the estate of the decedent by making or indorsing a promissory note as such executor or administrator.[62] An executor or administrator can only bind himself by his contracts; the assets of the estate under his control are only bound for the debts contracted by the decedent during his lifetime.[63] If an executor or administrator make a negotiable promissory note, or accept a bill of exchange, and the same be transferred before it becomes due, he is held to a personal liability thereon; because he himself makes in such a case a positive promise to pay, and executes it in the form of a negotiable instrument. Having no power to bind the estate of

285, in which it was held that executors are in general bound by all the covenants of the testator, except such as must be performed by the testator in person. See also McCrady v. Brisbane, 1 Nott & McC. (S. C.) 104, 9 Am. Dec. 676; Parker v. Barlow, 93 Ga. 700, 21 S. E. 213. As to contracts of a personal nature, see Cochran v. Davis, 15 Ky. 119; McGill v. McGill, 59 Ky. 258; Marvel v. Phillips, 162 Mass. 399, 38 N. E. 1117, 44 Am. St. Rep. 370, 26 L. R. A. 416; Chambers v. Wright, 40 Mo. 482, 93 Am. Dec. 311; Russell v. Buckhout, 87 Hun, 46, 34 N. Y. Supp. 271; Gray v. Hawkins, 8 Ohio St. 449, 72 Am. Dec. 600; White's Exrs. v. Commonwealth, 39 Pa. St. 167.

62. Boggs v. Wann (C. C.), 58 Fed. 681; Winter v. Hite, 3 Iowa, 142; Dunne v. Deery, 40 Iowa, 251; Livingston v. Gaussen, 21 La. Ann. 286, 99 Am. Dec. 731; Studebaker Bros. Mfg. Co. v. Montgomery, 74 Mo. 101; Stirling v. Winter, 80 Mo. 141.

In New York it has been held that although an administrator, after ordering a tombstone for his intestate, gave his note for it, he remains liable as administrator, in the absence of proof that he contracted for the tombstone in his individual capacity. The note will in such a case be deemed to have been given as collateral to his indebtedness as administrator. Laird v. Arnold, 25 Hun, 4. And in this State in the case of Schmittler v. Simon, 25 Hun, 76 (revd. on other grounds, 114 N. Y. 176, 21 N. E. 162), where a draft beginning with the words: "Mr. S., executor, will please pay," etc., and concluded with the words, "and charge the amount against me and my mother's estate," and was accepted by writing across its face, "accept, S., executor." It was held that the acceptor was liable in his capacity as executor only.

63. McFarlin v. Stinson, 56 Ga. 396; Harrison v. McClelland, 57 Ga. 531; Lynch v. Kirby, 65 Ga. 486; Brightwell v. Jordan, 74 Ga. 486; White v. Thompson, 79 Me. 207, 9 Atl. 118; Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am. Rep. 215, which was an action on a note drawn "I promise to pay," etc., signed "A., executor," and it was held that the burden was on the executor, and it was competent for him to show that, as his individual contract, the note was without consideration, and that the payee had agreed to look only to the estate. In the case of Schmittler v. Simon, 114 N. Y. 176, 21 N. E. 162, it was held error to exclude evidence to the effect that when a draft was drawn upon an executor and accepted by him as such, it was understood between the drawer, payee, and plaintiff that it was to be paid out of the drawer's interest in the estate; that defendant then stated in their presence he would not accept or become liable personally, and it was agreed that he should accept in his capacity as executor, to be paid only out of the drawer's interest in the estate. See also Boyd v. Johnston, 89 Tenn. 284, 14 S. W. 804; Hostetter v. Hoke, 17 Kan. 81; O'Brien v. Jackson, 167 N. Y. 31, 60 N. E. 238.

the deceased, his unqualified promise to pay is held to bind him to a personal responsibility; especially where the promise is made in a form that imports or implies a sufficient consideration.[64] He does not limit his liability by describing himself as executor, unless he expressly confines his stipulation to pay out of the estate;[65] and in such a case the bill or note is no longer negotiable.[66] It has also been held that the renewal of a note of a testator by his executor makes him personally liable.[67] It would seem, however, that although an administrator cannot bind the estate by a note signed by him as executor, yet the estate is liable for the consideration of the note if it is for the payment of a legal debt against the estate.[68] There is a sufficient consideration for a note signed by an executor or administrator in his official capacity to bind him personally (1) when the maker has assets in his hands which he might have applied in payment of the debt for which the note was given, and (2) where a consideration for his promise has been received by the executor or administrator himself.[69]

64. Edwards on Bills and Notes, p. 78.

65. Childs v. Monins, 2 B. & B. (Eng.) 460; King v. Thorn, 1 Term R. (Eng.) 489; Serle v. Waterworth, 4 Mees. & W. (Eng.) 9; Davis v. French, 20 Me. 21.

Signature "as executor," etc.—The cases are very numerous to the effect that the addition of an official character to the signatures of executors and administrators, in executing written contracts and obligations, has no significance, and operates merely to identify the person and not to limit or qualify the liability. Schmittler v. Simon, 101 N. Y. 554, 558, 54 Am. Rep. 737. In this action a draft was accepted by the drawer "as executor" in which the drawer directed him to "charge the amount against me and my mother's estate." The executor was held personally liable. But see s. c., 114 N. Y. 176, 21 N. E. 162. The mere designation of himself as "trustee" by a party to a contract does not relieve him of personal liability thereon. To do this he must stipulate that the other party is to look solely to the trust estate. Taylor v. Mayo, 110 U. S. 330, 28 L. Ed. 163. See also Hopson v. Johnson, 110 Ga. 283, 34 S. E. 848; Jenkins v. Phillips, 41 App. Div. 389, 58 N. Y. Supp. 788.

66. **Personal liability of executor, etc.**—An executor or administrator, if he make, indorse, or accept negotiable paper, will be held personally liable, even if he adds to his own name the name of his office, signing a note for example, "A., as executor of B.," for this will be deemed only a part of his description, or will be rejected as surplusage. But if he chooses to exclude his personal liability expressly, as by the words, "I promise to pay, etc., out of the assets of C. D., deceased, and not otherwise," or use any clearly equivalent language, then he is only bound so far as the assets extend. But the instrument, in that case, will not be a bill of exchange or promissory note, because not payable at all events. The same rule is applicable to guardians, trustees, and all persons acting in a representative capacity, except agents. Parsons on Notes and Bills, p. 161.

67. Yerger v. Foote, 48 Miss. 62; Cornthwaite v. Bank, 57 Ind. 268.

68. Dunne v. Deery, 40 Iowa, 251.

69. The consideration upon which a promise of an executor as such is held to be binding at law, when there are assets sufficient to pay the debt or legacy, is that the executor, having sufficient assets for the purpose, is bound, both morally and by virtue of

c. *Rights of executors and administrators as to bills and notes of decedents.*— The executor or administrator of a deceased party to a bill or note has, in general, the same rights in respect thereto, as his testator or intestate.[70] Only the executors or administrators, and not the heirs or next of kin of deceased persons, can claim possession of his bills and notes, or demand payment, or put them in suit.[71] In suing upon them, they must set out distinctly the facts which constitute their representative capacity, because this is a part of their title.[72] It has been held not sufficient to describe themselves as executors, nor even to aver that they were duly appointed; but they are required to set out the proceedings, so that the court may see that the appointment was legal.[73]

his office, to pay the debt or legacy, and such duty is a sufficient consideration to support a promise to pay, so that *indebitatus assumpsit* will lie upon it. McGrath v. Barnes, 13 S. C. 328, 36 Am. Rep. 687. See also Troy Bank v. Topping, 9 Wend. (N. Y.) 273, which was an action against an administrator, on a promissory note payable in sixty days. It was held that the delay of payment for sixty days could not be construed as an agreement to forbear, and that the promise was *nudum pactum*, unless there were assets at the time it was made. Walker v. Patterson, 36 Me. 273; Snead v. Coleman, 7 Gratt. (Va.) 300, 56 Am. Dec. 112.

Where an administrator undertakes to bind the estate by a note, believing he has due authority, but in point of fact having no authority, he will be held personally liable, because where one of two innocent persons must suffer a loss, he ought to bear it who has been the sole means of producing it, by expressly or impliedly inducing the other to place a false confidence in his acts, and because an administrator, who enters into a contract to bind the estate, impliedly warrants his own authority to so bind it. Farmers' Co-op. T. Co. v. Floyd, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346; White v. Madison, 26 N. Y. 124; Frankland v. Johnson, 147 Ill. 525, 35 N. E. 480; Jefts v. York, 10 Cush. (Mass.) 395. See also Germania Bank v. Michaud, 62 Minn. 459; 65 N. W. 70, 30 L. R. A. 286, in which case the court says: "When the executor or administrator, having assets of the estate applicable to the payment of the debt, gave his own note to the creditor for such debt, it amounted to an appropriation of the assets to the amount of the debt to the payment thereof; and this constituted a sufficient consideration for his promise, and he was personally liable, whether he made the note as administrator or in his own right. If he failed to reimburse or indemnify himself, it was his own fault, and no concern of the creditor. But if, without any new consideration, he gave his note for the debt of the deceased when he had no assets, there was no consideration for the note, and his promise to pay was *nudum pactum*."

70. Byles on Bills (16th ed.), p. 62. The executors of every person are implied in himself and bound without naming; per Lord Macclesfield, in Hyde v. Skinner, 2 P. Wms. (Eng.) 196.

71. Morse v. Clayton, 13 Smedes & M. (Miss.) 373.

72. Parsons on Notes and Bills, p. 154.

73. Beach v. King, 17 Wend. (N. Y.) 197, in which the court says: "The defendant cannot be administrator unless letters of administration of the goods, chattels, and credits of the intestate had been granted to him by one of the surrogates of this State. The proper mode of pleading the fact, is by direct allegation that such letters were granted. The defendant has not pursued that course, but pleads that he was *duly* appointed administrator. This allegation consists partly of matter of fact and partly of mat-

d. *Indorsement by executor or administrator.*— A promissory note or bill of exchange, made payable to the deceased or his order, may be indorsed by his executor or administrator.[74] And, generally speaking, there is no difference between an indorsement of a note by the deceased, and one by his personal representative.[75] It is provided in the Negotiable Instruments Law that where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.[76] A delivery of a note, indorsed by the payee before his death, by the executors of such payee, without their indorsement, is insufficient to pass title; there must in every case be an indorsement and delivery by the executors.[77] The question of the sufficiency of an indorsement to pass title will be considered hereafter.[78] An executor or administrator may, under certain conditions, be compelled to indorse a bill or note; as where the decedent made a valid contract, for the consummation of which delivery and indorse-

ter of law, and is not capable of trial. That the defendant was appointed administrator by somebody, or in some form, is a question of fact; but whether he was duly appointed or not is a question of law. The defendant should have stated how he was appointed, and then the court could determine its sufficiency upon demurrer, or if an issue to the contrary were joined upon the fact of having obtained letters, the question could be determined by jury."

74. Rawlinson v. Stone, 3 Wils. (Eng.) 1; Clark v. Blackington, 110 Mass. 374; Rogers v. Zook, 86 Ind. 237; Latta v. Miller, 109 Ind. 302; Hertell v. Bogert, 9 Paige (N. Y.), 52; Walker v. Craig, 18 Ill. 116; Makepeace v. Moore, 10 Ill. 474; Wilson v. Doster, 7 Ired. Eq. (N. C.) 231; Weider v. Osborn, 20 Ore. 307; Mackey v. St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881; Abercrombie v. Stillman, 77 Tex. 589; Cahoon v. Moore, 11 Vt. 604; Cleveland v. Harrison, 15 Wis. 670.

The administrator, by virtue of his appointment and authority as such, obtains the title in promissory notes or other written evidences of debt, held by the intestate at the time of his death, and coming to the possession of the administrator; and may sell, transfer, and indorse the same; and the purchasers or indorsees may maintain actions in their own names against the debtors in another State, if the debts are negotiable promissory notes, or if the law of the State in which the action is brought permits the assignee of a chose of action to sue in his own name. Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641.

Where executors who had also been appointed trustees under the will indorsed a note as rustees, it was held sufficient to pass title notwithstanding the misdescription. Ward v. Venner, 173 Mass. 210, 53 N. E. 395.

75. Watkins v. Maule, 2 Jac. & Walk. (Eng.) 243.

76. Neg. Inst. L. (N. Y.), § 74; *post*, chap. V, § 65; English Bills of Exchange Act, 1882, § 41.

77. In a case where the payee of a note, made payable to him or his order, had indorsed it, but had died without having made any delivery of it, and after his death his executors had merely delivered it so indorsed to the plaintiff, it was held that he could not maintain his action on the note: — for the indorsement of the testator was incomplete without a delivery by him, and the delivery by his executors without any indorsement by them was inefficacious. Bromage v. Lloyd, 1 Exch. (Eng.) 32; Bishop v. Curtis, 18 Q. B. (Eng.) 879.

78. See *post*, chap. V, § 56.

ment of a bill or note is required.[79] And where the decedent delivered a note to a person for a valuable consideration, but without indorsement, thereby creating a perfect equitable title, though not a legal one, the holder may in equity compel the executor or administrator of the decedent to give a formal transfer.[80]

e. *Presentment for payment, notices, etc.*— Presentment, notice of dishonor, and payment should be made by and to the executor or administrator, in the same manner as by or to the decedent.[81] Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.[82] If the holder of the bill be dead, and the executor has not yet produced the will for probate, it is nevertheless the duty of the executor to present the bill when presentable.[83] This is so since the title of the executor is derived exclusively from the will, and it vests in him at the moment of the testator's death.[84] A different rule exists as to administrators. An administrator's title to his

79. Parsons on Notes and Bills, p. 160.

80. Watkins v. Maule, 2 Jac. & W. (Eng.) 237. Upon the death of the holder of a promissory note, the right of transfer thereof vests in his personal representatives, as well as the power to indorse, and perfect the negotiation of such paper previously transferred by him without indorsement. Malbon v. Southard, 36 Me. 147, 148.

81. Parsons on Notes and Bills, p. 160, says: "In general it is within the power and duty of executors or administrators to present for acceptance or for payment, and give notice of nonacceptance or nonpayment, and make protest, in the same manner, and for the same causes as the deceased could and should have done. And all presentments and demands, and all notices, may and should be made against or given to them in like manner as against or to the deceased."

82. Neg. Inst. Law, § 136; Eng. Bills of Exch. Act, 1882, § 41.

83. Byles on Bills (16th ed.), p. 63.

84. Wooley v. Clark, 5 B. & Ald. (Eng.) 744.

Distinction between executor and administrator.— There is a broad and marked distinction, recognized in the common law, between the authority of an administrator, deriving his powers from the appointment of the ordinary, and an executor deriving his powers from the will, of which the letters testamentary, granted by the ordinary, are the due and proper authentication. The property of goods is vested in the executor before probate. He may pay and receive debts: may commence an action, though he shall not declare; because when he declares, he must make profert of his letters testamentary, if he sues as executor, or if the will is a part of the proof necessary to his title; but he may maintain trover before probate, for goods of the testator taken out of his possession; for there the profert of letters testamentary is not necessary. An administrator can do nothing, though entitled to administration, before administration is granted to him, inasmuch as he derives his authority, not like an executor from the will, but entirely from the appointment of the ordinary. But the title of an executor is derived from the will itself, and he may perform most of the acts incident to his office, before probate. Rand v. Hubbard, 4 Metc. (Mass.) 252, 256.

intestate's estate does not exist until he has received his letters of administration from the proper court of probate, and until that time he would be excused from presenting the bill.[85] The Negotiable Instruments Law provides that "when any party is dead, "and his death is known to the party giving notice, the notice [of "dishonor] 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." [86]

f. *Acts of one of two or more executors.*— It seems to be well settled that where there are two or more executors appointed under a will, they are deemed in law but one person representing the testator; and the acts done by one of them which relate to the delivery, sale, or release of the testator's goods, are deemed the acts of all. Thus one of two executors may assign a note belonging to the estate of their testator; and he may also pledge such a note or assign it as collateral security for a judgment obtained against the estate of his testator.[87] This rule applies as well to securities given to executors as such, after the death of their testator, as to those given to him in his lifetime, provided the money, when recovered, would be assets.[88] But where a note for a debt due the testator is made payable to two executors as such, an indorsement by one is not sufficient.[89] If such a note was made payable

85. See preceding note. Section 141 of the Neg. Inst. Law (N. Y.) provides as follows: "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 fault, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

86. Neg. Inst. Law (N. Y.), § 169; *post*, chap. IX, § 108, (*g*). See also Eng. Bills of Exch. Act, 1882, § 49 (9). Where the maker of a note dies before it is due, a demand of payment on his widow at the last place of his abode is *prima facie* a sufficient demand to charge the indorser, the burden of proof as to whether there was an executor or administrator being on the defendant. Bank of Washington v. Reynolds, Fed. Cas. 954, 2 Cranch, 289.

87. Wheeler v. Wheeler, 9 Cow. (N. Y.) 34. Coexecutors, however numerous, constitute an entity, and are regarded in law as an individual person. Consequently the acts of any of them in respect to the administration of estates are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. Barry v. Lambert, 98 N. Y. 300, 308. See also Bordereaux v. Montgomery, Fed. Cas. 1,694, 4 Wash. C. C. 186; Herald v. Harper, 8 Blackf. (Ind.) 170; Wilkinson v. Wooten, 28 Ga. 568; Hord v. Lee, 20 Ky. 36; Dean v. Duffield, 8 Tex. 235, 58 Am. Dec. 108; Chapman v. City Council, 30 S. C. 549, 9 S. E. 591, 3 L. R. A. 311.

88. Bogart v. Hertel, 4 Hill (N. Y.), 492. This case expressly dissents from the ruling made in Smith v. Whiting, 9 Mass. 334, where it was held that one of two executors cannot transfer by indorsement a negotiable promissory note made to the two as executors, for a debt due the testator.

89. Smith v. Whiting, 9 Mass. 334; Johnson v. Mangum, 65 N. C. 146.

to the deceased, under the rule above stated, either of the executors may transfer the note by indorsement and delivery.[90]

g. *Note due from administrator or executor.*— It was a rule of the common law that if a creditor constituted his debtor as his executor, the debt was released and extinguished, for the same hand being at once to receive and pay, the action was suspended; and a personal action once suspended by the act of the parties is gone forever; but it was otherwise in equity in the absence of circumstances showing an intention to release the debt, and the equitable doctrine now prevails.[91] The rule at law was never held to apply to administrators. And in equity the rule has been that the debt of the executor to the estate of his testator is considered to have been paid to himself, and becomes assets of the estate in his hands. In this country as in England an executor or administrator is now charged with the debt he owes to his decedent, and he must account for it in the same manner as other assets of the estate.[92] The rule at law did not apply in cases where the

Indorsement where note is payable to two executors.— Where a note for a debt due the estate of the decedent is payable jointly to his two administrators, both must join in an indorsement thereof; and a release of the liability of the maker, in consideration of the payment of less than the amount due thereon, executed by one only of the payees, is insufficient. Clark v. Gramling, 54 Ark. 525, 16 S. W. 475. The rule in the text is not without its opponents. It is difficult to reconcile the conflict between the cases cited in this note and that of Bogert v. Hertel, 4 Hill (N. Y.), 492. Parsons, in his work on Notes and Bills (p. 158), says: "Whether the same rule will apply to notes taken by them for debts due the estate has been considered doubtful. It would seem to depend upon the question already noticed, namely, whether such notes are to be considered as assets. And it being now settled that they are, it seems that they may be indorsed as effectually by one executor as by all."

90. Rawlinson v. Stone, 3 Wils. (Eng.) 1, 2 Stra. 1260.

91. Byles on Bills (16th ed.), p. 64.

Effect of appointment of maker of note or acceptor of bill as executor.— It has been held that if the holder of a bill appointed the acceptor as his executor, the acceptor was discharged at law, and all the other parties also, for a release to the principal also discharged the sureties. Freakley v. Fox, 9 B. & C. (Eng.) 130; Waukford v. Waukford, 1 Salk. (Eng.) 299; Cheetham v. Ward, 1 B. & P. (Eng.) 630. And it has also been held that if the payee of a note payable on demand constituted the maker of the note his executor, the maker was discharged, not only from his liability to the estate of the testator, but also from his liability as maker to an indorsee to whom the executor assigned it after the testator's death. Freakley v. Fox, 9 B. & C. (Eng.) 130. But it was otherwise where the note was in the hands of an indorsee at the time of the testator's death.

92. Ipswich Mfg. Co. v. Story, 5 Metc. (Mass.) 310.

In many of the States, as in New York, it is provided that the executor must account for his debt to the estate as assets, and his appointment is no legal release or extinguishment of the debt. Code Civ. Pro., § 2714. And see Adair v. Brimmer, 74 N. Y. 539; Matter of Consalus, 95 N. Y. 340; Winship v. Bass, 12 Mass. 198; Tarbell v. Jewett, 129 Mass. 457; McCarty v. Frazer, 62 Mo. 263; Charles v. Jacob, 9 S. C. 295.

assets of the estate were not sufficient to satisfy the testator's debts.[93]

§ 28. Trustees, guardians, committees, etc.

Many of the rules which have already been stated as applying to the rights and liabilities of executors and administrators are also applicable to trustees, guardians, committees, and others acting in a fiduciary capacity. It is a general rule regulating the investment of trust funds that such funds cannot be invested in personal securities.[94] There must be express authority in the instrument creating the trust to authorize a loan on personal promises.[95] It follows, therefore, that a person acting in a position of trust cannot, without violating his duty, loan the money belonging to the trust estate and take as security therefor the promissory note of the person to whom the money is loaned.[96] It makes no difference that there are several joint promisors;[97] nor that the loan is to a person to whom the testator loaned money on his personal promise;[98] nor will personal sureties justify the loan.[99]

Trustees and guardians, like executors and administrators, cannot bind the estate under their control, or the persons for whom or for whose benefit they act, by their promissory notes, or by the acceptance of a bill of exchange; to give any validity to such a note or bill they must be deemed personally bound as makers or acceptors.[1] A guardian may assign or transfer notes taken by and payable to him as guardian, and the purchaser or assignee who buys gets a good title if he buys in good faith.[2] The rule in respect

93. 2 Bl. Comm. 512.

94. Perry on Trusts, § 453.

95. Forbes v. Ross, 2 Bro. Ch. (Eng.) 430; Child v. Child, 20 Beav. (Eng.) 50; Simmons v. Oliver, 64 Wis. 633, in which case a trustee was held personally liable for a loss occasioned by his investment of trust funds in a promissory note made by a manufacturing corporation.

Investments by trustees upon mere personal securities are not regarded by the courts of the State of New Jersey as safe, prudent, or proper; consequently if they be made, they are at the risk of the trustees, who must personally answer for any loss that may result from them. Dufford v. Smith, 46 N. J. Eq. 216.

A certificate of deposit issued by a national bank, the stock of which is selling at par, and occasionally at a premium, may be purchased by a trustee with the trust funds, and he will not be liable for a loss arising from a failure of the bank before the day stipulated for the payment of the certificate. Hunt, Appellant, 141 Mass. 515, 6 N. E. 554.

96. Walker v. Symonds, 1 Swanst. (Eng.) 81, in which case Lord Hardwicke says: "A promissory note is evidence of a debt, but no security for it."

97. Clark v. Garfield, 8 Allen (Mass.), 427.

98. Styles v. Guy, 1 Mac. & G. (Eng.) 423.

99. Watts v. Girdlestone, 6 Beav. (Eng.) 188.

1. Story on Promissory Notes, § 63.

2. Zoller v. Cleveland, 69 Ga. 631.

to transfers of negotiable paper by indorsement applicable to guardians and trustees is the same as in the case of executors and administrators.[3]

C. PERSONS ACTING IN REPRESENTATIVE CAPACITY.

§ 29. Agents.

a. *In general.*— Whatever a man may do himself he may do by his agent.[4] An agent has been defined " as a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal, by making contracts with third persons, or by making promises or representations to third persons calculated to induce them to change their legal relations." [5] No particular form of the appointment of an agent is necessary to enable him to bind his principal by making, drawing, indorsing, or accepting bills and notes; he may be specially appointed for this purpose or derive his power from some general or implied authority.[6] And where the act of an agent in attempting to bind his principal by means of a bill or note is not within the authority conferred upon such agent, it may be subsequently made the act of the principal by ratification.[7]

3. See *ante*, § 27 (*d*).

4. Comb's Case, 9 Rep. (Eng.) 75; Lindus v. Bradwell, 5 C. B. (Eng.) 583.

Who may act as agent.— Disqualifications for contracting on a person's own account are not necessarily disqualifications for contracting as agent for another; for an agent is considered as a mere instrument; therefore infants, married women, persons attainted, outlawed, or excommunicated, aliens and other persons laboring under disabilities, may be agents. Coke's Litt. 52 (*a*).

5. Huffcut on Agency, § 6.

6. Byles on Bills (16th ed.), p. 39.

7. Saunderson v. Griffiths, 5 B. & C. (Eng.) 909; Vere v. Ashley, 10 B. & C. (Eng.) 288.

Ratification will not relieve the agent from personal liability on a promissory note once incurred. Rossiter v. Rossiter, 8 Wend. (N. Y.) 494. See also on ratification generally, McCracken v. San Francisco, 16 Cal. 591; Grant v. Beard, 50 N. H. 129; Dempsey v. Chambers, 154 Mass. 330.

Ratification defined.—Ratification as it relates to the law of agency is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority; and this results as effectually to establish the duties, rights, and liabilities of an agency as if the acts ratified had been fully authorized in the beginning. Am. & Eng. Enc. of Law (Vol. 1), p. 1181. See Lawrence v. Taylor, 5 Hill (N. Y.), 107; Wilson v. Darue, 58 N. H. 392.

Ratification of agent's acts as to bills and notes.— In the case of Harrod v. McDaniels, 126 Mass. 413, it appeared that B., acting as the attorney of A., signed the name of the latter on the back of the note in October, 1874; that in May, 1874, A. gave B. a power of attorney which authorized him to manage A.'s property during the absence of the latter from the United States, and to sign notes; that in August, 1874, A. returned to the United States, and was there when the note was executed; and that in August, 1875, A., with other creditors of the maker of the note in suit, who had then become bankrupt, signed an agreement of composition under seal, and received a dividend on the note from the bankrupt's estate, and agreed

b. *Authority to make notes and accept bills.*— The general authority bestowed upon an agent to transact the business of his principal, and to receive payment of and to discharge debts, will not imply an authority to accept or indorse bills, so as to charge the principal.[8] The power to make or indorse negotiable instruments must be expressly granted by the principal.[9] A power so granted is subject to strict interpretation, and must be performed in strict conformity with the terms thereof.[10] A negotiable in-

to save the maker of the note harmless from liability upon such notes as were signed or indorsed by either of them, having been previously informed by B. that he had signed the same in the name of A., under the power of attorney; that after the return of A., and before the note in suit was made, other notes were signed by B., as the attorney for A., with no other authority than he then possessed under the power, which were subsequently paid by A. It was held that there was sufficient evidence of a ratification of B.'s act. See also Commercial Bank of Buffalo v. Warren, 15 N. Y. 577, 579; Dow v. Spenny, 29 Mo. 386.

A principal who accepts and retains the proceeds of a note, knowing that it was transferred by his agent upon an unauthorized indorsement, ratifies such indorsement. Baer v. Lichten, 24 Ill. App. 311. A mere subsequent unconditional promise to pay a note signed by an agent without authority, is not as a matter of law a ratification, but evidence from which a ratification may be inferred. Commercial Bank v. Bernero, 17 Mo. App. 313; Ousley v. Phillips, 78 Ky. 517, 39 Am. Rep. 258.

8. Hogg v. Smith, 1 Taunt. (Eng.) 347; Murray v. East India Co., 5 B. & Ald. (Eng.) 204; Howard v. Baillie, 2 H. Bla. (Eng.) 618; *In re* Cunningham, 35 Ch. Div. (Eng.) 532; Odell v. Cormack, 19 Q. B. D. (Eng.) 223, 56 L. J. Q. B. (Eng.) 463. But where an agent managed a business and acted ostensibly as principal, it was held that he could bind his principal by accepting a bill, even though expressly forbidden so to do. Edmunds v. Bushell, L. R., 1 Q. B. (Eng.) 97. See also Perkins v. Boothby, 71 Me. 91; Temple v. Pomroy, 4 Gray (Mass.), 128; New York Iron Mine v. Bank, 39 Mich. 644.

9. Robertson v. Levy, 19 La. Ann. 327; Jackson v. Bank, 92 Tenn. 154, 20 S. W. 802. In the leading English case of Attwood v. Munnings, 7 B. & C. (Eng.) 273, the facts were as follows: A. B., who carried on business on his own account, and also in partnership, went abroad and gave to certain persons in England two powers of attorney; by the first of which, authority was given for him, and in his name and to his use to do certain specific acts (and amongst others, to indorse bills, etc.), and generally to act for him, as he might do if he were present; and by the second, authority was given "for him and on his behalf, to accept bills drawn on him by his agents or correspondents." C. D., one of A. B.'s partners (and who acted as his agent), in order to raise money for the payment of creditors of the joint concern, drew a bill which the attorney accepted in A. B.'s name by procuration. In an action against A. B. by the indorsee of the bill, it was held, *first*, that the right of the indorsee depended upon the authority given the attorney; *second*, that the power only applied to A. B.'s individual and not to his partnership affairs; *third*, that the special power to accept extended only to bills drawn by an agent in that capacity; and that C. D. did not draw the bills in question as agent, but as partner; and *fourth*, that the general words in the power of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given.

10. Farmington Sav. Bank v. Buzzell, 61 N. H. 612; Batly v. Carswell, 2 Johns. (N. Y.) 48; Nixon v. Palmer, 8 N. Y. 398; Craighead v. Petersen, 72 N. Y. 279; Camden Safe Dep. Co. v. Abbott, 44 N. J. L. 257; Brant-

strument differing in amount from that authorized, or made payable at a different time, will not bind the principal.[11] There are cases, however, upholding the implied authority of an agent to bind his principal by a bill or note; as where the agent has formerly made a note or drawn a bill for his principal, and such principal had recognized his acts.[12] It is provided in the Negotiable Instruments Law that: "The signature of any party may "be made by a duly authorized agent. No particular form of "appointment is necessary for this purpose, and the authority of "the agent may be established as in other cases of agency."[13]

c. *Liability of person signing as agent.*—(1) *Statutory provision.*— The Negotiable Instruments Law provides: "Where "the instrument contains or a person adds to his signature words "indicating that he signs for or on behalf of a principal, or in a

ley v. Southern L. Ins. Co., 53 Ala. 554; Ward v. Kentucky Bank, 7 T. B. Mon. (Ky.) 93; Luning v. Wise, 64 Cal. 410.

11. As to different amount, see King v. Sparks, 77 Ga. 285; Blackwell v. Ketcham, 53 Ind. 184; Nixon v. Palmer, 8 N. Y. 398. As to time, see Tate v. Evans, 7 Mo. 419; N. Y. Iron Mine Co. v. Citizens' Bank, 44 Mich. 344. If an agent is authorized to execute a note payable in six months, the agent cannot bind the principal by a note payable in sixty days. Batty v. Carswell, 2 Johns. (N. Y.) 48.

12. Allin v. Williams, 97 Cal. 403; Turner v. Keller, 66 N. Y. 66.

Implied authority.—An authority is often implied from circumstances; as if the agent has formerly been in the habit of drawing, accepting, or indorsing for his principal, and his principal has recognized his acts. Thus, to an action against an acceptor of a bill, the defense was, that the drawer had forged the acceptor's signature, in answer to which it was proved that the defendant had previously paid such acceptances; and this was held proof of authority to the drawer. Barber v. Ginzell, 3 Esp. (Eng.) 60; Llewellyn v. Winckworth, 13 M. & W. (Eng.) 598.

"It may be admitted," says Tindal, C. J., in the case of Prescott v. Flynn, 9 Bing. (Eng.) 19, "that an authority to draw does not import in itself an authority to indorse bills; but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine from the whole evidence whether an authority to indorse existed or not."

And in the American States there seems to be a similar doctrine as to implied authority. New York Iron Mine Co. v. Bank, 39 Mich. 644; Trundy v. Farrar, 32 Me. 225; Edwards v. Thomas, 66 Mo. 468. In the case of Odiorne v. Maxay, 13 Mass. 182, it was held that the general agent of a company may give its note for purchases necessary to carry on its business.

An agent, authorized to transact a particular affair, may execute a note jointly with others who have a common interest in the subject-matter, to pay the necessary expenses for the accomplishment of a common end. Layet v. Gano, 17 Ohio, 466.

13. Neg. Inst. Law (N. Y.), § 38

Effect of signature without authority.— The Negotiable Instruments Law (N. Y.), § 42, also provides that: "Where a signature is forged *or made without authority* of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery *or want of authority.*"

"representative capacity, he is not liable on the instrument if he "was duly authorized; but the mere addition of words describing "him as an agent, or as filling a representative capacity, without "disclosing his principal, does not exempt him from personal "liability." [14]

(2) *Liability in general.*— The question of the personal liability of agents and other persons executing negotiable paper in a representative capacity is a vexed one, upon which there has been considerable difference of opinion. It would be impossible to reconcile all of the opinions on this subject. But there are certain general rules which may be said to be supported by the weight of authority. There is little doubt that where there is nothing in the instrument disclosing the principal sought to be charged, and the signature is by the representative followed by such words as "agent," "executor," "trustee," "administrator," the addition to the signature will be regarded simply as *descriptio personæ,* and the agent will be personally liable upon the instrument.[15] As was

14. Neg. Inst. Law (N. Y.), § 39. This section is a substitute for section 26 (1) of the English Bills of Exch. Act, 1882, which is as follows: "Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."

Reason for change of rule in Negotiable Instruments Law.—The original draft as submitted to the Commissioners on Uniformity of Laws, from which the Negotiable Instruments Law, in force in so many of the States, emanated, contained the provisions of the above-quoted section of the English Bills of Exchange Act. In this connection, after quoting such section, the draughtsman of the law (Mr. Crawford) says in his note to section 39: "Under that rule (the English) a person signing for or on behalf of a principal was not liable *on the instrument*, notwithstanding he had no authority to bind his principal. There was an implied warranty on his part that he possessed such authority, and if he did not, he became liable upon such warranty for the damages resulting from the breach. Miller v. Reynolds, 92 Hun (N. Y.), 400. But no action could be maintained against him on the instrument when by its terms it did not purport to bind him. And his liability upon the implied warranty did not accompany the transfer of the instrument, unless the claim founded upon the warranty was also assigned to the person to whom the instrument was transferred. (Id.) The effect of the section, as it now stands, is to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal."

Exception may well be taken to the conclusion of the learned draughtsman as contained in the last sentence. There is nothing in the language of the section as it stands which bears out his conclusion. The section seems to state the general rule of law as heretofore understood. Personal liability does not necessarily mean liability on the instrument.

15. *California.*— Sayre v. Nichols, 5 Cal. 487; San Bernardino Nat. Bank v. Anderson (Cal.), 32 Pac. 168.

Connecticut.— Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225.

Georgia.— Graham v. Campbell, 56 Ga. 258; Harrison v. McClelland, 57 Ga. 531.

said by Lord Ellenborough: "Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion?"[16] Where an agent executes a note on behalf of his principal without disclosing his agency, the agent is bound and not his principal.[17] Persons dealing with

Illinois.— Haines v. Nance, 52 Ill. App. 406.

Indiana.— Kenyon v. Williams, 19 Ind. 44.

Iowa.— Webb v. Mauro, 1 Morr. 488; Tryon v. Oxley, 3 G. Greene, 289; American Ins. Co. v. Stratton, 59 Iowa, 696, 13 N. W. 763.

Louisiana.— Cooley v. Esteban, 26 La. Ann. 515.

Maine.— Sturdivant v. Hull, 59 Me. 172; Rendell v. Harriman, 75 Me. 497.

Massachusetts. — Williams v. Robbins, 82 Mass. 77, 77 Am. Dec. 396; Towne v. Rice, 122 Mass. 67; Stacpole v. Arnold, 11 Mass. 27; Bedford Commercial Ins. Co. v. Covell, 49 Mass. 442; Shoe & Leather Bank v. Dix, 123 Mass. 148, 25 Am. Rep. 49.

Minnesota.—Brunswick-Balke-Collender Co. v. Boutell, 45 Minn. 21, 47 N. W. 261.

Nebraska. — Webster v. Wray, 19 Neb. 558, 27 N. W. 644.

New York.— Snelling v. Howard, 51 N. Y. 373; Schmittler v. Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; Cortland Wagon Co. v. Lynch, 82 Hun, 173, 31 N. Y. Supp. 325.

Ohio.—Anderton v. Shoup, 17 Ohio St. 125; Collins v. Buckeye Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612.

Pennsylvania.— Barclay v. Pursley, 110 Pa. St. 13, 20 Atl. 411; McCullough v. McKee, 16 Pa. St. 289.

Rhode Island. — Manufacturers & Merchants' Bank v. Follett, 11 R. I. 92, 23 Am. Rep. 418.

Tennessee.— Boyd v. Johnston, 89 Tenn. 284, 14 S. W. 804.

Texas.— Sydnor v. Hurd, 8 Tex. 98; Gibson v. Irby, 17 Tex. 173.

16. Leadbitter v. Farrow, 5 Maule & S. (Eng.) 345, 349.

17. Heaton v. Myers, 4 Colo. 59; Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225; Stacpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Bedford Commercial Ins. Co. v. Covell, 49 Mass. 442; Lyons v. Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129.

In the case of Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705, the facts were that a promissory note, given for the debt of a corporation, was written on a blank having printed on its margin the name of the corporation, but there was no reference to it in the body of the note. It read: "We promise to pay." It was signed by the president of the corporation in his individual name, with "Prest." written after it, and in the same manner by the treasurer, with "Treas." added. The note was discounted by the plaintiff for the payee before maturity. It was held in the case that the officers had obligated themselves personally, and the rule is further laid down that in the absence of competent evidence showing or charging knowledge in the holder as to the character of an obligation, it must be regarded as the agreement of its ostensible maker.

Effect of affixing corporate seal.— In the ruling English case of Dutton v. Marsh, L. R. 6 Q. B. 361, 4 Eng. Rul. Cas. 278, Chief Justice Cockburn said: "This is an action upon a promissory note in this form: 'We, the directors of the Isle of Man Slate & Flag Company, Limited, do promise to pay John Dutton the sum of £1,600 sterling, with interest at the rate of six per cent. per annum, until paid, for value received.' This was signed by the defendant Marsh as chairman, and by the other defendants who were directors, and the seal of the company is affixed to the promissory note. The question is, whether the promissory note is binding upon the persons who signed it, or was binding not upon them, but upon the company.

"Let us assume, for the present, that the seal was not affixed. The effect of the authorities is clearly this: that where parties, in making a promissory negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them, and a person not

note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing,— if they merely describe themselves as directors, but do not state that they are acting on behalf of the company,— they are individually liable. But, on the other hand, if they state they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of Lindus v. Melrose, 3 H. & N. 177, 27 L. J. Eq. 326, fully establishes they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented.

"If, therefore, in this case it had simply stood that the defendants described as directors, but without saying 'on behalf of the company,' signed the promissory note, it is clear they would have been personally liable, and the note could not have been considered as binding the company. But this case is rendered doubtful by the fact of the corporate seal being affixed to the document. It does not purport in form to be a promissory note made on behalf of or on account of the company. So far as the written portion of it goes, it is totally without any such qualifying expression; but some doubt was raised in my mind whether the affixing of the seal might not be taken as equivalent to a declaration in terms, on the face of the note, that the note was signed by the persons who put their names to it, on behalf of the company and not on behalf of themselves. But on consideration it is agreed by this court that that effect cannot be given to the placing of the seal of the company upon the note. It may be that that was simply for the purpose of ear-marking the transaction, or, in fact, showing as to the directors that, as between themselves and the company, it was for the company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the company; but there is no case that goes to the length of saying that the affixing of the seal where the parties do not otherwise use terms to exclude their personal liability, would have that effect. We think it is going too far to say that the mere affixing of the seal has that effect."

The rule in this country seems to be different from that existing in England. In the case of Miller v. Roach, 150 Mass. 140, 22 N. E. 634, a promissory note reciting in the body thereof, "We promise to pay," etc., but with nothing there to indicate to whom the word "we" referred, bore upon its face, in the usual place of signing, the name "John Roach," beneath which was written the word "Treasurer," and had in addition the impression stamped upon it of a large circular corporate seal, around the outer edge of which appeared in print "New York Skating Rink Construction Company," and in the center of it the words "Incorporated 1884." It was held that the note was the note of the company. The court (*per* Knowlton, J.) said: "The case is peculiar in the use of the corporate seal. If the words which appear on the face of the seal had been written in their place on the note and had been followed by the words "John Roach, Treasurer," there would have been no doubt that they were so written as the signature of the corporation appended by its treasurer. Draper v. Massachusetts Steam Heating Co., 5 Allen (Mass.), 338. That mode of signing is common among corporations. And if the words had been affixed in print by a stamp designed to be used in signing the corporate name, and a blank space had been left in which the treasurer's name was afterward inserted by him in his own handwriting, the result would have been the same. We think it makes no difference that the name of the corporation impressed upon the paper was so impressed by the corporate seal, which is ordinarily used only in connection with a corporate act of signing. We are of the opinion that the paper should be treated as a promissory note a party cannot be charged upon proof that the ostensible party signed or indorsed as his agent.[18]

(3) *How representative capacity to be indicated.*— In order to exempt an agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his

signed by and with the signature of the corporation affixed by its treasurer, who for convenience in affixing it used a stamp, except in that part which contained for verification his own name and official designation." The case of Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330, is to a similar effect. See also Scanlan v. Keith, 102 Ill. 634, 640.

In the case of Guthrie v. Imbrie, 12 Ore. 182, 6 Pac. 664, 53 Am. St. Rep. 331, a promissory note was phrased "We promise," etc., and was signed by the president and secretary of the corporation, and was impressed with a seal inscribed "Granger Market Co., Portland, Oregon." It was held to be the obligation of the corporation. The court said: "It may often happen in the haste incident to the prompt execution of business, or through inadvertence, being more intent on the substance than the form, that merchants or others engaged in business transactions express themselves in their writings informally, and without precision of language, and hence the liberal policy of allowing the intent to govern, as discoverable from the whole instrument. But we do not think it is usual for persons engaged in business transactions, when acting for themselves and not in a representative capacity, to attach to their signatures such designations of office, and to attest the same with the seal of the corporation bearing an impression of its corporate name. On the contrary, we believe that when such things are done, and the instrument is consistent and operative with such *indicia*, they are more properly referable to the company than the persons as individuals who signed the instrument."

18. Briggs v. Partridge, 64 N. Y. 363; Cortland Wagon Co. v. Lynch, 82 Hun, 173, 31 N. Y. Supp. 325.

In the case of Manufacturers & Traders' Bank v. Love, 13 App. Div. (N. Y.) 561, 43 N. Y. Supp. 812, the court says: "The law merchant surrounds negotiable paper in the hands of a *bona fide* holder with a credit not given to other contracts, and protects him against hidden equities of which he has no notice, and permits him to recover against the party whose name is signed to the instrument, though there be attached to his name the word "agent," and he is not bound to search for a principal unknown to the instrument itself. Nor can he do so. The rights of the holder are confined to the parties to the instrument, and he must rely upon them alone, except that he can establish that the name used as the signature to the instrument has been adopted by the assumed principal, or by the person not named in the instrument as his own in transacting the business. This may be done. A person may become a party to a bill or note by any mark or designation he chooses to adopt, provided it be used as a substitute for his name, and he intends to be bound by it." The court held in this case that the rule is not changed by the fact that a sworn statement of the existence of the agency had been filed pursuant to the statute (N. Y. Penal Code, § 363*a*, as amended by L. 1893, chap. 708), the payee and holder not having knowledge of the fact, and a revocation of the agency having been made, although not filed before the note was given.

The doctrine in relation to commercial paper is, in general, that if it appears, from the nature and terms of the instrument, not only that the party is agent, but that he means to act for and to bind his principal, and not to draw, accept, or indorse the bill on his own account, that construction will be adopted, in furtherance of the actual intention of the instrument, however inartificial may be the language. But if the instrument is not thus explicit in its terms, although it may appear that the party is an agent, he will be deemed to have contracted in his personal capacity. Sydnor v. Hurd, 8 Tex. 98.

principal, but he must express by some form of words that the writing is the act of the principal though done by the hand of the agent. If he expresses this, the principal is bound, and the agent is not. But a mere description of the general relation or office which the person signing the paper holds to another person or corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal, or to exempt the agent from personal liability.[19] It is not absolutely indispensable that the name of the agent should appear when a negotiable paper is signed by him in the name of his principal; the agent may sign the name of the principal alone, without adding anything to disclose the agency.[20] Reasons of convenience and propriety, however, render it highly desirable that the fact that the note or bill is executed by the agent in the name of the principal, should appear on the face of the instrument.[21] The true and best mode of an agent's signing or indorsing a promissory note or bill of exchange is: "A. (principal) by B. (agent)" or "A. (principal) by his attorney or agent B."[22] A signature in the form "B. agent for A. (the principal)" will be sufficient to bind the principal, although it is not technically as correct.[23] There are many and various forms of signatures

19. Gray, J., in Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

20. First Nat. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430; Forsyth v. Day, 41 Me. 382.

In New York it has been held that if an agent sign his principal's name to a note, he, the agent, may be sued thereon, as if it were his own note. Dusenbury v. Ellis, 3 Johns. Cas. 70; Palmer v. Stevens, 1 Den. 471. This is not a universal rule even in New York. See Walker v. Bank of State, 13 Barb. 639; White v. Skinner, 13 Johns. 307; Meech v. Smith, 7 Wend. 315.

In Massachusetts, a person without authority assuming to contract as agent for another is not personally liable on the contract, but his assumption of authority is in the nature of a false warranty upon which he is liable. Jefts v. York, 16 Cush. (Mass.) 392, 395; May v. Western Union Tel. Co., 112 Mass. 90, 95.

But if the agent sign the principal's name within the scope of his authority, the rule as stated in the text is controlling.

21. Mechem on Agency, § 434.

22. Chitty on Bills (8th ed.), chap. 2, pp. 37, 38; Story on Promissory Notes, § 68.

23. Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, in which case the court says: "The variation between the words 'for' and 'of' seems at first view slight; but, in the connection in which they are used in signatures of this kind, the difference is very substantial. 'Agent of' or 'president of' a corporation named, simply designates a personal relation of the individual to the corporation. 'Agent for' a particular person or corporation may designate either the general relation which the person signing holds to another party, or that the particular act in question is done in behalf of and as the very contract of that other; and the court, if such is manifestly the intent of the parties, may construe the words in the latter sense."

In the case of Ballou v. Talbot, 16 Mass. 461, a note signed "Joseph Talbot, agent for David Perry," was held not to bind Talbot personally, but to be the obligation of Perry, his prinby agents in use in commercial transactions, which have occasioned endless confusion and given rise to great embarrassments in endeavoring to determine whether the principal or the agent himself is personally bound. The courts have frequently differed in their interpretation of similar instruments, and it is almost impossible to declare positive or definite rules which will be universally applicable in all jurisdictions.[24]

cipal. In that case the court construed the important and effective word to be not the word "agent," nor the name of the principal, but the connecting word "for," which might indeed indicate merely the relation which the agent held to the principal; but which was equally apt to express the fact that the act was done in behalf of the principal, in the same manner as if the words had been transposed thus: "For David Perry, Joseph Talbot, agent." This is made manifest by considering that if the word "agent" had been wholly omitted, and the form of the signature had been simply, "Joseph Talbot, for David Perry," or "For David Perry, Joseph Talbot," it would have been well executed as the contract of the principal, even if it had been under seal, and of course not less so in the case of a simple contract. Long v. Colburn, 11 Mass. 97; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; Mussey v. Scott, 7 Cush. (Mass.) 215. See also Hovey v. Magill, 2 Conn. 680; King v. Handy, 2 Ill. App. 212.

In the case of Hills v. Bannister, 8 Cow. (N. Y.) 31, a note signed by two persons, with the addition, "Trustees of Union Society, Phelps" (who were a legal corporation), was held to bind the signers personally. And in Barker v. Mechanic Ins. Co., 3 Wend. (N. Y.) 94, a note signed, "John Franklin, president of the Mechanic Fire Insurance Company," was held on demurrer not to be the note of the company, although alleged to have been made within the authority of the president and the scope of the legitimate business of the corporation; the court saying: "In this case, there is an averment that the president was lawfully authorized; but it does not appear that he acted under that authority; he does not say that he signs *for the company;* he describes himself as president of the company, but to conclude the company by his acts he should have contracted in their name, or at least on their behalf."

In the case of De Witt v. Walton, 9 N. Y. 571, a note was signed "David Hubbell Hoyt, agent for The Churchman," and it was held that the words "agent for" were mere *descriptio personæ* of the agent, and that the principal was not bound thereby. The court said: "We may conjecture that the affix to the name of Hoyt was designed by him to answer some other purpose than simply to designate his person. He may have supposed that it created a contract upon the part of the defendant, or, what is more probable, he may have designed it as a memorandum to enable him to determine thereafter from what fund the note should be paid, and to guide him in making up his account with 'The Churchman,' or with the defendant personally. It is sufficient to defeat this action, that this purpose is equivocal; that the language does not necessarily, or by a fair and reasonable construction, create an assumpsit on the part of the defendant, whether known as William Walton or as 'The Churchman.' There is no great hardship in requiring that if one man undertakes to oblige another, by note, bill of exchange, or other commercial instrument, he should manifest his purpose clearly and intelligibly, or that his principal will not be bound, whatever may be the result in reference to himself." See also Dawson v. Cotton, 26 Ala. 591; Tannatt v. Rocky Mountain Nat. Bank, 1 Colo. 278; Rawlings v. Rolson, 70 Ga. 595.

24. Illustrations as to signatures by agents, etc.— A note in the following form: "One year after date, we promise to pay," etc., signed by "Henry Hackemack, Pres.," and "Raythe Nagel, Secy.," the respective officers of

(4) *Disclosure of name of principal in body of instrument.*— There are many authorities to the effect that a note containing no words of description after the signatures, but describing the promisors in the body of the instrument, as officers of a private corpora-

a corporation, upon which the payee advanced money in the belief that such officers were personally liable, is the personal note of the officers, and they are liable thereon. Hackemack v. Wiebrock, 172 Ill. 98, 49 N. E. 984.

A note reciting "I promise to pay," etc., and signed by a person as president of a corporation, personally binds the president. Prescott v. Hixon, 22 Ind. App. 139, 53 N. E. 391. See also Vleit v. Simanton, 63 N. J. L. 458, 43 Atl. 738.

In the case of Mott v. Hicks, 1 Cow. (N. Y.) 513, the note read: "The President and directors promise to pay," etc., and was subscribed by the defendant as president. It was held the note clearly imported that no personal engagement was entered into or intended.

A note reading, "Eighteen months after date, we, the trustees of the First Free Will Baptist Society of Chicago, promise to pay," etc., was signed by the trustees with the words, "Trustees of the First Free Will Baptist Society of Chicago, Ill.," appended. Such words correctly stated the name of the corporation, and it was therefore held that the note was that of the corporation, and did not bind the trustees personally. New Market Savings Bank v. Gillett, 100 Ill. 254. The court says in this case that "there is a distinction to be taken between such a case, where the name used, both in the body of the note, and as appended to the signatures of the persons signing the same, was the proper corporate name of the society, and those cases in which the names or designations used were not the *corporate* name, and where it was therefore held that the instruments sued upon were not the obligations of the corporations, but the individual obligations of the persons signing them." Referring to Powers v. Briggs, 79 Ill. 493; Ada Street M. E. Church v. Garnsey, 66 Ill. 133; Lombard v. Chicago Sinai Congregation, 64 Ill. 487.

In the case of Sturtivant v. Hull, 59 Me. 172, 8 Am. Rep. 409, it was held that a note in the following form: "I promise to pay to the order of S. & Co.," and signed by "John T. Hull, Treasurer St. Paul's Parish," was held to be the note of Hull.

A note given by the secretary of an incorporated company in the form, "We promise to pay," etc., and signed by him with his own name with the words "Sec'y" affixed, and impressed thereon the seal of the company, it was held that he was not personally liable on such note. Means v. Swormstedt, 32 Ind. 87, 2 Am. Rep. 330.

Where a promissory note was in these words: "I, the subscriber, treasurer of the Dorchester Turnpike Corporation, for value received, promise," etc., and was signed by "A. B., Treasurer of the Dorchester Turnpike Corporation," it was held to be the note of the corporation and not of the treasurer. Mann v. Chandler, 9 Mass. 335.

A note as follows: "We, the undersigned, trustees of the First African Methodist Episcopal Church, and in behalf of the whole board of trustees, etc., promise," etc., and signed with their own names simply, by two trustees who had authority to bind the whole, binds the church and not the two signers, as the agency sufficiently appears on the face of the writing. Haskell v. Cornish, 13 Cal. 45. And in the case of San Bernardino Nat. Bank v. Anderson (Cal.), 32 Pac. 168, it was held that where two persons signed a note with their individual names, adding thereto, "President" and "Secretary," respectively, and there was nothing on the face of the note to indicate a principal back of the makers, the fact that a resolution of a corporation with the corporate seal thereon, authorizing defendants to make the note in the name of, and as the note of the corporation, was attached to the note, was without effect, as such attachment did not make the resolution a part of tne note.

Where a note reciting that "the Western Seaman's Friend Society agree to pay," etc., is signed "B. F., Gen. Supt.," proof that B. F. had no aution or society, is the personal obligation of the signers.[25] As where a note executed in the following words: "For value received, we, the subscribers, jointly and severally promise to pay Messrs. J. & T. B., or order, for the Boston Glass Manufactory, thirty-five hundred dollars, on demand, with interest," and was signed "J. H., S. G., C. F. K.," it was held to be the note of the signers, and not of the manufactory.[26] And a note reciting that

thority to sign said note for the society is sufficient to charge him with personal liability thereon. Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480.

A note signed by "J. A. Robson, Agent for his wife," binds the wife. Rawlings v. Robson, 70 Ga. 595.

A note reciting, "We promise to pay," etc., signed by the name of a corporation, followed by the name of an individual, with the word "Pres." after his name, though without the word "per" between his name and the name of the corporation, is the note of the corporation and not the note of the individual, nor the joint note of the corporation and the individual. Reeve v. First Nat. Bank, 54 N. J. L. 208, 23 Atl. 853, 33 Am. St. Rep. 675, 16 L. R. A. 143.

25. *Alabama.*— Drake v. Flewellen, 33 Ala. 106; May v. Kelly, 27 Ala. 497; Dawson v. Cotton, 26 Ala. 591.

California.— Chamberlain v. Pacific Wool-Growing Co., 54 Cal. 103; Hobson v. Hasset, 76 Cal. 203, 18 Pac. 320, 9 Am. St. Rep. 193; Farmers & Mechanics' Bank v. Colby, 64 Cal. 352, 28 Pac. 118.

Illinois. — Night Hawks Burlesque Co. v. Louisiana, etc., R. Co., 40 Ill. App. 49; McNeil v. Shober, etc., Lith. Co., 144 Ill. 238, 33 N. E. 31; Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177.

Indiana.— Hays v. Crutcher, 54 Ind. 260; Hayes v. Brubaker, 65 Ind. 27; McLellan v. Robe, 93 Ind. 298.

Iowa.— Coburn v. Omega Lodge, A. F. & A. M., 71 Iowa, 581, 32 N. W. 513. But see Wheelock v. Winslow, 15 Iowa, 464.

Kentucky.— Burbank v. Posey, 70 Ky. 372.

Maine.— Rendell v. Harriman, 75 Me. 497, 46 Am. Rep. 421; McClure v. Livermore, 78 Me. 340, 6 Atl. 11.

Massachusetts.— Davis v. England, 141 Mass. 587, 6 N. E. 731.

Michigan.— Tilden v. Barnard, 43 Mich. 376, 5 N. W. 420, 38 Am. Rep. 197.

New Hampshire.— Andover v. Grafton, 7 N. H. 298.

New Jersey.— Kean v. Davis, 21 N. J. L. 683, 47 Am. Dec. 182.

New York.— Barker v. Mechanic Fire Ins. Co., 3 Wend. 94, 20 Am. Dec. 664; Hills v. Bannister, 8 Cow. 31; Haight v. Naylor, 5 Daly, 219; Moss v. Livingston, 4 N. Y. 208; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737.

Ohio.— Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 8 N. E. 583, 58 Am. Rep. 829.

Texas.— Burton v. Grand Rapids School Furniture Co., 14 Tex. Civ. App. 270, 31 S. W. 91.

Virginia.— Earley v. Wilkinson, 9 Gratt. 68.

West Virginia.— Scott v. Baker, 3 W. Va. 285.

See also Century Dig., vol. VII, Bills and Notes, § 262 (col. 448–454), for other cases bearing upon this question.

26. Bradlee v. Boston Glass Mfg. Co., 16 Pick. (Mass.) 347. Chief Justice Shaw says in this case: "The main question in the present case arises from the form of the contract; and the question is, whether in this form it binds the person who signed it, or the company for whose use the money was borrowed. As the form of words in which contracts can be made and executed are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity or trust in which he acts, or the person for whose account his promise is made; or whether the words referring to a principal are intended to indicate that he does a merely ministerial act in giving effect and authenticity to the act, promise, and contract of another. Does the person signing apply the executing hand as the instru-

"we, the T. P. Company, promise to pay," etc., and signed by the defendants as president and secretary, respectively, was held to be the obligation of the defendants and not of the T. P. Company, since it did not appear that such company was a corporation, a partnership, or a voluntary association of persons.[27] And it was held that a note stating that "we, the trustees of the Methodist Episcopal Church promise, etc.," and signed by the trustees as individuals, with nothing to indicate that they signed as trustees, was their individual promise, for which they were responsible.[28] The mere insertion of "for" or "for or in behalf of" the principal in the body of the instrument does not make it the contract of the principal if signed by the mere name of the agent without addition.[29] But where the body of the instrument discloses that it is evidently executed for or on behalf of a principal therein named, and the person signing adds to his signature such words as indicate that he was acting in a representative capacity, and not in a personal capacity, the instrument will be deemed to be the obligation of the principal.[30] Where the principal's name appears on the heading or margin of a bill or note in the form commonly used by persons and corporations extensively engaged in the transaction of business, and the bill or note is signed and executed by an agent within the scope of his authority, there seems to be practically unanimity of opinion that the principal's name is thus sufficiently disclosed, and the principal and not the agent will be bound thereby.[31] In New York a different rule has been laid down, it

ment of another, or the promising and engaging mind of a contracting party?

27. Day v. Ramsdell, 90 Iowa, 731, 57 N. W. 630.

28. Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71.

29. Barlow v. Congregational Society, 8 Allen (Mass.), 460.

30. Mechem on Agency, § 436.

In the case of Baker v. Chambles, 4 Greene (Iowa), 428, a note was given in the form following: "We, the undersigned directors of school district No. 4, Montpelier Township," etc., which was signed by three persons without the addition to their signatures of any descriptive designation. It was held that the note was that of the school district, and the court said: "The rule is well settled that if the name of the principal and the relation of agency be stated in the writing, and the agent is authorized to make the contract or obligation, the principal alone is bound unless the intention is clearly expressed to bind the agent personally. * * * It is true, as claimed by counsel, that in deciding whether a party contracts personally or as agent, the presumption is in favor of the former. It is obvious that a party should be personally bound unless his agency is disclosed. But it is equally true, in deciding whether an apparent agent intends to bind himself or his principal, the presumption is that he intended to bind his principal, because the agent should not be personally bound unless that intention is expressed in the contract. See also Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502.

31. In the case of Hitchcock v. Buchanan, 105 U. S. 416, 26 L. Ed. 1078,

having been held that the appearance upon the margin of the instrument of the printed name of the company was not a fact carrying any presumption that the instrument was, or was intended to be, one by the company.[32] The court said: "It was competent for its officers to obligate themselves personally, for any reason satisfactory to themselves, and, apparently to the whole world, they did so by the language of the note; which the mere use of a blank form of note, having upon its margin the name of their company, was insufficient to negative." A leading and early opinion of the Supreme Court of the United States is entitled to consideration as bearing upon the question of the effect of the heading of a negotiable instrument containing the name of the principal. In the case of Mechanics' Bank v. Bank of Columbia,[33] a check,

a bill of exchange was headed "Office of Belleville Nail Mill Co.," and was concluded with the words, "Charge the same to account of Belleville Nail Mill Co., A. B., Pres.; C. D., Sec'y." It was held to be the bill of the company and not of the individual signers. This case was followed and approved in Post v. Pearson, 108 U. S. 422, 27 L. Ed. 775, 2 Sup. Ct. 801; Falk v. Moebs, 127 U. S. 602, 607, 32 L. Ed. 267, 8 Sup. Ct. 1321; Farrell v. National, etc., Bank, 43 Fed. 130.

In the case of Carpenter v. Farnsworth, 106 Mass. 561, a bank check having the words "Ætna Mills" printed on the margin, and signed "A. B., Treasurer," was held to be the check of the Ætna Mills and not of A. B. In Fuller v. Hooper, 3 Gray (Mass.), 334, a draft with the words "Pompton Iron Works" printed in the margin, and concluding with the words, "which place to account of Pompton Iron Works, W. Burtt, Agent," was held to bind the proprietor of the Pompton Iron Works. So in Slawson v. Loring, 5 Allen (Mass.), 340, 343, in which a draft, having the words, "Office of Portage Lake Manufacturing Co., Hancock, Mich.," printed at the top, was signed "I. R. Jackson, Agent," Chief Justice Bigelow said: "No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon." See also Chipman v. Foster, 119 Mass. 189; Lacy v. Dubuque Lumber Co., 43 Iowa, 510; Sayre v. Nichols, 7 Cal. 335, 68 Am. Dec. 280; Waugh v. Suter, 3 Ill. App. 271; Gillig v. Lake Bigler Road Co., 2 Nev. 214; Schaefer v. Bidwell, 9 Nev. 209.

32. Casco Nat. Bank v. Clark, 139 N. Y. 307, 312, 34 N. E. 908, 36 Am. St. Rep. 705. In this case a promissory note given for the debt of a corporation was written on a blank having printed on its margin the name of the corporation. No reference to the corporation was made in the body of the note. The note was in the following form:

RIDGEWOOD ICE COMPANY.

$7,500.

BROOKLYN, N. Y., *Aug.* 2, 1890.

Three months after date, we promise to pay to the order of Clark & Chaplin Ice Co., seventy-five hundred dollars at Mechanics' Bank. Value received.

JOHN CLARK, *Prest.*

E. H. CLOSE, *Treas.*

In the case of First Nat. Bank v. Wallis, 150 N. Y. 455, 44 N. E. 1038, a similar note signed by the president and treasurer of the Wallis Iron Works, and having the name of that company on the margin thereof, was held not to be the note of the company. Judge Andrews stated the rule to be that "nothing short of notice, express or implied, brought home to the bank at the time of the discount, that the note was issued as the note of the corporation, and was not intended to bind the defendants, could defeat its remedy against the parties actually liable thereon as promisors."

33. 5 Wheat. (U. S.) 326.

containing at its head "Mechanics' Bank of Alexandria" with the date "June 25th, 1817," drawn upon the "Cashier of the Bank of Columbia," and signed by "Wm. Paton, Jr.," without official designation of any kind, was held to be the official act of Paton as cashier of the Mechanics' Bank of Alexandria and to be binding upon such bank. The court said: "But the fact that this appeared on its face to be a private check, is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper, at once leads to the belief that it is a corporate, and not an individual transaction; to which must be added the circumstances, that the cashier is the drawer and the teller is the payee; and the form of ordinary checks deviated from by the substitution of "to order" for "to bearer." The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction."

(5) *Parol evidence admissible to show intent.*— Ordinarily, no extrinsic testimony of any kind is admissible to vary or explain negotiable instruments. Such paper speaks its own language, and the meaning which the law affixes to it cannot be changed by any evidence *aliunde.*[34] There are a few exceptions to this general rule. As where there is anything on the face of the paper which suggests a doubt as to the party bound; or the character in which any of the signers acted in affixing his name, parol evidence is admissible between the original parties to the instrument and those affected with notice to show the party whom it was intended should be bound.[35] And in some cases it has been held that where there

34. Hardy v. Pilcher, 57 Miss. 18, 34 Am. Rep. 433.

35. **Parol evidence to show intent.** —In the case of Hardy v. Pilcher, *supra*, the court said: "One of the few exceptions to this rule is where anything on the face of the paper suggests a doubt as to the party bound, or the character in which any of the signers has acted in affixing his signature; in which case testimony may be admitted between the original parties to show the real intent. Thus, where one has signed as agent of another, while the *prima facie* presumption is that the words are merely *descriptio personæ*, and that the signer is individually bound, yet it may be shown in a suit between the parties that it was not so intended, but that, on the contrary, the true intention was that the payee should look to the principal whose name was disclosed in the signature of his agent, or who was well known to be the true party to be bound. The principle, though not recognized in all the cases, is, we think, a sound one, and supported by the weight of authority." See also Haile v. Pierce, 32 Md. 327, 3 Am. Rep. 139; McClellan v. Reynolds, 49 Mo. 312. In the case of Haile v. Pierce, *supra*, the court said: "Where the language of a note or its terms are so unintelligible as to admit of no rational interpretation of the meaning, or are not sufficiently decisive of the intention of the parties, but on the contrary, are equivocal and uncertain, extraneous proof as between the original parties may be admitted to show the true character of the instrument, and what party,

is any indication by words of description or otherwise, that the person signing the paper signed as agent for another, parol evidence may be admitted as between the original parties and those affected with notice, to show the actual intent of the original parties.[36] This doctrine is not universally adopted by any means.

the principal or the agent, or both, is liable. Where individuals subscribe their proper names to a promissory note, *prima facie* they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers, as agents, with the payee's knowledge." See Pratt v. Beaupre, 13 Minn. 187; Kean v. Davis, 21 N. J. L. 683, 47 Am. Dec. 182.

Mr. Justice Bradley, in the case of Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665, said: "The ordinary rule undoubtedly is that if a person merely adds to the signature of his name the word 'agent,' 'trustee,' 'treasurer,' etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere agent, trustee, or officer of some principal, and is in the habit of expressing in that way his representative character in his dealings with a particular party, who recognizes him in that character, it would be contrary to justice and truth to construe the documents thus made and used, as his personal obligations, contrary to the intent of the parties."

Cases holding parol evidence admissible.— The following cases may also be cited as holding that parol evidence may be admitted in cases where there is ambiguity as to the person who should be charged with the obligation of a negotiable instrument:

Alabama.— Lazarus v. Shearer, 2 Ala. 718; Deshler v. Hodges, 3 Ala. 509; May v. Hewitt, 33 Ala. 161.

Colorado.— Hager v. Rice, 4 Colo. 90, 34 Am. Rep. 68.

Connecticut.— Hovey v. Magill, 2 Conn. 680; Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225.

Georgia.— Cleaveland v. Stewart, 3 Ga. 283; Bedell v. Scarlett, 75 Ga. 56.

Illinois. — La Salle Nat. Bank v. Tolu Rock & Rye Co., 14 Ill. App. 141. (This case is not a ruling case on this question. The weight of authority in Illinois is against the admissibility of such evidence.)

Kansas.— Kline v. Bank of Tescott, 50 Kan. 91, 31 Pac. 688, 34 Am. St. Rep. 107, 18 L. R. A. 533; Benham v. Smith, 53 Kan. 495, 36 Pac. 997.

Kentucky.— Webb v. Burke, 44 Ky. 51; Owings v. Grubb, 6 J. J. Marsh. 32.

Maryland.—Laflin, etc., Powder Co. v. Sinsheimer, 48 Md. 411, 30 Am. Rep. 472.

Michigan.— Keidan v. Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705.

Minnesota. — Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502; Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116; Kranniger v. People's Bldg. Soc., 60 Minn. 94, 61 N. W. 904.

Ohio.— Magruder v. McCandlis, 3 Ohio Dec. 269. But see *contra*, Collins v. Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612.

Texas.— Traynham v. Jackson, 15 Tex. 170, 65 Am. Dec. 152; Texas Land & Cattle Co. v. Carroll, 63 Tex. 48.

Virginia.— Earley v. Wilkinson, 9 Gratt. 68.

36. Huffcutt on Agency, p. 239.

Parol evidence to show intent as between original parties.— In the case of Metcalf v. Williams, 104 U. S. 93, 26 L. Ed. 665, the instrument in controversy was a check in the following form:

"No. —.

"ALEXANDRIA, VA., *Oct.* 2, 1875.

"The First National Bank of Alexandria, pay to the order of A. E. & C. E. Tilton, seven thousand and no/100 dollars.

"W. G. WILLIAMS, *Prest.*

"E. P. AISTROP, *Secy.*"

There are a number of cases which emphatically deny the right to introduce parol evidence to vary the terms of negotiable paper.[37]

And it was held that the officers signing such check, being known to the bank as the officers of the Montpelier Female Humane Association of Orange County, Virginia, were not personally liable thereon, and ruled that evidence to show the knowledge of the bank of the official connection of the signers with such association was admissible.

In Brockway v. Allen, 17 Wend. (N. Y.) 40, where the makers of a note appended to their signatures the words "Trustees of the Baptist Society," it was held that they were entitled to show by proof that there was a corporation called the Trustees of the First Baptist Society of the Village of Brockport; that they were its trustees; that the note was given by them in their official capacity; and that the plaintiff, the payee, knew this fact.

In the case of Kline v. Bank of Tescott, 50 Kan. 91, 31 Pac. 688, 34 Am. St. Rep. 107, 18 L. R. A. 533, the Supreme Court of Kansas held that when a note is executed by a corporation, and is signed by its president and secretary, and its directors write their names upon the back thereof, as directors, before delivery, extrinsic evidence is admissible between the original parties or any subsequent holder of the note accepting the same as collateral, with full notice of all the facts and circumstances connected with the execution and delivery thereof, not only to show that the president and secretary executed the instrument in their official capacity as officers of the corporation, but also that the directors signed the note on the back thereof solely as officers of the corporation and to bind the corporation only.

Where individuals subscribe their proper names to a promissory note, *prima facie*, they are personally liable, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents, with the payee's knowledge. Haile v. Pierce, 32 Md. 327; McWhirt v. McKee, 6 Kan. 412; Talley v. Burtis, 45 Kan. 147, 25 Pac. 603; Fullerton v. Hill, 48 Kan. 558, 29 Pac. 583; Benham v. Smith, 53 Kan. 495, 36 Pac. 997.

In the case of Keidan v. Winegar, 95 Mich. 430, 54 N. W. 901, 20 L. R. A. 705, the note recited, "Ninety days after date, I promise to pay to the order of Geo. Keidan," etc., and was signed "W. S. Winegar, Agt." The court held that the defendant could show by parol testimony that the paper was really that of his principal, who was the real party to the transaction, to the knowledge of the payee. See also Kean v. Davis, 21 N. J. L. 683; Bean v. Pioneer Mining Co., 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86; Martin v. Smith, 65 Miss. 1, 3 South. 33; Collender Co. v. Boutell, 45 Minn. 21, 47 N. W. 261; Peterson v. Homan, 44 Minn. 166, 46 N. W. 303; Miller v. Way, 5 S. D. 468, 59 N. W. 457; Janes v. Citizens' Bank of North Enid, 9 Okla. 546, 60 Pac. 290.

37. **Parol evidence inadmissible.**—But where neither the name of the principal nor any other circumstance appears on the face of the instrument to connect it with him, extrinsic evidence is inadmissible to show any other intent than that expressed in the instrument to bind the agent, though the word "agent" is added to the signature. Am. & Eng. Encyc. of Law, Vol. I (Agency), p. 1053.

In the case of Sturdivant v. Hull, 59 Me. 172, 174, the court said: "When a man has deliberately said in writing, 'I promise to pay,' and a valid consideration for the promise is shown, right and justice are not very likely to be the gainers by allowing him to retract, and to undertake to prove that he did not actually mean, '*I* promise,' but that he meant, and the other party understood that he meant, that some third party, whose promise the writing does not purport to be, undertook the payment. It is better that a careless or ignorant agent should sometimes pay for his principal, than to subject the construction of valid written contracts to the manifold perversions, misapprehensions, and uncertainties of oral testimony." See also Simpson v. Garland, 72 Me. 40; Mellen v. Moore, 68 Me. 390; Ross v. Brown, 74 Me. 352.

There is much confusion among the authorities of the several States respecting the admissibility of parol evidence in such cases, and it is, therefore, well nigh impossible to deduce general rules which can be applied in all cases. One rule is practically of universal application, and that is that where there is nothing in the body of the instrument nor attached to the signatures to show that the promise was made for or in behalf of any person other than the signers, there can be no evidence admitted outside of the instrument itself to show that it was the promise of any persons

In the case of Rendell v. Harriman, 75 Me. 497, a note reciting, "For value received, we promise to pay," etc., and signed by several persons who designated themselves as "President and Directors of Prospect and Stockton Cheese Company," it was held that there being nothing in the body of the note, nor attached to the signatures, to show that the promise was made for or in behalf of any person other than the signers, evidence to show that it was the promise of the cheese company and not of the individual signers was not admissible.

In Illinois it is said: "Whatever may be the decisions elsewhere on analogous questions, the authorities in this State are full to the point that a party will not be permitted to show by oral testimony that his written agreement, understandingly entered into, was not in fact to be binding upon him. Accordingly, it was held in Hypes v. Griffin, 89 Ill. 134, 31 Am. Rep. 71, mainly on the authority of Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175, that where trustees of a church corporation made a note in their individual names, although they described themselves as trustees of the church, parol evidence was inadmissible to show it was the intention of the parties that it was to be the note of the church corporation and not the note of the trustees executing it. The principle running through that and other cases is that such instruments will be construed as the parties made them, without the aid of extrinsic evidence. That rule of interpretation would seem to be as well settled in this State as any rule can be." Scanlan v. Keith, 102 Ill. 634, 40 Am. Rep. 624.

In Indiana, a note signed by certain persons with the words "Trustees of Perry Lodge 37, F. & A. M.," which did not recite in the body thereof that it was for or on behalf of such lodge, was held to be the personal obligation of the signers, and parol evidence was held inadmissible to show that the parties intended and supposed it to be the note of the lodge, and agreed that such should be its effect. Williams v. Second Nat. Bank of Lafayette, 83 Ind. 237.

In the case of Slawson v. Loring, 5 Allen (Mass.), 340, 81 Am. Dec. 750, the court says: "The rule excluding all parol evidence to charge any person as principal, not disclosed on the face of the note or draft, rests on the principle that each person who takes negotiable paper makes a contract with the parties on the face of the instrument, and with no other person."

A bill of exchange drawn on the P. Insurance Company by their agents, F. & Co., and ending thus: "Charge the same to account of F. & Co., agts. P. Ins. Co.," binds F. & Co. personally as drawers, although delivered by the insurance company to the payee in payment of a loss on one of their policies; and cannot be shown by parol evidence not to have been intended by the parties to create a debt against any one but the company. Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101. See also Williams v. Robbins, 16 Gray (Mass.), 77; Forster v. Fuller, 6 Mass. 58; Fuller v. Hooper, 3 Gray (Mass.), 334; Davis v. England, 141 Mass. 587, 6 N. E. 731; Bartlett v. Hawley, 120 Mass. 92.

The following cases are cited upon the general proposition that no evidence is admissible to vary the terms of a negotiable instrument which upon its face purports to be that of the signer, notwithstanding the annexing other than such signers.[38] Nor will such evidence be admissible to discharge an agent who signs his own name merely to a negotiable instrument, though he describes himself in the body of the instrument as the agent of another.[39] As between the original parties and a *bona fide* holder of a negotiable instrument, no extrinsic evidence is admissible to show that some other person than the one named in the instrument is chargeable with the debt;[40] except, perhaps, in those cases where the terms of the instrument are such as to suggest that it was the intention of the parties to bind some other person than the one named as maker or drawer.[41] There are cases, also, where the principal has adopted the agent's name as his own, in which case extrinsic evidence may be admitted to show that such name had been so adopted.[42]

to his signature of some term designating the fact that he acted in a representative capacity: Bedell v. Scarlett, 75 Ga. 56; Kenyon v. Williams, 19 Ind. 44; Junge v. Bowman, 72 Iowa, 648, 34 N. W. 612; Matthews v. Dubuque Mattress Co., 87 Iowa, 246, 54 N. W. 225, 19 L. R. A. 676; McCandless v. Belle Paine Canning Co., 78 Iowa, 161, 42 N. W. 635, 16 Am. St. Rep. 429; Pentz v. Stanton, 10 Wend. (N. Y.) 271; Phelps v. Borland, 30 Hun (N. Y.), 362; Collins v. Buckeye State Ins. Co., 17 Ohio St. 215, 93 Am. Dec. 612; Taylor v. McLean, 1 McMul. (S. C.) 352; Moore v. Cooper, 1 Speers (S. C.), 87; Bulwingle v. Cramer, 27 S. C. 376, 3 S. E. 776; Arnold v. Spague, 34 Vt. 402; Sparks v. Despatch Transfer Co., 104 Mo. 531, 15 S. W. 417, 24 Am. St. Rep. 351, 12 L. R. A. 714.

38. Babbett v. Young, 51 N. Y. 238; Brown v. Parker, 7 Allen (Mass.), 339; Hancock v. Fairfield, 30 Me. 299.

39. Nash v. Towne, 5 Wall. (U. S.) 689, 18 L. Ed. 527; Mann v. Smyser, 76 Ill. 365; Morrell v. Codding, 4 Allen (Mass.), 403; Titus v. Kyle, 10 Ohio St. 444.

40. Cragin v. Lovell, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903; Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225; De Witt v. Walton, 9 N. Y. 571; Anderson v. Shoup, 17 Ohio St. 125; Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 58 Am. Rep. 829; Arnold v. Spague, 34 Vt. 409.

41. Hood v. Hallenbeck, 7 Hun (N. Y.), 362; Kean v. Davis, 21 N. J. L. 683; Paige v. Stone, 10 Metc. (Mass.) 160; May v. Hewitt, 33 Ala. 161.

42. **Name of agent adopted by principal.**— In Massachusetts and elsewhere, one may make the name and signature of another virtually his own, by using it or allowing it to be used in the course of his business; and where a party adopts a name he will be holden by contracts executed in such name, whether the name so assumed be an artificial one, or the proper name of a living person. In principle there is no difference between assuming the proper name of some other natural person; only this, that in the latter case the proof ought to be very clear that the contract was not designed to be the personal contract of such natural person. Pease v. Pease, 35 Conn. 131, 95 Am. Dec. 225. See also Barlow v. Congregational Soc., 8 Allen (Mass.), 460; Brown v. Parker, 7 Allen (Mass.), 337; Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158, 51 Am. Dec. 59; Chandler v. Coe, 54 N. H. 561; Crocker v. Colwell, 46 N. Y. 212.

The general rules relating to admissibility of parol evidence to vary the terms of a negotiable instrument as stated by Mr. Mechem in his work on Agency (§ 443), have been frequently quoted by the courts in recent opinions and are well worthy of citation as being a most excellent statement of what may properly be deduced from the weight of authority upon this perplexing question. We take the liberty of quoting Mr. Mechem at length in this connection:

d. *Signature by procuration; effect of.*— A signature by "procuration" operates as notice that the agent had but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.[43] A signature by procuration is a technical one seldom used in this country. The signature is ordinarily in the following form: "A. (agent) per proc. or p. p. B. (principal)." It is notice to all persons of the limits of the agent's authority and in that respect differs somewhat from the cases of ordinary agency, when an instrument is sought to be enforced by a *bona fide* holder for value and without notice.[44]

"I. Where the paper on its face is the undertaking of the agent only, no reference being made on its face to representative capacity, and where the paper on its face is unmistakably the principal's, parol evidence will not be received, in the one case to exonerate, and in the other to charge the agent.

"II. But where the paper bears on its face some reference to a principal, or some appellation indicating representative character, while it is undoubtedly true that the mere addition of the words 'agent,' 'trustee,' 'treasurer,' and the like, or the mere recital in the body of the instrument that the person signing is such agent, treasurer or trustee of a principal named or unnamed, is, as has been said, *prima facie* or *descriptio personæ* merely, and not as characterizing the act as one done in a representative capacity; and while it is also true, as a general rule, that parol evidence is not admissible to exonerate an agent from a contract into which he has personally entered, yet it is believed that the preponderance of authority will warrant the statement of the rule that:

"1. Between the immediate parties to a bill or note, parol evidence is admissible to show:

"*a.* That, by a course of dealing between the parties, that form of execution has become to be the recognized and adopted form by which the obligation of the principal is entered into; or

"*b. That* the instrument was, to the knowledge of the parties, intended to be the obligation of the principal and not of the agent, and that it was given and accepted as such;

"*c.* That an instrument which is so ambiguous on its face as to render it uncertain who was intended to be bound, was known to be the obligation of the principal.

"2. Between one of the original parties and a third party, such evidence is admissible to make either of the lines of proof mentioned above:

"*a.* Where the third person is not a *bona fide* holder.

"*b.* Where the instrument bears sufficient evidence upon its face, or is so ambiguous as to put a reasonably prudent man upon inquiry. As to this last subdivision it may be said that the mere addition of the word 'agent,' 'trustee,' etc., without disclosing the principal, is not sufficient to make third persons chargeable with notice of any representative relation of the signer; but the form of executing may be such as to well awaken the suspicion of third persons (citing Metcalf v. Williams, 104 U. S. 93; Slawson v. Loring, 5 Allen [Mass.], 340, 81 Am. Dec. 750; Davis v. Henderson, 25 Miss. 549, 59 Am. Dec. 229; Mott v. Hicks, 1 Cow. [N. Y.] 513, 13 Am. Dec. 550).

"III. As between the principal and the agent, the more modern cases hold that it is competent for the agent to show that what appears to be the agent's obligation is in fact the principal's."

43. Neg. Inst. Law (N. Y.), § 40. See English Bills of Exchange Act, § 25.

44. The rule as stated in the text is supported in the cases of Attwood v. Munnings, 7 B. & C. 278, 4 Eng. Rul. Cas. 364; Stagg v. Elliott, 12 C. B. (N. S.) [Eng.] 373.

e. *Liability of agent indorsing negotiable paper, or drawing bill of exchange.*— There is a clear distinction between what has been said of the liability of an agent who makes or accepts negotiable paper in his own name, and simply affixes thereto a word showing his representative capacity, without disclosing his principal, and one who indorses a bill or note, or draws a bill in that form. The authorities generally hold that in the latter case the agent is not liable where the principal is disclosed in the body of the instrument and his indorsement passes the title.[45] Perhaps the leading case on the effect of such an indorsement is that of Falk v. Moebs, decided in the United States Supreme Court, an extract from which is given in the note.[46] Mr. Mechem, in his work on Agency

45. Collins v. Buckeye State Ins. Co., 17 Ohio St. 255, 93 Am. Dec. 612; First Nat. Bank v. Hall, 44 N. Y. 395.

46. Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319, 32 L. Ed. 266. The note in this case was in the following form:

$1,061.24.

Detroit, Mich., *Aug.* 4, 1880.

Four months (4) after date we promise to pay to the order of George Moebs, Sec. & Treas., ten hundred and sixty-one and 24/100 dollars, at Merchants & Manufacturers' National Bank, value received.

Peninsular Cigar Co.

Geo. Moebs, Sec. & Treas.

Endorsed: 'Geo. Moebs, Sec. & Treas.'"

The question involved, as stated by the court, was: "Does the indorsement on the notes involved in this case, in terms, purport to be that of the Pennsylvania Cigar Co., or does it purport to be the personal indorsement of Moebs? In other words, can it be clearly ascertained from these instruments themselves who is, in law, the indorser of them? Is the indorsement plain and clear, or is it ambiguous?"

The court, after calling attention in specific detail to the many cases both for and against the admissibility of extrinsic evidence to determine the liability of parties who have made, drawn, or indorsed negotiable paper, said:

"Many more authorities are cited and might be dwelt upon *ad infinitum.* A discussion of all of them would greatly protract this opinion, and would subserve no beneficial result. In all this vast conflict — we had almost said *anarchy* — of the authorities bearing on the question under consideration, it is not easy to lay down any general rule on the subject which would be in harmony with all of them. It seems to us, however, that the case of Hitchcock v. Buchanan, 105 U. S. 416, 26 L. Ed. 1078, controls the case at bar. Both involve the same principles, and the decision in this, to be consistent with that of the former, must sustain the contention of the defendant in error. Neither do we think that the case of Mechanics' Bank v. Bank of Columbia, 18 Wheat. (U. S.) 326, when considered in the light of the facts upon which it is based, in anywise conflicts with this conclusion.

We conclude, therefore, that the notes involved in this controversy, upon their face, are the notes of the corporation. In the language of the court below, they were "drawn by, payable to, and indorsed by, the corporation." There is no ambiguity in the indorsement, but on the contrary, such indorsement is, *in terms,* that of the Peninsular Cigar Company.

This being true, it follows that the court below was right in excluding from the jury the evidence offered to explain away and modify the terms of such indorsement. White v. Miners' Nat. Bank, 102 U. S. 658; Martin v. Cole, 104 U. S. 30; Metcalf v. Williams, Id. 93."

The case of Falk v. Moebs, *supra,* has not been uniformly approved by the courts of all the States. The

(§ 439), draws a distinction between a note or bill drawn payable to an agent of a private individual and indorsed by such agent, and one drawn payable to an individual as an officer of a corporation; in the former case he asserts that the same general rules apply to his liability on the indorsement, as where he signs the bill or note in the same form as a maker; while in the latter case he considers the note or bill to be in reality payable to the corporation of which the individual payee is an officer and regards the indorsement of such officer in the same way as an indorsement of the corporation. There does not seem to be any valid reason for this distinction. The same reasoning which would make the indorsement of an officer of a corporation an obligation of the corporation rather than of the officer would also make the indorsement of an agent of a private individual, made in the same way, binding upon the private individual. But few cases can be cited affecting indorsements made by agents of private individuals;[47] but many have been reported where indorsements have been made by agents and officers of corporations.[48] The Court of Appeals of the State of New York in an often-cited case[49] has said: "The indorsement of a

Supreme Court of Illinois, in the case of Hately v. Pike, 162 Ill. 241, 44 N. E. 441, expressly dissents from the authority of that case. In this case a note made by a corporation, payable to "P., President" (P. being president of the corporation) was held to be payable to P., the word "President" being merely descriptive; and an indorsement by "P., President" was held to be an indorsement by P. individually. There are other Illinois cases to the same effect. See Johnson v. Glover, 121 Ill. 283, 12 N. E. 257; Courtney v. Hogan, 93 Ill. 101.

47. In the case of Mott v. Hicks, 1 Cow. (N. Y.) 513, a note was made payable to J. H. or order, and indorsed thus, "J. H., Agent." It was held that the indorser was not personally liable, such an indorsement being equivalent to a declaration that he will not be personally liable. See also Bowne v. Douglass, 38 Barb. (N. Y.) 312.

48. **Indorsements by agents of corporation.**—Where a note is indorsed by the president of a corporation by signing his name with his title of office, such indorsement is sufficient to charge the corporation, and to enable the indorsee to maintain an action against the maker in his own name. Chillicothe Branch of State Bank v. Fox, Fed. Cas. 2,683, 3 Blatchf. 431. See also Bank of University v. Hamilton, 78 Ga. 312; Souhegan Nat. Bank v. Boardman, 46 Minn. 293, 48 N. W. 1116.

In the case of Terhune v. Parrott, 59 N. J. L. 16, 35 Atl. 4, it was held that an indorsement of a note in the following form: "J. W. Parrott, Prest. of Long Branch Hotel and Cottage Co.," imports *prima facie* the personal liability of J. W. Parrott.

Babcock v. Beman, 11 N. Y. 200; Sieckman v. Allen, 3 E. D. Smith (N. Y.), 561; Bank of New York v. Bank of Ohio, 29 N. Y. 619, are also to the effect that an indorsement by a person who signs as an agent or officer of a corporation with authority so to do will not personally bind such agent or officer.

49. Babcock v. Beman, 11 N. Y. 200. The note in question in this case was drawn in these words: "Four months after date we promise to pay to the order of R. Beman, *treas.*, five hundred dollars, value received." Signed "Adam Smith & Co.," and in-

promissory note or bill of exchange effects two different and distinct purposes. It is a present transfer and assignment of the paper to the indorsee, and an executory contract by which the indorser agrees, upon certain conditions, to pay the amount of the note or bill himself. There can be no regular indorsement which does not *ipso facto* transfer the paper; but it is not absolutely essential that it should also contain the collateral contract. The defendant in this case indorsed the note in question by writing his name upon it, and adding the word 'treasurer,' and the note itself was payable to him with the addition of the usual abbreviation of the same word. The answer shows that the defendant when he made the indorsement was the treasurer of a manufacturing corporation and that this was known to the plaintiffs, who received the note thus indorsed on account of a demand which they had against the corporation. The question is, whether this was a qualified indorsement, passing, as it clearly did, the interest in the note, but without any other contract on the part of the corporation. This question was decided against the plaintiff in the Supreme Court more than thirty years ago and has since been acquiesced in by the profession, and has been extensively acted on by business men." The reasoning of the court in this case assumes that in the hands of a *bona fide* holder who took the same without notice of the relation in which the indorser stood to the company for whom he acted as agent, the note would be valid as against the indorser; and this corresponds with other New York authorities that hold the question of agency, in such cases, material and issuable, and also the fact that the party taking the note received it with notice.[50] This question has frequently arisen in connection with the indorsement of commercial paper by bank cashiers. It has been generally held that an indorsement by or to a cashier with the use of his name and by adding thereto the word "cashier" will bind the bank or transfer the instrument to the bank where it is shown by the pleadings and the proof that that was the design of the transaction and the intention of the parties.[51]

dorsed "R. Beman, Treas.," he being known to the indorsee as the agent of a manufacturing company.

50. Brockway v. Allen, 17 Wend. (N. Y.) 40; Randall v. Van Vechten, 19 Johns. (N. Y.) 60; Tafft v. Brewster, 9 Johns. (N. Y.) 334; White v. Skinner, 13 Johns. (N. Y.), 307.

51. First Nat. Bank of Angelica v. Hall, 44 N. Y. 395. In this case a draft in the following form: "Three months after date, pay to the order of J. E. Robinson, Cashier," etc., was in question. It was held the addition of the word "cashier" imported that the bank of which the person named was cashier, was intended as the payee; and that an indorsement by

f. *Negotiable instruments by public agents.*— As a general rule, when public agents, in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable unless the intent to incur a personal responsibility is clearly expressed, although it should be found that through ignorance of the law they may have exceeded their authority.[52] This

such cashier was not necessary to give title to the bank.

In the case of Bank of Genesee v. Patchin Bank, 19 N. Y. 312, S. B. Stokes, the cashier of the Patchin Bank, sent to the Bank of Genesee to be discounted, a bill of exchange payable to the order of "S. B. Stokes, Cas.," indorsed by him with the same addition to his signature and inclosed in a letter dated at the banking-house and signed "S. B. Stokes, Cas." It was held that these circumstances imported that the indorsement was that of the Patchin Bank in the regular course of business, and not that of S. B. Stokes, individually. In Bank of New York v. Bank of Ohio, 29 N. Y. 619, it was held that a draft drawn payable to "D. C. Converse, Esq., cashier," who was cashier of the defendant, was in judgment of law payable to the bank of which he was the cashier.

In Watervliet Bank v. White, 1 Den. (N. Y.) 608, the indorsement was in these words: "Pay to E. O., Cashier, or order;" it was held a transfer to the bank of which E. O. was the cashier. See also Robb v. Bank, 41 Barb. (N. Y.) 586; Mechanics' Bank v. White Lead Co., 35 N. Y. 505; Farrar v. Gilman, 19 Me. 440; Burnham v. Webster, 19 Me. 232; Nichols v. Frothingham, 45 Me. 220, 71 Am. Dec. 539; Russell v. Folsom, 72 Me. 436; Bank v. Wheeler, 21 Ind. 90; Nave v. Lebanon Bank, 87 Ind. 204; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29; Houghton v. First Nat. Bank of Elkhorn, 26 Wis. 663, 7 Am. Rep. 107; Kennedy v. Knight, 21 Wis. 345, 94 Am. Dec. 543; Stamford Bank v. Ferris, 17 Conn. 268; Collins v. Johnson, 16 Ga. 458.

Exception to general rule in favor of bank cashiers.— In the case of Robinson v. Kanawha Valley Bank, 44 Ohio St. 441, 58 Am. Rep. 829, the court said: "We fail to see how it can make any difference in this respect whether the party signing describes himself as agent simply, or adds the name of his principal; in either case the principle upon which his liability is established and parol testimony excluded must be the same; the instrument upon its face is his own, and not the promise of his principal. To this rule usage has established an apparent exception, in the instances where a bill is drawn or accepted by the cashier of a bank. But it is rather apparent than real, since the custom by which a cashier represents his bank in such matters, by simply signing his own name, is so general that the practice has reduced the custom to the certainty of law, as it is everywhere understood that in such cases, whether he describes himself as cashier or not, he is an *alter ego* of the bank. His signature is a recognized mode in which a bank may become a party to commercial paper; and the obligation so created is that of the bank and not of the cashier."

52. **Presumption as to authority of public agent.**— In the case of Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502, a note was executed on behalf of a school district in form following: "One year from date, we, as trustees of school district No. 10, in Rice Co. promise to pay," etc., and signed by the three trustees with their individual names with no appendage to show their representative capacity. The trustees were held not to be personally responsible. In the course of its opinion the court uses the following language: "In this as in all other cases, the intention of the parties governs, and when a person, known to be a public officer, contracts with reference to the public matters committed to his charge, he is presumed to act in his official capacity only, although the contract may not in terms allude

same rule should in reason be adopted in case of the making, drawing, accepting, and indorsing of negotiable instruments by public agents. The cases upon this question are not all in favor of the application of this rule to such instruments,[53] although the weight of authority would seem to be upon that side.[54] Justice Story has said: "The same principle applies to cases, where public officers, contracting for a public purpose, afterward, upon a settlement of accounts with the other contracting party, strike a balance, and in writing promise to pay that balance on a specific day, signing their names with their official designations annexed, as for example, as commissioners; for such a written document is quite

to the character in which he acts, unless the officer by unmistakable language, assumes a personal liability, or is guilty of fraud or misrepresentation. Being a public agent with his powers and duties prescribed by law, the extent of his powers are presumed to be as well known to all with whom he contracts as to himself."

Parsons, in his work on Notes and Bills (p. 122), says: "As a general rule, one who acts professedly as a public agent, and had authority so to act, is not liable, although the public fail to perform the contract, unless circumstances indicate that it was understood between him and the party dealing with him that the contract was made on his personal credit. As, for example, that an officer charged with the erection of some public building induced laborers to engage in it by his personal promise that their wages should be paid at all events, and whether funds were provided or not. So if he drew bills or gave notes for the public, but with the same personal assurance, or guaranty, or if such assurance could be implied from the nature of the case."

53. **Authority to bind not presumed.** —In the case of Cahokia v. Rautenberg, 88 Ill. 219, a note in the form: "Ninety days after date I promise to pay to the order," etc., and signed by the persons as "school trustees," was held to be the personal obligation of the signers. It appeared in this case that while the money borrowed on the note was used for the benefit of the school district, the term of office of the trustees had expired and they had no authority to bind the district.

In Wing v. Glick, 56 Iowa, 473, it was held that a contract containing the words "We promise to pay," and signed by two persons describing themselves respectively as "President School Board" and "Secretary School Board," but which contained no reference to any school district, was held to be the personal obligation of the signers, who could not show by parol evidence that such was not in fact the intention. See also Fowler v. Atkinson, 6 Minn. 579; Bayliss v. Peterson, 15 Iowa, 279.

54. Monticello v. Kendall, 72 Ind. 91, 37 Am. Rep. 139; Moral School Township v. Harrison, 74 Ind. 93; Sheffield School Township v. Andress, 56 Ind. 157.

Where public agents sign a note adding their character of agents, they are not personally liable, unless, at the time of the suit, they have public funds in their hands. They are not liable on the ground that they have made payments on contracts entered into subsequent to the note on which they are sued, and thus exhausted their funds. Fox v. Drake, 8 Cow. (N. Y.) 191.

In Iowa it has been held, contrary to the case cited in the preceding note, that a note reading, "We, the undersigned directors of school district No. —," etc., signed with their individual names merely, creates no individual liability against its signers, but holds them only in their official capacity. Baker v. Chambles, 4 G. Greene (Iowa), 428.

A foreign consul who draws a bill on account of his government in his official capacity is not personally liable thereon. Jones v. Le Tombe, 3 U. S. (3 Dall.) 384, 1 L. Ed. 647.

consistent with an intention not to incur any personal responsibility; but merely to apply the public funds, which might be in their hands at the time prescribed, toward the discharge of the public debt." [55]

§ 30. Partners.

a. *In general; what constitutes a partnership.*— Many of the rules applicable to agents as makers, drawers, acceptors, and indorsers of negotiable paper are also applicable to partners.

A partnership exists where two or more persons enter into a joint undertaking, with an agreement to share in the profits and losses of the business;[56] as where two persons make a joint purchase for a particular adventure, upon an agreement to share jointly in the ultimate profit and loss;[57] or where persons become joint proprietors of property and funds, and engage in a business upon a contract to share the profits and losses.[58] A community of interest in land does not make mere partners, nor does a community of interest in personal property. There must be some joint adventure, and an agreement to share in the profit and loss of the undertaking.[59] As between the parties themselves, in order

55. Story on Agency, § 304.

56. Definitions.— In the English Partnership Act, 1890, a partnership is defined as "the relation which subsists between persons carrying on a business in common with a view of profit.

Partnership is a legal entity formed by the association of two or more persons for the purpose of carrying on business together and dividing its profits between them. Parsons on Partnership, § 1; 3 Kent's Comm. 23; New York (Proposed) Civil Code.

Partnership is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them. Indian Contract Act, § 239.

57. Reynolds v. Cleveland, 4 Cow. (N. Y.) 288; Champion v. Bostwick, 18 Wend. (N. Y.) 175.

58. Cumpston v. M'Nair, 1 Wend. (N. Y.) 457; Chase v. Barrett, 4 Paige (N. Y.), 148.

59. Porter v. McClure, 15 Wend. (N. Y.) 187.

A contract by the terms of which the owner transfers to another the exclusive use and control of property, and is to receive as rent therefor a portion of the profits arising from such use is not a partnership contract. Garrett v. Republican Pub. Co., 61 Neb. 541, 85 N. W. 537.

Community of interests in profits, not by way of compensation for services rendered or capital loaned, but profits as such, and community of interests in the property the subject of the venture, and community of power of management of such property, are correct tests of copartnership. Waggoner v. Bank, 43 Neb. 84, 61 N. W. 933.

Where several persons joined in a written agreement, each to pay a certain definite sum of money to defray the expenses of sinking a gas well, and, in the event that gas was found in paying quantities, to share in the proceeds thereof, if any there were, they did not thereby become partners as to each other, since the agreement did not constitute such a community of profit as to constitute a partnership. Clark v. Rumsey, 59 App. Div. (N. Y.)) 435, 69 N. Y. Supp. 102. See also Winslow v. Young, 94 Me. 145, 47 Atl. 149.

to constitute a partnership there must be a joint ownership of the partnership funds, according to the intention of the parties; and an agreement, either express or implied, to participate in the profits and losses of the business, either ratably or in some other proportion agreed upon.[60] To constitute a person a partner in a firm in this sense, he must have an interest in the stock, with the right of control, and thus have a right to the profits as the result of capital and industry in which he and the others concerned are all interested, and must be liable for losses; for a mere participation in the profits of a business by way of payment for his labor and services, without having any interest in the capital stock or right to control the business, does not make him a partner.[61]

60. If one party furnishes the largest part of the capital, a store and a clerk, and the other carries on the business, and by the agreement between them there is to be a division of the profits, this is a partnership. Cushman v. Bailey, 1 Hill (N. Y.), 526. So. if one party furnishes the capital and the other carries on the business of manufacturing, under an agreement between them that the first is to receive back his capital and a certain portion of the profits made, this is a partnership. Everett v. Cox, 5 Den. (N. Y.) 180.

61. Ogden v. Astor, 4 Sandf. (N. Y.) 311; Cornell v. Redrow, 60 N. J. Eq. 251, 47 Atl. 56; Leeds v. Townsend, 89 Ill. App. 646; McWilliams v. Elder (La.), 27 South. 352.

Agents and employees given shares of profits.— A person is not a partner where he is employed as an agent in conducting the business of a firm at an annual salary, with a stipulation that he is to receive in addition thereto one-third of the profits of the business, not being liable for losses. Vandenburgh v. Hull, 20 Wend. (N. Y) 70. See also Randle v. State, 49 Ala. 14; Wheeler v. Farmer, 38 Cal. 203; Le Fevre v. Cartagino, 5 Colo. 564; Loomis v. Marshall, 12 Conn. 70; Pond v. Cummins, 50 Conn. 372; Sankey v. Columbus Iron Works, 44 Ga. 228; Thornton v. McDonald, 107 Ga. 683, 33 S. E. 680; Stevens v. Faucet, 24 Ill. 483; Burton v. Goodspeed, 69 Ill. 237; Mayfield v. Turner, 180 Ill. 332, 54 N. E. 418; Ellsworth v. Pomeroy, 26 Ind. 158; Emmons v. Newman, 38 Ind. 372; Keiser v. State, 58 Ind. 379; Heshion v. Julian, 82 Ind. 576; Holbrook v. Oberne, 56 Iowa, 324; Porter v. Curtis, 96 Iowa, 539, 65 N. W. 824; Dwinel v. Stone, 30 Me. 384; Holden v. French, 68 Me. 241; Reddington v. Lanahan, 59 Md. 429; Judson v. Adams, 8 Cush. (Mass.) 556; Emmons v. Westfield Bank, 97 Mass. 230; Partridge v. Kingman, 130 Mass. 476; Morrison v. Cole, 30 Mich. 102; Stockman v. Michell, 109 Mich. 348, 67 N. W. 336; Richardson v. Hewitt, 76 N. Y. 55; Cassidy v. Hall, 97 N. Y. 159; Leggett v. Hyde, 58 N. Y. 272; La Flex v. Burss. 77 Wis. 538, 46 N. W. 801; Sohns v. Sloteman, 85 Wis. 113, 55 N. W. 158.

And the law is well settled that a mere agent or servant who is bound to obey orders, and has no interest in the capital stock, is not rendered a partner even as to third persons, merely because he is to be compensated for his services by receiving a share of the profits which may arise from the business in which he is employed. Burckle v. Eckhard, 1 Den. (N. Y.) 337. On the other hand, the doctrine has been stated thus: "Traders become partners between themselves by a mutual participation of profit and loss; but, as to third persons, they are partners if they share the profits of a concern; for he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is, therefore, to be made liable for losses, although he may have expressly stipulated for exemption from them." Dob v. Halsey, 16 Johns. (N. Y.) 34, 40. But, as Chief Justice

As was said by Mr. Justice Gray of the United States Supreme Court,[62] after an exhaustive review of the authorities, both English and American, relating to the question of what constitutes a partnership: "In the present state of the law upon this subject, it may, perhaps, be doubtful whether any more precise general rule can be laid down than that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow, that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund, to which the creditors have a right to look for the payment of their debts; that all are liable as partners on contracts made by any of them with third persons, within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive evidence of partnership."

To subject a person to responsibility as a partner, for the acts of another, done without his express concurrence, he must stand in one or the other of these two positions: first, he must at the time of making the contract, whether bill, note, or other instrument, have been actually a partner in the joint concern; or, secondly, admitting that he was not, he must have represented or permitted himself to be represented as such, before or at the time of making the contract, either generally to all the world, or to several individuals, or to the plaintiff in particular, or to some person through whom he claims.[63]

Bronson observes, in Burckle v. Eckhard, 1 Den. (N. Y.) 337: "But this rule is not universal; and the exception which will best reconcile the cases, is least liable to abuse, and is so distinctly marked that it can be easily administered, is that adopted in this State (New York), which allows one man to employ another as a subordinate in his business, and agree to pay him out of the profits, if any shall arise, without giving the party employed the rights or subjecting him to the liabilities of a partner."

62. Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 836.

63. *Per* Tindale, C. J., in the leading English case of Fox v. Clifton, 6 Bing. 791, and in which he also says: "By the general rule of law relating to partnerships in trade, each member of it is liable to the debts and engagements of the whole company, contracted in the course of the trade. This is a consequence not confined to the law of this country, but extending generally throughout Europe: and it is founded partly on the desire to favor commerce, that merchants in partnership may obtain more credit in the world, and more especially on the principle that members of trading

b. *Authority of one partner to execute commercial paper in name of firm.*—As a reasonable inference from the principles just enunciated, the general rule may be laid down that it is within the power of each partner in a trading firm to bind the firm by a note or bill made, indorsed, drawn, or accepted by him, provided such power is exercised in the usual course and as a part of the usual routine of the firm business.[64] And even if the articles of agree-

partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership, so that by the contracts of the agent all his principals are bound.

64. **Power of one member to bind firm by note or bill.**— When one of a firm makes a note, or indorses or accepts a bill of exchange in the name of the concern, and apparently in the due course of its business, the act is deemed that of the partnership, especially where the bill or note has passed into the hands of a *bona fide* holder. The person who, acting in good faith, receives a bill or note by indorsement from one of several partners, is not bound to apply to each of the others to ascertain if he assented to such indorsement; in the absence of all fraud on the part of the indorsee, the act will bind the firm. *Per* Lord Ellenborough, in Swan v. Steele, 7 East (Eng.), 210.

In the case of Wilson v. Richards, 28 Minn. 337, a partner who had bought lumber from his firm gave his note to it, and the firm indorsed the note and got it discounted. A renewal of the note by such partner and indorsement by him for the firm was held to be within the scope of his authority, and not using the firm name for his private debt.

Parsons, in his work on Partnership (4th ed.), § 131, says: "It was established, as long ago as the reign of William III, that, 'by the custom of England, when there are two joint traders, and one accepts a bill drawn on them both, for him and partner, it binds both, if it concerns the trade.' The same doctrine has also been always applied both to the making and to the indorsement of bills of exchange and promissory notes, as well in law as in equity."

Story, in his work on Partnership (7th ed.), § 102, says: "Each partner may, in like manner, enter into any contracts or engagements on behalf of the firm in the ordinary trade and business thereof; as, for example, by buying, or selling, or pledging goods, or by paying, or receiving, or borrowing moneys, or by drawing, or negotiating, or indorsing, or accepting bills of exchange and promissory notes, and checks, and other negotiable securities, or by procuring insurance for the firm, or by doing any other acts which are incident or appropriate to such trade or business, according to the common course and usages thereof."

It is no defense to a firm note to show that the holder knew that one member signed it without consent of the other, provided it was really or ostensibly given for firm purposes. Moffit v. Roche, 92 Ind. 96.

In drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. Lord Kenyon, in Harrison v. Jackson, 7 T. R. (Eng.) 207.

Where a member of a firm, who had charge of its financial business, took up firm notes by giving in exchange therefor notes of a third person, indorsed by him in the firm name, which indorsement was without the knowledge of his partner, it was held that the indorsement was within the authority of the partner making it, and that the firm was liable thereon. Steuben County Bank v. Alberger, 101 N. Y. 202.

In commercial partnerships a note executed by one member in the firm name is *prima facie* the obligation of the firm, and if one of the parties seeks to avoid its payment, the burden of proof lies upon him to show that the note was given in a matter not relating to the partnership business, and that, also, with the knowledge of the holder of the note. Lee v. First Nat. Bank, 45 Kan. 9, 25 Pac. 196.

A managing partner in control of the

ment expressly prohibit one partner from binding the firm by means of negotiable instruments, a note executed in violation of such articles will, nevertheless, be valid in the hands of a payee who had no knowledge thereof.[65] But if such payee had knowl-

business of a partnership has authority to execute and deliver notes and renew them as the business of the partnership may require. First Nat. Bank of Mankato v. Grignon (Ida.), 65 Pac. 365. See also Carter v. Steele, 83 Mo. App. 211, in which case it was held that an instruction to a jury to the effect that if a nonsigning partner did not authorize the other partner to sign a note, and did not thereafter ratify it, he was not bound by it, was erroneous, where it appeared that the partnership was engaged in buying and selling, and was formed for that purpose, as such note was equally binding on all the members. But where the partnership was not organized for trading purposes, no member has authority to bind his copartners by a negotiable bill, note, or acceptance in the firm name, even for a debt which the firm owes, unless he has express authority therefor, or unless the giving of such instrument is necessary to carry on the firm business, or is usual in similar partnerships; and the burden is upon the holder to prove such authority, necessity, or usage. Stavnow v. Kenefick, 79 Mo. App. 41. And see also McManus v. Smith, 37 Ore. 222, 61 Pac. 844.

The taker of a promissory note or bill of exchange of a trading partnership may lawfully presume that it is a firm transaction. Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627.

As to application of rule generally, see:

Alabama.— Wagner v. Simmons, 61 Ala. 143; Palmer v. Scott, 68 Ala. 380.

Connecticut.— Pease v. Cole, 53 Conn. 53; Champion v. Mumford, Kirby, 147.

Illinois.— Dow v. Phillips, 24 Ill. 249; Silverman v. Chase, 90 Ill. 37; Walsh v. Lannan, 98 Ill. 27, 38 Am. Rep. 75; Johnson v. Barry, 95 Ill. 483.

Indiana.— Moffit v. Roche, 92 Ind. 96; Leffler v. Rice, 44 Ind. 103.

Iowa.— Sherwood v. Snow, 46 Iowa, 481, 26 Am. Rep. 155.

Kansas.— Deitz v. Regnier, 27 Kan. 94; Lindh v. Crowley, 29 Kan. 756.

Kentucky.— Judge v. Braswell, 13 Bush, 67, 75, 26 Am. Rep. 185.

Louisiana. — Martin v. Muncy, 40 La. Ann. 190, 3 South. 640; Cottam v. Smith, 27 La. Ann. 128.

Maryland.— Porter v. White, 39 Md. 613.

Maine.— Casco Bank v. Hills, 16 Me. 155; Waldo Bank v. Greely, 16 Me. 419.

Massachusetts.— Richardson v. French, 4 Metc. (Mass.) 577; Smith v. Collins, 115 Mass. 388; Stimson v. Whitney, 130 Mass. 591; Shaw v. McGregory, 105 Mass. 96; Fuller v. Percival, 126 Mass. 381.

Michigan.— Carrier v. Cameron, 31 Mich. 473.

Minnesota.— Wilson v. Richards, 28 Minn. 337.

Mississippi.— Faler v. Jordan, 44 Miss. 283; Sylverstein v. Atkinson, 45 Miss. 81.

Missouri.— Holt v. Simmons, 16 Mo. App. 97; Third Nat. Bank v. Snyder, 10 Mo. App. 213; Feurt v. Brown, 23 Mo. App. 97.

Nebraska.— Mace v. Heath, 30 Neb. 620, 46 N. W. 918; Peck v. Tingley, 53 Neb. 171, 73 N. W. 450.

New Hampshire.— Dow v. Moore, 47 N. H. 419; Wagner v. Freschl, 56 N. H. 495.

New York.— Wells v. Miller, 66 N. Y. 255; Steuben County Bank v. Alberger, 101 N. Y. 202; Genesee Bank v. Patchin Bank, 13 N. Y. 309; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994.

Ohio.— Benninger v. Hess, 41 Ohio St. 64.

Pennsylvania.— Hoskisson v. Elliott, 62 Pa. St. 393; Morehead v. Gilmore, 77 Pa. St. 118.

Texas.— Crozier v. Kirker, 4 Tex. 252, 51 Am. Dec. 724; Spencer v. Jones (Tex. Civ. App.), 47 S. W. 29.

West Virginia.— Michael v. Workman, 5 W. Va. 391.

Wisconsin.— Morse v. Hagenah, 68 Wis. 603, 32 N. W. 634.

65. Restrictions in articles.— Bates on Partnership (§ 322) states the foledge of the limitations contained in the articles, he cannot recover against the other partners.[66] Neither can a person in whose favor a bill was drawn recover on such bill against partners in a firm, where it appears that the acceptance is contrary to an agreement between such partners, and by one of them in fraud of the rest, although such drawee was ignorant of the fraud, unless he can show that he gave value for it.[67]

c. *Presumption in favor of validity of partnership paper executed by one partner.*— The presumption is in favor of the validity of a negotiable instrument executed, accepted, or indorsed by one partner in the name of the firm, in the ordinary transaction of the firm's business, and within the scope thereof.[68] Parsons says: "It must be regarded as the general presumption of law, that all paper upon which the signature of the firm has been put by a partner, is the paper and bears the signature of the partnership; and that all transfers of such papers by him are lawful. This, therefore, would call on the partnership to discharge itself, and, therefore, would lay the burden of proof on them."[69] A note given by one of several partners in the name of the firm, is of itself presumptive evidence of the existence of a partnership debt; and

lowing doctrine: "It follows from the fact that the public judges of the scope of a partner's powers from the nature of the business, and the usage of similar occupations, and the acts and habits of the firm, that restrictions contained in the articles or partnership contract limiting the powers that are incident to the occupation or trade do not affect the public, who are not made aware of them." See also Bloom v. Helm, 53 Miss. 21; Benninger v. Hess, 41 Ohio St. 64.

66. **Knowledge of restrictions.**— If restrictions or limitations on the powers of the partners, or of some or one of them, are known to a person, his attempt to deal with a partner in violation thereof would be a fraud upon or an invasion of the rights of the others, and he will be deemed to have treated with such partner in his individual capacity, and cannot look to the partnership, although it received the benefit of such dealing. Bates on Partnership, § 323.

The power of each partner to put the name of the firm to negotiable paper is so universally implied from the very existence of the partnership, that stipulations among the partners that one or more of them shall not have this right will not affect third parties unless made known to them; and this is true whether all the partners be known, or whether some be unknown and dormant. Parsons on Partnership (7th ed.), § 132.

67. Chitty on Bills, 42, 43.

68. Manufacturers & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11; Waldo Bank v. Greely, 16 Me. 419; Barrett v. Swann, 17 Me. 180; Knapp v. McBride, 7 Ala. 19; Miller v. Hines, 15 Ga. 197.

A party may enter into contracts in the ordinary business of the firm, sell or pledge goods, draw, negotiate, indorse or accept bills or other negotiable securities, and do any other acts incident or appropriate to such trade. Hoskinson v. Elliott, 62 Pa. St. 393. See also Hickman v. Kunkle, 27 Mo. 401; Carrier v. Cameron, 31 Mich. 373; Rocky Mt. Bank v. McCaskill, 16 Colo. 408, 26 Pac. 821; Sherwood v. Snow, 46 Iowa. 481; First Nat. Bank v. Morgan, 73 N. Y. 593.

69. Parsons on Partnership, § 134.

if the other partners seek to avoid its payment, the burden of proof lies upon them to show that the note was given in a matter not relating to the partnership business, and that the payee had knowledge of such fact.[70] The fact of good faith between the partners, or that the name was used as a joint undertaking in the regular course of business, is presumed; that is, the note is taken to be what it purports to be, and the burden of proof is on the defendants, the partners, to show the contrary; as, for example, if the credit or name of the firm was used by the signing partner to pay his own debt, or as an accommodation or security for others, or to obtain a loan for himself, or is for a purchase or a purpose outside the scope of the business, this is a matter of defense, and the burden, therefore, up to this point is upon the partners resisting payment to show this state of facts and the payee's knowledge of it.[71] But where commercial paper signed by one member of a firm with the firm's name is taken by a third person in payment of a debt of the member who signs, such paper will not be binding upon the firm, unless the third person is able to show that the firm's name was used with the authority of the firm, or that the signature was afterward adopted or ratified.[72] It is a general doctrine of law relating to partnership that every contract in the name of the firm, in order to bind the firm, must not only be made within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm.[73] Once having proved that the note was not within the scope

70. Whittaker v. Brown, 16 Wend. (N. Y.) 506.

A promissory note made by one of two members of a firm in the firm name is valid against the firm in the hands of a *bona fide* holder for value, although not made in the partnership business, and although the other partners did not consent to and did not know of the making of the note. The note is presumptive evidence that it is valid business paper, and was given for a debt due from the makers to the payee. First Nat. Bank v. Morgan, 73 N. Y. 593.

71. Bates on Partnership, § 362.

72. Parsons on Partnership, § 134. See also Horner v. Wood, 11 Cush. (Mass.) 62.

73. Story on Partnership, § 128.

The English Partnership Act, 1890, § 8, contains the following: "If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement."

It is observed by Mr. Lindley, in his sixth edition of Lindley on Partnership, p. 185, that this section appears to have been intended to settle a doubtful question raised by the *dicta* of Lord Ellenborough, in Galway v. Mather, 10 East (Eng.), 264, and Alderson v. Pope, 1 Campb. (Eng.) 404. In the former case Lord Ellenborough is reported to have said: "It is not essential to a partnership that one part-of the partnership, or that the payee had knowledge that the partner executing it was acting without authority the presumption of validity as to such payee is destroyed. It has been held that where a note has been made or indorsed by a partner, in violation of his duty, if the holder who receives it has been guilty of gross negligence in receiving it, it will not be binding in his hands upon the partnership.[74]

ner should have power to draw bills and notes in the partnership firm to charge the other; they may stipulate between themselves that it shall be done; and if third persons, having notice of this, will take such a security from one of the partners, he shall not sue upon it in breach of the stipulation."

The doctrine in the text is based upon that principle of the law of agency to the effect that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority and that his act is in excess of, or an abuse of the authority actually conferred, then manifestly the principal is not bound, and it is immaterial whether the agent is a general or special one. Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5, 10; Stainer v. Tysen, 3 Hill (N. Y.), 279. See, generally, Knox v. Buffinton, 50 Iowa, 320; Bartlett v. Powell, 90 Ill. 331; Fuller v. Percival, 126 Mass. 381; Wilson v. Richards, 28 Minn. 337; Stegall v. Coney, 49 Miss. 761; Cargill v. Corby, 15 Mo. 425; Yeager v. Wallace, 57 Pa. St. 365; Harting v. Hopkinson, 28 Vt. 108.

Fraud of one partner.— Where one partner makes a negotiable note in the name of the partnership and disposes of it to a third person, who had knowledge that the proceeds thereof were to be used in fraud of the firm, it would not be binding upon the firm. Stegall v. Coney, 49 Miss. 761; Wright v. Brosseau, 73 Ill. 381; Blodgett v. Weed, 119 Mass. 215.

74. **Gross negligence of payee, etc.** —New York Firemen's Ins. Co. v. Bennett, 5 Conn. 574, 580, 13 Am. Dec. 109, in which Homer, C. J., says: "By long-established law originating in the custom of merchants, a contract by one partner, having the appearance of being in behalf of the firm, is considered as being obligatory upon the partnership. Whenever a bill is drawn, accepted, or indorsed, by one of the several partners during the partnership existence, and in behalf of the firm, and it gets into the hands of a *bona fide* holder, the partners are liable, though in truth the partner negotiated the bill without the consent of the partners, and for his own particular benefit. But, in respect of a person who at the time of receiving the bill knew, or had reason to believe, that the partner negotiated it for his individual advantage, and without the concurrence of his associates, the bill is entirely unavailable. The principles are obvious and founded in general convenience. A partner, strictly speaking, has an implied authority, by virtue of the partnership connection, to perform acts and make contracts, only within the limits of the partnership covenants. But, as persons dealing with him cannot always know when he is acting within the sphere allotted him, and when, for his own use, *those who are not guilty of gross negligence* and act *bona fide*, are protected in their contracts, whatever may be the concealed obliquity of his conduct. * * * On the same principle, if the person receiving the bill had knowledge that he was violating his duty to his partners, yet, if the bill came *bona fide* into the hands of a purchaser, he acquires a right to subject the partnership. Public convenience demands the establishment of tnese principles. If a secret fraud of the nature above mentioned were to vitiate a note or bill, it would demand inquiries which could not often be made or satisfied, before either of them could be safely received, and would thus operate as a pernicious impediment to their circulation. But neither justice nor convenience requires that the person who has knowledge of the fraud *or is ignorant through gross negligence* should have a right to subject a partnership by the contract of

d. *Commercial paper of trading and nontrading partnerships.* — It is a fundamental principle of the right of one partner to bind the partnership by contracts in the form of negotiable instruments, that such instruments should be executed within the scope of the partnership business.[75] Where a firm is not engaged in trade, it is a general rule that no implied authority to execute negotiable instruments is possessed by any individual member of such firm.[76] This follows from the fact that a nontrading partnership, as for the purpose of practicing law, would not ordinarily be called upon to secure the payment of its debts by the execution and delivery of negotiable paper,[77] and the binding of the firm by

one of the partners made for his own benefit. If, therefore, at the time he received the instrument from one of the partners, he knew, or had reason to believe, that it was in payment of the partner's debt, or for his own peculiar advantage, aside of the partnership benefit, he acquires no right by this attempted prostitution of the firm. These principles are firmly and universally established on every page of the law merchant with respect to this subject."

75. Lindley on Partnership (6th ed.), p. 142, where it is said: "With respect to partnerships which are not trading partnerships, the question whether one partner has any implied authority to bind his copartners by putting the name of the firm to a negotiable instrument, depends upon the nature of the business of the partnership."

76. Bates on Partnership, § 343. As to what are and what are not trading partnerships, see Bates on Partnership, §§ 327-329, and notes.

77. **Firms of attorneys.**— In the case of Marsh v. Gold, 2 Pick. (Mass.) 285, a promise was made by one of a firm of attorneys to indemnify a sheriff for making an arrest under an execution, and it was held that, while an attorney-at-law cannot bind his copartner by such a promise, the partnership is, nevertheless, a circumstance, from which, with other circumstances, it may be inferred that the attorney intended to act for the firm; and since it appeared that the copartner, subsequently to the commitment, adopted and ratified the promise, the sheriff might maintain an action against them jointly. See also Hedley v. Bainbridge, 3 Q. B. (Eng.) 316; Levy v. Pyne, Car. & Marsh. (Eng.) 453; Harman v. Johnson, 2 E. & B. (Eng.) 61. In the case of Hedley v. Bainbridge, *supra*, Lord Denman, C. J., said: "No doubt a debt was due from the firm; but it does not follow that one partner had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange; for it is in the usual course of mercantile transactions so to do, and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business."

A member of a firm of attorneys has no implied authority to bind his copartners by a post-dated check drawn in the name of the firm. Forster v. Mackreth, 36 L. J. Exch. (Eng.) 94, 16 L. T. 23.

The business of attorneys is not such as to render it either necessary or usual to draw or to indorse bills of exchange, and therefore a member of a firm of attorneys has not, as such, authority to bind his firm, either by drawing or by indorsing them. Garland v. Jacomb, L. R., 8 Exch. (Eng.) 216, 28 L. T. 877, 6 Moak, 289. See also Story on Partnership, § 102*a*; Smith v. Sloan, 37 Wis. 285; Rogers v. Priest, 74 Wis. 538, 43 N. W. 510. (In the latter case it was held that one partner in a firm of attorneys has no implied authority to give a firm note; but the partner giving such a note, and such contracts would not, under common usage, be within the scope of the business for the transaction of which the firm was organized. In the absence of evidence showing usage the power of a single member of a firm to bind the other members, without their express consent, has been denied in the case of mine prospectors,[78] quarry workers,[79] farmers,[80] planters,[81] physicians and surgeons,[82] sugar refiners,[83] hotel-keepers.[84] Partners in the practice of medicine may mutually bind each other for all things properly belonging or

who himself received the money for which it was given, is estopped to deny its validity.)

Borrowing money is no part of the regular business of an attorney and counselor-at-law; from the existence of a partnership in that profession, therefore, no authority results to any member of the firm to obtain loans on the credit of the firm; and, though one may undertake to pledge the firm for a loan obtained by him, unless authority is given by the express terms of the partnership contract, or may be implied from the general habits of the partners,— no other member will be bound by such contract without his express consent. Breckinridge v. Shrieve, 4 Dana (Ky.), 375. See also Friend v. Daryee, 17 Fla. 116; Bays v. Connor, 105 Ind. 415.

78. Brown v. Byers, 16 Mees. & W. (Eng.) 252; Dickinson v. Valpy, 10 B. & C. (Eng.) 128; Brown v. Kidger, 3 H. & N. (Eng.) 853.

79. Thicknesse v. Bromilow, 2 Cr. & J. (Eng.) 425.

80. **Firms engaged in farming.**— In the case of Ulery v. Ginrich, 57 Ill. 531, it was held that while in the case of commercial partnerships each partner may execute promissory notes and other negotiable securities, in the name of the firm, or do any other acts which are incident or appropriate to such trade or business, according to the common course and usages thereof, yet, where the partnership is organized for farming purposes, the parties do not, as incident thereto, possess a power to draw or accept bills, or to draw or indorse notes for the firm. In such cases there must be some proof that an express authority is given for this purpose, or that it is implied by the usages of the business, or the ordinary exigencies and objects thereof. See also Hunt v. Chapin, 6 Lans. (N. Y.) 139; Greenslade v. Dower, 7 B. & C. (Eng.) 635.

81. **Firms engaged as planters.**— In the case of Prince v. Crawford, 50 Miss. 344, the court said: "In a planting partnership, there does not exist the implied power in the several members to borrow money, make promissory notes, draw bills of exchange, and thereby bind the firm. Those who deal with an individual jointly interested with another in the cultivation and production of agricultural products, must, at their peril, inform themselves of the articles of association, and the power communicated to each to bind all. * * * The rule is founded in manifest wisdom and propriety. One man may be entirely willing to engage with another in the cultivation of a farm, on terms defined by articles, who would not risk his associate beyond that special business. A landlord might well agree to unite with one or several in the cultivation of his land, on joint account, on specific terms, who would not confide to him, or those joined with him, the powers implied by law in a more general partnership."

82. Crosthwaite v. Ross, 1 Humph. (Tenn.) 23.

83. Hermanos v. Duvigneaud, 10 La. Ann. 114; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251.

84. Cocke v. Branch Bank of Mobile, 3 Ala. 175. The great changes and developments which have been made during recent years in the conduct of the business of hotel-keepers would seem to have modified the rule as applied to firms engaged in such business. The nature and scope of their business is such as to include such firms in the same class and subject them to the same liabilities as trading firms.

necessary to be used by them in their vocation, such as medicines, surgical instruments, and supplies of a similar nature, but they cannot bind each other by drawing bills, or making, indorsing, and issuing notes for other purposes, or for raising money, that not being an article for which the firm has any direct use.[85] There are other cases to the effect that where a negotiable instrument is executed by one partner for the purchase of supplies necessary for a proper transaction of the business of the partnership, the other partners will be bound thereby; as a note given by a member of a law firm for the purchase of law books,[86] and one given by a member of a firm of lumber sawyers for the purchase of food and groceries for the use of their employees.[87] The courts are not uniformly disposed to favor exceptions similar to those cited. The general doctrine may be summed up in the language of Judge Lyon in the case of Smith v. Sloan:[88] "We gather from all of the authorities that the distinction between a trading and a nontrading partnership, in respect to the power of a partner to bind his copartner by negotiable instruments, is not limited to a mere presumption of such authority in one case, and the absence of such presumption in the other; but we think and must so hold, that one

85. **Firms of physicians.**— In the case of Crosthwaite v. Ross, 1 Humph. (Tenn.) 23, the court said: "Crosthwaite and Hartwell were partners in the practice of physic; this is an occupation, and they may mutually bind each other for all things properly belonging to or necessary to be used by them in this vocation. * * * But the drawing of bills or the making of notes is no more within the scope of their partnership, in fact not so much so, as was the buying of brandy by the parties in the sugar refinery, or the drawing of the bills in the mining company. If the note in this case had been executed for anything for which a firm of physicians had use, as such, the firm would have been bound, though the member who drew it had designed at the time to appropriate it to his own use and did so, unless the person contracted with knew of his intention at the time. But money is not an article for which such a firm has use directly, though it may indirectly, but if it has, it must be raised by the individuals comprising the firm, and not by one member, unless he is authorized by the others so to do independent of any right arising from the partnership."

86. Miller v. Hines, 15 Ga. 197, 201.

87. Johnston v. Dutton, 27 Ala. 245. For similar cases of notes given for supplies, labor, and other matters held binding upon nontrading firms, see Hickman v. Kunkle, 27 Mo. 401 (overruled in 78 Mo. 128); Newell v. Smith, 23 Ga. 170; Pease v. Cole, 53 Conn. 53, 72; Voorhis v. Jones, 29 N. J. L. 270; Brayley v. Hedges, 52 Iowa, 623.

In the case of Graves v. Kellenberger, 51 Ind. 66, it appeared that two persons were partners in the milling business, one owning the mill, and the other furnishing the money for carrying on the business, but having no interest in the mill. The former, without the knowledge, consent, or ratification of the latter, gave the firm note to a third person for a lightning rod put upon the mill. It was held that, the transaction not being within the scope of the ordinary affairs of the partnership, the note was not binding upon the nonassenting member of the firm.

88. 37 Wis. 285.

partner in a nontrading partnership cannot bind his copartner by a bill or note drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships; and that the burden is upon the holder of the note who sues upon it, to prove such authority, necessity, or usage."

e. *Rights of bona fide holder.*— Though a note be made by one of a firm in the firm name, out of the usual course of business, yet if it is signed by them, or, being made payable to them or order, it be indorsed by one of them in the name of the firm, and then discounted or transferred to a *bona fide* holder, all the partners are responsible on the note.[89] As has been said: "If the firm's business is such that the making of any notes is in its scope, a *bona fide* buyer can hold the firm and need not inquire whether the note was issued within the scope of the business or not, or whether it was to pay or secure a separate debt of a partner, or was for the accommodation of a third person, or for a loan to the signing member, or in any other way in fraud of the rights of copartners." [90] But in the hands of the person who receives a note from

89. Gansevoort v. Williams, 14 Wend. (N. Y.) 123. Nelson, J., in speaking in this case of the reason for the rule holding members of a firm liable to *bona fide* holders of the firm's note executed or indorsed by one of them, says: "It may be asked, why should the partners be bound at all when the paper is in fact signed without their authority? This is no doubt against general principles, and involves the injustice of subjecting a person to answer for an act of another to which he never expressly or impliedly assented. The answer is founded upon the law merchant. By entering into the partnership, each reposes confidence in the other, and constitutes him a general agent as to all the partnership concerns; and the inconvenience to commerce, if it were necessary that the actual consent of each partner should be obtained, or that it should be ascertained that the transaction was not for the benefit of the firm in the ordinary transaction of their business, suggested the rule that the act of one, when it has the appearance of being on behalf of the firm, is considered the act of the rest; and whenever a bill is drawn, accepted, or indorsed by one of several partners on behalf of the firm during its continuance, which comes into the hands of a *bona fide* holder, the partners are liable to him, though in truth one partner only negotiated the bill for his own benefit, without the consent of the copartners." See also Rich v. Davis, 4 Cal. 22; Freeman v. Ross, 15 Ga. 252; Wright v. Brosseau, 73 Ill. 381; Waldo Bank v. Lambert, 16 Me. 416; Blodgett v. Weed, 119 Mass. 215; Boyd v. McCann, 10 Md. 118; Central Nat. Bank v. Frye, 148 Mass. 498; Nichols v. Sober, 38 Mich. 678; Bloom v. Helm, 53 Miss. 21; Atlantic State Bank v. Savery, 82 N. Y. 291; Evans v. Wells, 22 Wend. (N. Y.) 324; Stall v. Catskill Bank, 18 Wend. (N. Y.) 466; Morehead v. Gilmore 77 Pa. St. 118, 18 Am. Rep. 435; Sedgwick v. Lewis, 70 Pa. St. 217; Duncan v. Clark, 2 Rich. (S. C.) 587; Roth v. Colvin, 32 Vt. 125.

90. Bates on Partnership, § 352.

the hands of the partner making or indorsing it, with knowledge that it is given or indorsed for his private debt, or in a transaction unconnected with the partnership business, it is not binding on the firm.[91] But if a note is transferred before maturity, and in the usual course of business, the firm becomes liable, on the principle that being negotiable paper, and having been made or indorsed by one who *prima facie* had the authority to do the act, a recovery thereon is not to be defeated, when the action is brought in the name of the holder who has received the same for value, and in good faith.[92] Though this rule is partly founded on public policy, it is supported by justice and good sense; if one of two innocent parties must suffer, the loss should fall upon the one who by his own acts has made it possible for the guilty person to commit the fraud.[93] This doctrine does not protect the holder of a note of a nontrading partnership; the partner signing the note having no

91. Foot v. Sabin, 19 Johns. (N. Y.) 154; Dob v. Halsey, 16 Johns. (N. Y.) 34, 38, in which Spencer, J., said: "This court has decided, in several cases, that where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note, unless they have been previously consulted and consent to the transaction." Citing Livingston v. Hartie, 2 Cai. (N. Y.) 246; Lansing v. Gaine, 2 Johns. (N. Y.) 300; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251.

92. Swan v. Steele, 7 East (Eng.), 210.

Where a note has been indorsed or signed with the firm name by a partner without authority, a *bona fide* holder who has taken it without notice, either from the paper itself, or from evidence *aliunde*, that the indorsement or signing was for accommodation or by way of guaranty or suretyship, may enforce it against the firm. Whaley v. Moody, 2 Humph. (Tenn.) 495; Austin v. Vandermark, 4 Hill (N. Y.), 259; Waldo Bank v. Lambert, 16 Me. 416. If the holder had good reason to believe that the transaction was authorized by the firm, he will be protected. Long v. Carter, 3 Ired. (S. C.) 238. For unless there is something on the face of the paper or in the circumstances to warn the holder that the indorsement or signing was by way of accommodation, guaranty, or suretyship, he has a right to assume that it was in the usual course of partnership business. Adams v. Ruggles, 17 Kan. 237; Blodgett v. Weed, 119 Mass. 215; Wagner v. Freschl, 56 N. H. 495.

In Freeman's Nat. Bank v. Savery, 127 Mass. 75, Law, the maker of the note, made it payable to the firm of C. F. Parker & Co., of which he was a member, and the name of that firm was indorsed thereon by De Merritt, another member of the firm. The name of the firm of John Savery's Sons was without authority indorsed on the note by Law, of which firm he was also a member. The note was discounted at the bank by De Merritt, who was known by the officers of the bank to be a member of the firm of C. F. Parker & Co. It was held that there was no notice to the bank that Savery Sons were accommodation indorsers and sureties. And the court remarked that "a suspicion that there is a defect of title or a knowledge of circumstances which might excite suspicion in the mind of a cautious person, or even gross negligence, not amounting to evidence of fraud or bad faith, will not defeat the title of the purchaser."

93. Edwards on Bills and Notes, p. 103, note; Bates on Partnership, § 352.

apparent authority to bind the firm, the payee has no claim or title that will be binding upon the other members of the partnership; the payee cannot, in such a case, convey a better title than he had, and it is the duty of the purchaser to inquire as to whether the nature of the business transacted by the firm is such as will warrant the issue of commercial paper by them; if such purchaser makes no such inquiry he will be legally presumed to have knowledge of the nature of the partnership, and he cannot recover of the firm.[94]

In determining the question as to who are *bona fide* holders of partnership notes many of the rules applicable to ordinary commercial paper are applicable.[95] As, where the holder had no knowledge of the fact that the partner issuing the instrument had no authority to bind the firm, if such holder could, by the exercise of proper diligence, have ascertained the lack of authority he will not be regarded as a *bona fide* holder.[96] It has been held, however, that a knowledge of circumstances which might excite suspicion in the mind of a cautious person, or even gross negligence, not amounting to evidence of fraud or bad faith, will not defeat the

94. **Holders of paper of nontrading firms.**— A partner in a nontrading partnership has *prima facie* no authority to render his copartners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible. Chalmers on Bills of Exchange (5th ed.), p. 69. See also Pease v. Cole, 53 Conn. 53; Deardorf v. Thacher, 78 Mo. 128, 47 Am. Rep. 95; Levi v. Latham, 15 Neb. 509, 19 N. W. 460, 48 Am. Rep. 361.

In noncommercial partnerships, one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority, or that such is the custom and usage of that particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his copartners with the requisite authority, the distinction being that in commercial partnerships the extent of a partner's power to bind the firm is a question of law, while the power of a partner in a noncommercial firm to bind his copartner is a question of fact. Judge v. Braswell, 13 Bush (Ky.), 69, 26 Am. Rep. 185.

In the case of Hotchkiss v. English, 4 Hun (N. Y.), 369, the defendant E. entered into an agreement with the defendant P., by which P. was to sell the rights to a patent owned by E. It also provided that notes should be taken payable to the order of E. & P., and authorized P. to sign the name, if necessary, of E. & P. in transacting the business or anything incident thereto, and for the purpose of converting such notes into cash or other securities. P., without any consideration, indorsed a note of a third person with the name of E. & P., intending thereby to defraud E. The plaintiff purchased the note for full value, in good faith, and before maturity. E. & P. had never held themselves out as partners, nor did the plaintiff know of the agreement entered into between them at the time of purchasing the note. It was held that the agreement did not authorize P. to indorse the note in E.'s name, and that the latter was not liable thereon.

95. See *post*, chap. IV.

96. See New York Firemen's Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109.

title of a purchaser.[97] The paper may by its form or the manner in which it is signed or indorsed convey information that it was not signed by a partner under a power to bind the firm, as where it is stated that the firm are sureties, or the position of the firm name is such that it shows that it is not in the chain of title; in such cases purchasers cannot be deemed innocent holders.[98]

f. *Signing firm name for accommodation or security.*— It is no part of the business of a partnership to loan its credit as a surety or for the accommodation of others. No authority of that kind arises out of the partnership relation, and the signature of a firm to commercial paper given for such a purpose, made by one of the

97. Freeman's Nat. Bank v. Savery, 127 Mass. 75; Stimson v. Whitney, 130 Mass. 591, 595.

In the case of Nichols v. Sober, 38 Mich. 678, 681, the court said: "The law has always been solicitous to exclude any rules calculated to hinder the free circulation of mercantile paper having legitimate inception, as in this case, and it is settled in this State that a transferee cannot be deprived of his right as a *bona fide* holder in this class of cases except upon evidence sufficient to show his participation in the fraud, or equivalent misconduct of the party who transfers to him." Citing Miller v. Finley, 26 Mich. 249; Tupper v. Kilduff, 26 Mich. 394; Carrier v. Cameron, 31 Mich. 373; Cromwell v. County of Sac, 96 U. S. 51.

98. **When purchasers not deemed bona fide.**— In the leading New York case of Foot v. Sabin, 19 Johns. (N. Y.) 154, a note was signed by Holmes, as principal, and by Wilson, with the name of the firm of "Wilson & Foot, as sureties." The court said: "The principle established is this, that where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partner is not bound, unless he has been previously consulted, and has consented to the transaction; and then the burden of the proof, that the partner who did not sign the note, consented to be bound, is thrown on the creditor. The same principle applies with greater force, when one of the partners becomes security for another person, and attempts to bind his copartners. The creditor is aware that he is pledging the partnership responsibility in a matter no wise connected with the partnership business; and that is a fraud on such of the parties as do not assent expressly that the firm shall be bound." See also Rollins v. Stevens, 31 Me. 454; National Security Bank v. McDonald, 127 Mass. 82; Stall v. Catskill Bank, 18 Wend. (N. Y.) 466, 478; Hendrie v. Berkowitz, 37 Cal. 113.

In the case of National Bank v. Law, 127 Mass. 72, a partner made a note and indorsed it in the firm's name above the name of the payee. The court said: "In the present case the defendant's name being on the back of the note above that of the payee's, it was apparent upon the note itself, read in the light of the statute (Stat. Mass. 1874, chap. 404), which every one was bound to know, that the liability of the partnership was but conditional and secondary, and therefore that, *prima facie* at least, their signature was affixed for the accommodation of the maker."

But in the case of Redlon v. Churchill, 73 Me. 146, it was held that when a member of a firm makes his individual note payable to his own order and indorses thereon his own name and the name of his firm, and receives and appropriates the proceeds thereof to his own use, the firm will be liable therefor, being duly notified, to an indorsee, who in good faith, for an adequate consideration, purchased the same before maturity, ignorant of all the circumstances affecting its validity. The form of the note is not notice that it was given for the maker's accommodation and in fraud of the firm.

members, without the authority or consent of the others, will not bind the firm, and the holder of such paper, who knows or should know the purposes for which it was given, cannot recover of the firm,[99] although the member who so uses the firm's name is liable thereon as though he had signed with his individual name.[1] The legal presumption is against the authority of a partner to bind his partnership for such purposes;[2] but this presumption may be re-

99. *England.*— Crawford v. Stirling, 4 Esp. 207; Duncan v. Lowndes, 3 Campb. 478; Brettel v. Williams, 4 Exch. 623; Hazleham v. Young, 5 Q. B. 833.

Alabama.—Mauldin v. Branch Bank, 2 Ala. 502; Lang v. Waring, 17 Ala. 145; Tallmadge v. Milliken, 119 Ala. 40, 24 South. 843.

California.— Hendrie v. Berkowitz, 37 Cal. 113.

Connecticut.— Firemen's Ins. Co. v. Bennett, 5 Conn. 57, 13 Am. Dec. 109; Mix v. Muzzy, 28 Conn. 186.

Delaware.— Mayberry v. Bainton, 2 Harr. 24.

Georgia.— Wingate v. Atlanta Nat. Bank, 95 Ga. 1, 22 S. E. 37.

Illinois.— Spurck v. Leonard, 9 Ill. App. 174; Marsh v. Thompson Nat. Bank, 2 Ill. App. 217.

Indiana.— Beach v. State Bank, 2 Ind. 488.

Iowa.—Whitmore v. Adams, 17 Iowa, 567; Clark v. Hyman, 55 Iowa, 14.

Kansas.— Silvers v. Fosters, 9 Kan. 56.

Kentucky.— Chenowith v. Chamberlain, 6 B. Mon. 60.

Maine.— Rollins v. Stevens, 31 Me. 454; Darling v. March, 22 Me. 184; Redlon v. Churchill, 73 Me. 146, 40 Am. Rep. 345.

Massachusetts.—Sweetser v. French, 2 Cush. (Mass.) 309, 48 Am. Dec. 666; Butterfield v. Hemsley, 12 Gray (Mass.), 226; National Bank v. Law, 127 Mass. 172.

Michigan.— Heffron v. Hanaford, 40 Mich. 305; Moynahan v. Hanaford, 42 Mich. 329, 3 N. W. 944.

Minnesota.—Selden v. Bank of Commerce, 3 Minn. 166; Osborne v. Stone, 30 Minn. 25, 13 N. W. 922; Osborne v. Thompson, 35 Minn. 229, 28 N. W. 260.

Mississippi.— Silverstein v. Atkinson, 45 Miss. 81; Bloom v. Helm, 53 Miss. 21.

New Hampshire.— Kidder v. Page, 48 N. H. 380.

New York.—Livingston v. Roosevelt, 4 Johns. 251; Foot v. Sabin, 19 Johns. 154; Laverty v. Burr, 1 Wend. 529; Boyd v. Plumb, 7 Wend. 309; Mercein v. Andrus, 10 Wend. 461; Wilson v. Williams, 14 Wend. 146, 28 Am. Dec. 518; Gansevoort v. Williams, 14 Wend. 133; Butler v. Stocking, 8 N. Y. 408; Chemung Canal Bank v. Bradner, 44 N. Y. 680; Atlantic State Bank v. Savery, 82 N. Y. 291.

Ohio.—Smith v. Loring, 2 Ohio, 440; Gano v. Samuel, 14 Ohio, 592.

Pennsylvania.—McQuewans v. Hamlin, 35 Pa. St. 517; Kaiser v. Fendrick, 98 Pa. St. 528; Shaaber v. Bushong, 105 Pa. St. 514.

Tennessee.— Whaley v. Moody, 2 Humphr. 495; Bank of Tennessee v. Safferrans, 3 Humph. 597; Pooley v. Whitmore, 10 Heisk. 629, 27 Am. Rep. 733.

Vermont.— Green v. Burton, 59 Vt. 423.

West Virginia.—Tompkins v. Woodward, 5 W. Va. 216.

Wisconsin.— Avery v. Rowell, 59 Wis. 82, 17 N. W. 875.

1. Myatts v. Bell, 41 Ala. 222, 232; First Nat. Bank v. Carpenter, 34 Iowa, 433; Silvers v. Foster, 9 Kan. 56; Wiggin v. Lewis, 12 Cush. (Mass.) 486; Brown v. Broach, 52 Miss. 536; Ferguson v. Thacher, 79 Mo. 511; Merchant v. Belding, 49 How. Pr. (N. Y.) 344; Stiles v. Meyer, 64 Barb. (N. Y.) 77; Avery v. Rowell, 59 Wis. 82.

2. Parsons on Partnership (4th ed.), § 143.

Presumption against authority to bind firm.— Chancellor Walworth said, in the case of Stall v. Catskill Bank, 18 Wend. (N. Y. 466, 477: "The principle of the cases referred to is this: that it is no part of the ordinary business of a mercantile firm to make or indorse notes as sureties for third perbutted either by direct evidence of authority granted by the other partners, or by usage or frequent recognition of such signature, or such other similar facts as would satisfy a jury that the signature

sons, or to pay the private debts of the individual partners, and of course there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership has no interest, for such purposes. If, therefore, it appears upon the face of the paper that the partnership name is signed as a mere surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary course of partnership business. He must, therefore, at his peril, make the necessary inquiries, and ascertain that there was some special authority for one partner to sign the partnership name as such surety, either express or implied. So, if the drawer of a note carries it to a bank to get it discounted on his own account, or transfers it to a third person with the name of the firm indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank or person who receives it from the drawer, being thus chargeable with the notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm who have been made sureties, without their consent, are not liable to such holder of the note."

The case of Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, established the principle in New York, which has been confirmed in other States, that one partner has not an implied power to bind the firm in any engagements which are unconnected with, and foreign to, the partnership, and that when a third person deals with one of the partners, in a matter not within the scope of the partnership, though that partner himself will be bound, the firm will not be, without affirmative consent of the other members. 1 Am. Lead. Cas. (5th ed.), Vol. I, p. 545. See Walcott v. Canfield, 3 Conn. 194, 198; Cocke v. Bank of Mobile, 3 Ala. 175; Croughton v. Forrest, 17 Mo. 131; Eastman v. Cooper, 15 Pick. (Mass.) 276, 290.

Accommodation paper; proof.— If a party takes negotiable paper made, accepted, or indorsed by one of the partners in the partnership name, knowing that the name of the firm was signed or indorsed only for the accommodation of a third person or firm, or by way of surety for them, the creditor cannot charge the other members of the firm, unless he proves that they have assented to the transaction; and this, whether money is advanced, or other new considerations intervene, at the time, or not, and whether the fact of the paper, being but a security be apparent on the face of the instrument, or implied in the nature of the transaction, or expressly communicated to the creditor. 1 Am. Lead. Cas. (5th ed.) 560 [*455], citing Foot v. Sabin, 19 Johns. (N. Y.) 154; Laverty v. Burr, 1 Wend. (N. Y.) 529; Austin v. Vandermark, 4 Hill (N. Y.), 260; Bank of Vergennes v. Cameron, 7 Barb. (N. Y.) 144, 150; Chenowith v. Chamberlain, 6 B. Mon. (Ky.) 60; Whaley v. Moody, 2 Humph. (Tenn.) 495; Bank of Tennessee v. Saffarrans, 3 Humph. (Tenn.) 597; Hibler v. De Forrest, 6 Ala. 93; Lang v. Waring, 17 Ala. 145. But an accommodation note, in the hands of a *bona fide* holder for value, who took it without notice, express or implied, of the purpose for which it was issued, will be binding upon the firm. Austin v. Vandermark, 4 Hill (N. Y.), 260, 261; Waldo Bank v. Lumbert, 16 Me. 416; Parker v. Burgis, 5 R. I. 280. An authority to draw or indorse for accommodation may sometimes be implied from a general course of dealing, as where it is the usual practice of the firm, or of a partner, to indorse for the accommodation of another house. Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 41, 45; Sweetser v. French, 2 Cush. (Mass.) 310, 315.

Presumption against the authority to issue accommodation paper does not arise where such paper is really issued for the benefit of the firm in whose name it issued, and for the purpose of raising money for them, was for the partnership and by its authority.[3] In speaking of the burden of proof in such cases it has been said: "The holder, suing on a note signed by one of a concern in the firm name, proves

the transaction being in fact an exchange with another firm of bills or acceptances for the benefit of both firms; in such a case it has been held that an accommodation bill made or accepted by one partner in the name of the firm is binding upon the firm. Gano v. Samuel, 14 Ohio, 592.

3. Rebuttal of presumption.—Where one member of a firm was in the general habit of indorsing at bank in the name of the firm, and with the knowledge of the firm for the accommodation of third persons, such general course of dealing would be sufficient evidence of authority from all the members of the firm, and all would be bound. Bank of Tennessee v. Saffarrans, 3 Humph. (Tenn.) 597. See also Darling v. March, 22 Me. 184, 188; Gansevoort v. Williams, 14 Wend. (N. Y.) 133, 139.

In Early v. Reed, 6 Hill (N. Y.), 12, it was held that the fact of one partner having repeatedly indorsed the name of the firm by way of accommodation, without the knowledge and assent of the other partner, was not sufficient evidence to show an authority to sign the name of the firm to such paper as surety, the two contracts being materially different.

Proof in rebuttal of presumption.—In the case of Bank of Monongahela Valley v. Weston, 159 N. Y. 202, 54 N. E. 40, it appeared that the firm of Weston Brothers, composed of Abijah, Orren and William W. Weston, was organized about 1853, and did a large and prosperous lumbering business at Weston's Mills, N. Y., until dissolved in January, 1892. The business was managed by William W. Weston, the other partners residing at a distance from Weston's Mills. William signed checks, indorsed notes, and used the firm name in the transaction of business for the firm, and as early as 1882 he began to use the firm name in indorsing accommodation notes for his friends. He did not simply indorse at rare intervals, but made it a practice, and continued it for ten years, until the dissolution of the firm, and even for a year or two after that. The evidence showed that the other members of the firm knew that William was using the firm name in this manner, although they had no knowledge of the amount involved. They occasionally remonstrated with him, but the practice continued. Letters were written to certain individuals stating that William had no authority to bind the firm by his signature of the firm's name to such paper. But no public notice to that effect was made. Nothing was apparently done by the other members of the firm except to expostulate with William and accept his promises not to do so any more, even after they knew he had systematically violated previous promises to the same effect. The court said: "The testimony, which came mainly from Abijah and Orren Weston, who were interested witnesses, presented a singular state of facts, as the jury might have found. For about ten years two members of the firm of Weston Brothers knew that the third was constantly using the firm name for the accommodation of friends. Having the power to prevent it they took no effective steps to do so, but let the public run the risk of loss through his indorsing in the name of the firm. They repeatedly remonstrated with him in private, and he always promised to stop, but never kept his promise, and they had reason to believe not only that he did not intend to keep it, but that he knew that they did not expect him to keep it. If, upon the first discovery, they had warned him, and he had not only promised, but had also lived up to his promise, no question of fact would have arisen.

"Perhaps there might be more latitude than this without presenting a question of fact, but a systematic and persistent course of conduct, known to the defendants, calls in question their good faith. They had no right to assume that William would do otherwise in the future than he had in the past. If a son should forge his father's name, to his knowledge, for a series of years, mere private expostulation would not save the father from liability. It would be necessary for first the existence of the copartnership and that the signature is in the handwriting of one of the partners; if nothing further is shown the plaintiff is entitled to recover. But if the defendants here take up the case and prove that the note was signed and delivered to the holder as accommodation paper, they establish a defense to the note; and the plaintiff, in order to recover, must then show that the note was executed with the consent of the other members of the concern, or that he is a *bona fide* holder of the note." [4]

Where commercial paper is signed or indorsed by one partner with the firm's name, as a surety or for the accommodation of third persons, without the knowledge of the other partners, but with the knowledge of such third persons that the name of the firm as so used was without authority, it is a fraud upon the firm, and has

him to take some public action for the protection of innocent persons. Weed v. Carpenter, 4 Wend. (N. Y.) 219, and 10 Wend. (N. Y.) 404. If Abijah and Orren Weston, knowing that the public was liable to be injured, preferred that William should keep on indorsing rather than disgrace him by exposure, they must take the consequences, for the sanctity of commercial paper and respect for the rights of third persons will not permit the business community to be imposed upon by their negligence if a jury finds, under all the circumstances, that the negligence was so persistent as to amount to ratification. Failing to stop him, or to give notice of any kind, after repeated offenses, is evidence of acquiescence in and ratification of his course. They cannot rest upon their objections and his promises, under the facts disclosed, without subjecting their good faith to the scrutiny of a jury. Resistance may be so feeble as to be evidence of acquiescence, and persistent acquiescence is evidence of implied consent. They knew that it did no good to talk to him upon the subject, and that outside parties were liable to be victimized by their failure to act. If they had not given him six months' time in the spring of 1891, the plaintiff could not have acquired the paper in suit. If they meant what they said, why did they not act accordingly? Did not mere remonstrance finally become submission? Did they not encourage him to continue? Did not both his course and theirs lead him to understand that if he continued to do in the future what he had repeatedly done in the past, to their knowledge, it would meet with the same treatment only in the future that it had in the past? When they threatened dissolution or exposure if he indorsed without authority again, why did they not keep their word if they were sincere? Why did they have the same stereotyped conversation every few months, for year after year, accept the same promise and condone its violation, with unvarying regularity, if they were acting in good faith? Did they prefer that innocent persons should suffer loss rather than hurt their brother's feelings? Did they keep silent when it was their duty to speak? Were they making evidence to protect themselves if William finally went too far and they concluded to repudiate? Was their story, as a whole, probable, and was the jury bound to believe it? These inquiries, which bear upon the main question of good faith, acquiescence and ratification, were for the consideration of the jury, and we think the trial court erred in not submitting the case to them for consideration. Juries have a right to look between the lines of the evidence and infer what a man's intention was from his conduct, beyond the positive testimony in a case." See also on this question Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080; Citizens' Nat. Bank v. Weston, 162 N. Y. 113, 56 N. E. 494.

4. Edwards on Bills and Notes, p. 105; Citizens' Nat. Bank v. Weston, 162 N. Y. 113, 56 N. E. 494.

been so regarded in the English courts, where they put the defense of the partnership upon the distinct ground of fraud, committed upon it by the signing member and the holder of the paper.[5] In this country the defense, for the most part, is placed upon the ground of a want of authority; and it is enough in the first instance for the firm to show that the instrument was given and received as accommodation paper.[6]

When a note or other negotiable paper is made or indorsed in the name of the firm for the accommodation of other parties, and negotiated or transferred to one who has no knowledge of the circumstances, it is as has been said, no defense for the other party to allege that it was made or indorsed out of the usual course of business, or without authority.[7] But the rule is subject to this qualification: if the firm proves that it was made or indorsed as accommodation paper, the holder will then be required to show that he received it *bona fide*, and for a valuable consideration.[8] Receiving it as security is not, but receiving it in discharge of a precedent debt, is receiving it for value.[9]

g. Negotiable paper in payment of individual debts of partner. —A partner cannot use the credit of his firm for the payment of his individual debts without the consent of the other partners; a note or other commercial paper executed by a partner in the name of the firm for such a purpose will not bind the firm, in the hands of the payee, or any other person, except a *bona fide* indorsee.[10]

5. Hope v. Cust, 1 East (Eng.), 52, 8 Ves. (Eng.) 544; Ridley v. Taylor, 13 East (Eng.), 175; Green v. Deakin, 2 Stark. (Eng.) 347.

6. See cases cited in preceding notes.

7. Bank of Rochester v. Monteath, 1 Den. (N. Y.) 402; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251; Gano v. Samuel, 14 Ohio, 592.

8. Bank of St. Albans v. Gilliland, 23 Wend. (N. Y.) 311.

9. In the case of Bank of St. Albans v. Gilliland, *supra*, it was held that receiving a note for a precedent debt is receiving it for value within the law merchant, if it be taken in satisfaction of such precedent debt and the indebtedness he canceled.

10. **Credit of firm used for private debts.**— If one member of a partnership makes a note in his own name payable to the order of his firm, indorses the name of such firm thereon, and requests a bank to place the proceeds of the note, after discount, to his personal credit on its books, the bank thereby has notice of such facts as puts it on inquiry, and prevents it becoming a *bona fide* holder, in case such indorsement is unauthorized. Brown v. Petit, 178 Pa. St. 17, 35 Atl. 865, 56 Am. St. Rep. 742.

Where a note is given in the name of the firm by one of the partners for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note unless they have been previously consulted and consent to the transaction. Dob v. Halsey, 16 Johns. (N. Y.) 38, 8 Am. Dec. 293; Livingston v. Hartie, 2 Johns. (N. Y.) 300, 3 Am. Dec. 422; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, 4 Am. Dec. 273.

See, generally, on this proposition the following cases:

Such a note is a gross fraud on the copartners.[11] The partnership name affixed to a negotiable instrument is *prima facie* evidence of a partnership obligation, the presumption of law being that an instrument so drawn or indorsed is given for a partnership debt, and the plaintiff is not required to show, in the first instance, that it was given in a partnership transaction.[12] But if it be shown on the defense, that the instrument was given by one partner for his private debt, and was taken by the plaintiff with knowledge of that fact, it is then incumbent on the plaintiff to show that such instrument was given with the previous authority or subsequent consent of the other partners.[13] If this be not shown the plaintiff cannot recover. The consent of the partners need not be express, but may be implied from the facts and circumstances of the case, upon sufficient evidence.[14]

h. *Partnership paper in name of individual members.*— Where the members of a copartnership agree that the business of the concern shall be carried on by and in the name of one of the copartners, such name, for the purposes of the business of the firm, is its partnership name, and by it the several members of the firm are bound.[15] And where a partnership business is so conducted in the

Alabama.— Scott v. Dansby, 12 Ala. 714.

Florida.— Lanier v. McCabe, 2 Fla. 32, 48 Am. Dec. 173.

Georgia.— Freeman v. Ross, 15 Ga. 252.

Illinois.— Wittram v. Van Wormer, 44 Ill. 525.

Indiana.— Taylor v. Hillyer, 3 Blackf. 433, 26 Am. Dec. 430; Hickman v. Reinking, 6 Blackf. 387.

Massachusetts.— Flagg v. Upham, 10 Pick. 147; Adams Bank v. Jones, 16 Pick. 574.

Michigan.— Roberts v. Pepple, 55 Mich. 367.

Mississippi.— Robinson v. Aldrich, 34 Miss. 352.

Missouri.— Ferguson v. Thacher, 79 Mo. 511.

New Hampshire.— Davenport v. Runlett, 3 N. H. 386; Williams v. Gilchrist, 11 N. H. 535.

New York.— Gale v. Miller, 54 N. Y. 536; Rust v. Hauselt, 41 N. Y. Super. Ct. 467; s. c., 76 N. Y. 614; Atlantic State Bank v. Savery, 82 N. Y. 291.

Ohio.— Himelright v. Johnson, 40 Ohio St. 40.

Pennsylvania.—Clay v. Cottrell, 18 Pa. St. 408; Porter v. Gunnison, 2 Grant's Cas. 297; Miller v. Consolidated Bank, 48 Pa. St. 514, 88 Am. Dec. 475.

Texas.—Van Alstyne v. Bertrand, 15 Tex. 177.

11. Bates on Partnership, § 347.

12. Doty v. Bates, 11 Johns. (N. Y.) 544, 546; Vallett v. Parker, 6 Wend. (N. Y.) 615, 619; Waldo Bank v. Greely, 16 Me. 419; Barrett v. Swan, 17 Me. 180; Jones v. Rives, 3 Ala. 11; Knapf v. McBride, 7 Ala. 20, 27; McMuller v. McKenzie, 2 Iowa, 369.

13. Lansing v. Gaine, 2 Johns. (N. Y.) 300, 305; Dob v. Halsey, 16 Johns. (N. Y.) 34, 38; Chazowines v. Edwards, 3 Pick. (Mass.) 5, 10; Davenport v. Runlett, 3 N. H. 386, 391; Lanier v. McCabe, 2 Fla. 32, 48 Am. Dec. 173.

14. Jones v. Booth, 10 Vt. 268; Hamilton v. Summers, 12 B. Mon. (Ky.) 11; Bank of Rochester v. Monteath, 1 Den. (N. Y.) 402, 43 Am. Dec. 681.

15. Where persons are doing business under the partnership name of

name of one of its members, and he indorses notes and bills in his own name the firm is liable thereon, if he procures them to be discounted as the paper of the concern; and his representations, as well as his acts, are binding upon his copartners.[16] Presumptively, however, commercial paper signed in the name of one partner, notwithstanding the fact that it is the name under which the firm is transacting business, is the obligation of the partner who signs, especially where it appears that such partner is also engaged in business for himself.[17] Where a partnership business is done in the name of an individual member of the firm, the burden is upon one, seeking to charge the copartnership upon a note given for money loaned, executed in the name of such individual member,

one of them, all of the partners are liable on notes signed by the partner in whose name the business is transacted. Moore v. Williams (Tex. Civ. App.), 62 S. W. 977. Ordinarily where a note is made in the name of one partner, which is not that of the partnership, it is not binding upon the partnership; but when the obligation was incurred for the benefit of the partnership and upon its credit, the note will be deemed collateral to the original debt, for which the partnership is liable. Fair v. Citizens' State Bank (Kan. App.), 59 Pac. 43.

A member of a firm, who usually attended to the firm's contracts for loans, having agreed to borrow a sum of money of plaintiff for the firm, made his individual note therefor, and indorsed upon it the name of the firm. The money received upon the note was placed by the maker to his private account, but it did not appear that this was known to the plaintiff; it was held that the note bound all the members of the firm. Reed v. Bacon, 175 Mass. 407, 56 N. E. 716.

It is said in Lindley on Partnership (6th ed.), 192: "Again, persons may carry on business in partnership in the name of one of themselves, and if they do they expose themselves to serious liability. *Prima facie* his acceptance will bind them, even although dishonestly given. At the same time if they can show that he gave the bills as his own and not as the bills of the firm, they will not be liable even to a *bona fide* holder for value. This was decided by the Court of Appeal in The Yorkshire Banking Co. v. Beaton, 5 C. P. D. (Eng.) 109, in which the law on this subject will be found exhaustively examined. In that case an accommodation acceptance given by one partner in his own name was held not binding on his dormant partner, as the acceptance was not intended to bind him, and was, in truth, a private transaction, and was not entered in the books of the firm. The fact that the plaintiffs took the bill as the bill of the persons, whoever they were, who might be associated with the partner whose name was on the bill, was held immaterial. The plaintiffs never knew of or gave credit to any one else." See also the following English cases: Nicholson v. Ricketts, 2 E. & E. 497; Miles' Claim, 9 Ch. 635.

16. U. S. Bank v. Binney, 5 Mason (U. S.), 176, 5 Pet. (U. S.) 529; Manufacturers, etc., Bank v. Winship, 5 Pick. (Mass.) 11; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416.

17. Strauss v. Waldo, 25 Ga. 641; Buckner v. Lee, 8 Ga. 285; Mercantile Bank v. Cox, 38 Me. 500; National Bank v. Ingraham, 58 Barb. (N. Y.) 290; Williams v. Gillies, 75 N. Y. 197; U. S. Bank v. Binney, 5 Mason (U. S.), 176. In the last case it was held that, where a firm business has been carried on in the name of one partner, indorsements in the name of such partner will only bind the firm where they were received as its indorsements upon a representation to that effect, and were made in the firm name.

to show that the money was borrowed for or appropriated to the use of the firm, or at least that the name was in fact used to denote the firm.[18]

i. *Commercial paper given by partner for use of firm.*—As a general rule it may be stated that if money is borrowed, or goods bought, or any other contract is made by one partner upon his own exclusive credit, he alone is liable therefor; and the partnership, although the money, property, or other contract is for their proper use and benefit, or is applied thereto, will in no manner be liable therefor.[19] If money is loaned to a firm on the sole credit of one of its members, and a note is given therefor signed by such member, the obligation is that of the individual member and not that of the firm, and the fact that the proceeds thereof are used for the benefit of the firm is not material.[20] If it can be shown that the

18. Gernon v. Hoyt, 90 N. Y. 631. In the case of Manufacturers' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369, the court said: "The rule that a note or draft given in a partnership name shall, in the hands of an innocent holder, be *prima facie* considered as having issued for the partnership account, must be confined to cases where the signatures or other circumstances indicate a partnership concern. In such cases the burden of proof would rest upon the defendants. They might show that the partnership name had been misapplied, and that the holder knew that the paper was made for the account of the individual and without the knowledge of the other partners."

From the facts of this case it appears that the firm business was transacted under the name of "John Winship," who was one of the partners. Winship also carried on business as a merchant on his own account. The jury found that the note in question was an accommodation note made by Winship for the benefit of a third person, and that the plaintiff discounted it on the belief that the other members of the firm of John Winship were liable thereon; and that the note was not discounted to raise money for the business of the firm. The court instructed the jury that the burden of proof was on the plaintiff to show that the note was given for the use of the partnership. The court said as to this point: "If it had been proved that the note had been given for the use of the firm at the manufactory, the partners in that concern would be liable. But the case at bar was left without any evidence upon that point, and the direction of the chief justice seems to have been perfectly correct. that the burden of proof was upon the plaintiffs. The partners are not to be charged, unless upon their contract, and no recovery is to be had against them, so long as it remains doubtful whether they have or have not made the contract declared upon." See also U. S. Bank v. Binney, 5 Mason (U. S.), 176, where transactions by the same firm were under consideration.

19. Story on Partnership, § 134. As stated by Justice Story this rule is based upon the evident fact that "it is entirely competent for one partner to borrow money, or to buy goods, or to enter into contracts on his own sole and exclusive credit with third persons; and, on the other hand, it is equally competent for them to rely on that exclusive credit, and either to refuse to contract with the firm, or to exonerate the firm from all liability upon any contract which would otherwise bind the firm as being for their account and benefit."

20. **Note of one member not binding on firm.**—Where money is loaned upon the promissory note of one member of a copartnership, and upon his individual credit, the fact that the money was applied to the payment of the partnership debts does not constitute

debt or loan for which the individual note or bill of a partner was given was contracted on behalf and for the benefit of the firm, and such note or bill was accepted on the credit of the firm, the note or bill will be deemed as collateral to the original obligation, and the other partners may be held thereon.[21] There has been con-

the lender a creditor of the firm. It is only in cases where the name used, and to which credit is given, is that adopted by the firm, and used to designate the partnership, that it is held liable. National Bank of Salem v. Thomas, 47 N. Y. 15. See also 2 Kent's Comm. 41, 42; Collyer on Partnership, p. 365, § 401; Jacques v. Marquand, 6 Cow. (N. Y.) 197; Le Roy v. Johnson, 2 Pet. (U. S.) 186, 199, 200.

The court in the case of National Bank of Salem v. Thomas, *supra*, in speaking of the leading English case of Emily v. Lye, 15 East, 7, says: "The case from East is to the effect that where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent, who procured the discount of other bills drawn in the partnership name with the same bankers, the latter has no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills, though the proceeds were carried to the partnership account, the money being advanced solely on the security of the parties whose names were on the bills, by way of discount, and not by way of a loan to the partnership, and though the bankers conceived at the time that all the bills were drawn on the partnership account. The authority of this case has never been questioned, and it cannot be distinguished from the case in hand. The question in all cases is whether the name used, and to which credit is given, is that of the firm, or a name which the firm has adopted and used as a name to designate the partnership; and it is only in cases where such name has been used, that the members of the firm have been held." Citing Faith v. Richmond, 11 A. & E. (Eng.) 339; Le Roy v. Johnson, 2 Pet. (U. S.) 186; Beavan v. Lewis, 1 Sim. (Eng.) 376; Wright v. Hooker, 6 Seld. (N. Y.) 51.

To bind a partner by a note drawn by his copartner in his own individual name, it must appear that such individual name was the style of the firm. If the individual name of one partner is accepted as a merger of a partnership liability the other partner is thereby exonerated. Macklin v. Crutcher, 6 Bush (Ky.), 401.

21. Loan to one partner for use of firm.—Where, at the time of obtaining a loan, the reason for the loan, and the uses to which it was to be applied, were distinctly stated to be for a partnership, and it was so understood by both borrower and lender, and the money was, in fact, so used, the inference is a fair one that the advance was on the credit of the partnership. Maffet v. Leuckel, 93 Pa. St. 468. See also Farmers' Bank of Missouri v. Bayliss, 41 Mo. 274, 287; s. c., 35 Mo. 428; Allen v. Coit, 6 Hill (N. Y.), 318; Duval v. Wood, 3 Lans. (N. Y.) 489; Uhler v. Browning, 28 N. J. L. 79; Weaver v. Tapscott, 9 Leigh (Va.), 424: Cunningham v. Smithson, 12 Leigh (Va.), 32; Smith v. Collins, 115 Mass. 388.

In the case of Hoeflinger v. Wells, 47 Wis. 628, 631, 3 N. W. 589, the court said: "If upon the trial the plaintiff can show that the money was borrowed for the firm, that he was at the time advised that it was for the firm, and that he loaned it to the firm and upon its credit,—and, as we construe the allegations of the complaint, they are sufficient to admit such evidence,—then the mere taking of the individual note of the one partner for the money so loaned will not defeat the action. The taking of such note may be evidence tending to show that the money was not loaned to the firm, and that the sole credit was given to the individual partner; but it is not conclusive of that fact; and if the jury or the court should find as a fact that the money was borrowed by and loaned to the firm, and upon its credit, then the taking of the individual note of one siderable discussion as to whether the giving of a note or other security by one partner to a creditor of a firm is an extinguishment of the firm debt. It is no doubt true that where a creditor agrees expressly to take a note or security of a single partner for a partnership debt that such debt is discharged.[22] The mere taking of such note or security from a single partner will not, of itself, discharge the firm's indebtedness; there must be either an agreement to such effect, or facts sufficient to warrant the inference that the parties intended that the partnership debt should be discharged.[23]

j. *Liability of dormant partner.*— As a general rule a secret or dormant partner, whose name does not appear, is bound by notes made or bills drawn, accepted, or indorsed by his copartners in the name of the firm; both when they are negotiated for the benefit and when given under such circumstances as to bind the firm.[24] There are in many States statutes providing for the formation of

member of the firm would not be a payment of such firm debt, unless it was affirmatively shown that such note was taken in payment of the same."

22. **Discharge of firm debt by note of individual partner.**— Story, in his work on Partnership (§ 155), has laid down the following rule: "If a partnership were originally liable to a creditor for a debt, and he should afterward accept a security of one partner, at all events, if it should be a security of a higher or negotiable nature, for the whole debt, as a satisfaction thereof, wholly or in part, it will operate as an extinguishment of the debt of the partnership." See also Arnold v. Camp, 12 Johns. (N. Y.) 409; Bonnell v. Chamberlain, 26 Conn. 487; Rayburn v. Day, 27 Ill. 46; Leach v. Church, 15 Ohio St. 169; Stephen v. Thompson, 28 Vt. 77; Powers v. Still, 29 Pa. St. 65; Nichols v. Cheairs, 4 Sneed (Tenn.), 229.

In the case of Powell v. Charless, 34 Mo. 485, it is said: "Decisions in other States, and in England, appear to have been somewhat conflicting; but the best authority now seems to be that a creditor of a partnership may, by an agreement with a new consideration (and a new note is a sufficient consideration), accept the responsibility of one or more partners in lieu of the firm's liability and thus discharge the other partners." To the same effect is Tyner v. Stoops, 11 Ind. 22.

23. Bonnell v. Chamberlain, 26 Conn. 487; Keerl v. Bridges, 18 Miss. 612. In Muldoon v. Whitlock, 1 Cow. (N. Y.) 290, it was said that: "No principle of law is better settled than that taking a note either from one of several joint debtors, or from a third person for a pre-existing debt, is no payment, unless it be expressly agreed to be taken as payment, and at the risk of the creditor. Nor does the taking a note and giving a receipt for so much cash, in full of the original debt, amount to evidence of such express agreement to take the note in payment." And it is also said in the case of Powell v. Charless, 34 Mo. 485: "Where, upon the execution of a new note, the old one is given up, this fact is entitled to great weight with the jury, but does not raise a legal presumption of an agreement to extinguish it, and discharge the liability of the other partner. Nor, in the absence of an express agreement, is it competent for the court to instruct the jury, that any fact, or facts alone, and unconnected with a consideration of the intention or animus of the parties, will constitute an agreement."

24. Byles on Bills (16th ed.), p. 58; Edwards on Bills and Notes, p. 107.

limited partnerships, and limiting the liability of the dormant or special partners to the amount of capital invested by them in the business of the partnership.[25] These statutes generally provide that such special partner shall take no part in the actual transaction of the business of the concern, and it is probable that the firm would not, therefore, be liable upon notes given or bills drawn, accepted, or indorsed by him.[26] Independent of the statute, an actual, though secret or special partner, is liable on the notes or bills issued by the firm in the same manner and to the same extent as a general partner;[27] but under the statute such liability will only extend to the amount which such secret or special partner has invested in the firm's business.

k. *Effect of dissolution.*— After the dissolution of a partnership, neither partner has any authority to bind his former partners by giving a promissory note in the name of the firm;[28] the act of

25. See New York Partnership Law (L. 1897, chap. 420).

26. The New York Partnership Law (§ 37) provides that: "Except as provided in this section, a special partner may not sign for the partnership, nor bind the same, nor transact any business on account of the partnership, nor be employed for that purpose, as agent, attorney, or otherwise."

27. Edwards on Bills and Notes, p. 109.

28. National Bank v. Norton, 1 Hill (N. Y.), 572; Mitchell v. Ostrom, 2 Hill (N. Y.), 520. And see also the following cases bearing upon this question:

Alabama.— Myatts v. Bell, 41 Ala. 222; Cunningham v. Bragg, 37 Ala. 436.

California.— Curry v. White, 51 Cal. 530.

Georgia.— Bower v. Douglass, 25 Ga. 714; Roberts v. Barrow, 53 Ga. 314.

Illinois.— Easter v. Farmers' Nat. Bank, 57 Ill. 215; Smith v. Vanderburgh, 46 Ill. 34.

Indiana.— Chase v. Kendall, 6 Ind. 304; Conklin v. Ogborn, 7 Ind. 553; Floyd v. Miller, 61 Ind. 224.

Iowa.— Van Valkenburgh v. Bradley, 14 Iowa, 108; Star Wagon Co. v. Swezy, 52 Iowa, 391.

Kentucky.— Turnbow v. Broach, 12 Bush, 455; Montague v. Reakert, 6 Bush, 393.

Louisiana.— Dodd v. Bishop, 30 La. Ann. 1178; Meyer v. Atkins, 29 La. Ann. 586.

Maine.— Perrin v. Keene, 19 Me. 355; Darling v. March, 22 Me. 184; Lumberman's Bank v. Pratt, 51 Me. 563.

Maryland.— Hurst v. Hill, 8 Md. 399.

Massachusetts.— Parker v. Macomber, 18 Pick. 505; Parham Sewing Machine Co. v. Brock, 113 Mass. 194.

Michigan.— Matteson v. Nathanson, 38 Mich. 377; Jenness v. Carleton, 40 Mich. 343; Smith v. Sheldon, 35 Mich. 42.

Minnesota.— Bryant v. Lord, 19 Minn. 396.

Mississippi.— Brown v. Broach, 52 Miss. 536; Maxey v. Strong, 53 Miss. 280.

New York.— Lusk v. Smith, 8 Barb. (N. Y.) 570; Morris v. Perry, 11 Hun, 33; Smith v. Weston, 159 N. Y. 194, 54 N. E. 38; Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40; Second Nat. Bank of Elmira v. Weston, 161 N. Y. 520, 55 N. E. 1080.

Pennsylvania.— McCowin v. Cubbison, 72 Pa. St. 358; Lloyd v. Thomas, 79 Pa. St. 68; Heberton v. Jepherson, 10 Pa. St. 124; Robinson v. Taylor, 4 Pa. St. 242.

Tennessee.— Fowler v. Richardson, 3 Sneed, 508; Hatton v. Stewart, 2 Lea, 233.

dissolution is a revocation of all authority to act for, and contract in the name of, the company. But notwithstanding a valid dissolution of a partnership by an agreement between the parties, still, as between the firm and the world, the authority of the ex-partners to bind each other by bills, notes, or other contracts, within the scope of the former partnership, continues until a sufficient notice of the dissolution be duly given.[29] Such a notice may be either express or implied.

A partnership continues, notwithstanding formal dissolution, as to third persons acting in good faith, who have had neither actual nor constructive notice that the firm has been dissolved.[30] The rule is that as to all persons who have had actual dealings with the firm, actual notice of the dissolution must be given;[31] as to all who have had no dealings with the firm, but knew of its existence, though not of its dissolution, it is necessary that notice should be published by advertisement in a newspaper.[32] And it has been held that mere notice to two prominent commercial agencies is insufficient to bind a creditor who was not a subscriber thereto, because such agencies circulate the information contained in their books and report among their customers only, who are required to treat it in a confidential manner.[33] The dissolution once effected,

Texas.— Seward v. L'Estrange, 36 Tex. 295; White v. Tudor, 24 Tex. 639; Haddock v. Crocheron, 32 Tex. 276.

West Virginia.— Miller v. Miller, 8 W. Va. 542.

Wisconsin.— Lange v. Kennedy, 20 Wis. 279.

29. Byles on Bills (16th ed.), p. 61.

30. Bank of Monongahela Valley v. Weston, 159 N. Y. 202, 211, 54 N. E. 40.

31. Vernon v. Manhattan Co., 17 Wend. (N. Y.) 524; National Bank v. Norton, 1 Hill (N. Y.), 572; Buffalo City Bank v. Howard, 35 N. Y. 500.

32. City Bank of Brooklyn v. McChesny, 20 N. Y. 240; Austin v. Holland, 69 N. Y. 571; National Shoe & Leather Co. v. Herz, 89 N. Y. 629; Elmira Iron & Steel Rolling Mill Co. v. Harris, 124 N. Y. 280, 26 N. E. 541.

33. Bank of Monongahela Valley v. Weston, 159 N. Y. 202, 54 N. E. 40.

Proper notice of dissolution.— Edwards on Bills and Notes (p. 116), says: "The safest course undoubtedly is to send a circular, or in some other way give actual notice of the dissolution to those with whom the house has had dealings. The retiring partner knows or has means of knowing who these persons are; and inasmuch as he has, by transacting business with them, obtained a credit for the firm on the joint responsibility of all its members, justice requires that the severance of the united credit should be made as notorious as was the union itself. This is accomplished by the rule that persons having had particular dealings with the firm should have particular notice of the dissolution or alteration; but that a general notice, by advertisement or otherwise, should be sufficient for those who know the firm only by general reputation. This is no more than saying, that a credit already raised on the faith of the partnership is presumed to be continued on the same footing, until a special notice of a change is given. Consequently, a note given in the partnership name, the next day after a dissolution, binds the former partners, and it is no ground of objection to their liability, that there and a proper notice having been given, while it may be presumed, unless there be an agreement to the contrary, that each partner still has authority to dispose of the partnership property, and to collect, adjust, and pay debts, and give proper acquittances therefor, there is no presumption that a partner may make new promises or engagements in the name of the firm, even though they only change without increasing the prior obligation of the partners.[34] And the fact that upon dissolution one of the partners is deputized to close up the affairs of the partnership, and to sign the firm's name in liquidation does not authorize him to create new obligations or to bind the firm by a bill or note.[35] Such liquidating partner cannot give a negotiable instrument in payment of an existing debt or for money borrowed to pay debts.[36] Nor can he sign commercial paper for the purpose of renewing outstanding paper bearing the firm's name.[37] A different rule exists in Pennsylvania where it is held that the liquidating partner, but no other, may borrow on the credit of the firm for the purpose of paying its debts, and give a note for the purpose, the loan not being regarded

has not been time to give or publish the notice." Citing Bristol v. Sprague, 8 Wend. (N. Y.) 423.

34. Bell v. Morrison, 1 Pet. (U. S.) 351, 367, 374.

35. **Powers of liquidating partner.** —Palmer v. Dodge, 4 Ohio St. 21, 62 Am. Dec. 271. It was held in this case that no power to bind a copartner to new engagements, contracts, or promises can be inferred from an authority given by one partner to the other, to settle, liquidate, and close up the affairs of the partnership. A liquidating partner has no power to extend the time for the payment of obligations of the firm, to increase their amounts, or to obligate the firm to persons to whom it was not bound at the dissolution of the partnership. A surety on a promissory note given by one of the members of a dissolved partnership, in the name of the firm, and to renew a debt of such partnership, must look to such member alone for indemnity, as he cannot hold the other for it.

In the case of Parker v. McComber, 18 Pick. (Mass.) 509, this same question came before the Supreme Court of Massachusetts; there a firm, consisting of three partners, was dissolved; two of them were authorized to collect the debts and settle the business of the partnership. They indorsed a note due to the firm at the time it was dissolved. The question was whether the other partner was liable as indorser of the note. For the plaintiff it was insisted that the authority given to the two other partners raised the inference that it was intended to give them power to negotiate the note then in question. The court said in reply: "We cannot perceive the correctness of this inference. Were it sound, each partner must be presumed to know of all the negotiable bills and drafts due to the firm and unindorsed at the time of the dissolution. He must be presumed to have intended to give authority to negotiate them in the name of the firm."

See also Perrin v. Keene, 19 Me. 357; Darling v. Marsh, 22 Me. 184.

36. Bank of Montreal v. Page, 98 Ill. 109; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Fellows v. Wyman, 33 N. H. 351; Mauney v. Coit, 80 N. C. 300, 30 Am. Rep. 80; Conrad v. Buck, 21 W. Va. 396.

37. Myatts v. Bell, 41 Ala. 222; First Nat. Bank v. Ells, 68 Ga. 192; Van Valkenburg v. Bradley, 14 Iowa, 108; Haddock v. Crocheron, 32 Tex. 276, 5 Am. Rep. 244; Parker v. Cousins, 2 Gratt. (Va.) 372, 44 Am. Dec. 388.

as a new obligation, but a mere change of creditors;[38] and also that such a partner may renew a note,[39] or give a note for an outstanding debt.[40]

But copartners may, by agreement prior to dissolution, or by subsequent ratification or assent, make themselves liable on negotiable paper given by a liquidating partner in the name of the firm; such an assent or ratification may be inferred from circumstances pertaining to the transaction.[41]

After a dissolution of the partnership it has been held that all the partners must join in the transfer of a partnership security, such as a draft or promissory note, in order to vest the title in the transferee.[42]

1. *Notice of dishonor; presentment.*— Where the persons to be notified of the dishonor of a negotiable instrument are partners, notice to one partner is notice to the firm even though there has been a dissolution.[43] Where the persons primarily liable on a negotiable instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.[44]

§ 31. Corporations.

a. *Power to execute commercial paper.*— A corporation having the power to contract for the purchase of articles has also the power to make a negotiable promissory note or accept a bill of exchange in payment of the price agreed upon in such contract.

38. Estate of Davis and Desauque, 5 Whart. (Pa.) 530, 34 Am. Dec. 574; Robinson v. Taylor, 4 Pa. St. 242; Heberton v. Jepherson, 10 Pa. St. 124; McCowin v. Cubbison, 72 Pa. St. 358; Lloyd v. Thomas, 79 Pa. St. 68; Siegfried v. Ludwig, 102 Pa. St. 547.

39. Fulton v. Central Bank of Pittsburgh, 92 Pa. St. 112; Eason v. Mackey, 106 Pa. St. 452.

40. Robinson v. Taylor, 4 Pa. St. 242; Brown v. Clark, 14 Pa. St. 469.

41. Kelly v. Crawford, 5 Wall. (U. S.) 788; Draper v. Bissell, 3 McLean (U. S.), 275; Bower v. Douglass, 25 Ga. 714; Easter v. Farmers' Nat. Bank, 57 Ill. 215; Leonard v. Wilde, 36 Me. 265; Eaton v. Thayer, 10 Mass. 54; Yale v. Eames, 1 Metc. (Mass.) 486; Graves v. Merry, 6 Cow. (N. Y.) 701, 16 Am. Dec. 471.

42. Sandford v. Mickles, 4 Johns. (N. Y.) 224; Geortner v. Trustees of Canajoharie, 2 Barb. (N. Y.) 625.

Edwards, in commenting (Bills and Notes, p. 120) on this ruling, says: "However, it is clear that either of the partners, in the absence of any special agreement as to who shall close up the business, may collect such demands and apply them to the payment of the partnership debts; and it is not easy to state a reason why he may not also sell such securities for money, without indorsing them so as to render the firm liable; since this is only a shorter mode of collecting and realizing such choses in action, belonging to the firm.

43. Neg. Inst. Law (N. Y.), § 170. As to notice of dishonor see *post*, chap. IX, § 108, (*h*).

44. Neg. Inst. Law (N. Y.), § 137. As to presentment for payment see *post*, chap. VIII.

An ability to make a contract implies an ability to make a promissory note.[45] As the court said in Moss v. Averell:[46] "No question is better settled upon authority than that a corporation, not prohibited by law from doing so, and without any express power in its charter for that purpose, may make a negotiable promissory note payable either at a future day, or upon demand when such note is given for any of the legitimate purposes for which the company was incorporated." [47] In England it is held that there is an

45. Parsons, in his work on Notes and Bills (p. 164), says: "In this country, however, it may be regarded as settled, that the power of corporations to become parties to bills of exchange or promissory notes is coextensive with their power to contract debts. Whenever a corporation is authorized to contract a debt, it may draw a bill or give a note in payment of it. Every corporation, therefore, may become a party to bills and notes for some purpose. Thus a mere religious corporation may need fuel for its rooms, and as an economical measure may buy a cargo of coal, and give its note for it; and such a note would undoubtedly be valid in this country."

46. 10 N. Y. 457.

47. The following cases among a great number of others may be cited as upholding this doctrine:

United States.— Vallette v. White Water Val. Canal Co., Fed. Cas. 16,820, 4 McLean, 192; Mahony Mining Co. v. Anglo-Cal. Bank, 104 U. S. 192; Grommes v. Sullivan, 81 Fed. 45.

Alabama.— Kelly v. Alabama & C. R. Co., 58 Ala. 489; Talladega Ins. Co. v. Peacock, 67 Ala. 253.

California.— Temple St. Ry. Co. v. Hellman, 103 Cal. 634, 37 Pac. 530; Smith v. Eureka Flour Mills Co., 6 Cal. 1.

Georgia.—Mitchell v. Rome Ry. Co., 17 Ga. 574; Butts v. Cuthbertson, 6 Ga. 166.

Illinois.— Millard v. St. Francis Xavier Female Academy, 8 Ill. App. 341; Ward v. Johnson, 95 Ill. 215.

Indiana.— Hamilton v. New Castle & D. R. Co., 9 Ind. 359; James v. Rogers, 23 Ind. 451; Lebanon, etc., Gravel Road Co. v. Adair, 85 Ind. 244.

Iowa.— Thompson v. Lambert, 44 Iowa, 239; Des Moines Gas Co. v. West, 50 Iowa, 26.

Kentucky.— Commercial Bank of New Orleans v. Newport Mfg. Co., 1 B. Mon. 13, 35 Am. Dec. 171.

Louisiana.—Brode v. Firemen's Ins. Co., 8 Rob. 244; Brown v. Union Ins. Co., 3 La. Ann. 177.

Maine.— Came v. Brigham, 39 Me. 35.

Maryland.—Heironimus v. Sweeney, 83 Md. 146, 34 Atl. 823.

Massachusetts.— Merchants' Nat. Bank v. Citizens' Gas Light Co., 159 Mass. 505, 34 N. E. 1083; Monument Nat. Bank v. Globe Works, 101 Mass. 58, 3 Am. Rep. 322; Kneeland v. Braintree Street Ry. Co., 167 Mass. 161, 45 N. E. 86; Bird v. Daggett, 97 Mass. 494; Morville v. American Tract Co., 123 Mass. 136, 25 Am. Rep. 40.

Michigan.— People v. River Raisin & L. E. R. Co., 12 Mich. 389, 86 Am. Dec. 64; Odd Fellows v. Sturgis First Nat. Bank, 42 Mich. 461, 4 N. W. 167.

Minnesota.—Sullivan v. Murphy, 23 Minn. 6; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285.

Missouri.— Preston v. Missouri & P. Lead Co., 51 Mo. 43; Hayward v. Graham Book & Stationery Co., 59 Mo. App. 453; Donnell v. Lewis Co. Sav. Bank, 80 Mo. 165; Sparks v. Dispatch Transfer Co., 104 Mo. 531, 24 Am. St. Rep. 351, 15 S. W. 417.

Nebraska — Paxton Cattle Co. v. Arapahoe First Nat. Bank, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852.

New Hampshire.— Richards v. Merrimack, etc., Ry. Co., 44 N. H. 135.

New Jersey.— Lucas v. Pitney, 27 N. J. L. 221; Fifth Ward Sav. Bank v. First Nat. Bank, 48 N. J. L. 513, 7 Atl. 318.

New York.— Barker v. Mechanic Fire Ins. Co., 3 Wend. 94, 20 Am.

implied power of issuing bills and notes possessed by corporations incorporated for the purposes of trade,[48] but this power is not to be implied in the case of a railroad company,[49] a water-works company,[50] a gas company,[51] a mining company,[52] or any other company not primarily incorporated for the purpose of buying and selling.[53] The reason for the American rule is well expressed by Judge Comstock of the New York Court of Appeals in a leading case[54] as follows: "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 the 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 assume that it has no existence."

The power to issue bills and notes may be either expressed in the charter of a corporation, or implied from the nature of its business or the purposes for which it is organized. If the business of the corporation is such that the issuance of bills and notes would not be necessary for its transaction or usual in the case of other persons or corporations transacting the same business, an implied power for such purpose will not be vested in such cor-

Dec. 664; Moss v. Oakley, 2 Hill, 265; Attorney-General v. Life & Fire Ins. Co., 9 Paige, 470; Kelley v. City of Brooklyn, 4 Hill, 263; Partridge v. Badger, 25 Barb. 146; Moss v. Averell, 10 N. Y. 449; Mead v. Keller, 24 Barb. 20; Bank of Genesee v. Patchin, 13 N. Y. 315; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Curtis v. Leavitt, 15 N. Y. 66; Barnes v. Ontario Bank, 19 N. Y. 152.

Ohio.— Strauss v. Eagle Ins. Co., 5 Ohio St. 59; Larwell v. Hanover Sav. Fund Soc., 40 Ohio St. 282.

Pennsylvania.— Wright v. Pipe Line Co., 101 Pa. St. 204; Orr v. Mercer Co. Mut. F. Ins. Co., 114 Pa. St. 387.

Rhode Island.— Clark v. School District No. 7, 3 R. I. 199.

Tennessee.— Union Bank v. Jacob, 6 Humph. 515.

Virginia.—Richmond, F. & P. R. Co. v. Snead, 19 Gratt. (Va.) 354, 100 Am. Dec. 670.

Wisconsin.— Rockwell v. Elkhorn Bank, 13 Wis. 653.

48. Bateman v. Mid-Wales Ry. Co., L. R., 1 C. P. (Eng.) 512; *In re* General Estates Co., 3 Ch. App. (Eng.) 758; *In re* Land Credit Co., 4 Ch. App. (Eng.) 460; Broughton v. Manchester Water-Works Co., 3 B. & Ald. (Eng.) 1, 22 R. R. 278.

49. Bateman v. Mid-Wales Ry. Co., L. R., 1 C. P. (Eng.) 512.

50. Broughton v. Manchester Water-Works Co., 3 B. & Ald. (Eng.) 1, 22 R. R. 278.

51. Bramah v. Roberts, 3 Bing. N. C. (Eng.) 963.

52. Dickinson v. Valpy, 10 Barn. & Cr. (Eng.) 128; Gilbert v. McAnnany, 28 Up. Can. Q. B. 384. See also Burmester v. Norris, 6 Exch. (Eng.) 796.

53. Bult v. Morrell, 12 Ad. & El. (Eng.) 745; Neale v. Turton, 4 Bing. (Eng.) 149; Thompson v. Universal Salvage Co., 1 Exch. (Eng.) 694.

54. Curtis v. Leavitt, 15 N. Y. 66.

poration.[55] Nor will a corporation be possessed by implication with the power to issue bills and notes for a purpose not within the scope of its authorized business.[56] Where there is no power to contract there can be no power to execute a note or accept a bill. It has been held, for instance, that a railroad company had no power to establish a steamboat line to run in connection with its road, but beyond its terminus, and that a note, therefore, given for the price of a steamboat purchased by it, could not be recovered upon.[57]

b. *Defense of ultra vires.*— If a corporation has power to make a note for any purpose, it cannot, as against a *bona fide* holder, set up as a defense that it had no power to make a note for a particular purpose.[58] Where a corporation is prohibited by its

55. Police Jury v. Britton, 15 Wall. (U. S.) 566.

56. Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; National Park Bank v. German-American Mut. Warehousing, etc., Co., 116 N. Y. 281, 22 N. E. 567; People v. River Raisin & L. E. R. Co., 12 Mich. 389, 86 Am. Dec. 64; in the last case a railroad corporation for its own convenience and that of its employees and patrons attempted to issue bills to circulate in the form and similitude of bank notes, and it was held to be an act of banking and unlawful for a corporation formed for the purpose of maintaining a railroad: Strauss v. Eagle Ins. Co., 5 Ohio St. 59; James's Admr. v. Rogers, 23 Ind. 451.

57. Pearce v. Madison & Indianapolis R. Co., 21 How. (U. S.) 441.

Ultra vires acts.— A promissory note, executed in behalf of a manufacturing and trading corporation, by all of its directors, who are also all of its stockholders, in payment for the shares owned by one of such stockholders purchased by and for the benefit of the others, cannot be repudiated by the corporation as an *ultra vires* transaction. Soloman Solar Salt Co. v. Barber, 58 Kan. 419, 49 Pac. 524.

A corporation has the power to issue notes when authorized by its board of directors; and a negotiable note of a railroad corporation, executed by authority of its board of directors, is not *ultra vires*, and the corporation cannot defend against it in the hands of a *bona fide* indorsee for value, before maturity, though it may have a defense against the payee, and the directors may have abused their authority in directing its execution. Kneeland v. Braintree St. R. Co., 167 Mass. 161, 45 N. E. 86.

58. Commercial Bank v. St. Croix Mfg. Co., 23 Me. 280; Genesee Co. Sav. Bank v. Michigan Barge Co., 52 Mich. 438, 18 N. W. 206; Auerbach v. Le Sueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285; National Bank of Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488; Lehigh Valley Coal Co. v. West Depere Agricultural Works, 63 Wis. 45, 22 N. W. 831.

Note apparently valid.— In the case of Willmarth v. Crawford, 10 Wend. (N. Y.) 341, it was held that a note given to an incorporated company for stock is valid in the hands of an indorsee without notice, notwithstanding the statutory provision forbidding directors of such companies to receive a note or other evidence of indebtedness in payment of any stock actually called in and required to be paid, where it is not affirmatively shown that the note was given for stock called in and required to be paid.

A note, on its face valid, issued by a corporation, came to the hands of an innocent holder for value; it was held that the corporation could not defend a suit on the note by showing it to have been given for the purchase of stock of another corporation; such purchase being prohibited by its charter, and the stock having been delivered. Wright v. Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701.

charter or by statute from issuing negotiable paper under any circumstances, such paper is absolutely void, even in the hands of a *bona fide* holder for value; "since what is absolutely void *ab initio* cannot acquire validity by being transferred to a third person any more than a forged instrument could acquire validity in that way." [59] Where a corporation has received the benefit of the proceeds of a bill or note it cannot set up the defense of *ultra vires* in an action on such bill or note.[60]

c. *Power to make or indorse for accommodation.*— While a corporation has, under certain circumstances, the general power to bind itself by promissory notes and contracts of indorsement, made in the general course of its business, it has no power to make or

If a corporation that has no power to make notes or to take them except for certain purposes, takes them for unauthorized purposes and transfers them to an innocent purchaser, he may enforce them, unless the statute expressly declares them void. Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; Cornell v. Hichens, 11 Wis. 353.

59. Thompson on Corporations, § 5737. See Elliott Bank v. Western, etc., R. Co., 2 Lea (Tenn.), 676; Smead v. Indianapolis, etc., R. Co., 11 Ind. 104; Dewey v. Toledo, etc., R. Co., 91 Mich. 351, 51 N. W. 1063.

60. National Park Bank v. German-American Mut. Warehousing & Sec. Co., 116 N. Y. 281, 22 N. E. 567, 5 L. R. A. 673; citing Central Park Bank v. Empire Stone Dressing Co., 26 Barb. (N. Y.) 23; Bridgeport City Bank v. Empire Stone Dressing Co., 30 Barb. (N. Y.) 421; Morford v. Farmers' Bank of Saratoga, 26 Barb. (N. Y.) 568; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Ætna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Davis v. Old Colony R. Co., 131 Mass. 258; Culver v. Reno Real Est. Co., 91 Pa. St. 367; Hall v. Auburn Turnpike Co., 27 Cal. 255, 87 Am. Dec. 75; Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531, 42 Am. St. Rep. 335; Blake v. Domestic Mfg. Co. (N. J. Eq.), 38 Atl. 241.

The treasurer of a manufacturing company has no implied authority to bind the corporation as an accommodation indorser. Usher v. Raymond Skate Co., 163 Mass. 1, 39 N. E. 416.

An accommodation indorsement for the sole benefit of another is *ultra vires*. But if the indorsement is shown to be for the benefit, partially, of the corporation, as for the purpose of enabling its creditor to raise money to be partially used in discharging its debt, the corporation will be estopped, after receiving the money, to deny the validity of its contract. Lyon, Potter & Co. v. First Nat. Bank, 85 Fed. 120, 29 C. C. A. 45. See also Pick v. Ellinger, 66 Ill. App. 570.

The indorsement of negotiable paper for the accommodation of others, by a mercantile corporation, is *ultra vires*, and its powers in this regard are not enlarged by an amendment to its by-laws, made with the unanimous consent of its stockholders, whereby its president is authorized "to sign all notes or bonds, as principal, security, or indorser, which he may deem to the interest of the corporation." Steiner v. Steiner Land & Lumber Co. (Ala.), 26 South. 494.

Previous transactions.— A corporation cannot evade liability on negotiable paper indorsed with their name, by their agent, for the accommodation of a third person, on the ground that the agent had no authority so to indorse it, if it appears that the agent had frequently before indorsed their paper, and procured it to be discounted by the plaintiff, and received the avails, and that the corporation had recognized the validity of such previous transactions. Bank of Auburn v. Putnam, 1 Abb. Dec. 80. But see Webster v. Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.

indorse notes for the accommodation of others.[61] The validity of such paper can also be assailed upon the theory that the officer of a corporation who executes it cannot so bind the corporation in a matter not connected with its business, or in which it has no beneficial interest.[62] But in the hands of a *bona fide* purchaser for value accommodation paper duly executed by the officers of a corporation can be enforced against the corporation.[63] The rules applicable to the rights of *bona fide* holders of accommodation paper, signed by one of a partnership without the consent of his copartners, can also be applied in the case of similar paper executed by the officers of a corporation.[64]

d. *Presumption in favor of validity of corporation paper.*— A corporation having either an express or implied power to issue negotiable paper is presumed to act within the scope of such power and in accordance therewith; and, therefore, a presumption exists in favor of the validity of the corporation's paper issued

61. Hall v. Auburn Turnp. Co., 27 Cal. 255, 87 Am. Dec. 75.

Ratification by stockholders.— In the case of Martin v. Niagara Falls Paper Mfg. Co., 122 N. Y. 165, 25 N. E. 303, it was held that if the officers or trustees of a manufacturing corporation do an unauthorized act, or incur indebtedness, which would not create a corporate liability, the stockholders may subsequently ratify, and so validate the transaction. There is nothing *malum in se* or *malum prohibitum* in the loaning of its credit by such a corporation, and when accommodation paper has been executed in its name by its president, and the transactions have been ratified by the stockholders, and no other rights intervene, they are thus validated and may be enforced against the corporation. But see Webster v. Howe Mach. Co., 54 Conn. 394, 8 Atl. 482.

Loans of credit to persons dealing with corporation.—A corporation dealing in manufactured goods, and needing them for sale, may, as a proper incident to its business, extend financial aid to a manufacturer by advancing him money to enable him to furnish the goods. This may be done by a loan of its own money, or by indorsing the manufacturer's note, looking for reimbursement out of the goods to be manufactured and delivered. Holmes v. Willard, 125 N. Y. 75, 25 N. E. 1083, 11 L. R. A. 170; National Bank of Commerce v. Allen, 90 Fed. 545.

62. National Park Bank v. German-Am. Mut., etc., Co., 116 N. Y. 281, 22 N. E. 367.

63. Bank of Genesee v. Patchin, 13 N. Y. 309; Mechanics, etc., Assn. v. New York, etc., Co., 35 N. Y. 505; Bridgeport Bank v. Empire Stone Dressing Co., 30 Barb. (N. Y.) 421; Madison, etc., R. Co. v. Norwich Savings Soc., 24 Ind. 457; National Bank v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

The provision of a statute that no corporation shall employ its stock, means, assets, or other property for any other purpose than the objects of its creation, does not render the accommodation indorsement of a corporation on a draft invalid, in the hands of a *bona fide* holder for value before maturity. Marshall Nat. Bank v. O'Neal (Tex. Civ. App.), 34 S. W. 344.

Where a corporation and a firm are, for all practical purposes, one and the same, and all transactions that inure to the benefit of one also benefit the other, accommodation paper executed by the corporation for the benefit of such firm is binding on the corporation, whether it has power to execute accommodation paper or not. National Bank of Cynthiana v. Mattingly (Ky.), 33 S. W. 415.

64. See preceding section, p. 118.

pursuant to such power.[65] Paper so issued will then be presumed valid until the contrary is shown, and the burden is upon him who denies the existence of the power, or the right to execute the paper under that power.[66] As said by Mr. Thompson "the presumption manifestly has no scope where the corporation is under a statutory prohibition in respect of issuing, taking, or transferring any paper of the kind in controversy; and it is in this relation that we find, in some of the decisions, the qualification that, although negotiable securities issued by a corporation are to be presumed valid and legal when not prohibited by law, and when they are received in good faith, yet they are invalid when given in violation of law, or for purposes wholly foreign to those for which the corporation was created." [67]

e. *Power of officers to issue commercial paper.*— Treasurers of manufacturing and trading corporations have been held to be clothed by virtue of their office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange; and such negotiable instruments in the hands of innocent purchasers for value, who have taken them without notice of any want of authority on the part of the treasurer, are binding upon the corporation.[68] This proposi-

65. Mitchell v. Rome R. Co., 17 Ga. 574.

66. Lucas v. Pitney, 27 N. J. L. 221; New York Fire Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664; Beers v. Phœnix Glass Co., 14 Barb. (N. Y.) 358, 368.

67. Thompson on Corporations, § 2741.

Validity in hands of bona fide holder.—A negotiable security of a corporation, which, upon its face, appears to have been duly issued by such corporation, and in accordance with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof, without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company and in violation of the laws of the State where it was actually issued. Smith v. Sac County, 78 U. S. 163, 20 L. Ed. 109; Goodman v. Simonds, 61 U. S. 365, 15 L. Ed. 941; Thompson v. Lee County, 70 U. S. 327, 18 L. Ed. 177. And see also Auerbach v. Le Sueur Mill Co., 28 Minn. 296; McIntire v. Preston, 10 Ill. 48; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Mechanics' Banking Assn. v. New York, etc., Co., 35 N. Y. 505; Bissell v. Michigan, S. & N. I. R. Co., 22 N. Y. 258.

68. Drafts accepted by the treasurer of a corporation are presumed to be properly accepted by the corporation, there being no circumstances to indicate fraud or illegality; and in an action by the holder against the corporation as acceptor, the burden of proof is upon the defendant corporation to show that the plaintiff had knowledge that the acceptances were for accommodation, and that he was not a *bona fide* holder for value. Credit Co. v. Howe Machine Co., 54 Conn. 357, 1 Am. St. Rep. 123. See also Walker v. Detroit Transit R. Co., 47 Mich. 338, 11 N. W. 187.

A corporation may be held liable upon promissory notes issued by its treasurer in accordance with a usage as well as upon those expressly authorized. *In re* Great Western Tel. Co., Fed. Cas. 5,740, 5 Biss. 363. And in the case of Foster v. Ohio-Colo. Reduction & Mining Co., 17 Fed. (C. C.) 130, it was held that the authority tion has not remained unchallenged; there are many cases holding that such officers are not to be presumed to possess the power to bind the corporation by its notes executed by them.[69] It has been stated as a general proposition that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper.[70] They have no inherent power to execute negotiable notes in the name of the corporation.[71] The directors of a corporation are in control of its affairs and have the management of its business, subject to the restrictions and limitations imposed upon them by the articles of incorporation, by-laws, and statutes. If the issuing of commercial paper is within the power of the corporation itself, such paper may in all cases be executed by the directors acting as a board.[72]

of an officer of a corporation depends upon the by-laws, or upon the custom of the corporation; if it be the custom of a corporation to permit the treasurer to execute its promissory notes, the corporation will be bound by such note, especially if it received the benefit of the money for which it was issued.

Rule in Massachusetts.— In the case of Merchants' Nat. Bank v. Gas Light Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453, this question was discussed at length and the court said: "Treasurers of business corporations usually have much more extensive powers (than treasurers of towns or cities), and the decisions of this court hold that the treasurer of a manufacturing and trading corporation is clothed by virtue of his office with power to act for the corporation in making, accepting, indorsing, issuing, and negotiating promissory notes and bills of exchange, and that such negotiable paper in the hands of an innocent holder for value, who has taken it without notice of any want of authority on the part of the treasurer, is binding on the corporation, although with reference to the corporation it is accommodation paper." Citing Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282; Bates v. Keith Iron Co., 7 Metc. (Mass.) 224; Lester v. Webb, 1 Allen (Mass.), 34; Bird v. Daggett, 97 Mass. 494; Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Corcoran v. Snow Cattle Co., 151 Mass. 74, 23 N. E. 727.

The rule as laid down in the above case would seem to be confined to a manufacturing or trading corporations. The Supreme Court of Massachusetts has said in the case of Craft v. South Boston R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641, that "whatever may be true of trading corporations there is nothing in the nature of the business of a horse railroad corporation, or of the duties of a treasurer of such a corporation, which implies that the treasurer, by virtue of his office, has authority to borrow money for the company and to give its notes therefor."

69. Atkinson v. St. Croix Mfg. Co., 24 Me. 171; *In re* Millward-Cliff Cracker Co., 161 Pa. St. 157, 28 Atl. 1072; Oak Grove & Sierra Verde Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522.

70. City Electric St. R. Co. v. First Nat. Exch. Bank, 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535. But see Am. Exch. Bank v. Oregon Pottery Co., 55 Fed. 265.

71. McCullough v. Moss, 5 Den. (N. Y.) 567; Life & F. Ins. Co. v. Mechanic F. Ins. Co., 7 Wend. (N. Y.) 31; Hyde v. Larkin, 35 Mo. App. 365; Walworth Co. Bank v. Farmers' Loan & Trust Co., 14 Wis. 325; Titus v. Cairo & F. R. Co., 37 N. J. L. 98; Wait v. Nashua Armory Assn., 66 N. H. 581, 23 Atl. 77, 14 L. R. A. 356; National Bank of Commerce v. Atkinson, 55 Fed. 465.

72. Schimpf v. Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373.

The rules controlling the liability of a corporation for the acts of its officers and agents are similar to those applying to the acts and contracts of the agents of a natural person.[73] "Corporations, like natural persons, are bound, and bound only, by the acts and contracts of their agents, done and made within the scope of their authority." [74] If the business of a corporation is of such a character as to require the issuing of negotiable paper under ordinary circumstances, a party receiving such paper in good faith and without notice, from an agent of the company having authority to issue it under ordinary circumstances, will be protected, although the agent may have acted without authority and in violation of the company's charter in the particular case. But if the execution of negotiable instruments is not required in carrying on the legitimate business of a corporation, except under *extraordinary* circumstances, a party receiving such paper is not entitled to assume the existence of those extraordinary circumstances and must, at his peril, ascertain the real facts.[75] The power to bind the corporation by issuing bills and notes is usually conferred upon its officers by its articles of incorporation, its by-laws, or by resolution duly passed by its board of directors. But the power may be inferred from the circumstances of the particular case, or from an acquiescence of the corporation in the acts of its officers in the regular course of its authorized business for a series of years.[76]

73. See *ante*, § 29, p. 80*ff*.

74. *Per* Justice Campbell in Philadelphia, etc., R. Co. v. Quigley, 21 How. (U. S.) 202, 16 L. Ed. 72.

75. Morawetz on Private Corporations, § 351.

76. **Implied power of officers generally.**— The power to make commercial paper is a necessary incident to the proper transaction of business by a business corporation and the usual executive officers are presumed to act within the scope of their authority, and every intendment will be made to support the paper given, especially when signed by the financial officer of the company. *In re* Great Western Tel. Co., Fed. Cas. No. 5,740, 5 Biss. 363.

When the business of a church corporation is required by its articles to be conducted by its officers as a board of trustees, the president and secretary cannot execute a note binding on the corporation without authority from such board. Cattron v. First Univ. Soc., 46 Iowa, 102.

And in the case of Downer v. Read, 17 Minn. 493, it was held that a transfer by the trustee of a corporation of a promissory note, payable to its order, and the legal title to which is in the corporation, without the direction of its executive committee, who alone have power to authorize such transfer, was binding and vested a good title, even as against the corporation, the beneficial owner, if the indorsee knew nothing of the restriction on the power of the trustee.

Where it is within the power of a corporation to make and indorse notes, and, in the course of its business, notes have been made by a certain officer, an indorsement of a note by him in the name of the corporation may be enforced by a *bona fide* holder, notwithstanding that the holder has never before dealt with the corporation's commercial paper. Bank of At-

Evidence that paper signed by an officer of a corporation was habitually used by it in the ordinary transaction of its business for a long time, although without any express authority conferred by its by-laws, or by any formal resolution of its board of directors, is sufficient to establish a power in such officer to bind the corporation.[77] As was said by Judge Story in the case of Bank of United

tica v. Pottier & Stymus Mfg. Co., 49 Hun, 606, 1 N. Y. Supp. 483.

Authority of the president and general manager of a corporation to issue notes in its name will not be implied from the fact that they had on former occasions executed notes in the corporate name, which they had taken care of, without the knowledge of the board of directors. Elwell v. Puget Sound & C. R. Co., 7 Wash. 487, 35 Pac. 376.

Power of president.—A construction company, whose president had general charge and control of its business, and who had been permitted by the directors to execute and indorse notes and drafts for the purpose of raising money to conduct the corporate business, is liable for the amount of notes executed by the president to pay off debts due from the company. Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608. See also Irwin v. Bailey, Fed. Cas. No. 7,079, 8 Biss. 523. Possessed by a president of an insurance company authorized and required by its by-laws to pay losses. Baker v. Cotter, 45 Me. 236. And also where by-laws give power to corporation to borrow money. People ex rel. Attorney-General v. American Steam Boiler Ins. Co., 3 App. Div. 504, 38 N. Y. Supp. 406.

In the absence of evidence to the contrary it is presumed that the managing president of a corporation engaged in loaning money and buying and selling securities has authority as such to transfer a note payable to such corporation. Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958. And where full control of the business of a corporation is conferred upon the president by a vote of the directors, he may purchase materials and give the note of the corporation therefor. Castle v. Belfast Foundry Co., 72 Me. 167. See also Siebe v. Joshua Hendy Mach. Wks., 86 Cal. 390, 25 Pac. 14; Seeley v. San José Independent M. & L. Co., 59 Cal. 22; McCormick v. Stockton & T. C. R. Co., 130 Cal. 100, 62 Pac. 267.

A general power vested in the president of a corporation to borrow money includes authority to transfer the ordinary securities for the money borrowed. Hatch v. Coddington, 95 U. S. 48, 24 L. Ed. 339. See also Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621.

Power of secretary.— The secretary of a mining company has no implied authority, as incident to his office, to make an assignment of promissory notes belonging to the company. To sustain such an assignment, either an express authority or a ratification must be shown. Blood v. Marcuse, 38 Cal. 590, 99 Am. Dec. 435. See First Nat. Bank v. Hogan, 47 Mo. 472; Thompson v. Des Moines Driving Park (Iowa), 84 N. W. 678.

Power of superintendent or manager.— The sole manager of a corporation intrusted by the officers with its entire conduct may bind it by executing a note in its name, especially where the officers had previously acquiesced in his execution of similar notes. Gane v. Loemo Printing Co., 46 Ill. App. 456. See also Bates v. Keith Iron Co., 7 Metc. (Mass.) 224. The fact that an agent who accepted a draft upon the corporation acted as general agent is insufficient, of itself, to show his authority to accept the draft. Gould v. Norfolk Lead Co., 63 Mass. 338, 57 Am. Dec. 50.

A general agent of a mining company, without being especially authorized so to do, has no authority to make promissory notes in the name of the company. New York Iron Mine Co. v. First Nat. Bank, 39 Mich. 644; Merchants' Nat. Bank v. Detroit Knitting Co., 68 Mich. 620, 36 N. W. 696.

77. **Power exercised in ordinary transaction of business; acquiescence of directors.**— The leading New York case on this proposition is that of Olcott v. Tioga R. Co., 27 N. Y. 546, where

States v. Dandridge:[78] "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 shall be deemed rightful, and the delegated authority will be presumed." And it has been said in a recent Wisconsin case[79] that: "The idea that every time a person deals with an officer of a corporation, or a person assuming to act in its behalf, he must, under all circumstances, take his chances on whether such person or officer has been specially authorized in regard to the matter, has no place in the law of our day. Proof of apparent authority of a corporate officer to contract in its behalf, *prima facie* establishes actual authority so to do, and evidence of want of such authority will not relieve the corporation from the burden of a contract made with reasonable reliance upon such apparent authority, if such corporation is responsible for such appearance." Where the officers of a corporation, who customarily are empowered to act in its behalf, execute a note in its name and cause such execution to be authenticated by the corporate seal, the

it appeared that the president of a railroad corporation was allowed for three years to purchase locomotives, giving bills for them purporting to bind the company, and to run them upon the road which he managed in his discretion. Afterward the directors resumed the charge of the road and of the property thus obtained, and for some years, though they did not settle, did not question, the accounts rendered by the president of these transactions. The court said: "The board of managers, designedly, as it must be presumed, relinquished to the president, for a period of three years (embracing the time of all the transactions involved in the present action), the exclusive management of the business of the corporation; allowing him, at his own discretion, to employ and pay the workmen constructing the road; to purchase and lay the iron constituting the track; to borrow money in large and small sums, giving the notes or bills of the corporation therefor, as well as other securities; to purchase locomotives and cars, and to put them in use on the road, paying for them in like bills and notes; and when, at the end of the three years, the managers again resumed the discharge of their appropriate duties, they took possession of the road and of all the property thus procured by the president, and continued to use such property for several years, without question as to the manner in which it had been obtained. Under such circumstances, the acts of the assumed agent cannot be repudiated. The powers of the agent of a corporation are such as he is allowed by the directors or managers of the corporation to exercise within the limits of the charter; and the silent acquiescence of the directors or managers may be as effectual to clothe the agent with power as an express letter of attorney."

78. 12 Wheat. (U. S.) 64. This doctrine has been confirmed in the following cases: Melledge v. Boston Iron Co., 5 Cush. (Mass.) 175; Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645, 659; Bridenbecker v. Lowell, 32 Barb. (N. Y.) 9; Hoyt v. Thompson's Executors, 19 N. Y. 208, 219.

79. Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115, citing Ford v. Hill, 92 Wis. 188, 66 N. W. 115; McElroy v. Horse Co., 96 Wis. 317, 71 N. W. 652.

presence of such seal on the instrument carries with it *prima facie* proof of the authority of the officers to execute the note.[80]

Where an officer of a corporation issues a note or bill or signs a check in the name of the corporation, for the payment of his individual debt, without any actual or apparent authority, the payee is charged with notice of such officer's incapacity to issue such paper, and cannot recover from the corporation on such bill or note; and in the case of a check, if he accepts it without question and draws the money thereon, he is liable in an action by the corporation to recover the amount paid as money received by him to its use.[81]

f. *Power of officers to transfer commercial paper.*— A corporation having the power to contract must necessarily have the power to receive in conformity with the terms of a contract, or as evidence of indebtedness to it, the negotiable paper of other persons or corporations. The power to receive such paper, in payment or settlement of debts contracted within the general scope of the powers of the corporation, may be regarded as one of the implied or inherent powers of all corporations.[82] The power to receive negotiable paper must necessarily be accompanied by a power to transfer it to a third person, in the ordinary course of its business.[83]

80. Bullen v. Milwaukee Trading Co., 109 Wis. 41, 85 N. W. 115.

81. **Bill, check, or note issued by officer for his own use.**— Rochester, etc., Turnpike Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114.

The president of a corporation, authorized to make corporate notes for a corporate purpose, made a note regular in form and attested by the secretary, payable to the order of a third party, who in fact had no interest therein. Such note was indorsed by the nominal payee to a mercantile firm of which the president was a member; it was thereupon indorsed by the firm, and wrongfully delivered by the president, before maturity, to a stranger having no actual knowledge or notice of a defect in the title, as collateral security for a cash advance of more than its amount, upon a note of the firm and for its benefit. It was held that the fact that the corporate note bears upon its face the signature, as president, of the party dealing with it, is not sufficient to put the transferee upon inquiry so as to render him chargeable with knowledge of all the facts that such inquiry would have revealed, and hence does not deprive him, as matter of law, of the character of a *bona fide* purchaser, so as to prevent him, on becoming absolute owner of the note after its maturity, from enforcing the note against the corporation. Cheever v. Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701. See also Hanover Bank v. American Dock & T. Co., 148 N. Y. 612, 43 N. E. 72; Bank of New York, etc. v. American Dock & T. Co., 143 N. Y. 559, 38 N. E. 713.

82. Mitchell v. Rome R. Co., 17 Ga. 574; Goodrich v. Reynolds, 31 Ill. 390, 83 Am. Dec. 240; Hardy v. Merriweather, 14 Ind. 203; Bank of Missouri v. Price, 1 Mo. 54; Strauss v. Eagle Ins. Co., 5 Ohio St. 59; White's Bank v. Toledo Fire, etc., Co., 12 Ohio St. 601; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; Wayland Univ. v. Boorman, 56 Wis. 657, 14 N. W. 819.

83. Savage v. Walshe, 26 Ala. 619; Frye v. Tucker, 24 Ill. 180; Goodrich

Many of the same rules which control the indorsement and transfer of negotiable paper by agents are also applicable to officers and agents of a corporation.[84] As in the case of the power of a corporate officer to bind the corporation by issuing bills and notes, the power of such officer to transfer negotiable paper received by the corporation may be implied from the circumstances or from the customs of the corporation.[85] A uniform practice by an insurance company, for a period of several months prior to the transfer of the note in suit, of raising money on its notes, upon the indorsement of its president for the purpose of passing title, may be given in evidence to the jury, and will warrant the jury in finding that the indorsement of the note in suit was upon sufficient authority to make it binding upon the company.[86] There can be no general or *prima facie* authority vested in a corporate officer to transfer paper of the corporation by indorsement, any more than such officer can have *prima facie* authority to bind the company by a note or bill issued by him. But a cashier of a bank is, *virtute officii,* generally intrusted with the notes, securities, and other funds of the bank; and is held out to the world by the bank as its general agent in the negotiation, management, and disposal of them. *Prima facie,* therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and in its behalf. No special authority for their purpose is necessary to be proved.[87]

v. Wilder, 31 Ill. 490; Morris v. Cheney, 51 Ill. 451; Carne v. Brigham, 39 Me. 35; Lucas v. Putney, 27 N. J. L. 221; Buckley v. Briggs, 30 Mo. 452; Marvine v. Hymers, 12 N. Y. 223; Bank of Genesee v. Patchin, 19 N. Y. 312; Farmers' Bank v. Maxwell, 32 N. Y. 579; Holbrook v. Basset, 5 Bosw. (N. Y.) 147; Ogden v. Andre, 4 Bosw. (N. Y.) 583.

84. See § 29, *ante*, p. 99.

85. **The rule as applied to agents and officers of a corporation** in the performance of representative acts has been stated by Mr. Thompson (on Corporations, § 4883) as follows: "In general, it may be stated to be well settled that if an officer of a corporation is allowed to exercise a particular authority in respect to the business of a corporation, or a particular branch of it, for a considerable time; in other words, if he is held out to the world as having authority in the premises, the corporation is bound by his acts in the same manner as if the authority were expressly granted." See also Union Gold Mining Co. v. Rocky Mt. Nat. Bank, 2 Colo. 248, 257; Phillips v. Campbell, 43 N. Y. 271; Chicago Bldg. Soc. v. Crowell, 65 Ill. 453; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Dougherty v. Hunter, 54 Pa. St. 380.

If an officer of a corporation openly exercises a power which presupposes a delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful, and the delegated authority will be presumed. Fayles v. National Ins. Co., 49 Mo. 380.

86. Marine Bank of New York v. Clements, 31 N. Y. 33.

87. Wild v. Bank of Passamaquoddy, 3 Mason (U. S.), 505, *per* Story, J.

g. Form of notes and bills by corporations; form of indorsement.— We have already referred to the forms of negotiable instruments executed by agents and others acting in a representative capacity, and have discussed at length the liabilities of agents arising from an irregular signature of such instruments.[88] Many cases have been there cited where the courts have held the officers of corporations liable personally upon the notes and bills of such corporations, because such instruments did not show upon their faces that they were made to bind such corporations.[89] It will

Indorsement by bank cashier.— In the case of Fleckner v. U. S. Bank, 8 Wheat. (U. S.) 338, 360, Story, J., also said: "We are very much inclined to think that the indorsement of notes, like the present, for the use of the bank, falls within the ordinary duties and rights belonging to the cashier of the bank, at least if his office be like that of similar institutions, and his rights and duties are not otherwise restricted. The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, etc., to be used, from time to time, for the ordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes and other property, when payments have been duly made. He draws checks, from time to time, for moneys, wherever the bank has deposits. In short, he is considered the executive officer, through whom and by whom the whole moneyed operations of the bank, in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds as the moneyed capital of the bank to discharge its debts and obligations."

See also the following cases:

United States.— La Fayette Bank v. State Bank, Fed. Cas. No. 7,987, 4 McLean, 208; Lanning v. Lockett, 10 Fed. 451.

Alabama.—Everett v. United States, 6 Port. 166, 30 Am. Dec. 584.

Georgia.— Carey v. Giles, 10 Ga. 9; Collins v. Johnson, 16 Ga. 458.

Illinois.— Owens v. Stapp, 32 Ill. 653.

Indiana.— State Bank v. Wheeler, 21 Ind. 90; Jones v. Hawkins, 17 Ind. 550; Allison v. Hubbell, 17 Ind. 559.

Louisiana.— Merchants' Ins. Co. v. Chauvin, 8 Rob. 49; Haynes v. Beckman, 6 La. Ann. 224.

Maine.— Burnham v. Webster, 19 Me. 232; Farrar v. Gilman, 19 Me. 440, 36 Am. Dec. 766.

Maryland — Ecker v. First Nat. Bank, 59 Md. 291.

Massachusetts.— Hartford Bank v. Barry, 17 Mass. 94.

Michigan.— Kimball v. Cleveland, 4 Mich. 606; Davenport v. Stone, 104 Mich. 521, 62 N. W. 722.

Mississippi.— Harper v. Calhoun, 8 Miss. 203.

Missouri.—Young v. Hudson, 99 Mo. 102, 12 S. W. 632.

New Hampshire.— Elliot v. Abbot, 12 N. H. 549, 37 Am. Dec. 227; Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Preston v. Cutter, 64 N. H. 461, 13 Atl. 874.

New York.— Barrick v. Austin, 21 Barb. 241; Bridenbecker v. Lowell, 32 Barb. 9; City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332.

Ohio.— Sturges v. Bank of Circleville, 11 Ohio St. 153, 78 Am. Dec. 296; Union Nat. Bank v. First Nat. Bank, 45 Ohio St. 236, 13 N. E. 884.

Pennsylvania.—Bissell v. First Nat. Bank, 69 Pa. St. 415.

Tennessee.— Maxwell v. Planters' Bank, 10 Humph. 507.

West Virginia.— Smith v. Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

Wisconsin.—Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107.

88. See § 29, note 17, *ante*, p. 84, as to effect of affixing corporate seal, and notes 23 and 24, *ante*, pp. 87, 88, as to signatures generally.

89. See § 29, *c*, (3), and notes on pp. 86–93, *ante*.

not be necessary, therefore, in this connection to treat of the liabilities of officers and agents of corporations in making, drawing, accepting, and indorsing commercial paper.

The body of a negotiable instrument which seeks to bind a corporation should contain the correct name of the corporation, without the name of the officer or agent who issues it. Such instrument should be signed by writing the name of the corporation, and by adding thereto the name of the officer or agent making the signature. A note in the following form would comply with all the requirements:

$1,000. ALBANY, N. Y., *January* 1, 1903.

The James B. Lyon Company promises to pay to Matthew Bender or order, six months after date, one thousand dollars.

THE JAMES B. LYON COMPANY,
By JAMES B. LYON, *President*.

There are other forms and methods of signing which have been held sufficient to bind the corporation. A note running "I, A. B., treasurer of the D. F. Company, promise," etc., and signed by "A. B., Treasurer of D. F. Company," might be held to be that of the company, and not of the individual.[90] But there is conflict among the authorities as to the sufficiency of such a signature, and there are cases holding that similar signatures only bind the officer, individually, and not the corporation.[91] A signature "A. B., for the D. F. Company," or "A. B., Treasurer, for the D. F. Company," would probably be a proper signature, especially if the promise, as stated in the body of the instrument, was in the name of the company.[92] But questions have sometimes arisen as to the force of such a signature,[93] and it would, therefore, be much better to name the corporation first, and add "by A. B., Treasurer," or president, as the case may be. There are no reported cases where instruments signed in such a manner have been the subject of controversy. By such a signature the intention to bind the company is clear and unequivocal and no question can arise as to its effect.

90. Mann v. Chandler, 9 Mass. 335.

91. Barker v. Mechanic Fire Ins. Co., 3 Wend. (N. Y.) 94; Brockway v. Allen, 17 Wend. (N. Y.) 40; Hills v. Bannister, 8 Cow. (N. Y.) 31; Cleveland v. Stewart, 3 Ga. 283; Dennison v. Austin, 15 Wis. 334; Sturdivant v. Hall, 59 Me. 172.

92. Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160; Rice v. Grove, 22 Pick. (Mass.) 158, 33 Am. Dec. 724; Ballou v. Talbot, 16 Mass. 461, 8 Am. Dec. 146; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101.

93. Rice v. Grove, 22 Pick. (Mass.) 758, 33 Pac. 724.

Similar principles control in the case of the indorsement of negotiable paper by an officer of a corporation, and the same reason exists why such officer should be explicit in designating himself as acting for or in behalf of the corporation.[94] The appropriate manner of indorsement would be "The James B. Lyon Company, by James B. Lyon, President;" in other words, the indorsement should be made in the same manner as a contract would be signed for the corporation. A different rule has arisen in the case of bank cashiers, from the almost universal custom among bankers; where an indorsement is made by a cashier, with the addition of the word "cashier," the bank will be bound thereby, and no personal liability attaches to him in such a case.[95]

§ 32. Municipal corporations.

a. *Power to contract.*— Municipal corporations include generally cities, villages, and towns; as defined by Judge Dillon,[96] they are "institutions designed for the local government of towns and cities; or, more accurately, towns and cities, with their inhabitants, are, for purposes of subordinate local administration, invested with a corporate character." The power to contract inheres in every municipal corporation, limited by the terms of its charter and subjected to the lawful purposes for which such corporation was created. The charter or statute conferring the right of corporate existence upon a municipality, as a rule, determines the conditions and purposes of municipal contracts and regulates the objects thereof and the methods of their execution. In ascertaining whether a municipal corporation can contract it is necessary in every case to examine the statutes under which the affairs of such corporation are governed.[97] For the purpose of exercising the special powers and functions conferred upon a municipality by its charter, even if there is no express power to contract granted

94. See § 29, *e*, note 46, *ante*, p. 99.

95. Bank of Genesee v. Patchin, 19 N. Y. 312; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326.

96. Dillon on Munic. Corp., § 12.

97. Dillon on Munic. Corp., § 443, where it is said: "Where there are express provisions on the subject, they will, of course, measure, as far as they extend, the authority of the corporation. The power to make contracts, and to sue and be sued thereon is usually conferred in general terms in the incorporating act. But where the power is conferred in this manner it is not to be construed as authorizing the making of contracts of all descriptions, but only such as are necessary and usual, fit and proper, to enable the corporation to secure or to carry into effect the purposes for which it was created; and the extent of the power will depend upon the other provisions of the charter prescribing the matters in respect to which the corporation is authorized to act."

therein, such municipality must be deemed to possess an implied or incidental power to make and enforce contracts.[98]

b. *Power to borrow money.*— According to a large number of decided cases, the power to borrow money, if not expressly granted by charter or by statute, does not exist by implication in a municipal corporation.[99] As Judge Dillon says: "In view of the legislative practice to confer, in terms, all powers so important as this, the dangerous nature of this power, by reason of the temptation it holds out to incur needless debt and to make extravagant expenditures, and the facilities it offers for frauds, and the settled and salutary doctrine that such corporations have no powers but such as are expressly conferred, and those which are necessary to effect the objects of the corporation, and those which are incidental to the express grants, the author, where the legislative will is wholly silent, is strongly inclined to deny the existence of a general implied or incidental power to borrow money." [1] This statement of the law has not remained unchallenged. There are many authorities, of well-recognized ability and importance, which maintain that in carrying out the express powers, or in effecting any legitimate municipal object, a municipal corporation possesses the incidental or implied power to borrow money.[2] It seems practically impossible to deduce any

98. 2 Kent's Comm. 224; Galena v. Corwith, 48 Ill. 423; Chaffee v. Granger, 6 Mich. 51; Goodrich v. Detroit, 12 Mich. 279; Montgomery County v. Barber, 45 Ala. 237; Indianapolis v. Indianapolis Gas Co., 66 Ind. 396; Smith v. Stephan, 66 Md. 381.

99. Mayor of Nashville v. Ray, 19 Wall. (U. S.) 468; Police Jury v. Britton, 15 Wall. (U. S.) 566; Wells v. Supervisors, 102 U. S. 625; Minot v. West Roxbury, 112 Mass. 1, 17 Am. Rep. 52; Hawkins v. Carroll County, 50 Miss. 762; Hackettstown v. Swackhamer, 37 N. J. L. 191; Wells v. Salina, 119 N. Y. 280, 23 N. E. 870.

1. Dillon on Munic. Corp., § 117.

2. Austin v. Colony, 51 Iowa, 102, 49 N. W. 1051; Folsom v. School Directors, 91 Ill. 402; Sheffield Township v. Andress, 56 Ind. 157; City of Richmond v. McGirr, 78 Ind. 192; State *ex rel.* City of Norfolk v. Babcock, 22 Neb. 614, 35 N. W. 941; City of Williamsport v. Commonwealth, 84 Pa. St. 487, 24 Am. Rep. 208; Bank of Chillicothe v. Town of Chillicothe, 7 Ohio, pt. 2, p. 31, 30 Am. Dec. 185; Mills v. Gleason, 11 Wis. 470.

Implied power in absence of statute.—That a town, in the absence of statute or constitutional restriction, has power to borrow money for a legal town purpose, and within the limits of that purpose, without special statute authority is now conceded. If money is needed for the performance of a town duty, *and the State has not commanded an assessment of taxes for it*, the majority of the inhabitants of a town, acting in a legal town meeting under a sufficient warrant, can bind all the inhabitants in determining to borrow part, and even all, of the money, rather than raise it at once from taxes. Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141, 143, citing Clark v. School District, 3 R. I. 199; Baileyville v. Lowell, 20 Me. 178; Bank v. Stockton, 72 Me. 522; Brown v. Winterport, 79 Me. 305, 9 Atl. 844.

The Ohio case of Bank of Chillicothe v. Town of Chillicothe, 7 Ohio, pt. 2, p. 31, 30 Am. Dec. 185, is apparently clearly defined and universally applicable rules to control the determination of this question. In any event it would seem to follow from all the cases that there must be some power conferred by legislative enactment to do some act, the consummation of which would necessarily involve the borrowing of money. In the

one of the leading cases in favor of conferring upon municipal corporations the implied power of borrowing money; as stated in the text, it was held in this case that the power to borrow money was an incident to the legislative power granted by the charter. "When an ordinance was passed directing the borrowing of money it would be obligatory on the corporation, and the money procured would constitute a debt which the corporation must discharge. Such law would contravene no principle of the Constitution or laws of the State or the United States, or any principle contained in the charter of incorporation. To effect other objects than those specified in the charter, money could not with propriety be borrowed. But if it should be, that circumstance could hardly be set up as matter of defense against an action brought for the recovery of the money. It would rather be a question between the individual corporation and their officers, or it might be between the State and the corporation."

In the Wisconsin case of Mills v. Gleason, 11 Wis. 491, which is also a leading case on this question, the court said: "It is claimed that the city had no power to make this loan or issue its bonds therefor. There is no special act and no provision in its charter authorizing it, and it was said that without this, the power to borrow money did not exist, and could not be claimed as incidental to the execution of the general powers granted by the charter. The charter does confer the power to purchase fire apparatus, cemetery grounds, etc., to establish markets, and to do many other things, for the execution of which money would be necessary as a means. It would seem, therefore, that in the absence of any restriction, the power to borrow money would pass as an incident to the execution of their general powers, according to the well-settled rule, that corporations may resort to the usual and convenient means of executing the powers granted; for certainly no means is more usual for the execution of such objects than that of borrowing money.

In the Pennsylvania case of Williamsport v. Commonwealth, 84 Pa. St. 495, the court said: "The ground principally relied upon by the learned author (Judge Dillon) and others who take this view of the question (against the implied power) is that the power is a dangerous one. But showing that the power is dangerous does not show that it does not exist. Power is always dangerous. Yet it must be lodged somewhere, or human governments cease to exist. Without it they can neither repel aggression from without, nor suppress disorder from within. A government without the power to execute its own laws would be contemptible, and of no more stability than a rope of sand. To withhold power merely because of its liability to abuse is utopian. It is not too much to say that instances of such abuse can as readily be found in the National and State governments as in the humblest municipality."

In Illinois the courts have held that for the purpose of building schoolhouses, purchasing school sites, or for repairing or improving the same, school directors, by a vote of the people of the district, may borrow money and issue bonds therefor. Folsom v. School District, 91 Ill. 402; School Directors v. Sippy, 54 Ill. 287.

In Nebraska it was held that a statute conferring upon a city of a certain class the right to make regulations to secure the general health of the city, and to construct sewers, and to regulate their use, implied a power to borrow money and issue bonds for the construction of sewers; and the court said: "If it becomes necessary for the health and convenience of the city to drain the principal streets by the use of underground drains or sewers, the power is given to do so, in express terms. To say that this power existed, case of Bank of Chillicothe v. Chillicothe,[3] which is a leading authority in favor of the implied power to borrow money, the charter conferred upon the governing board of a city capacity to purchase, receive, possess, and convey real and personal estate and authorized such board to erect and repair public buildings for the use of said city. The court held that the power to borrow money was an incident to legislative power, and, if it became necessary for the safety and convenience of the town, or to carry into effect the power granted to purchase real or personal property, or to repair or erect public buildings, to borrow money, there could be no objection to passing a law or ordinance to that effect. There would seem to be two distinct classes of cases where this implied power is involved; first, where by some special provision of the charter or a statute, a municipality is authorized to perform an act or execute a contract which carries with it the immediate expenditure of a large sum of money, which cannot conveniently be raised by taxation, and second, where the charter conveys only ordinary municipal powers in general language, with no express provision for incurring indebtedness. In the first class of cases there would seem to be no conflict; all seem to concur in holding that the power to borrow money is necessary for the exercise of the special power. In the second class there is a direct and absolute conflict of authority which seems incapable of reconciliation. Notwithstanding the unsatisfactory condition of the law on this subject, and the manifest difference of opinion as to the effect of withholding or granting this implied power to municipalities, the safer doctrine seems to be in favor of compelling them to resort to taxation in the regular course of the administration of municipal affairs, for the purpose of raising money to accomplish the objects which are within their general governmental powers, rather than to permit a resort to the doubtful expediency of borrowing money. The legislative grant of a general power should never be extended by implication beyond what would be necessarily included in a proper exercise of that power. The right to borrow money should be denied to a municipal corporation except when

but that the means to make it effective had been withheld, would simply destroy the authority and nullify the legislative grant. We are fully aware of the necessity for great care in the exercise of the right to borrow money by municipal corporations, and that the power so to do should not be held to have been conferred except when expressly given, or when absolutely necessary to carry out and make effective the powers expressly conferred. State *ex rel.* City of Norfolk v. Babcock, 22 Neb. 614, 35 N. W. 941.

3. 7 Ohio, pt. 2, p. 31, 30 Am. Dec. 185.

the authority is expressly conferred, or when it is necessary for carrying into effect a power which has been expressly conferred upon such corporation.[4]

4. **When power should not be implied.**—In New York, the case of Wells v. Salina, 119 N. Y. 280, 29 N. E. 870, seems to be a leading case upon the power of towns to borrow money. In that case the court said: "The expenses of the town poor and of the town bridges and of town officers are all town charges, and yet no one will contend that the town could borrow money to meet those charges, instead of meeting them in the mode prescribed by statute, by taxation. It is the policy of the law that the town charges shall be met by annual recurring taxation, and thus extravagance and improvidence are in some degree checked, as those who create town charges, or are the taxpayers when they arise, must bear the burden of taxation to meet them.

It is the policy of the laws that town charges shall be met by annual recurring taxation, and thus extravagance and improvidence are in some degree checked, as those who create town charges or are the taxpayers when they arise, must bear the burdens of taxation to meet them. It is quite easy for the taxpayers of today to create a debt which they are not to feel and which the taxpayers of the future are to discharge. The system of laws relating to towns requires that all bills for moneys expended or materials furnished, or services rendered to the town shall be verified and presented to the board of town auditors and audited by them, and then enforced by warrants of the town board of supervisors against the taxpayers of the town. This whole system would be subverted if towns could borrow money upon credit to meet town charges. Then the money would have to be repaid whether the town had had the benefit thereof or not, and the wise provisions of the statutes to secure economy and safety by the audit of accounts would be entirely frustrated.

The danger of allowing money to be borrowed on the credit of the town for such a town purpose as we have here is quite clearly illustrated in this case. Here the sum of $8,400 was authorized to be borrowed to carry on an ordinary litigation, and $1,500 was paid to the attorney long before the trial of the action, and thereafter $3,000 more was paid to him for his services and expenses, and there remains still a balance due. The bills for services and expenses have never been audited or allowed in the mode prescribed by the statutes. There was no proof upon the trial that the money borrowed was actually needed for the prosecution of that action, or that it was prudently, honestly, or wisely used. But even if we should assume that it had been sufficiently established that the town had the full benefit of the money thus borrowed, that would not authorize the maintenance of this action. If a town could be made liable for money borrowed simply because it had been applied for town purposes, then the entire system for the audit and allowance of town charges would be overturned."

In the case of Ketchum v. City of Buffalo, 14 N. Y. 366, the court said: "It is true the power to contract to pay A. $10,000 at the end of a year for certain work, and the power to borrow $10,000 of B. upon credit at a year for the purpose of paying A. for doing the work might seem at first view to be substantially identical. The amount is the same, and the time of payment the same; the credit only is different. A little examination, however, will show that there is a very material difference between the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt cannot be diverted to any illegitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It may be borrowed to build a market and appropriated to build a theater, and yet the corporation

c. *Power to issue negotiable instruments.*— The power to borrow money does not necessarily carry with it the power to issue nego-

would be responsible for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the power and expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. * * * No one can fail to see that to concede to corporations the power to borrow money for any purpose would be entirely subversive of the principle which would limit their operations to legitimate objects." See also Starin v. Town of Genoa, 23 N. Y. 439; Parker v. Board of Supervisors, Saratoga County, 106 N. Y. 392, 13 N. E. 308; Birge v. Berlin Iron Bridge Co., 133 N. Y. 477, 487, 31 N. E. 609.

The rule in New Jersey as laid down in the case of Hackettstown v. Swackhammer, 37 N. J. L. 191, is the same: The court in that case said:

"I am at a loss to perceive how it can be inferred that a power to borrow money is an appendage to the usual franchise given to municipal corporations. Such a right cannot, in any reasonable sense, be said to be necessary within the meaning of that term as already defined. Under ordinary circumstances it is not certainly indispensable, as common experience demonstrates. In the great majority of instances the municipal affairs are, with ease and completeness, transacted without it. * * * My remarks are to be restricted to that class of cases where charters are granted containing nothing more than the usual franchises incident to municipal corporations, and under such conditions it seems clear to me that the power to borrow money is not to be deduced. I have already said that it does not appear to be a necessary incident to the powers granted, for such powers can be readily and efficiently executed in its absence. It would be to fly in the face of all experience to claim that the ordinary municipal operations cannot be efficiently carried on, except with the assistance of borrowed capital. Without any help of this kind, it is well known that our towns and cities have long been, and are now being improved and governed. For the attainment of these ends it has not generally been found necessary to resort to loans of money. The supplies derived annually from taxation have been found amply sufficient for these purposes; consequently I am unable to perceive any necessity to borrow money under these conditions, from which the gift of such power to borrow is to be implied. It undoubtedly is clear that if, as has been asserted, the ends of the municipal charter can be conveniently reached, without a resort to the device of raising moneys by loan, there is not the least legal basis for a claim of the power to obtain funds in that way. Granted the fact that the charter can be executed with reasonable ease and with completeness, the conclusion is inevitable that the power in question cannot be called into existence by intendment, and as I claim the fact to exist I must, of necessity, reject the right of implication in question."

United States Supreme Court.— The case of The Mayor v. Ray, 19 Wall. 468, is a leading case in the United States Supreme Court on this question. The court was divided; Justice Bradley wrote the prevailing opinion, concurred in by Justices Miller, Davis, and Field, and Justice Hunt concurred in the judgment, although he expressly differed from his associates upon the question of the implied power of municipal corporations to borrow money. Mr. Justice Bradley used the following language: "A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local government institution, it exists for the benefit of the people within its corporate limits. The legislation invests it with such powers as it deems adequate to the ends to be accomplished.

tiable instruments.[5] A municipal corporation may be empowered to incur indebtedness, and to borrow money, but, according to

The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred, although it is not unusual to affix limits for its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit which arises from the loan; its burden is not felt until afterward. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."

Opinion of Judge Dillon.— Judge Dillon, in his able treatise on Municipal Corporations (§ 125), has summarized his views on the power of municipal corporations to borrow money in the following language: "(1) The power to borrow money as a means of raising a fund to make future local improvements, or to carry on the ordinary operations of the municipality, cannot be implied from the mere authority to make such improvements or from the usual grants of municipal power. These contemplate that the expense of the execution of the ordinary municipal powers shall be met by the revenues derived year by year from taxation. (2) It does not follow because banking, trading, and other private corporations organized for pecuniary profit are held in this country to possess the incidental power to borrow money, and to issue commercial paper having all the qualities attributed to such paper by the law merchant, that a like power is inherently possessed by public and municipal corporations. The analogy is false and delusive. The purposes of the two classes of corporations, the powers of their officers, and the means of making provisions for meeting their liabilities are all essentially different. The nature of the usual duties devolved by law upon municipalities does not make it necessary to imply the existence of a general power to borrow money and to issue commercial paper. The consequences of recognizing such power in the extravagance it will stimulate, in the funds it will engender, and in the onerous indebtedness it will inevitably produce are alarming to contemplate. The history of the express power given to municipalities to aid railways by borrowing money and issuing commercial obligations is full of warning and instruction." See also the remainder of this summarized conclusion of Judge Dillon on page 156.

5. **Power to borrow does not include power to issue negotiable instruments.** — In the case of Gause v. Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276, Judge Dillon said: "It is a *non-sequitur*, as applied to municipal and public corporations, to affirm that this power to create debts implies the power to give a negotiable bill, bond, or note therefor, which shall be invested with all the incidents of negotiability. Such an implied power is denied in England even as to private corporations organized for pecuniary profit (other than banking or trading corporations), and this demonstrates that the alleged implication of such a power in municipal corporations is neither logical nor legally sound. But if it be conceded that as respects private corporations the American doctrine is otherwise, and that it is rightly so, still it does not follow that the same rule does apply, or ought to apply, to municipal corporations. They are not created for trading, commer-

many authorities, the power is not to be extended by implication to the power of issuing negotiable instruments. These authorities contend that the power of issuing such instruments must be expressly conferred, or, at least, that it cannot be implied from the power to create indebtedness or to borrow money.[6] There is here also a decided conflict of authority. The cases are numerous and emphatic to the effect that a municipal corporation, having the

cial, or business purposes. Private corporations are more vigilant of their interests than it is possible for municipal corporations to be. The latter are in their nature governmental agencies, having in general but one resource with which to meet their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. The frauds such a doctrine will enable unscrupulous officers successfully to practice ought to weigh with decisive force against its unnecessary judicial entertainment." See also Merrill v. Monticello, 138 U. S. 682, 11 Sup. Ct. 445; Francis v. Howard County, 50 Fed. 56; Bogart v. La Motte Township, 79 Mich. 298, 44 N. W. 613.

6. **Power to issue negotiable instruments to be expressly conferred.**— Wells v. Supervisors, 102 U. S. 625; Mayor v. Ray, 19 Wall. (U. S.) 468; Katzenberger v. Aberdeen, 121 U. S. 172, 7 Sup. Ct. 947, 30 L. Ed. 911; Minot v. West Roxbury, 112 Mass. 1, 17 Am. Rep. 32; Hawkins v. Carroll County, 50 Miss. 762; Hill v. Memphis, 134 U. S. 198, 10 Sup. Ct. 502, 33 L. Ed. 887; Benham v. German-Am. Bank, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; Hackettstown v. Swackhammer, 37 N. J. L. 191; Starin v. Genoa, 23 N. Y. 439; Wells v. Salina, 119 N. Y. 280, 23 N. E. 870.

In the case of Mayor v. Ray, *supra*, Justice Bradley said: "Much less can any precedent be found (except of modern date and in this country) for the issue, by local civil authorities, of promissory notes, bills of exchange, and other commercial paper * * * if city and town officials should have the power thus to bind their constituencies, it is easy to see what abuses might, and probably would, ensue. We know from experience what abuses have been practiced where the power has been conferred. Fraudulent issues, peculations, and embezzlements, and the accumulation of vast amounts of indebtedness, without any corresponding public benefit, have been rendered easy and secure from merited punishment. The purpose and object of a municipal corporation do not ordinarily require the exercise of any such power. They are not trading corporations and ought not to become such. They are invested with public trusts of a governmental and administrative character; they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order, and general well-being of the community as a political society and district; and invested with power by taxation to raise the revenues necessary for those purposes. The idea that they have the incidental power to issue an unlimited amount of obligations of such a character as to be irretrievably binding on the people, without a shadow of consideration in return, is the growth of a modern misconception of their true object and character. If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the Legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. It is too dangerous a power to be exercised by all municipal bodies indiscriminately managed as they are by persons whose individual responsibility is not at stake." See also Wall v. County of Monroe, 103 U. S. 78; Clark v. Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; Newgass v. New Orleans, 42 La. Ann. 163, 21 Am. St. Rep. 368, 7 South. 565; Milan Taxpayers v. Tenn., etc., R. Co., 11 Lea (Tenn.), 329; Colburn v. Chattanooga R. Co., 94 Tenn. 43, 28 S. W. 298.

power to contract an indebtedness, may also, in connection therewith, exercise the power of issuing any form of an evidence of such indebtedness, whether negotiable or nonnegotiable.[7] The Supreme Court of the United States has repeatedly declared that such corporations have no power to make and alter commercial paper of any kind unless such power is expressly conferred by law or is clearly implied from some other power expressly given, which cannot be fairly exercised without it.[8]

Where a municipal corporation has no express power to make an expenditure for a certain purpose, it may, as a necessary incident to that power, make a contract for the accomplishment of that purpose, and thereby incur an indebtedness, for which proper vouchers may be issued. But there is a marked legal distinction between the power to give a note to the lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale in open market a bond as commercial security, with immunity in the hands of a *bona fide* holder for value from equitable defenses.[9] Ordinary warrants and orders, negotiable in form, may be made by the proper officers of a municipality upon other officers having municipal funds under their control to be disbursed by them as provided by law. In

7. Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557; Rushville, etc., Co. v. Rushville, 121 Ind. 206, 23 N. E. 72, 16 Am. St. Rep. 388; Williamsport v. Commonwealth, 48 Pa. St. 487, 24 Am. Rep. 208.

In Illinois the decisions upon this subject are much modified, if not overruled, by a more recent adjudication, affirming in substance that the power to issue negotiable instruments cannot be exercised by a municipality unless expressly granted "or necessarily implied in order to carry into effect a general power." Harden County v. McFarlan, 82 Ill. 138, 141.

8. **Power to be clearly implied.**— Benham v. German-American Bank, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390; Wells v. Supervisors, 102 U. S. 625, 26 L. Ed. 122; Ogden v. County of Daviess, 102 U. S. 634, 26 L. Ed. 263; Claiborne County v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470. In this last case the court said: "Our opinion is that mere political bodies, constituted, as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make and alter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it." See also Concord v. Robinson, 121 U. S. 165, 7 Sup. Ct. 937, 30 L. Ed. 911; Kelley v. Milan, 127 U. S. 139, 8 Sup. Ct. 1101, 32 L. Ed. 77; Hill v. Memphis, 134 U. S. 198, 10 Sup. Ct. 502, 33 L. Ed. 887; Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069; Atchison Board of Education v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, 37 L. Ed. 573; Ashuelot Nat. Bank of Keene v. School District, 5 C. C. A. 468, 56 Fed. 197; Lehman v. City of San Diego, 83 Fed. 669, 27 C. C. A. 668.

9. Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. 441, 34 L. Ed. 1069; Claiborne County v. Brooks, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470.

many States such warrants or orders may be transferred by indorsement or by delivery, and the holder may sue thereon in his own name. It does not follow, however, that they are commercial or negotiable paper in the hands of *bona fide* holders, so as to exclude inquiry into the legality of their issue, or to preclude defenses thereto.[10]

Judge Dillon has summarized the law relating to the power of a municipal corporation to issue commercial paper; because of the marked ability of the learned author in treating this question, and the frequency with which he is quoted as an authority by both the courts and text-book writers in respect to matters pertaining to municipal corporations, his conclusions are peculiarly valuable, and should do much toward reconciling the pronounced conflict between the cases involving a consideration of this vexed question. His conclusions are as follows:[11] "(3) The power to issue commercial paper which is unimpeachable in the hands of the holder is not among the ordinary incidental powers of a public or municipal corporation. It must be conferred expressly, or by fair implication, as a necessary, or at least a reasonable and usual means of executing the particular power to which it is claimed to be incidental. (4) Express power to borrow money, perhaps in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as for example subscriptions to aid railroads and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability.[12] (5) When it is expressly provided by statute, that public and municipal corporations shall audit all claims presented, and shall issue to the creditor warrants or orders, and no other provision is made, this will not authorize as a means of payment the issue of negotiable or commercial paper which shall

10. Dillon on Municipal Corporations, § 487. See Clark v. Des Moines, 19 Iowa, 199; People v. County, 11 Cal. 170; Sturtevant v. Liberty, 46 Me. 457; Emery v. Mariaville, 56 Me. 315; Mathes v. Cameron, 62 Mo. 504; Smith v. Cheshire, 13 Gray (Mass.), 318; Hyde v. Franklin, 27 Vt. 185; Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Halstead v. Mayor, 3 N. Y. 430; Hubbard v. Lyndon, 28 Wis. 674.

11. Dillon on Municipal Corporations, § 125.

12. Mayor v. Inman, 57 Ga. 370; Galena v. Corwith, 48 Ill. 423; Kelly v. Mayor, 4 Hill (N. Y.), 265; De Voss v. City of Richmond, 18 Gratt. (Va.) 338; Tucker v. City of Randolph, 75 N. C. 267; City of Vicksburg v. Lombard, 51 Miss. 125; Williamsport v. Commonwealth, 84 Pa. St. 487; Reinboth v. Pittsburg, 41 Pa. St. 278; Holmes v. Shreveport, 31 Fed. 113.

possess all the incidents of negotiability; and if issued, it is subject to all defenses in the hands of a transferee to which it would be subject in the hands of the original holder. (6) Although a municipal corporation proper, in the execution of its ordinary corporate powers and the discharge of its corporate duties, may make contracts and create debts, and may, when not restrained, evidence the liabilities thus incurred, yet if the instrument is made to assume the form of negotiable paper, such paper is always open to defenses in the hands of transferees when it is issued without express authority from the Legislature, or authority fairly to be implied from the charter or legislation applicable to the municipality." Judge Dillon then states the true doctrine to be that merely as incidental to the discharge of its ordinary corporate functions, no municipal or public corporation has the right to invest any instrument it may issue, whatever its form, with that supreme and dangerous attribute of commercial paper which insulates the holder for value from defenses and equities which attach to its inception.[13] Express power to a municipal corporation to borrow money is usually held to include the power to issue its negotiable bonds, or other securities to the lender.[14]

d. *Power of officers to issue negotiable instruments.*— The powers and duties of municipal officers are prescribed by statute. It has been held that agents, officers, or even a city council of a municipal corporation, cannot bind the corporation by any act which transcends their lawful or legitimate powers; and this rule applies to the issue of negotiable as well as unnegotiable evidences of debt.[15] Every person dealing with the officers of a municipal corporation must, at his peril, make inquiry as to the corporate powers of the municipality and the power of such officers to exe-

13. Dillon on Municipal Corporations, § 126.

14. Commonwealth v. Pittsburg, 34 Pa. St. 496, 511; Middletown v. Allegheny County, 37 Pa. St. 241; Indianapolis & C. R. Co. v. Evansville, 15 Ind. 395, 412, followed in Evansville v. Dennett, 161 U. S. 135; s. c., 20 C. C. A. 142, 73 Fed. 966.

15. Clark v. City of Des Moines, 19 Iowa, 199, in which Judge Dillon said: "This doctrine rests upon reasonable grounds. The body corporate is constituted of all of the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Everyone, therefore, may know the nature of these duties and the extent of these powers. These considerations, as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule that the corporation is bound only when its agents, by whom, from the very necessities of its being, it must act if it acts at all, keep within the limits of their authority."

cute the contract.[16] Every such person is charged with a knowledge of the powers of such officers.[17] If an officer transcends his power in the execution of negotiable securities, such securities are invalid.[18] The officers of a municipal corporation have no implied power *virtute officii* to execute negotiable instruments which will be free from all equities in the hands of purchasers.[19]

16. Marsh v. Fulton County, 10 Wall. (U. S.) 676; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141; McAleer v. Angell, 19 R. I. 688, 36 Atl. 588; Clements v. Lee, 114 Ind. 397, 16 N. E. 799; Boston Elect. L. Co. v. Cambridge, 163 Mass. 64, 39 N. E. 787; Turney v. Town of Bridgeport, 55 Conn. 412, 12 Atl. 520.

17. Boston Elect. L. Co. v. Cambridge, 163 Mass. 64, 39 N. E. 787.

18. Judge Dillon says (Municipal Corporations, § 445): "There is a broad distinction between the acts of an officer or agent of a public or municipal corporation, and those of an agent for a private individual. In cases of public agents the public corporation is not bound unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed in his capacity as a public agent to make the declaration or representation for the government."

Hainer, in his work on Municipal Securities (§ 21), has said: "The rule is firmly established that municipal corporations may, by their officers and duly authorized agents, make contracts the same as individuals and other corporations in matters that relate to the municipality, and are within the scope of their powers. However, it seems that municipal officers and their agents are limited more strictly within the prescribed powers than officers and agents of private concerns, and there are many cases in which it has been held that a contract made by the agent of a municipal corporation did not bind the principal in the absence of authority." Citing Louisville City R. Co. v. Louisville, 8 Bush (Ky.), 415; Parsel v. Barnes, 25 Ark. 261; Mayor, etc., of Baltimore v. Musgrave, 48 Md. 272; City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Lyon v. Adamson, 7 Iowa, 509; Blanchard v. Blackstone, 102 Mass. 343; Goodrich v. City of Waterville, 88 Me. 39, 33 Atl. 659.

19. Clark v. City of Des Moines, 19 Iowa, 199, 214.

In the case of Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367, 40 Atl. 141, the court held that "The town treasurer is not the town's financial agent, and has no power whatever, as such, to bind the inhabitants of the town to repay money borrowed by him for the town and used by him in discharging liabilities of the town. He has no more authority than a highway surveyor in this respect. He is unlike the cashier of a bank or the treasurer of a trading corporation. He is simply a public officer charged by law, not by the town, with the duty of receiving and guarding the public money, and disbursing it upon lawful warrant."

CHAPTER III.

Form and Requisites.

§ 33. Statutory provision as to form.

The Negotiable Instruments Law contains the following, which must be deemed controlling in all those States where the law has been adopted, and is of great importance in all other States, since it must be recognized as an authoritative declaration of the law upon the questions involved:

"An instrument to be negotiable must conform to the following "requirements:

"1. It must be in writing and signed by the maker or drawer;

"2. Must contain an unconditional promise or order to pay a "sum certain in money;

"3. Must be payable on demand, or at a fixed or determinable "future time;

"4. Must be payable to order or to bearer, and

"5. Where the instrument is addressed to a drawee, he must "be named or otherwise indicated therein with reasonable certainty." [20]

§ 34. Instrument must be in writing; signature.

a. *Must be in writing.*— The word "written" includes printed and the word "writing" includes print,[21] so that any written or printed form of a negotiable instrument which complies with all the other requirements imposed by statute will be sufficient. It was scarcely necessary for the law to state that a negotiable instrument must be in writing; the term "instrument" necessarily indicates that it must be in writing, and a negotiable instrument could not be defined without including this among the requisites of the contract.[22] The mode of writing does not seem to be material; it may be in pencil or in ink.[23]

b. *Signature.*— A negotiable instrument must be signed by the maker or drawer.[24] The name of the maker or drawer may appear

20. Neg. Inst. Law (N. Y.), § 20. For same section in statutes of other States see Appendix.

21. Neg. Inst. Law (N. Y.), § 2. For same section in statutes of other States see Appendix.

22. Geary v. Physic, 5 Barn. & Cress. (Eng.) 234.

23. **How written.**— Bayley, J., in the case of Geary v. Physic, *supra*, remarked: "I cannot see any reason why, when the law requires a contract to be in writing, that contract shall be void if it be written in pencil. If the character of the handwriting were thereby wholly destroyed, so as to be incapable of proof, there might be something in the objection; but it is not thereby destroyed, for, when the writing is in pencil, proof of the character of the handwriting may still be given. I think, therefore, that this is a valid writing at common law, and also that it is an indorsement according to the usage and custom of merchants; for that usage only requires that the indorsement should be in writing, and not that that writing should be made with any specific materials." And, in the same case, Abbott, C. J., said: "There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law merchant requiring only that an indorsement of bills of exchange should be in writing, without specifying the manner in which the writing is to be made, I am of the opinion that the indorsement in this case was a sufficient indorsement in writing within the meaning of the law of merchants, and that the property in the bill passed by it to the plaintiff."

Byles on Bills (16th ed.), p. 88, says: "Bills of exchange and promissory notes are usually, but, it is apprehended, not necessarily, written on paper. It is conceived that they might be written on parchment, linen, cloth, leather, or any other convenient substitute for paper, not being a metallic substance. They may be written in any language and in any form of words. A bill or note, or any other contract, may be printed or written, and in pencil as well as in ink." See also Reed v. Roark, 14 Tex. 325, 65 Am. Dec. 127; Merritt v. Clason, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; Draper v. Pattini, 2 Spears L. (S. C.) 292.

24. The English Bills of Exchange Act (§ 3), requires a bill to be signed by the drawer. The signature may be added at any time (See Id., §§ 18, 20) the instrument is inchoate and without effect. Thus, A. draws a bill on B.,

in any part of the writing if placed there in the capacity of maker or drawer.[25] It is immaterial where the signature is placed, if the liabilities of the parties may be determined therefrom.[26] But in a Maine case [27] it was held that if a person writes his name to a note, at the place commonly used for attestation, though without using any words of attestation, the presumption is that he writes it, not as a maker of the note, but as a subscribing witness. And an instrument in the form of a bill of exchange, but not signed by any drawer, is not a bill of exchange, although accepted and indorsed, and the acceptor and indorser are not liable in an action thereon by the holder.[28] Misspelling his name by the maker does

but does not sign it. B. accepts, and the instrument is transferred for value to C. The instrument is neither a bill nor a note. McCall v. Taylor, 34 L. J. C. P. (Eng.) 365; Goldsmid v. Hampton, 5 C. B. N. S. (Eng.) 94; *Ex p.* Hayward, L. R., 6 Ch. (Eng.) 546. See also German Exchange Law, art. 4.

25. Lampkin v. State, 105 Ala. 1, 16 South. 575.

Signing in attestation.— In the case of Palmer v. Stephens, 1 Den. (N. Y.) 471, it appeared that a note in the form, "We promise," etc., and signed "G. Stephens," and immediately underneath with the initials "W. G. S.;" after holding that a person could bind himself by a signature with his initials as well as by a signature of his full name, the court said: "But the initials might have been written, and so might the full name, to attest the execution of the note by the one who was the maker, or to indicate that the one who wrote the initials had, as agent of the person whose name appeared as maker, executed the note for him and in his name. These are supposable cases; but they present questions on which the jury should have passed. Ordinarily, a witness places his name at the left-hand side of the instrument he attests, as the one who executes it signs on the right, But, although these are the positions usually and presumptively occupied by the maker and the witness, it is not indispensable that their names should be so located. It is always competent, certainly between the original parties, to show that one whose name appears to a note or any other obligation, whatever may be the relative position which the name occupies, placed it there, not as a maker of the instrument, but to attest its execution, or for some other lawful purpose. This is involved in the question of the due execution of the instrument, and where the evidence is conflicting it must be disposed of by the jury."

26. Quinn v. Sterne, 26 Ga. 223, 71 Am. Dec. 204; Schmidt v. Schmaelter, 45 Mo. 502; Hunt v. Adams, 5 Mass. 358; Carver v. Warren, 5 Mass. 545; Clason v. Bailey, 14 Johns. (N. Y.) 484.

27. Farnsworth v. Rowe, 33 Me. 263. See also Kripner v. Lincoln, 66 Ill. App. 532 (1898).

28. Necessity of signature.— Tevis v. Young, 58 Ky. (1 Metc.) 197, 71 Am. Dec. 474. In discussing this question, the court says: "It is the well-settled doctrine, however, that the language of no particular formulary is essential to the validity of a bill. 'On the contrary,' says Judge Story, 'the form and language may be greatly varied, and often is varied, in the practice of different nations. It will be sufficient in our law that the contract be in writing, and have all the other substantial requisites to constitute a bill, however inaccurately or inartificially it may in other respects be expressed; or, in other words, it will be sufficient if it be in writing, and contain an order or direction by one person to another person, absolutely to pay money to a third person, and cannot be complied with or performed without the payment of money.' Story on Bills, 46. And among the substantial requisites elsewhere enumerated by the same author, and which, he says, constitute the very essence of bills of exchange as com-not affect the validity of the instrument or its signature.[29] A person may execute an instrument and bind himself as effectually by his initials as by writing his name in full.[30] Figures or a mark may be used in lieu of the proper name; and where either is substituted by a party, intending thereby to bind himself, the signature is effective to all intents and purposes.[31] A person may authorize another, by parol, to sign his name to an instrument, whether he can write his name or not; and a bill or note so signed or indorsed is as much the bill or note of the principal, as if it were signed with his own hand by writing his name in full, or by

mercial securities, are the names and description of the parties to the instrument, whether as drawer, payee, or drawee. For 'it is obvious that every bill must contain upon its face the name of the party by whom it is drawn.' The name of the drawer is usually written or subscribed at the bottom of the bill, but this does not seem to be absolutely indispensable; for, if the bill is written by him, and his name is inserted in the body of the bill, or is otherwise signed to it, so that it clearly appears that he is the drawer, it will be sufficient. It is clear, therefore, that whatever may have been the liberality of the courts, or the indulgence of the law, in dispensing with mere matters of form in the execution or construction of bills of exchange, they constitute no exception to the fundamental rule which requires, as essential to the validity of every contract, that there be proper parties to it. In the language of Parsons, 'We cannot conceive of a contract which has no parties.' And it would certainly be no less impossible to conceive of a promissory note which had no maker, or of a bill of exchange which had no drawer."

29. **Effect of misnomer.**— Kemp v. McCormick, 1 Mont. 420. In this case the maker of a note signed his name "Jno." for "John," and he was so designated in the pleading. The court said: "As to the question of misnomer, raised by the record, we hold that it is sufficient to describe a party to an action by any known and accepted abbreviation of his christian name, and that the defendant, having signed his name to the note in question with such abbreviation, is now estopped from denying it." And see Bank of Lassen County v. Sherer, 108 Cal. 513, 41 Pac. 415, where it was held that the validity of a note made payable to the order of the maker, and indorsed by him with his name correctly spelled, is not affected by the fact that in signing the note the "s" was omitted from his given name "Josiah."

30. Palmer v. Stephens, 1 Den. (N. Y.) 471, and cited with approval in David v. Williamsburgh City Fire Ins. Co., 83 N. Y. 265, 269. See also Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443.

31. Palmer v. Stephens, 1 Den. (N. Y.) 471.

In Brown v. The Butchers & Drovers' Bank, 6 Hill (N. Y.), 443, it was held that, where a person placed the figures "1; 2, 8" upon the back of a bill of exchange, intending thus to bind himself as indorser, the indorsement was valid, although it appeared that the indorser could write.

The making of one's mark is a sufficient signature to a promissory note, even if unattested. Shank v. Butsch, 28 Ind. 19; Hinkle v. Dodge, 7 Ky. L. Rep. 526; Willoughby v. Moulton, 47 N. H. 205; Gervais v. Baird, 2 Brev. (S. C.) 37; Paisley v. Snipes, 2 Brev. (S. C.) 200; Shiver v. Johnson, 2 Brev. (S. C.) 397; Brown v. McClanahan, 68 Tenn. 347.

The term "signature" is defined by statute in many of the States. In New York, by the Statutory Construction Law (§ 12), it is provided that "the term 'signature' includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing."

placing his cross or other mark thereon.[32] It is not necessary, in the execution of a note, that the person executing it, if unable to write his own name, should touch the pen in the hands of the person who is signing for him; it is only necessary that such person be authorized by him to sign his name for him.[33] If a person sign a negotiable instrument with a fictitious name or a *nom de plume* he will be liable thereon; for the reason as stated by Richardson, C. J., that "if an individual assume a name for the purpose of making a written contract, and put that name to the contract with a view to bind himself, there seems to be no reason why courts should not consider the name thus assumed as his name *pro hac vice*, and hold him to fulfil the contract." [34]

The remarks of Mr. Parsons on the desirability of unambiguous and explicit signatures are instructive and worthy of quotation in this connection: "This signature must be unambiguous and explicit, so as to leave no doubt of the person intended to be designated; because it is obvious that any doubt on this subject would impair, if it did not destroy, the utility of the document as an

32. Handyside v. Cameron, 21 Ill. 588, 74 Am. Dec. 119; Crumrine v. Crumrine, 14 Ind. App. 641, 43 N. E. 322. In this case it was held that a note is signed by the maker, if his name is written by another in his presence and by his direction, either with or without the maker's mark. See also Rentz v. Stanton, 10 Wend. (N. Y.) 271; Bank of North America v. Embury, 21 How. Pr. (N. Y.) 14; Haven v. Hobbs, 1 Vt. 238, 18 Am. Dec. 678; Morse v. Green, 13 N. H. 32; Forsyth v. Day, 41 Me. 382.

Signature of deeds, etc.— The authorities hold that, if the name of a grantor in a deed is written by the hand of another, in his presence and by his direction, it is his act, and the signature, in point of principle, is as actually his as though he had performed the physical act of making it. Mutual Benefit Life Ins. Co. v. Brown, 30 N. J. Eq. 193, 202, citing Gardner v. Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Irvin v. Thompson, 4 Bibb (Ky.), 295; Ball v. Dunsterville, 4 T. R. (Eng.) 313. See also Jansen v. McCahill, 22 Cal. 563; Videau v. Griffin, 21 Cal. 389; Williams v. Woods, 16 Md. 220; Frost v. Deering, 21 Me. 156; Bird v. Decker, 64 Me. 550; Pierce v. Hakes, 23 Pa. St. 231; Linsley v. Brown, 13 Conn. 192; Hall v. Redson, 10 Mich. 21; Burns v. Lynde, 6 Allen (Mass.), 305; Speckels v. Sax, 1 E. D. Smith (N. Y.), 253.

33. Kennedy v. Graham, 9 Ind. App. 624, 35 N. E. 925; s. c., 37 N. E. 25.

34. Grafton Bank v. Flanders, 4 N. H. 239.

The law looks to the identity of the individual.— In the case of Petition of John Snook, 2 Hilt. (N. Y.) 566, Daly, Ch. J., after a learned and exhaustive examination of the whole subject of names, said: "There are numerous cases, both in this country and in England, holding that where a man enters into a contract, or does any act in a particular name, he may be sued by the name that he used, whatever his true name may be, and generally that wherever a man has done an act in a particular name, or where he makes a grant, it may always be shown, in support of the validity of the act, that he was known by that name at or about the time when the act was done, although he may have been baptized or previously known by a different name. All that the law looks to is the identity of the individual, and when that is clearly established the act will be binding upon him and upon others."

instrument of business; and therefore it is that we doubt whether courts should permit the signature of a negotiable note to be made merely by initials, or to be inserted in the body, or at the beginning, or in the margin of the note, or elsewhere than at its close, which is the usual and proper place." [35]

If a signature be in the alternative, as where the instrument is signed "A., or B." it is likely that the signature is insufficient to bind any person.[36]

c. *Ratification of unauthorized signature.*— A person whose name is signed to or indorsed upon a negotiable instrument without his authority may afterward ratify the act and thus make himself liable thereon.[37] By ratifying and adopting a forged signature, the person whose signature has been forged becomes liable thereon, although no words of agency may appear upon the paper, and no facts are shown sufficient to constitute an estoppel *in pais.*[38] The ratification, to bind the person whose name is

35. 1 Parsons on Notes and Bills, p. 36.

36. 1 Parsons on Notes and Bills, p. 37.

In the case of Ferris v. Bond, 4 B. & Ald. (Eng.) 679, the note in controversy was in these words: "I, John Corner, promise to pay," etc., and was signed "John Corner, or else Henry Bond." The action was brought against Bond. The court said: "This is not a promissory note by this defendant within the Statute of Anne. It operates differently as to the two parties. It is an absolute undertaking on the part of Corner to pay, and it is conditional only on the part of the defendant, for he undertakes to pay only in the event of Corner's not paying."

37. Howard v. Duncan, 3 Lans. (N. Y.) 174. See also Union Bank v. Mott, 33 Conn. 95; Delahay v. Clement, 3 Ill. 575. In the case of Paul v. Berry, 78 Ill. 158, it was held, in substance, that, where a person's name is signed to a promissory note without his consent, he may ratify its execution and acknowledge its binding validity upon him, and when this is done his relation to the note will be precisely the same as if he had executed it himself.

The following cases are also in favor of this proposition: Forsyth v. Bonta, 68 Ky. 547; Williams v. Robbins, 82 Mass. 77; Dow v. Spenny, 29 Mo. 386; Cravens v. Gillilan, 63 Mo. 28; Waite v. Foster, 33 Me. 424.

38. Greenfield Bank v. Crafts, 86 Mass. 447; Wellington v. Jackson, 121 Mass. 157; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Fitzpatrick v. School Commissioners, 7 Humph. (Tenn.) 224.

Ratification of forged signature.— In the case of Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546, it was held that a mere promise to pay a forged note, when such promise is given by the supposed maker of the note without any new consideration, and after the promisee has acquired the note, is not binding. The court expressly disapproves of two Massachusetts cases above cited, and commends the English case of Brook v. Hook, 24 L. T. (Eng.) 34 (see 3 Alb. L. J. 255), and says: "This was a case where the defendant's name was forged, and he had given a written memorandum that he would be responsible for the bill. Chief Baron Kelley places his opinion upon the grounds: (1) That defendant's agreement to treat the note as his own was in consideration that he would not prosecute the forger; and (2) that there was not ratification as to the act done, — the signature to the note was illegal and void. And, though a voidable act may be ratified, it is otherwise when the act is originally, and in its incepforged or signed to an instrument without his consent, must be made with full knowledge of the facts affecting his rights.[39] The mere fact that the person whose name has been so signed does not disaffirm it within a reasonable time after it is brought to his attention does not amount to a ratification.[40] And it has been held that where one whose name has been forged to a note remains silent when the note is shown to him and he is asked to pay it, such silence does not estop him from denying the signature, unless the holder has been led to change his position, or otherwise act on it to his injury.[41] If a person promise to pay a note to which his name had been signed without his authority, it is an adoption of the act of the unauthorized signer, and equivalent, in law, to an antecedent authority to execute the note.[42] And when a person's

tion void. The opinion fully recognizes the proposition, that where acts or admissions alter the conditions of the holder of the paper, the party is estopped, but it is necessary that such a case should be made. It is further held that cases of ratification are those where the act was pretended to have been done for, or under the authority of, the party sought to be charged, which cannot be in the case of a forgery. A distinction is also made between civil acts, which may be made good by subsequent recognition, and a criminal offense, which is not capable of ratification." See *post* in chapter on Alteration and Forgery where this subject is again discussed.

In the case of Woodruff v. Monroe, 33 Md. 147, it is held that: "If, in an action against an indorser of a promissory note by the *bona fide* holders thereof, it be shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note, and its transfer to the plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a *bona fide* holder. But any admissions by the defendant, made subsequently to the maturity of the note, would not be evidence that he had authorized the indorsement of his name thereon."

39. Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 160; Gleason v. Henry, 71 Ill. 109; McDonough v. Heyman, 38 Mich. 334; King v. Rhea, 13 Colo. 69, 21 Pac. 1084; Fletcher v. Dysart, 48 Ky. 413; Walters v. Munroe, 17 Md. 150, 77 Am. Dec. 328; Dietz v. City Nat. Bank, 42 Neb. 584, 60 N. W. 896; Hazleton v. Batchelder, 44 N. H. 40; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Jones v. Hamlet, 34 Tenn. 256; Bell v. Wandby, 4 Wash. 743, 31 Pac. 18.

40. Reubin v. Cohen, 48 Cal. 545. Neglect to repudiate the signature of one's name to a check for more than two years after being informed of the transaction, though it is evidence tending to show that the signature was authorized, does not amount to a ratification of the act if it was unauthorized. De Land v. Dixon Nat. Bank, 111 Ill. 323.

41. Goetz v. Goldbaum, 37 Pac. (Cal.) 646. The agent of the payee of a note stated to the defendant, whose name appeared thereon as maker, that he had deposited her note with the plaintiff, and she thereupon told him that she had signed no such note, but did nothing further about it, and paid no attention to the plaintiff's notice that the note was due. Held, that her silence did not amount to a ratification of her unauthorized signature. California Bank v. Sayre, 85 Cal. 102, 24 Pac. 713. See also Corser v. Paul, 21 N. H. 24, 77 Am. Dec. 753.

42. Bigelow v. Denison, 23 Vt. 564; Devendorf v. West Virginia Oil and Oil Land Co., 17 W. Va. 135.

In an action on a promissory note against a maker whose signature was forged, it appeared that the defendant signature to a note is shown to him and he is asked if it is genuine, and after examining it acknowledges the signature to be genuine he is estopped from afterward denying the genuineness of the signature.[43]

§ 35. Promise or order to pay.

a. *In general.*— It is a well-recognized rule of law that a bill must contain an order as contradistinguished from a simple request, and a note an absolute promise, though the mere fact that words of civility are used will not affect the negotiability of the instrument.[44] There is an analogy between bills and notes which may well be kept in mind in dealing with the question of the promise or order as affecting negotiability. This analogy will appear from the following comparison. When the payee transfers a note to an indorsee, the analogy is complete. For example we have a promissory note as follows:

"$100. ALBANY, N. Y., *January* 1, 1903.

On demand I promise to pay to A., or order, the sum of one hundred dollars, value received. (Signed.) B."

(Indorsed) "Pay to the order of C." (Signed) A.

The following is an ordinary bill of exchange or draft:

"ALBANY, N. Y., *January* 1, 1903.

"Thirty days after sight pay to the order of C. one hundred dollars, value received, and charge to the account of

Accepted (Signed) B.

To "B." Signed. "A."

Troy, N. Y.

had said to the plaintiff that the note was "all right," and that if the plaintiff would "hold on" he would pay him, thereby inducing the plaintiff to omit to collect the note of the other maker, who afterward became insolvent and absconded. It was held that the defendant was estopped from denying the execution of the note. Hefner v. Dawson, 63 Ill. 403, 14 Am. Rep. 123; Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106.

A subsequent unconditional promise to pay, by one in whose name a note had been executed without authority, is not, as matter of law, a ratification, but evidence from which a ratification may be inferred. Commerce Bank v. Bernero, 17 Mo. App. 313. See also Traders' Nat. Bank v. Rogers, 167 Mass. 315, 45 N. E. 823, 36 L. R. A. 539.

43. Casco Bank v. Keene, 53 Me. 103.

44. In Hoyt v. Lynch, 2 Sandf. (N. Y. Super. Ct.) 328, there was an ordinary bill rendered to Smith & Woglom, who were builders, by C. H. Hoyt, who was a roofer. At the bottom of the bill was the following statement:

"WILLIAMSBURGH, *December* 16, 1847.

"Mr. J. LYNCH:

"Please pay the above bill, being the amount for tinning your house on South Sixth street, and charge the same to our account, and much oblige

"Yours,

"SMITH & WOGLOM."

From this example it is seen that when the note is made payable to an indorsee by the payee, it is an order from the payee upon the maker for the payment of money to the indorsee. The indorser payee is the drawer, the maker of the note is the acceptor, and the indorsee is the payee.[44a] This analogy may be of use in determining the different kinds of negotiable instruments.

b. *Promise to pay.*— To constitute an instrument a promissory note words must be contained therein which import an unconditional promise to pay. No particular form of expression is essential.[45] No matter how informal the instrument may be, it is a good note, provided it contain an agreement to pay to a person named in it, or to bearer, or to some person described, in terms that admit of no misapplication.[46] It is not necessary that the word "promise" be used, although words of equivalent import are required, the fair construction of which would be tantamount to a promise, express or implied.[47]

The court said that this was a bill of exchange and must be accepted in order to charge the drawee. Oakley, Ch. J., says: "It is an order in writing drawn by one party upon another requesting the latter to pay a certain sum of money to a third party at all events; depending upon no contingency and payable out of no particular fund." The bill, however, was held not to be negotiable because it did not contain the words "to order" or any other words of negotiability.

44a. See Commercial Bank v. Hughes, 17 Wend. (N. Y.) 98; Newman v. Frost, 52 N. Y. 422, 426.

45. Parsons on Notes and Bills, p. 24; Pepoon v. Stagg, 1 Nott & McC. (S. C.) 102; Woodfolk v. Leslie, 2 Nott & McC. (S. C.) 585; Hitchcock v. Cloutier, 7 Vt. 22; Hunt v. Devine, 37 Ill. 137.

46. Edwards on Bills and Notes, 132; United States v. White, 2 Hill (N. Y.), 59. See also Hickok v. Bunting, 67 App. Div. (N. Y.) 560, 73 N. Y. Supp. 967, where an instrument reciting: "Having been the cause of a money loss to my friend H., I have given her $3,000. I hold this amount in trust for her, and one year after date or thereafter on demand I promise to pay to the order of H., her heirs or assigns, $3,000, and interest," and signed by the obligor, was held to be a promissory note.

47. Fleming v. Burge, 6 Ala. 373; Rice's Admr. v. Rice, 68 Ala. 216. In this case a writing in the following form was under consideration: "Be it *none* all men by these presents that I, B. R., do *sertify* that I give the *girle* Mary R., the sum of five hundred dollars at my death, *pable onely* after my death to the said Mary R., *onela* to the said Mary R., and I hereby *forewarne every persones* or person for *traden* for said note *pable* after my death, this the *first day* of February, *the* 1873." Such writing was signed by the maker, but without attesting witnesses, and delivered to the said Mary R. It was held that it was not a promissory note, nor a testamentary paper, but merely a *nudum pactum*, which would not support an action, unless shown to be founded on a valuable consideration.

Words of promise required.— In the case of Cummings v. Gassett, 19 Vt. 308, an instrument read as follows:

"LUDLOW, VT., *Dec.* 11, 1833.

"For value received of Cummings & Manning or order, thirty dollars and eighty-three cents on demand and interest annually. (Signed)

"LEVI GASSETT."

Below the signature was a memorandum in these words: "To be paid in one year from date." The court held that such an instrument would be sufficient evidence under a count declaring upon it as a promissory note in com-

A *due bill* or an I O U is generally held to be a negotiable promissory note, provided there are words of negotiability at-

mon form, and said: "But, if it were necessary, it seems to me it would not be very difficult to supply the omission in this note by intendment. There is but one way in which it can be supplied; no two persons would think differently in regard to that. In such cases, it seems to me, that courts should, if they do not choose to stultify themselves in the estimation of all common-sense men, supply the defect; and I have no doubt we should in this case, if necessary."

An instrument in the following form: "Due A. B. $34.63, for goods purchased of him while at P., to be paid as soon as collected from my accounts at P.," is a promissory note, not a mere conditional obligation to pay. Ubsdell v. Cunningham, 22 Mo. 124.

"Good for," etc., when promissory note.— In the case of Weston v. Myers, 33 Ill. 424, tickets or printed instruments in the following form: "Good for fifty cents. H. C. Myers, Sut.," which were indorsed with the initials of the defendant, "H. C. M.," were held to be negotiable promissory notes. See also Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462, in which case an instrument reading, "Oct. 19, 1830. Good to Robert Cochran, or order, for thirty dollars, borrowed money. Joseph W. March," was held to be a promissory note. See also Hussey v. Winslow, 59 Me. 170.

But in an early Massachusetts case (Brown v. Gilman, 13 Mass. 158), an instrument, as follows: "May, 1810. Good for one hundred and twenty-six dollars on demand. Gilman & Hoyt," was held not to be a negotiable promissory note.

Writing intended as evidence of debt.— An action was brought upon a writing as follows: "I owe the estate of Zenas Warden, $190.15. May 13, 1863." It appeared that the party whose name was signed thereto had been in the habit of giving similar papers to those who had accounts with him, as statements merely of their accounts, and not as promissory notes, and, as there was no payee named, it was inferred the writing was intended, not as a promissory note, but only as a statement of the balance of his account at that time with the estate of Warden, and it was given effect accordingly. Bowles v. Lambert, 54 Ill. 237.

Intent to give.— A writing was as follows: "May 14, 1836. This is to show that I allow to give Willet James Two hundred and fifty dollars, to be paid in two years after date, as witness my hand and seal. Thomas James. [SEAL.]" It was held that it was not a promissory note. It simply expresses a present intention to give Willet James two hundred and fifty dollars within two years after its date. Harmon v. James, 7 Ind. 263. See also Johnston v. Griest, 85 Ind. 503.

Certificate issued by school district. — A certificate of the following tenor: "This is to certify that there is due from Johnson Township to A. & B., or order, one hundred dollars, for school furniture, etc., payable on, etc., with interest, etc., for value received, etc., payable at the First National Bank," etc. (Signed) "W. H. F., trustee Johnson Township," is a promissory note of Johnson School Township. Johnson School Township v. Citizens' Bank, 81 Ind. 515.

Receipt for money deposited.— In the case of Long v. Straus, 107 Ind. 94, 6 N. E. 123, 57 Am. Rep. 87, an instrument reading, "Received of Joseph S. Long sixteen hundred dollars, on deposit, in national currency. (Signed) Straus Bros.," was held to be a written contract importing a promise to pay the amount specified on the demand of the depositor. The court said: "The language used creates a contract, and the law implies, as part of the contract, that on reasonable demand the depositor is entitled to receive back that which belongs to him. The deposit of money is a transaction well known to the law, and it is one out of which well-defined legal rights emerge; chief among these rights is that of the depositor to receive his own again, and a correlative of this right is the implied promise of the person who receives money on deposit to return it to the depositor." And again, on a reargument of this case (107 Ind. 104, 7 N. E. 763), the court said: "If the instrument we have tached to it and it is absolutely payable. Unless it is absolutely payable, it is not a note of any kind, either negotiable or

under consideration had been written out in full, although payable on demand, it would be a promissory note, and it seems, under the principle we have stated, that it is a promissory note, and as such negotiable, for it is well settled that no precise form of words is necessary to constitute a promissory note, as any form that expresses a promise, although not in direct terms, will be sufficient." But see Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186; Gutch v. Fosdyck, 48 N. J. Eq. 353, 22 Atl. 590.

Promise to pay debt of another.— An instrument in the following form:

"SCHENECTADY, N. Y., *Aug.* 11, 1897.

"We, the undersigned, John Krank and John L. Mynderse, hereby agree to pay David Bradt, Becker & Co. a bill of two hundred and sixty-five dollars and fifty cents ($265.50) against Church & Jones, between now and Tuesday next.

"(Signed) JOHN KRANK,
"JOHN L. MYNDERSE."

was held not to be a promissory note. Bradt v. Krank, 164 N. Y. 515, 58 N. E. 657, 79 Am. St. Rep. 662.

Certificate as to payment.— A written obligation in the following language: "This is to certify that I am to pay to J. M. the sum of three thousand dollars on the first day of February, 1884," etc., constitutes an unconditional promise to pay money, and is, therefore, a promissory note. Meyer v. Weil, 37 La. Ann. 160. The court said in this case: "The word 'promise' is not sacramental in a promissory note. No particular form is required by law. It is enough if the note contain a legal promise for the certain payment of a specified sum, and that the maker and payee be designated with sufficient certainty. The language used in this case is precise, positive, peremptory. It is of at least equivalent force and similar meaning. It is rather emphatic. It certifies that the maker *is to pay*, that is, *must* and *shall* pay. It clearly meets all legal exigencies in that respect, and makes the instrument an unconditional promise to pay."

Words "I have borrowed," etc.— In the case of Harrow v. Dugan, 6 Dana (Ky.), 341, an instrument in the following form: "$136. I have borrowed from Aaron Myers one hundred and thirty-six dollars, which money was loaned to me by the said Myers, as agent for Hugh Dugan, for the benefit of my father, Joseph Harrow. (Signed) Thomas S. Harrow, Joseph Harrow," was held a promissory note. The court said: "The word 'borrow' imports in itself a promise to pay as strongly as the word 'due;' and the written acknowledgment that a party has borrowed money, is as clearly a note for the direct payment of money, as is the written acknowledgment that money is due, upon which it has been decided that a petition may be maintained." See also Woodfolk v. Leslie, 2 Nott & McC. (S. C.) 585.

"Promise to renew."— The following memorandum, written upon the back of a promissory note, and signed in the presence of an attesting witness, "I hereby renew the within note," is a witnessed promissory note within the Statute of Limitations. Daggett v. Daggett, 124 Mass. 149.

But, in the case of Gray v. Bowden, 23 Pick. (Mass.) 282, it was held that a memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and due," signed by the maker and attested by a witness, was not a promissory note, for the reason that "there are no express promissory words. It is not, therefore, a note in writing promising to pay money, or a promissory note. It is merely an acknowledgment, from which a promise might be inferred, so as to take the old note out of the statute, which would extend it six years, but not an attested note." See also Commonwealth Ins. Co. v. Whitney, 1 Metc. (Mass.) 21.

Indorsement on back of note.—A note was indorsed in the following form: "I hereby assume and agree to pay the principal of the within note," signed by the indorser and delivered to the payee named in the body of the note. It was held that the indorsement constituted a promissory note, being the open promise in writing of the indorser to pay absolutely and at all events the sum specified in nonnegotiable.[48] The authorities, both courts and text-writers, have materially differed in respect to the nature of a due bill.[49]

the instrument therein referred to as the "within note" to the payee designated in such instrument. Clark v. Marlow, 20 Mont. 249, 50 Pac. 713.

48. Byles on Bills (16th ed.), p. 34, says that an I O U is merely an acknowledgment of a debt due by virtue of some antecedent contract, and is not a promissory note. "But if the I O U contain an agreement that it is to be paid on a given day or on demand, it will be a promissory note, and must be stamped as such.

Due bills and I O U's.— In the case of Currier v. Lockwood, 40 Conn. 349, 16 Am. Rep. 40, a due bill in the following form was under consideration:

"$17.14

"BRIDGEPORT, *January* 22, 1863.

"Due Currier & Barker seventeen dollars and fourteen cents, value received.

"FREDERICK LOCKWOOD."

It was held not to be a promissory note. The court commented favorably on the decision in the case of Smith v. Allen, 5 Day (Conn.), 337, and stated that such case went to the extreme limit in holding the writing there given to be a promissory note, and did not "feel at liberty to go further in that direction than the court then went." In the case of Smith v. Allen, the words "on demand" were used, which were held to import a promise to pay. See also Mitchel v. Rome R. Co., 17 Ga. 574; Pepoon v. Stagg, 1 Nott & McC. (S. C.) 102.

In the case of Russell v. Whipple, 2 Cow. (N. Y.) 536, the paper sued on read, "Due S., or bearer, $10." It was held a promissory note. And in Kimbal v. Huntington, 10 Wend. (N. Y.) 675, a paper, "Due R. $325, payable on demand," was held admissible in evidence as a promissory note. Judge Nelson said: "The acknowledgment of indebtedness, on its face, implies a promise to pay the plaintiffs, and the payment by its terms is to be in money absolutely, on demand."

49. Cases holding due bills not promissory notes.— One of the leading cases holding that due bills or I O U's are not negotiable promissory notes is that of Gay v. Rooke, 151 Mass. 115, 23 N. E. 835, 21 Am. Rep. 434. In this case the instrument read:

"MARLBORO, Mass., *Sept.*, 1881.

"I O U E. A. Gay, the sum of seventeen dollars 5-100, for value received.

"(Signed) JOHN R. ROOKE."

Devens, J., says: "In order to constitute a good promissory note there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law, founded on an acknowledged indebtedness, will not be sufficient. (Story on Promissory Notes, § 14; Brown v. Gilman, 13 Mass. 158.) While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom. (Commonwealth Ins. Co. v. Whitney, 1 Metc. (Mass.) 21.) In this view the instrument sued on cannot be considered a promissory note. It is an acknowledgment of a debt only, and, although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt, and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. It was, therefore, held in Gray v. Bowden, 23 Pick. (Mass.) 282, that a memorandum on the back of a promissory note, in these words, 'I acknowledge the within note to be just and due,' signed by the maker and attested by a witness, was not a promissory note signed in the presence of an attesting witness within the meaning of the Statute of Limitations. In England an I O U, there being no promise to pay embraced therein, is treated as a due bill only. The cases, which arose principally under the Stamp Act, are very numerous, and they have held that such a paper did not require a stamp, as it was only evidence of a debt. (1 Daniel on Negotiable Instruments (3d ed.), § 36; 1 Randolph on Commercial Paper, § 88; Fesenmayer v. Adcock, 16 Mees. & W. (Eng.) 449; Melanotte v. Teasdale, 13 Mees. & W. (Eng.) 216; Smith v. Smith, 1 F. & F. (Eng.) 539; Gould v. Coombs, 1 C. B. (Eng.) 543; Fisher

As stated by Judge Story: "To constitute a good promissory note, there must be an express promise on 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. Hence, it has been held that the mere acknowledgment of a debt without a promise to pay, is not a good promissory note."[50] And as held by Smith, J., in the case of Smith v. Allen:[51] "Where a writing contains nothing more than a bare acknowledgment of debt, it does not in legal construction import an express promise to pay; but where a writing imports not only the acknowledgment of a debt but an agreement to pay it, this amounts to an express contract." In that case the words "on demand" in a due bill were held to import and to be an express promise to pay.[52] It was said in a leading New York case that "If there be in legal effect an absolute promise that money shall be paid, all the rest is a dispute about words. The whole inquiry is, does the paper import an engagement that money shall be paid absolutely? If it do, no matter by what words, it is a good note."[53] Some States have by

v. Leslie, 1 Esp. (Eng.) 425; Israel v. Israel, 1 Campb. (Eng.) 499; Childers v. Bouldnois, Dowl. & Ry. N. P. (Eng.) 8; Beeching v. Westbrook, 8 Mees. & W. (Eng.) 410.)

"While in a few States it has been held otherwise, the law as generally understood in this country is, that, in the absence of any statute, a mere acknowledgment of a debt is not a promissory note, and such is, we think, the law of this Commonwealth. (Gray v. Bowden, 23 Pick. 282; Commonwealth Ins. Co. v. Whitney, 1 Metc. (Mass.) 21; Daggett v. Daggett, 124 Mass. 149; Almy v. Winslow, 126 Mass. 342; Carson v. Lucas, 13 B. Mon. (Ky.) 213; Garland v. Scott, 15 La. Ann. 143; Currier v. Lockwood, 40 Conn. 349; Brenzer v. Wightman, 7 Watts & S. (Pa.) 264; Biskup v. Oberle, 6 Mo. App. 583.)"

Attention is also called to the following cases coinciding to a greater or less degree with that of Gay v. Rooke, *supra:* Fisher v. Leslie, 1 Esp. (Eng.) 426; Israel v. Israel, 1 Campb. (Eng.) 499; Tomkins v. Ashby, 6 B. & C. (Eng.) 541; Gould v. Combs, 1 C. B. (Eng.) 543, 50 E. C. L. (Eng.) 543; Garland v. Scott, 15 La. Ann. 143; Gray v. Bowden, 23 Pick. (Mass.) 282; Biskup v. Oberle, 6 Mo. App. 583; Carson v. Lucas, 13 B. Mon. (Ky.) 213; Rush v. Haggard, 68 Tex. 674.

Cases holding due bills promissory notes.— There are cases in many of the States holding simple due bills to be promissory notes. Johnson v. Johnson, Minor (Ala.), 263; Fleming v. Burger, 6 Ala. 373; Huyck v. Meador, 24 Ark. 191; Lee v. Balcom, 9 Colo. 216, 11 Pac. 74; Jacquin v. Warren, 40 Ill. 559 (but see Sears v. Wesleyan University, 28 Ill. 183, and Bowles v. Lambert, 54 Ill. 237; in the latter case a paper stating "I owe the estate of Z. W. $190.15, May 13, 1863," was held to be a mere statement of account, and not a promissory note); Long v. Straus, 107 Ind. 94, 57 Am. Rep. 84; McGowen v. West, 7 Mo. 569, 38 Am. Dec. 468; Brady v. Chandler, 31 Mo. 28; in the case of Cummings v. Freeman, 2 Humph. (Tenn.) 143, a writing in these words, "Due B. two hundred dollars, borrowed Oct. 21, 1838," was held to be a promissory note; Hopson v. Brunwankel, 24 Tex. 607, 76 Am. Dec. 124.

50. Story on Promissory Notes, § 14.

51. 5 Day (Conn.), 337.

52. Currier v. Lockwood, 40 Conn. 349, 16 Am. Rep. 40.

53. Luqueer v. Prosser, 1 Hill (N. Y.), 259. But in the case of Shel-

statute extended the law of bills and promissory notes to all instruments in writing whereby any person acknowledges any sum of money to be due to any other person.[54]

c. *Order to pay.*— A bill of exchange to be valid must contain an absolute and unconditional order to pay. The language used in expressing the order is not material. But it must be more than the request for the granting of a favor.[55] Judge Story has stated the true rule to be "to hold the mere drawing of a bill to be the demand of a right, and not the asking of a favor, in all cases where the language is susceptible of two interpretations; and to deem it a favor only, when the language used repels in an unequivocal manner, the notion that it is claimed as a right." [56] Any expression amounting to an order or direction is sufficient. The word "pay" itself is not indispensable.[57] Any synonymous or equivalent expression will suffice, as "credit in cash;" [58] and an order drawn on a third person, at the foot of an account for services done, ex-

don v. Heaton, 88 Hun (N. Y.), 535, 34 N. Y. Supp. 856, a paper reading, "$178.33. Due Mrs. M. E. Sheldon, one hundred and seventy-eight, 33–100 dollars. Rouses Point, April 29, 1863. (Signed) R. Heaton," was held to be a promissory note, though nonnegotiable, and that, as no time of payment was mentioned therein, it was payable immediately. This case seems to be at variance with other New York cases, since in all of them words were used in the instrument which imported that the amount specified was absolutely payable.

In the case of Kimball v. Huntington, 10 Wend. (N. Y.) 675, the instrument read, "Due A. B. $325, payable on demand," and it was held to be a promissory note. The court, in this case, said that "the acknowledgment of indebtedness on its face implies a promise to pay;" but did not pursue a discussion of the question, but it was not properly before the court.

"**Payable.**"— The word "payable," when used in a certificate of deposit, unquestionably imports a promise to pay the sum deposited. Richer v. Voyer, L. R., 5 P. C. (Eng.) 476. See also Johnson School Township v. Citizens' Bank, 81 Ind. 515, in which a writing, "Due from A. to B. or order, payable on, etc., payable at," etc., was held to be a good promissory note; Mitchell v. Rome, etc., R. Co., 17 Ga. 574, where the words, "Due payable on demand," were held to import a promise to pay and constituted a due bill a promissory note.

54. R. S. Ill., chap. 98, § 3 (Hurd's Ed., 1901); Horner's Anno. Stats., Ind., chap. 89, § 5501; Code of Iowa, 1897, § 3045; Mississippi Code, 1880, §§ 1123, 1124.

55. In the case of The King v. Ellor, 1 Leach (Eng.), 323, an order in the following terms was in controversy: "Messrs. Longer: Please to send ten pounds by the bearer, as I am ill I cannot wait on you. Elizabeth Wery," was held to be a mere letter requesting the loan of money and not an order for its payment.

In the case of Little v. Slackford, 1 M. & M. (Eng.) 171, 31 R. R. 726, the instrument read: "Mr. Little, please to let the bearer have seven pounds, and place it to my account, and you will oblige your humble servant, R. Slackford," was held not to be a bill of exchange. And Lord Tenterden said: "The paper does not purport to be a demand by a party having a right to call on the other to pay. The fair meaning is 'you will oblige me by doing it.'" See also Russell v. Powell, 14 Mees. & W. (Eng.) 418.

56. Story on Bills of Exchange, p. 44.

57. Byles on Bills (16th ed.), p. 92.

58. Ellison v. Collingridge, 9 C. B. (Eng.) 570.

pressing a sum certain as due by the debtor on such account, and requesting such third person to pay the account, and charge it to the debtor is a bill of exchange.[59] The introduction of ordinary words of civility or politeness, as "please pay, etc.," are not to be so construed as to raise a presumption that a favor is asked rather than a right demanded.[60] A written request made by one person upon another to credit a third person upon a book account with a certain sum of money has been held not to be a bill of exchange.[61]

§ 36. Promise or order to pay must be unconditional.

a. *In general.*— One of the essentials of the negotiability of a bill or note is that it contain an *unconditional* promise or order to pay a sum certain in money.[62] To render a bill or note negotiable it must be payable at all events, and cannot be dependent upon any contingency.[63] As was observed by Lord Kenyon in the case

59. Hoyt v. Lynch, 2 Sandf. (Super. Ct. N. Y.) 328; in this case the following writing was added at the foot of a bill for services rendered: "Mr. J. Lynch: Please pay the above bill, being the amount for trimming your houses on South Sixth street, and charge the same to our account, and much oblige yours, Smith & Woglom." See also Knefel v. Flanner, 66 Ill. App. 209; O'Donnell v. Smith, 2 E. D. Smith (N. Y.), 124.

60. **Words of civility.**— In Ruff v. Webb, 1 Esp. (Eng.) 129, the instrument was in the following form: "Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff or order, twenty guineas on his account;" it was held a bill of exchange.

In the case of Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522, the instrument read: "Sac City, July 18, 1857. Mr. Strobe: Please pay the bearer of these lines two hundred and thirty-six dollars, and charge the same to my account. E. D. Wheatley." The court said: "The order possesses all the requisites of an inland bill of exchange. It contains a direction for the payment of money by one person to another, absolutely and at all events. As no time is specified, it is to be taken as payable at sight. No further particulars than these are essential to constitute a bill of exchange. The insertion of the word "*please*" does not alter the character of the instrument. This is the usual term of civility, and does not necessarily imply that a favor is asked." See also Biesenthal v. Williams, 62 Ky. 329, 85 Am. Dec. 629; Jarvis v. Wilson, 46 Conn. 90, 33 Am. Rep. 18; Harris v. Dolmetch, 12 N. Y. St. Rep. 456; Spurgin v. McPheeters, 42 Ind. 527; Mehlberg v. Tisher, 24 Wis. 607.

61. Woolley v. Sergeant, 8 N. J. L. 262, in which case the writing was in these words: "March 24, 1822. Mr. David Sergeant, please to credit John Woolley, or bearer, thirty dollars, and I will pay you by the tenth day of April next, and you will oblige your friend. John Miller." The court said: "The instrument giving rise to the present dispute amounts neither to a bill of exchange under the custom of merchants, nor to a negotiable note under the provisions of the statute; for it does not require Sergeant to pay a cent of money; but only to give credit on a book account; and it confines this request of credit to Woolley himself; so that in the nature of things it does not admit of being indorsed over to another person, nor of entering into circulation like mercantile paper from hand to hand; nay, it does not remain in the hands even of the person in whose favor it is drawn."

62. Neg. Inst. Law (N. Y.), § 20; *ante*, p. 161.

63. **Instrument must be payable at all events.**— Chitty on Bills (p. 134), contains the following enunciation of the general rule: "The money must be payable at all events, not dependent on any contingency, either with regard

of Carlos v. Fancourt:[64] "It would perplex commercial transactions, if paper securities of this kind were issued into the world, incumbered with conditions and contingencies, and if the person to whom they were offered in negotiation were obliged to inquire when these uncertain events would probably be reduced to a certainty." Whether an instrument is negotiable must appear on its

to event, or with regard to fund out of which payment is to be made, or the parties by or to whom the payment is to be made."

Story on Promissory Notes (§ 22) says: "To make a written note for the payment of money a valid promissory note the money must be payable absolutely, and at all events, and not be subject to any condition or contingency."

See the following cases, which are generally applicable to the proposition that negotiability is dependent upon the fact that the instrument is unconditionally payable at all events:

Alabama.— Waters v. Carleton, 4 Port. 205.

Arkansas.— Henry v. Hazen, 5 Ark. 401.

Colorado.— Jennings v. First Nat. Bank, 13 Colo. 417, 22 Pac. 777, 16 Am. St. Rep. 210.

Connecticut.— First Nat. Bank v. Alton, 60 Conn. 402, 22 Atl. 1010; Hine v. Roberts, 48 Conn. 267.

Georgia.— Pool v. McCrary, 1 Ga. 319, 44 Am. Dec. 656; Hodges v. Hall, 5 Ga. 163.

Illinois.—Kelley v. Hemmingway, 13 Ill. 604, 56 Am. Dec. 474; Baird v. Underwood, 74 Ill. 176; Kingsbury v. Wall, 68 Ill. 311; Chicago Trust & Sav. Bank v. Chicago Title & Trust Co., 190 Ill. 404, 60 N. E. 586, 83 Am. St. Rep. 138.

Indiana.—Hays v. Givin, 19 Ind. 19; Cochran v. Nebeker, 48 Ind. 459.

Iowa.— State v. Stratton, 27 Iowa, 420, 1 Am. Rep. 282.

Kansas.—Killam v. Schoeps, 26 Kan. 310, 40 Am. Rep. 313.

Kentucky.— Nichols v. Davis, 1 Bibb, 490; Strader v. Batchelor, 8 B. Mon. 168.

Maine.— Legro v. Staples, 16 Me. 252; White v. Cushing, 88 Me. 339, 34 Atl. 164.

Massachusetts.— Coolidge v. Ruggles, 15 Mass. 387; Grant v. Wood, 12 Gray, 220.

Minnesota.— Cooper v. Brewster, 1 Minn. 94.

Mississippi. — Hart v. Taylor, 70 Miss. 655, 12 South. 553.

Nebraska — Grimison v. Russell, 14 Neb. 521, 16 N. W. 819, 45 Am. Rep. 126.

New Hampshire. — Matthews v. Crosby, 56 N. H. 21.

New York. — Dykers v. Leather Manufacturers' Bank, 11 Paige, 612; Austin v. Burns, 16 Barb. 643; Skillen v. Richmond, 48 Barb. 628; Loftus v. Clark, 1 Hilt. 310; James v. Hagar, 1 Daly, 517; White v. Haight, 16 N. Y. 310; Loomis v. Ruck, 56 N. Y. 462.

Pennsylvania.— Woods v. North, 84 Pa. St. 407, 24 Am. Rep. 201; Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194, 17 Atl. 603, 12 Am. St. Rep. 860, 4 L. R. A. 190; Iron City Nat. Bank v. McCord, 139 Pa. St. 52, 21 Atl. 143, 23 Am. St. Rep. 166, 11 L. R. A. 559.

Tennessee.— Shelton v. Bruce, 9 Yerg. 24.

Texas.— Martin v. Shumatte, 62 Tex. 188.

Vermont.— Smilie v. Stevens, 39 Vt. 315.

Wisconsin.— Kirk v. Dodge County Mut. Ins. Co., 39 Wis. 138, 20 Am. Rep. 39; First Nat. Bank v. Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365.

See Century Dig. (Vol. 7), Bills and Notes, § 411.

64. 5 T. R. (Eng.) 482, 2 R. R. 647. In this same case, Ashurst, J., also said: "Certainty is a great object in commercial instruments, and unless they carry their own validity on their face they are not negotiable. On that ground bills of exchange which are payable only on a contingency are not negotiable because it does not appear on the face of them whether or not they will ever be paid. The same rule then that governs bills of exchange in this respect must also govern promissory notes."

face, or a contemporaneous memorandum on the same paper. Its character depends upon its terms at the time it is made, and if it then purports a payment to be made upon a contingency, or a condition or uncertain event, the subsequent happening of the event or contingency will not change it.[65]

b. *Examples of conditional promises.*— A promise made by A. to pay B. out of any of A.'s money that might arise from a "reversion of forty-three pounds when sold" was held not to be a negotiable note.[66] A note which had words written across its end to the effect that it was given for advancements and on the understanding that it would be renewed at maturity, was held to be thereby deprived of its negotiability, because contingent and conditional.[67] And where a note contained a condition that as soon as the amount of it was received by the payees it should be given up to the maker, it was held by the Supreme Court of Massachusetts to be a contract to pay a sum of money on a condition, and not a promise to pay it to the payee or holder absolutely and at all events and, therefore, not negotiable.[68] An order or promise to pay out of the profits of a partnership or other enterprise is conditional, and, therefore, neither a bill of exchange nor a promissory note.[69]

65. Blackman v. Lehman, 63 Ala. 547, 35 Am. Rep. 57. In the case of White v. Smith, 77 Ill. 351, 353, 20 Am. Rep. 251, the court said: "The principle is undoubted, that, to constitute a valid promissory note, it must be for the payment of money which will certainly become due and payable one time or another, although it may be uncertain when that time will come. And where the payment depends upon a contingency, it will make no difference that the contingency does, in fact, happen afterward, on which the payment is to become absolute, for its character as a promissory note cannot depend upon future events, but solely upon its character when created."

66. In Carlos v. Fancourt, 5 T. R. (Eng.) 482, 2 R. R. 647, Lord Kenyon held that a writing containing such a promise could not be declared upon as a negotiable instrument, but that an action might be framed upon it as upon a special agreement, and the rule is laid down that an instrument creating a liability of payment upon a contingency cannot be a negotiable bill of exchange or note.

67. Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194, 12 Am. St. Rep. 860.

68. Hubbard v. Mosely, 11 Gray (Mass.), 170, 71 Am. Dec. 698.

69. **Promise to pay out of partnership funds.**— In Munger v. Shannon, 61 N. Y. 251, the instrument under consideration was addressed to the defendant as follows: "Mr. Harrison Shannon. You will please pay to Messrs. Wilkin & Hair the amount of a note for $2,000 dated on December 31st, 1868, and deduct the same from my share of the profits of our partnership business in malting. Note made by myself as principal to order of myself, and indorsed by Nathan Randall and Herrick Munger. L. A. Gulick, per E. Gulick. January 26, 1869." The said order was thereupon transferred to Wilkin & Hair and afterward accepted by the defendant. It was held by the Court of Appeals in an action brought upon the acceptance that the writing was not a bill of exchange but an equitable assignment of sufficient of the profits to pay the note, which was irrevocable as soon as assented to by defendant, so far as to require him to appropriate the

If a note is made payable out of the proceeds of certain carriages whenever they shall be sold, it is not negotiable for two reasons: it is payable out of a certain fund, and on the uncertain event of a sale.[70] A promise to pay "when any dividend shall be declared" by a certain corporation is payable on a contingency, being dependent upon the will of the corporation, and is, therefore, not a promissory note.[71] An agreement in writing by A. to pay B. a certain sum of money upon his completing a piece of work for A. is not a promissory note; and, in order to fix the liability of A., it is necessary to show that B. has done the work as provided in the agreement.[72] A promise in writing to refund a sum of money received from another on condition that a specified receipt be produced is not a promissory note;[73] but in many cases, contrary to this decision, a certificate of deposit with a statement that the amount deposited will be paid on the return of the certificate has been held to be a negotiable promissory note.[74] A written acknowledgment of indebtedness, with a promise to pay as soon as circumstances will permit, is not a promissory note.[75] And where

profits, if any, to its payment; but that he was not absolutely bound to pay, and the absence of profits was a good defense. This case contains a very good review of all the authorities. See also other cases cited in notes under § 36 (*d*) of this chapter.

70. De Forrest v. Frary, 6 Cow. (N. Y.) 151.

71. Brooks v. Hargreaves, 21 Mich. 254.

72. Chandler v. Carey, 64 Mich. 237, 31 N. W. 309. The instrument in question in this case reads as follows:

"$119.00. For value received, we jointly or severally promise to pay Alonzo Heath, or bearer, one hundred and nineteen dollars, on or before the first day of October, next, upon completion of the work to be done by said Heath on a dwelling-house to be built by him for said first parties.

"*February* 7, 1884.

"ABBEY J. CAREY,
"D. W. CAREY."

See also Duffield v. Johnston, 96 N. Y. 369.

In the case of Home Bank v. Drumgoole, 109 N. Y. 63, 15 N. E. 747, contractors delivered an order upon the owner of property directing him to pay to their own order the contract price and charge the same to the account of the contractors, "on account of contract when completed and satisfactory. It was held that the order was not a bill of exchange absolutely payable at the end of forty days.

73. Mason v. Metcalf, 4 Baxt. (Tenn.) 440.

74. Miller v. Austen, 54 U. S. 218, 14 L. Ed. 119; Kirkwood v. First Nat. Bank, 40 Neb. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444; Frank v. Wessels, 64 N. Y. 155; Smilie v. Stevens, 39 Vt. 315; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377; Bean v. Briggs, 1 Iowa, 488, 63 Am. Dec. 464; Drake v. Markle, 21 Ind. 433, 83 Am. Dec. 358; Birch v. Fisher, 51 Mich. 36, 16 N. W. 220; Beardsley v. Webber, 104 Mich. 88; 62 N. W. 173.

Contra.— But the following cases may be cited against this proposition, upholding the doctrine in the case of Mason v. Metcalf, *supra:* Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554; Lebanon Bank v. Mangan, 28 Pa. St. 452; Dempsey v. Harm (Pa. 1887), 12 Atl. 27; Hubbard v. Mosely, 11 Gray (Mass.), 170, 71 Am. Dec. 698; O'Neil v. Bradford, 1 Pin. (Wis.) 390, 42 Am. Dec. 574.

75. Salinas v. Wright, 11 Tex. 572.

a written promise is made to pay a certain sum " at such times and in such articles as the payee may need for her support," it is contingent as to time and manner of payment, and is not a promissory note.[76] A promise to pay money provided the ship Mary arrives at a European port of discharge, free from capture and condemnation by the British, is not valid as a bill of exchange or a promissory note;[77] nor is a promise to pay when a person is married,[78] or when a certain suit is terminated,[79] or a certain sale made,[80] or as soon as " you receive the amount of my account from the government." [81] An instrument containing a promise to pay a certain amount to a person when he arrives at the age of twenty-one is dependent upon a contingency which may never happen and is, therefore, not a negotiable promissory note.[82] An instrument conditioned to be void in case of the happening of a certain event is not a negotiable promissory note or bill of exchange and cannot be sued on as such.[83] A promissory note which

76. Corbitt v. Stonemetz, 15 Wis. 170; Scammon v. Scammon, 28 N. H. 435; Prindle v. Caruthers, 15 N. Y. 425; Light v. Scott, 88 Ill. 239.

77. Coolridge v. Ruggles, 15 Mass. 387.

78. Pearson v. Garrett, 4 Mod. (Eng.) 242; Beardsley v. Baldwin, Stra. (Eng.) 1151.

79. Shelton v. Bruce, 9 Yerg. (Tenn.) 24.

80. De Forest v. Fray, 6 Cow. (N. Y.) 151.

81. Palmer v. Bratt, 2 Bing. (Eng.) 185.

82. Rice v. Rice, 43 App. Div. 458, 462, 60 N. Y. Supp. 97. This case involved a consideration of an instrument in the following form: " For value received I promise to pay Oliver James Rice, or order, the sum of fifteen hundred dollars when he is twenty-one years of age, with interest from date. (Signed) Rachel C. Rice."

The court based its decision upon the case of Kelley v. Hemmingway, 13 Ill. 604, and said: " The court in that case held that inasmuch as the payment was conditional upon the attainment of his majority by the payee — an event which might never happen — it was made dependent upon a contingency, and, therefore, lacked one of the essential elements of a promissory note, which is that the money shall be certainly payable. This case is cited by Story and Daniel as authority for the proposition that a written promise to pay money when the payee shall become of age is not a good promissory note: " for *non constat* that he will ever arrive at that period of life; and we do not find that the correctness of the decision has ever been questioned."

83. Conditioned to be void on happening of event.— Conover v. Stillwell, 34 N. J. L. 54. In this case the instrument was in the following form: " For value received, thirty days after date I promise to pay, etc., on condition, nevertheless, if J. P. S. procure and deliver to said W. W. C. a bond executed by me and C. H., in thirty days from date hereof, indemnifying said W. W. C. against any claim that is or may hereafter arise, relating to the premises which said S. and wife sold and conveyed heretofore to said C., then this note to be void, otherwise to be in full force.

April 3, 1861.

JOHN P. STILLWELL."

And it was held not to be a negotiable promissory note. See also Shaver v. Western Union Tel. Co., 57 N. Y. 459; Chapman v. Wright, 79 Me. 595.

states that it is to be held as collateral security for the payment of certain debts of a third person is not negotiable.[84] But a note

In the case of Fralick v. Norton, 2 Mich. 130, 55 Am. Dec. 56, the instrument read: "$60.00. Plymouth, Jan. 11, 1841. Two years from date for value received, we or either of us promise to pay E. Woodruff, or bearer, sixty dollars, with use. Said Woodruff agrees that if fifty dollars be paid on the first day of January, 1843, it shall cancel this note. (Signed) A. B." The court said: "The whole of the instrument must be taken and construed together in order to determine the question [as to whether the instrument engaged absolutely and unconditionally to pay the sum mentioned.] The first clause taken by itself clearly imports such an agreement; but by the last clause, it is made subject to the condition that if a smaller sum should be paid at an earlier day, such payment should cancel the note. Now if the condition had been, that the note should become void provided the makers should convey a certain estate or perform certain labor, or deliver certain goods within a limited time, no one would pretend that the instrument was a promissory note. Such an instrument would simply import an engagement to do one of two things at the option of the maker, and not absolutely and at all events to do either. And could such an instrument be distinguished from the one under consideration? The purport of it is, that the defendants engage to pay $50 on the first day of January, or at their option to pay $60 and interest on the eleventh of the same month. They were bound absolutely to pay the one sum or the other, but not to pay either sum at all events. The sixty dollars with use they engaged to pay only in the event of their not paying the fifty dollars at a specified time. * * * The instrument declared on does not come within the definition of a promissory note, as given by any elementary writer. I am aware, however, that there are some American cases in which the qualities of a bill of exchange or a promissory note seem to have been given to instruments of this character. (Bayley on Bills, 10, note i.) But the well-settled doctrine upon this subject in England, the general tenor of the American decisions, and the language of all the elementary writers upon bills of exchange and promissory notes are the other way." See also Blackenhagen v. Blundell, 2 B. & Ald. (Eng.) 417; Hartley v. Wilkinson, 4 Mau. & Sel. (Eng.) 25.

84. Haskell v. Lambert, 16 Gray (Mass.), 592; American Nat. Bank v. Sprague, 14 R. I. 410.

Note given as collateral.— A promissory note on the margin of which are written the words "Given as collateral security with agreement," is not negotiable. Costello v. Crowell, 127 Mass. 293. The court said: "In this Commonwealth, it is settled by an uninterrupted series of decisions that any language, put upon any portion of the face or the back of a promissory note, which has relation to the subject-matter of the note, by the maker of it before delivery, is a part of the contract; and that if by such language payment of the amount is not necessarily to be made at all events, and of the full sum in lawful money, and at a time certain to arrive and subject to no contingency, the note is not negotiable. (Citing Jones v. Failes, 4 Mass. 245; Springfield Bank v. Merrick, 14 Mass. 322; Heywood v. Perrin, 10 Pick. (Mass.) 228; Makepeace v. Harvard College, 10 Pick. (Mass.) 298; Wheelock v. Freeman, 13 Pick. (Mass.) 165; Barnard v. Cushing, 4 Metc. (Mass.) 230; Cota v. Buck, 7 Metc. (Mass.) 588; Osgood v. Pearsons, 4 Gray (Mass.), 455; Palmer v. Ward, 6 Gray (Mass.), 340; Hubbard v. Mosely, 11 Gray (Mass.), 170; Way v. Smith, 111 Mass. 523; Stults v. Silva, 119 Mass. 137.) The words written upon the face of the note, 'given as collateral security with agreement,' being incorporated in and made a part of the contract, indicate with clearness that there may be a contingency, to wit, the performance of the undertaking to which this is collateral, in which it would not be payable; and so it lacks that element of negotiability, which requires that at all events a sum certain shall be payable at a time certain."

which contains a statement to the effect that the maker has deposited collateral security for its payment does not thereby lose its character of negotiability;[85] nor does the fact that a note is secured by collaterals affect such negotiability.[86] But a written instrument for the payment of a specified sum at a time specified is rendered nonnegotiable by an alternative contract therein that the payee may sell the collateral securities mentioned therein, and, if these decline in value, may sell them before the money for which the instrument was given would otherwise become due, in which case the proceeds of the sale, less the expense thereof, shall be applied in payment or part payment of the debt, and if a deficiency remains, the amount thereof shall become due forthwith.[87]

85. **Note containing recital that collateral has been deposited.**— In the case of Valley Nat. Bank v. Crowell, 148 Pa. St. 284, 23 Atl. 1068, the instrument had contained therein the following words: "Having deposited herewith a like amount of Crowell Company mortgage bonds as collateral security, which we authorize the holder of this note, upon the nonperformance of this promise at maturity, to sell either at the brokers' board, or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary charges, holding us as makers and indorsers responsible for any deficiency." The court said: "We find nothing in this to destroy the negotiability of the note. While it has been truly said that a promissory note is a courier without luggage, we find nothing in the language quoted above, beyond the statement that the note is accompanied with certain collateral. The mere giving of collateral security with a promissory note does not destroy its negotiability." See also Knipper v. Chase, 7 Iowa, 145; Arnold v. Rock River Valley Union R. Co. 5 Duer (N. Y.), 207; National Bank v. Gary, 18 S. C. 282; Towne v. Tice, 122 Mass. 67; Collins v. Bradbury, 64 Me. 37; Goss v. Emerson, 23 N. H. 38, in which last case it was held that a note is not rendered nonnegotiable by a recital that certain notes given to the payee as collateral are to be surrendered when the note is due; Duncan v. City of Louisville, 13 Bush (Ky.), 378, 26 Am. Rep. 201.

But a note containing an agreement that if there shall be any depreciation, prior to the maturity of the note, in the collateral security, the payee or holder may call for such further security as he deems satisfactory, and if it is not furnished within two days, may proceed at once to sell the collateral, is not negotiable. Lincoln Nat. Bank v. Perry, 66 Fed. 887, 14 C. C. A. 273, 32 U. S. App. 15.

In the case of Humphrey v. Beckwith, 48 Mich. 151, 12 N. W. 28, the instrument was in the following terms: "I promise to pay to E., or order, $1,532.90, with interest at the rate of ten per cent. per annum; interest not to be paid annually unless the said B. can make it convenient, and other security to be taken in exchange for this note when said B. can realize the same in proper shape from the C. homestead. This note is secured by a real estate mortgage bearing even date herwith." It was held that the note was not a negotiable instrument.

86. Mumford v. Tolman, 54 Ill. App. 471; Begler v. Merchants' Loan & Trust Co., 62 Ill. App. 560; Blumenthal v. Jassoy, 29 Minn. 177, 12 N. W. 517; Craft v. Bunster, 9 Wis. 503.

87. Continental Nat. Bank v. McGloch, 73 Wis. 332, 4 N. W. 409; Commercial Nat. Bank v. Consumers' Brewing Co., 17 App. (D. C.) 100.

c. *When order or promise is unconditional; statutory provision.* — The Negotiable Instruments Law contains the following provisions:

"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 reim- "bursement 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 promise to pay out of a particular fund is "not unconditional."[88]

As will be noticed hereafter, it is an unquestioned rule, independent of statute, that an order or promise to pay money out of a particular fund is neither a negotiable bill nor note, although it is generally held that such an instrument may be valid as an equitable assignment.[89]

If an order or promise to pay is unqualified, it is not conditional because it contains a statement indicating a particular fund out of which the maker or drawee is to reimburse himself.[90] Thus an order requesting the defendant to pay to the plaintiff, or order, £9 10s., "as my quarterly half-pay, to be due from the 24th of June to 27th of September, next, by advance," was held to be a bill of exchange.[91] The court said: "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person." The statute has not changed the pre-existing rules in respect to

88. Neg. Inst. Law (N. Y.), § 22. For same section in statutes of other States see Appendix.

The English Bills of Exchange Act, 1882, § 3, subd. 3, is as follows: "An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill is unconditional."

89. Brice v. Bannister, 3 Q. B. D. (Eng.) 569, 47 L. J. Q. B. (Eng.) 722.

In the leading New York case of Munger v. Shannon, 61 N. Y. 251, it appeared that a person gave to the holders of a promissory note made by her, a writing directed to the defendant, her partner, requesting the payment to the holders of the amount of the note, followed by the expression "and deduct the same from my share of the profits of the partnership business;" it was held that the writing was not a bill of exchange, but an equitable assignment of so much of the profits as should suffice to pay the note. See also Brill v. Tuttle, 81 N. Y. 454.

90. Munger v. Shannon, 61 N. Y. 251.

91. Macleod v. Snee, 2 Stra. (Eng.) 762.

charges upon particular funds. Now as before the true test in determining whether an instrument is a negotiable promissory note or a bill of exchange is, whether the maker or drawee is to be confined absolutely to a particular fund therein mentioned, or whether, though a particular fund is mentioned, the drawee would have the power to charge the bill up to the general account of the drawer, or the payee could compel payment of the note by the maker, if the designated fund should turn out to be insufficient. In the final analysis of each case, it must appear that the alleged note or bill is made payable absolutely by the maker or drawn on the general credit of the drawer.[92]

The question has frequently arisen in respect to orders or warrants issued by municipal corporations payable out of particular municipal funds or chargeable to particular accounts; and while it has been generally held that such orders and warrants are non-negotiable, they may be so worded as to come within the general rules relating to other negotiable instruments containing words indicating the "particular fund out of which reimbursement is to be made." For example, it has been held that a statement in a municipal warrant for the payment of a sum certain at a fixed time to a person or his order, that the same is payable "out of any funds belonging to the city, not before specially appropriated," and "chargeable to general city fund," does not deprive the instrument of the character of a negotiable promissory note.[93] An order

92. Munger v. Shannon, 61 N. Y. 251.

Personal credit of drawer.— The court in the case last cited quotes with approval the language used by the court in the case of Dawkes v. De Lorane, 3 Wils. (Eng.) 207, as follows: "The instrument or writing which constitutes a good bill of exchange is not confined to any certain form, or set of words, yet it must have some essential qualities, without which it is no bill of exchange; it must carry with it a personal and certain credit given to the drawer, not confined to credit upon anything or fund; it is upon the credit of a person's hand, as on the hand of the drawer, the indorser, or the person who negotiates it, he to whom such bill is made payable or indorsed, takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same."

An order to pay from a savings bank deposit is not negotiable. In the case of National Sav. Bank v. Cable, 73 Conn. 568, 572, 48 Atl. 428, the court said in speaking of such an order: "If the order had been negotiable it might have been held to import a consideration, but it is not negotiable. It is payable out of a particular fund; it is to pay $300, or what may be due on a specified book; the amount to be paid is made to depend upon the adequacy of a specified fund; such an order is conditional and so not negotiable under the Negotiable Instruments Law."

93. **Municipal orders or warrants.**— See Bull v. Sims, 23 N. Y. 570. In this case the court said: "It is claimed by the defendant that the payment depended upon the condition of the funds at the time they became due, and that the city would not be bound to pay them unless there was sufficient moneys in the city treasury

for the payment of a sum certain to a third person is none the less a bill of exchange because it shows on what account it is to be debited, or the consideration which has been received,[94] or the transaction upon which it is based.[95]

at that time, not specially appropriated, to meet the demand. Such is not their meaning. An indebtedness to the amount specified is acknowledged, and it is stated for what it has been incurred, and on what fund it is chargeable, and although it directs the treasurer to pay the amounts 'out of any funds belonging to the city not before specially appropriated,' no inference can be drawn from this direction that it is chargeable and payable out of any particular or specified fund; on the contrary such an inference is repelled. The financial officer of the city is, in effect, directed that he shall not pay the amount out of any specific moneys appropriated and set apart to other objects, but that he must make the payment out of the general funds of the city, and charge the general city fund therewith in his accounts. It is not contemplated that there will be a deficiency of funds to meet the demands at the time fixed for payment. The order to pay is absolute. It does not direct the payment to be made, if in funds or upon any express condition or contingency, nor do the words which have been mentioned give color to the idea that after acknowledging the indebtedness, the liability of the corporation to pay was in any way to depend on the condition of the city treasury. A presumption to that effect will not be implied against a creditor having a debt chargeable to the city at large, and not against a special fund. The instruments were, therefore, in the nature of negotiable promissory notes, and could be treated as such."

See also Garvin v. Wiswell, 83 Ill. 215, where an order upon a county treasurer payable out of a fund "appropriated for bounties to volunteers" was held to be negotiable. It was held in the case of Furgerson v. Staples, 82 Me. 159, 19 Atl. 158, that a town order might be so worded as to be negotiable under the rules applicable to commercial paper. See also Floyd County Comrs. v. Day, 19 Ind. 450; Sheffield School Township v. Andress, 56 Ind. 157.

94. Statement of consideration.— Hillstrom v. Anderson, 46 Minn. 382, 49 N. W. 187. In this case the order directed the drawee to pay the plaintiffs or order "the two hundred and fifty dollars due us by you on account of cash paid for repairing engine, and this will be receipt in full of all demands of us;" it was held to be a good bill of exchange.

In the case of Wells v. Brigham, 6 Cush. (Mass.) 6, the order was in the following form: "Mr. Brigham — Dear Sir: You will please pay E. W. $30, which is due me for the two-horse wagon bought last spring; and this may be your receipt." The court held that the order had all the essentials of a bill of exchange, and the fact that it indicated a debt due from the drawee as the consideration between the parties did not make it any less a cash order or draft. See also Rice v. Ragland, 10 Humph. (Tenn.) 545.

In Redman v. Adams, 51 Me. 433, where the bill said: "And charge the same against whatever may be due me for my share of fish," it was held that payment was not limited to the proceeds of the fish.

In the case of Defee v. Smith, 43 Ark. 221, the instrument read: "Mr. John Defee: Please pay J. G. Smith the sum of $450, amount due me for carrying the mail from Camden to El Dorado for the last quarter of 1880. R. S. Kendrick." The court said: "The reference in the draft to the 'amount due' the drawer 'for mail service' is merely an indication to the drawee how to reimburse himself or to show to what account it should be charged. Such a statement as to a particular fund does not vitiate the bill."

The case of Nichols v. Ruggles, 76 Me. 25, involved a similar state of facts and was decided in the same way as the case last cited. See also Spurgin v. McPheeters, 42 Ind. 527; Sylvester v. Staples, 44 Me. 496; Hoyt v. Lynch, 2 Sandf. (N. Y.) 328.

95. Statement of transaction.— An instrument reciting "Please pay Abra-

The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid.[96] Words added merely by way of explana-

ham Steers or order two thousand dollars, and charge the same to the balance due on my contract for the erection of two buildings [describing them]" is a negotiable draft, and not an order on a particular fund. Gunther v. Darmstadt, 14 Daly (N. Y.), 368.

One having purchased an engine, gave a note in the following form: "Fourteen and a half months after date I promise to pay to the order of the American Engine Compa-y, one hundred and fifty dollars, at seven per cent., at the Havana National Bank at Havana, N. Y., value received, being in part payment for a portable engine, which engine shall be and remain the property of the owner of this note, until the amount hereby secured is fully paid." Signed. Held, that this was a negotiable note and that it was the duty of the holder to demand payment of the maker and notify the indorser of its nonpayment. Mott v. Havana Nat. Bank, 22 Hun, 354, citing Arnold v. Rock River, etc., R. R. Co., 5 Duer (N. Y.), 207; Willoughby v. Comstock, 3 Hill (N. Y.), 389; Hodges v. Shuler, 22 N. Y. 114.

And where an instrument is made by a railroad corporation, promising to pay to W. S., or order, "a thousand dollars, with interest thereon payable semi-annually as per interest warrants hereto attached as the same shall become due, or upon the surrender of this note together with the interest warrants not due to the treasurer, at any time until six months of its maturity," it was held to be a negotiable note. Hodges v. Shuler, 22 N. Y. 114.

96. Siegel, Cooper & Co. v. Chicago Trust & Savings Bank, 131 Ill. 569, 23 N. E. 417, 19 Am. St. Rep. 51. In this case the instrument was in the following form: "On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of $300, for the privilege of one-framed advertising sign, size x inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Co., for a term of three months from May 15, 1887.

"Siegel, Cooper & Co."

Such instrument was indorsed by Dalziel, the payee, to the bank, for value, on the day of its execution. It appeared that the contract was never fulfilled because of Dalziel's forfeiture of his right to use the cars. The recital of the consideration in the note was held not to affect its negotiability. For a similar New York case decided in like manner see Chase v. Behrman. 10 Daly, 344.

Notes in land transactions.— In the case of Ferriss v. Tavel, 87 Tenn. 386, 11 S. W. 93, a promissory note given for land sold by a parol contract contained a recital that it was given for the "third payment on twenty-eight lots in Rains' Addition, Ninth District, this day purchased of Albert Tavel." The court said: "Following the weight of authority, and what is regarded as better public policy, we hold that the statement of the consideration in the face of the note did not impair its negotiability, and should not be allowed to prejudice the right of White [the indorsee] to enforce its collection." Citing Doherty v. Perry, 38 Ind. 15; Bank v. Barrett, 38 Iowa, 126; Hereth v. Bank, 34 Ind. 380; Sackett v. Kellar, 22 Ohio St. 558; Taylor v. Curry, 109 Mass. 36. See also Hubert v. Grady, 59 Tex. 502; Garrett v. Interstate Bank, 79 Tex. 133.

The English cases are somewhat different from the majority of the American cases, and for the most part have held that the recital must be that of a consideration which has already been executed. See Jarvis v. Wilkins, 7 Mees. & W. (Eng.) 410; Dixon v. Nuttal, 6 C. & P. (Eng.) 320, 25 E. C. L. (Eng.) 418.

tion to a positive order to pay do not affect the instrument.[97] Indeed, it is very common to specify in the bill the object or purpose for which it was drawn, as well as the account to which it is to be charged, without intending to make the order to pay either conditional or contingent.[98]

d. *Order or promise to pay out of a particular fund.*— It has been long established that a bill or note made payable out of a particular fund is not negotiable; that such an instrument is merely a special agreement to be treated in the same manner as an ordinary contract. When a bill or note is made payable out of a particular fund, the promise is made contingent upon the sufficiency of the fund; and if it fail, the promise becomes nugatory; and, therefore, the law does not regard such instruments, incumbered as they are with conditions and contingencies, as negotiable paper. If assigned, as they may be, the assignee must take them subject to all the equities.[99] The general rule, as stated by Story, is "that a bill of exchange always implies a personal general credit, not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill, in the general course of its negotiation; and if the bill wants upon the face of it this essential quality or character, the defect is fatal."[1] As an example, where the plaintiff drew upon A. and ordered him to pay B. £7 per month out of the plaintiff's growing subsistence, it was held no bill of exchange, for had the plaintiff died, or his subsistence been taken away, the bill would not have been payable.[2] And an order from the owner of a ship upon the charterer, to pay money on account of freight, is not a bill, for the future existence and amount of any debt due for freight are subject to a contingency.[3] Nor is an order to pay out of the rents or other moneys of the drawer, in the hands of the drawee;[4] or out of the proceeds

97. Leonard v. Mason, 1 Wend. (N. Y.) 522. This case was brought on a bill written under a note as follows: "Please pay the above note, and hold it against me in our settlement."

98. Goodrich v. Gordon, 15 Johns. (N. Y.) 6.

Where the mayor of Brooklyn drew a bill upon the treasurer of the city in these terms: "Pay Alexander Lyon, or order, fifteen hundred dollars for award No. 7, and charge to Bedford road assessment," it was decided to be a good bill of exchange; because the payment was not, on the face of the bill, either conditional or restricted to any particular fund. Kelly v. Mayor, etc., of Brooklyn, 4 Hill (N. Y.), 263.

99. Edwards on Bills and Notes, p. 143.

1. Story on Bills of Exchange, § 46, citing Dawkese v. Earl of Deloraine, 2 Wm. Bl. (Eng.) 782; Carlos v. Fancourt, 5 T. R. (Eng.) 482. See Andrews v. Harvey, 39 Tex. 123.

2. Josselyn v. Lacier, 10 Mod. (Eng.) 294.

3. Banburry v. Lissett, 2 Stra. (Eng.) 1211.

4. Morton v. Naylor, 1 Hill (N. Y.), 583, in which a written order by a

of certain sales.[5] Neither is an order drawn by a client on his attorney, to pay a certain sum out of any moneys collected for him, a bill of exchange;[6] nor is a receipt given by an attorney to be accountable to Thomas Witt or bearer, for securities deposited with him for collection, to be deemed a negotiable instrument.[7] Though written in the form of a note, if the writing containing the promise show that it is payable out of a special fund, it is void as a note; as where it is drawn in the shape of a receipt for £200 in drafts, concluding with a promise to pay it to the lender with interest.[8] And it has been held that a written agreement to pay a sum of money out of the net proceeds of ore to be mined and sold from a certain ore bed is not a promissory note.[9] Many other

landlord on his tenant to pay the rents accruing during a specified period was held not to be a bill of exchange requiring a written acceptance, although it appeared on inquiry *aliunde* that the rents were payable in money.

An order to pay a certain amount on account of the drawer's share of undue rent, and accepted by the drawees "when due," is not a bill of exchange. Rice v. Porter, 16 N. J. L. 440.

5. Atkinson v. Manks, 1 Cow. (N. Y.) 691.

An order to pay a certain sum "out of the proceeds of cattle to be sold on account of the drawer, when the same shall be received by the drawee," is not a bill of exchange, and a general acceptance by the drawee only renders him liable according to the conditions of the order. Kinney v. Lee, 10 Tex. 155. See also Curle v. Beers, 3 J. J. Marsh. (Ky.) 170; Kelly v. Bronson, 26 Minn. 359, 4 N. W. 607; Lowery v. Steward, 25 N. Y. 239, 82 Am. Dec. 346.

6. Crawford v. Cully, Wright (Ohio), 453.

Order to pay money collected.— The owner of a note placed it in the hands of the defendants, his attorneys, for collection, and subsequently gave the plaintiff an order on the defendants for the payment of a part of the money to be collected, which defendants accepted, "payable out of the first moneys collected." The client afterward compromised with the maker, and no money was ever collected. It was held that the order was not a bill of exchange, nor an assignment *pro tanto* of the note, but a mere mandate of the payee, which was revoked by the settlement, and that the defendants were not liable on the acceptance. Lindsay v. Price, 33 Tex. 280. See also Gliddon v. McKinstry, 28 Ala. 408; Hamilton v. Myrick, 3 Ark. 541; Owen v. Lavine, 14 Ark. 389; Raiguel v. Ayliff, 16 Ark. 594; Aguel v. Ellis, 1 McGloin (La.), 57; Harriman v. Sanborn, 43 N. H. 128.

7. Fisk v. Witt, 22 Pick. (Mass.) 83. And see Harriman v. Sanborn, 43 N. H. 128.

8. Williamson v. Bennett, 2 Campb. (Eng.) 418.

9. Worden v. Dodge, 4 Den. (N. Y.) 159. In this case an agreement was executed by the defendants by which they agreed to pay plaintiff or order $250, with interest, in a specified time, "out of the net proceeds after paying the costs and expenses of ore to be raised and sold from the bed on the lot this day conveyed by Edward Madden to Edwin Dodge, which bed is to be opened and the ore disposed of as soon as conveniently may be." In the trial court it was held that the plaintiff could not recover without proof that the defendants had received funds from the ore to enable them to pay, or had failed to work the ore bed as they had agreed. In the absence of this proof plaintiff was nonsuited. The court above held that the nonsuit was proper. That as the promise was not to pay absolutely and at all events it was not a negotiable promissory note, and hence must be recovered upon, if at all, as upon an ordinary contract.

instances might be noted indicating the application of the principles relating to the nonnegotiability of bills and notes payable out of particular funds; it will, perhaps, be sufficient to cite a number of cases in which these principles have been considered.[10]

§ 37. Must be payable in money.

a. *In general.*— It is an essential quality, as established by foreign and American law, without exception or modification, that a negotiable promissory note or bill of exchange be payable in money only.[11] And a bill cannot be for the delivery

10. The following are cases relating to this question arranged, as far as practicable, in respect to the nature of the particular funds from which the instruments are payable:

Payments from shares of estates of deceased persons, see West v. Foreman, 21 Ala. 400; Mills v. Kuykendall, 2 Blackf. (Ind.) 47; Richardson v. Carpenter, 46 N. Y. 660; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452; Mershon v. Withers, 1 Bibb (Ky.), 503.

Payments from amount due under a contract.— Wakeman v. Noble (N. J. Ch.), 20 Atl. 388; Van Wagener v. Terrett, 27 Barb. (N. Y.) 181; Gates v. Eno, 4 Hun (N. Y.), 96; Cole v. Dalton, 6 Daly (N. Y.), 484; Hollister v. Hopkins, 13 Hun (N. Y.), 210; Ehrichs v. De Mill, 75 N. Y. 370; Ellison v. McCahill, 10 Daly (N. Y.), 367; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Duffield v. Johnston, 96 N. Y. 369; Rice v. Ragland, 10 Humph. (Tenn.) 545, 53 Am. Dec. 737; Jackman v. Bowker, 4 Metc. (Mass.) 235; Bank of Antigo v. Ryan, 104 Wis. 365, 80 N. W. 440.

In the case of American Boiler Co. v. Fontham, 34 App. Div. 294, 55 N. Y. Supp. 923, an instrument in the following form:

"NEW YORK, *July* 20, 1895.
"CHARLES F. FONTHAM,
"105 W. 95th St., City.
"Dear Sir.— Please pay to the American Boiler Company, No. 94 Center St., City the sum of one hundred and eighty-seven and 15/100 ($187.15) dollars, and charge the same to my account on heating contract at 64 West 99th street, and oblige
"Yours Respectfully,
H. J. APGAR.

"Accepted, and I agree to pay the sum specified herein within sixty days from date. Charles F. Foutham," was held to be a mere order, and not an accepted bill of exchange, and in an action thereon against the acceptor, the latter was permitted to show that there was nothing due under the heating contract to the drawer of the order.

State and municipal orders, see cases cited in note 93, *ante*, and also Strader v. Batchellor, 8 B. Mon. (Ky.) 168; Dana v. City of San Francisco, 19 Cal. 486; Boardman v. Hayne, 29 Iowa, 339; Koch v. Branch, 44 Mo. 542, 100 Am. Dec. 324; Matthis v. Town of Cameron, 62 Mo. 504; Read v. City of Buffalo, 67 Barb. (N. Y.) 526; Warner v. Commonwealth, 1 Pa. St. 154, 44 Am. Dec. 114; Dyer v. Covington Township, 19 Pa. St. 200; First Nat. Bank v. Rush School Dist., 81 Pa. St. 307; Carran v. Little, 40 Ohio St. 397.

Payments out of proceeds of drafts, Raiguel v. Ayliff, 16 Ark. 389; or out of special deposit in bank, Andrews v. Harvey, 39 Tex. 123; out of any money in drawee's hands belonging to drawer, Averett v. Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203; out of proceeds of a bond, Kenny v. Hinds, 44 How. Pr. (N. Y.) 7; Stamps v. Graves, 4 Hawks (N. C.), 102; out of notes left for collection, Van Vacter v. Flack, 9 Miss. 393, 40 Am. Dec. 100; out of profits of a partnership, Munger v. Shannon, 61 N. Y. 251.

11. *United States.*— Hasbrouck v. Palmer, Fed. Cas. 6,188, 2 McLean, 10; Fry v. Rousseau, Fed. Cas. 5,141, 3 McLean, 106.

Alabama.— Goading v. Britain, 1 Stew. & P. 282.

or payment of merchandise, or other things in their nature susceptible of deterioration, loss, and variation in quality and value.[12] The only remaining difficulty is to determine what is money. There has been a very apparent conflict of authority in the consideration of this question, especially as regards those instruments made payable in current bank notes, in currency, and in legal tender. This question is not at the present time as important as it once was, owing to the fact that existing Federal laws have so modified our financial and banking systems, that circulating bank notes are rarely, if ever, issued by State banks under the restrictions imposed and the protection afforded by State laws. It seems necessary, therefore, to only mention the cases dealing with the

Georgia.— Poole v. McCrary, 1 Ga. 319.

Massachusetts.— Jones v. Fales, 4 Mass. 245; Sanger v. Stimson, 8 Mass. 260.

Michigan.—Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162.

New York.— Thompson v. Sloan, 23 Wend. 71, 35 Am. Dec. 546; Hodges v. Schuler, 22 N. Y. 114; Chrysler v. Renois, 43 N. Y. 209; Kelly v. Ferguson, 46 How. Pr. 411; Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534.

North Carolina.— Hodges v. Clinton, 1 N. C. 76.

South Carolina.— Lange v. Kohne, 1 McCord, 115; Hamburg Bank v. Johnson, 3 Rich. 42.

Texas.— First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40, 19 S. W. 334; Hogue v. Williamson, 85 Tex. 553, 22 S. W. 580, 34 Am. St. Rep. 823, 20 L. R. A. 481.

12. **Instruments for payment of merchandise.**— Chitty on Bills, 132. See also Atkinson v. Manks, 1 Cow. (N. Y.) 691, 707; Jerome v. Whitney, 7 Johns. (N. Y.) 321, where a note to pay sixty dollars in "neat cattle" was held not to be a note within the statute; Thomas v. Roosa, 7 Johns. (N. Y.) 461; Saxton v. Johnson, 10 Johns. (N. Y.) 418; Jones v. Fales, 4 Mass. 245; Youngs v. Adams, 6 Mass. 182. In the case of Carleton v. Brooks, 14 N. H. 149, it was held that a written promise to pay the plaintiff or his order, seventy-five dollars in grain, is not a promissory note. The court said: "But the rules which determine the requisites of negotiable paper have arisen from an experience of the necessities of commercial transactions, and have been settled by a well-considered course of judicial decisions. These rules should never be trenched upon, unless in cases of absolute necessity, when exceptions to them must of course exist. It has long been settled in England that a promissory note must be for the payment of money only, and not for the delivery or payment of merchandise, or other things in their nature susceptible of deterioration and loss, and variation in quality and value. Martin v. Chauntry, 2 Stra. (Eng.) 1271; Smith v. Boheme, 2 Ld. Raym. (Eng.) 1362. And such is the opinion of Chancellor Kent, who says that the doctrine of the cases which hold that a promissory note may be for the payment of other things than money, has been met and denied. 3 Kent's Comm. 76." See also Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Riggs v. Price, 3 G. Greene (Iowa), 334; McCartney v. Smalley, 11 Iowa, 85; Coyle v. Satterwhite, 4 T. B. Mon. (Ky.) 124; Pepper v. Peytavin, 12 Mart. (O. S.) (La.) 671; Brown v. Richardson, 20 N. Y. 472; Rhodes v. Lindley, 3 Ohio, 51, 17 Am. Dec. 580.

Payable in services.— A note payable wholly or partly in personal services is not assignable. Ransom v. Jones, 2 Ill. 291; Halbert v. Deering, 4 Litt. (Ky.) 9; Henry v. Hughes, 1 J. J. Marsh. (Ky.) 453; Bothick v. Purdy, 3 Mo. 82; Prather v. McEvoy, 8 Mo. 661; Quinby v. Merritt, 11 Humph. (Tenn.) 439.

question of negotiability of an instrument made payable in current bank notes.

b. *Definitions; money; currency; legal tender.*— Money is a general, indefinite term for the measure and representation of value.[13] It is a generic term, and embraces every description of coin or bank notes, recognized by common consent as a representative of value in effecting exchanges of property or payment of debts.[14] Money has been defined by Chancellor Kent in the case of Mann v. Mann,[15] to be cash, that is, gold and silver, or the lawful circulating medium of the country — including bank notes, when they are known and approved of, and used in the market as cash. Currency is bank bills, or other paper money, which passes as a circulating medium in the business community, as and for the constitutional coin of the country.[16] The term includes coin and such bank bills as pass freely in commercial transactions as money, and are regarded as equivalent in value to coin.[17] As stated by Ryan, Ch. J., in the well-considered case of Klauber v. Biggerstaff:[18] "In fact almost all civilized countries, including this

13. Black's Law Dict., p. 785.

14. Hopson v. Fountain, 5 Humph. (Tenn.) 140.

Money, meaning of term.— In the case of Jones v. Overstreet, 4 T. B. Mon. (Ky.) 547, Bibb, Ch. J., said: "We cannot but know that money, in its most general signification, meant a representative of value, a medium of commerce and exchange. In this general term is included lawful tender money, and current money, and that the one or the other of these species of money is intended by certain forms and modes of expression, according to the times and currencies in use, and the same words used at different periods may convey different ideas as to the kind of money intended. During the Revolutionary War, when paper money was the only circulating medium of the States, current money meant paper money; after that was abolished and called in, and gold and silver became the currency, then current money meant coined money and not paper," citing and distinguishing Chambers v. George, 5 Litt. (Ky.) 335; Lampton v. Haggard, 3 T. B. Mon. (Ky.) 149.

The American and English Encyc. of Law (2d ed.), vol. 20, p. 837, defines money "as that which passes freely from hand to hand throughout the community in final discharge of debts and full payment for commodities, being accepted equally without reference to the character or credit of the person who offers it, and without the intention of the person who receives it to consume or apply it to any other use than in turn to tender it to others in discharge of debts or payment for commodities." This definition is that employed by Mr. Walker in his work on "Money, Trade, and Industry," and is approved by Darling, J., in the case of Moss v. Hancock, L. R. (1899), 2 Q. B. D. (Eng.) 111, 116.

15. 1 Johns. Ch. (N. Y.) 236.

16. Galena Ins. Co. v. Kupfer, 28 Ill. 332, 81 Am. Dec. 284. This was an action on a check payable in current funds; when presented for payment, depreciated Illinois bank paper was offered and refused. The court held that the term "current funds" meant current money, par funds, or money circulating without any discount. See also Chicago Fire & Marine Ins. Co. v. Keiron, 27 Ill. 501.

17. Marine & Fire Ins. Co. v. Tincher, 30 Ill. 399; Webster v. Pierce, 35 Ill. 158; Bull v. Kasson Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97.

18. 47 Wis. 551, 32 Am. Rep. 773.

The term "currency," when applied to the medium of trade, means equally country, have a mixed circulation of coin and bank notes. These constitute the currency of the country — its money; and the general term, 'currency,' includes both. Currency, therefore, means money — coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, while paper money may generally be specially refused in payment of a debt; but a payment in either is equally made in money — equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender. The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money." Legal tender is that kind of money which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount.[19] Foreign gold or silver coins are not legal tender.[20] The gold and silver coins of the United States and United States notes are lawful money and legal tender in the payment of all debts, public and private.[21] National bank notes are lawful money but are not legal tender.[22]

c. *Instruments payable in current funds or currency.*— There are a number of cases holding that a note or bill payable in currency or current funds is not negotiable.[23] These do not seem to

coin, bank notes, or notes issued by the government. Webster's Dict.; Croker v. State, 47 Ala. 57.

Currency includes coined money and such bank notes and other paper money as are authorized by law and do in fact circulate from hand to hand as the medium of exchange. Black's Law Dict., p. 311.

19. Black's Law Dict., p. 700.

20. U. S. Rev. Stat., § 3584.

21. The gold coins of the United States shall be a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced in weight below such standard and tolerance, shall be a legal tender at valuation in proportion to their actual weight. U. S. Rev. Stat., § 3585.

Silver dollars are full legal tender, 20 U. S. Stat. at L. 25.

Silver coins of less than one dollar in denomination are legal tender in all sums not exceeding ten dollars in full payment of all dues, public and private. 21 U. S. Stat. at L. 7.

22. Woodruff v. Mississippi, 162 U. S. 291, 300, 16 Sup. Ct. 820, 40 L. Ed. 973.

23. Payment in currency.— Mobile Bank v. Brown, 42 Ala. 108; Huse v. Hamblin, 29 Iowa, 501, 4 Am. Rep. 244; Rindskoff v. Barrett, 11 Iowa, 72. In both of these Iowa cases it was intimated that evidence might be admitted to show that instruments payable in currency were negotiable under an existing custom. But see *contra*, Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Butler v. Paine, 8 Minn. 324, and Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773; Bank of U. S. v. Bank of Georgia, 10 Wheat. 333, where Justice Story says: "Bank notes constitute a part of the common *currency* of the country and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good accord with the generally accepted meaning of the term "money" or "currency." It would seem that if the instrument shows on its face that it was payable in coin, bank notes, government notes, or other paper which would properly come within the ordinary definition of money, it is negotiable. So that if the term "current funds" or "currency" as used in the instrument means money, there can be no doubt of its negotiability. It is probable that this question is not so important at the present time, as formerly, when, in each State, bank notes were issued by State banks and individual bankers under a system established pursuant to State statutes; in each State more or less protected and guaranteed by provisions made in such statutes, and always more or less dependent upon the individual credit of the bank or banker. State currency as distinguished from United States currency no longer exists, resulting partly from our comprehensive national banking system, and partly from the restrictions imposed by means of a tax upon circulating notes issued by State banks.[24] The elimination of State bank notes from the monetary field has limited the meaning of the term "money" so that it now includes national bank notes, United States notes, and gold and silver coin. All of these except national bank notes are declared by statute to be legal tender in the payment of all private debts; and national bank notes are lawful money.[25] Drawers of bills of exchange, or checks, or makers of promissory notes have frequently, since the passage of the so-called legal tender acts, indicated whether payment should be made in government notes or in gold or silver; and the term "current funds" has been used to designate any of these, all being current and declared by positive enactment to be legal tender. Such a term is intended to cover whatever is receivable and current by law as money, whether

tender as money, unless specially objected to; and, as Lord Mansfield observed in Miller v. Race, 1 Burr. Rep. (Eng.) 457, they are not, like bills of exchange, considered as mere securities or documents for debts."

24. U. S. Rev. Stat., § 3412.

In speaking of the tax imposed by this section upon circulating notes used and paid out by a bank, Chief Justice Waite said in the case of Merchants' Nat. Bank v. United States, 101 U. S. 1, 25 L. Ed. 979: "The tax thus laid is not on the obligation, but upon its use in a certain way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore, the banker who helps to keep up the use by paying them out, that is employing them as the equivalent of money in discharging his obligation, is taxed for what he does. *The taxation is no doubt intended to destroy the use;* but that, as has just been seen, Congress has the power to do."

25. Woodruff v. Mississippi, 162 U. S. 291, 300, 16 Sup. Ct. 820, 40 L. Ed. 973.

in the form of notes or coin.[26] It has been observed that the cases holding that a bill or note payable in "current funds," or "current bank notes," or "in currency," was not negotiable, were invariably decided when the paper money circulating in the several States was of a very heterogeneous character, and it is intimated that the cases might have been so decided in view of the unsatisfactory condition of such money.[27] We have cited in the note a number of cases holding that instruments payable in current funds[28] and in current bank notes[29] are not negotiable. An early case in New York was to the effect that a note payable in "York State bills or specie" is payable in lawful money and is a negotiable promissory note under the statute.[30] There are a number of other New York cases and also of other States to the same effect.[31] There has

26. Bull v. Bank of Kasson, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97. In this case a bank check for the payment of "five hundred dollars in current funds" was held payable in whatever is current by law as money, and to be a bill of exchange. See also Wright v. Morgan (Tex. Civ. App.), 37 S. W. 627.

27. Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773, where Ryan, Ch. J., has said in respect to a number of early cases decided in Wisconsin holding the nonnegotiability of such instruments: "These cases were decided respectively, in 1862, 1863, and 1864, when the paper money, circulating in the State *de facto*, was of a very heterogeneous character. How much influence this fact had on those decisions, or on similar decisions elsewhere, it is impossible to say. It is perhaps not altogether an uncommon infirmity of judicial rules, that they are made in view of exceptional conditions of things presently existing. Passing evils or exigencies should have little weight in general rules of decision. Judicial rules ought properly to be placed upon the general condition of society, and to be broad enough to meet occasional derangements incident to it."

28. **A certificate of deposit** made payable in current funds is not negotiable. National State Bank v. Ringel, 51 Ind. 393; Johnson v. Henderson, 76 N. C. 227; Platt v. Sauk County Bank, 17 Wis. 222; Lindsey v. McClelland, 18 Wis. 481. 86 Am. Dec. 786. But see *contra*, Kirkwood v. First Nat. Bank, 40 Neb. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444, where the court said: "It is next said that the amount of payment is uncertain, and the instrument is for that reason nonnegotiable. This argument is predicated upon the provision that the certificate is payable "in current funds." We are aware that many courts have held that such a clause does not require payment in money, and destroys the negotiability of the instrument. The cases so holding are either cases arising at a time when many forms of bank notes and bills were in use, varying in their values, or cases decided upon the authority of that class of cases, without regard to changed conditions." See also Hatch v. First Nat. Bank, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

29. **Current bank notes.**—See Fry v. Rousseau, Fed. Cas. 5,141, 3 McLean, 106; Irvine v. Lowry, 39 U. S. 293, 10 L. Ed. 462; Little v. Phenix Bank, 2 Hill (N. Y.), 425, affd. in 7 Hill (N. Y.), 359; State v. Corpening, 32 N. C. 58; Lackey v. Miller, 61 N. C. 26; McCormick v. Trotter, 10 Serg. & R. (Pa.) 94: Gray v. Donahue, 4 Watts (Pa.), 400; Kirkpatrick v. McCullough, 3 Humph. (Tenn.) 171, 39 Am. Dec. 158; Simpson v. Moulden, 43 Tenn. 429; Wolf v. Tyler, 1 Heisk. (Tenn.) 313.

30. Keith v. Jones, 9 Johns. (N. Y.) 120.

31. **The negotiable character of a** certificate of deposit issued by a bank is not destroyed by a provision therein making it payable in current bank

always been enough conflict of authority as to the negotiability of such paper to support the statement that there never has been a well-established doctrine in respect thereto. Finally, in our opinion, the better and more reasonable doctrine, as a result of the existing condition of monetary and mercantile affairs in this country, is to hold that wherever the terms "currency" or "current funds" are used in commercial transactions as the expression of the medium of payment, they should be construed to mean current money,— funds which are current by law as money; and when so construed, an instrument made payable in such a manner should be deemed negotiable.[32]

d. *Payable in foreign money.*— Story says: "Provided the note be for the payment of money it is wholly immaterial in the money or currency of what country it is made payable. It may be payable in the currency or money of England, or France, or Spain, or Holland, or Italy, or of any other country. It may be payable in coins, such as guineas, ducats, doubloons, crowns, or dollars, or in the known currency of the country, as in pounds sterling, livres, tournoises, francs, florins, etc., for in all these and the like cases, the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency, with reference to the par."[33] But where an instrument is made payable generally in the money of a foreign country, without specifying the kind or denomination of the coin or money, so that payment may be made in our own coin of equivalent value as determined by the par of exchange, it is not negotiable, according to a leading case

notes instead of money. Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176. See also Judah v. Harris, 19 Johns. (N. Y.) 144; Sweetland v. Creigh, 18 Ohio, 118, where it was held that a promissory note payable "in current Ohio bank notes" is for a sum of money certain, and therefore negotiable; Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Besancon v. Shirley, 17 Miss. 457; Laird v. State, 61 Md. 309, where it was held that words "current funds" in a bill of exchange, are equivalent to "current money," and do not destroy the negotiability of the bill.

32. Hatch v. First Nat. Bank, 94 Me. 348, 80 Am. St. Rep. 401, 47 Atl. 908.

33. Story on Promissory Notes, § 17; Story on Bills, § 43.

Pounds sterling.— In the case of King v. Hamilton, 12 Fed. 478, the court cited with approval the extract from Story on Bills of Exchange, and said: "It follows that a note payable in pounds sterling or British sovereigns is payable in "money" just as much and as certainly as if it was payable in dollars. The case is different from a note made payable in "currency," which may be "money" only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money, as pounds sterling, it is payable in money the same as if it was payable in a denomination of domestic money."

in New York upon this question.[34] This is not invariably the rule, for in a Michigan case a note payable in "Canada currency" was held negotiable, and the New York case already referred to was disapproved;[35] and a promissory note payable in Mexican silver dollars has been held negotiable.[36]

e. *Payment in money optional.*— Among the requisites of a negotiable bill or note is that it be for the payment of money only, and not for the performance of some other act, *or in the alternative.*[37] Hence a promissory note payable in cash or in certain specified articles is not negotiable.[38] And where a written agreement was made whereby the subscriber promised to pay another a sum of money on demand, with interest, and added, "but no demand is to be made as long as the interest is paid;" it was held that it was an alternative agreement to do a certain thing, or pay a sum of money, and was not, therefore, a negotiable promissory note.[39] So a note for money which may be discharged by the delivery of cotton is not negotiable;[40] nor is a note payable in "bank stock or lawful money of the United States."[41] It may be

34. **Canada money.**— Thompson v. Sloan, 23 Wend. (N. Y.) 71. In this case a note was made payable "in Canada money." The court said: "It is not pretended that coins current in Canada are, therefore, so in this State. As gold and silver they might readily be received; and so might the coin of any foreign country, Germany or Russia, for instance; but the creditor might, and in many cases doubtless would, refuse to receive them, because ignorant of their value. In law they are all collateral commodities, like ingots or diamonds, which though they might be received and be in fact equivalent to money, are yet but goods and chattels. A note payable in either would, therefore, be no more negotiable than if it were payable in cattle, or other specific articles. The fact of Canada coins being current here is not, at any rate, so notorious that we can judicially notice them as a universally customary medium of payment in this State; * * *

"This view of this case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings and pence, made in any country, is but another mode of expressing the amount in dollars and cents; and is so understood judicially. The course, therefore, in an action on such an instrument is to aver and prove the value of the sum expressed, in our own tenderable coin."

35. Black v. Ward, 27 Mich. 193, 15 Am. Rep. 162.

36. Hogue v. Williamson, 85 Tex. 553, 22 S. W. 580, 34 Am. St. Rep. 823, 20 L. R. A. 481.

37. Cook v. Satterlee, 6 Cow. (N. Y.) 108.

38. Matthews v. Houghton, 2 Fairf. (Me.) 377; Johnson v. Baird, 3 Blackf. (Ind.) 153; Howell v. Todd, Fed. Cas. 6,783.

39. Seacord v. Burling, 5 Den. (N. Y.) 444. Such an instrument was declared to be a contract "that the promisor at his election will pay the interest on five thousand dollars annually, or decline to do so, and to pay the principal on demand. A promise to pay money or perform an act is not a good promissory note."

40. Lawrence v. Dougherty, 5 Yerg. (Tenn.) 434.

41. Alexander v. Oaks, 2 Dev. & B. (N. C.) 513.

stated, then, as a rule of universal application that if there appears upon the face of the instrument any contingency which would make it payable in anything other than money, it does not possess the negotiable qualities of a promissory note or bill of exchange, and becomes a mere contract. It is an alternative to pay a sum of money or do some other act. But where the option rests with the holder of the note the case is different. The promisee may insist and the promisor is bound to pay absolutely the amount stated; but the promisee may, at his option, require the fulfilment of the alternative promise, and no choice is left to the promisor. There being an unconditional and absolute promise to pay money, the instrument is not deprived of its negotiable quality.[42] The Negotiable Instruments Law provides that the negotiable character of an instrument otherwise negotiable is not affected by a provision which gives the holder an election to require something to be done in lieu of payment of money.[43] There are cases to the effect that a note payable in money or a specified commodity to be delivered on a certain day, becomes an absolute promise to pay money if the commodity is not delivered on that day.[44]

f. *Act in addition to payment of money.*—An instrument which contains an order or promise to do any act in addition to the pay-

42. Hosstatter v. Wilson, 36 Barb. (N. Y.) 307. In this case a promissory note in the following form: "Four months after date, I promise to pay to the order of M. W. Wilson, fifty-five dollars, at my store, No. 134 4th street, (or in goods on demand) value received" was held to be a negotiable promissory note. The court said: "In the present case the debtor promises to pay in money. He has no election to do anything else. If the holder chooses he may surrender the note and receive goods; but that rests entirely with himself, and no choice is left to the debtor."

Option resting with holder of note. —In the case of Hodges v. Schuler, 22 N. Y. 114, it was held that the note of a corporation, for a specific sum, with a fixed time for payment, and containing the condition that the holder might within a given time surrender the note, and receive stock in lieu thereof, was a promissory note. This was no other than a note for money, or, in case the holder elected within the time specified, to be paid in stock. The court said: "The instrument is a promissory note. It is for the unconditional payment of money, at a specified time, to the payee's order. It was not optional with the makers to pay in money or stock, and thus fulfil their promise in either of two specified ways; in such case the promise would have been in the alternative." And again, "Although the election was given to the promisees upon a surrender of the instrument to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay." See also Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Mosely v. Walker, 84 Ga. 274; Dennett v. Goodwin, 32 Me. 44.

43. Neg. Inst. L. (N. Y.), § 24. For same section in statutes of other States see Appendix.

44. Baker v. Todd, 6 Tex. 273, 55 Am. Dec. 775; Fleming v. Nall, 1 Tex. 246; Grant v. Burleson, 38 Tex. 214; Van Hooser v. Logan, 3 Scam. (Ill.) 90.

ment of money is not negotiable.[45] This is the rule independent of the provisions of the Negotiable Instruments Law. As stated by Mr. Edwards: "It is also requisite that bills and notes be made for the payment of money only, and not for the payment of money *and* for the performance of some other act."[46] It does not, however, impair the validity of a note to mention in it by way of recital, a circumstance or fact that does not qualify or add to the undertaking expressed in it.[47] Where an agreement is engrafted on a note, it takes from the instrument its character as a promissory note, and converts it into an ordinary contract.[48]

To be a promissory note, the writing should be one entire instrument for the payment of money. If it be in form and substance a note up to a certain point, as where it is given for the payment of £695 in installments, payable from time to time, and concludes with a provision that the balance, £95, shall be applied as a set-off in a manner specified, the instrument is not a promissory note.[49] Reference has already been made to cases where certificates of deposit have been given, containing a statement that they are payable in cash upon the return of such certificates;[50] it seems to be a general rule that such certificates are negotiable. And where a note for a certain amount was indorsed by the maker by a written order, as follows: "Please pay the above note, and hold it against me in our settlement," the order was held to be operative as a bill of exchange, and the drawee after acceptance was held liable thereon.[51] But in another case an instrument in writing by which

45. Neg. Inst. L. (N. Y.), § 24. For same section in statutes of other States see Appendix.

46. Edwards on Bills and Notes, 138.

47. Fancourt v. Thorne, 9 Q. B. (Eng.) 312.

48. Bolton v. Dugdale, 4 B. & Ad. (Eng.) 619. The contract in this case was in these words: "Received and borrowed of Timothy Bolton, laborer, the sum of £30 which I do hereby promise to pay with interest, at the rate of five per cent. I also promise to pay the demands of the sick club at H——, in part of interest, and the remaining stock and interest to be paid on demand to the said Timothy Bolton, his executors, administrators or assigns." It was held not to be a promissory note.

49. Edwards on Bills and Notes, p. 139, citing Davies v. Wilkinson, 10 Ad. & El. (Eng.) 98.

50. See cases cited under § 36 (*b*), of this chapter, *ante*, pp. 177-181.

51. Leonard v. Mason 1 Wend. (N. Y.) 522. In this case the court said: "It is supposed that this case depends on the same principles as the case of Cook v. Satterlee, 6 Cow. (N. Y.) 108. The rule there recognized is, that a bill of exchange must be for the payment of money, and nothing else. In that case, the drawees were required to pay a certain sum of money, and take up a note given by the drawer to a third person. Here it is to pay a note, which is referred to merely to ascertain the amount; and the retaining of the note as a voucher is no more the performance of another act beside the payment of the money, than the retaining the order itself for the same purpose."

X. directed Y. to pay Z., or bearer, a certain amount and take X.'s note therefor was held not to be a bill of exchange.[52]

§ 38. Certainty as to sum.

a. *In general.*— An instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money.[53] No principle of law is more fully established by authority and the universal concurrence of the commercial world, than that to make a written promise a valid promissory note, it must be for a fixed and certain, and not for a variable amount. In France it is so determined by the provisions of the Code Napoleon. It is the recognized mercantile law of continental Europe. In England and in this country, it has received the sanction of repeated and well-considered adjudications. Without this essential requisite, a written promise, though in terms payable to order, is to be regarded as a simple contract and not negotiable.[54]

52. Cook v. Satterlee, 6 Cow. (N. Y.) 108.

53. Neg. Inst. L. (N. Y.), § 20. See Appendix.

54. **Sum must be fixed and certain.** — Dodge v. Emerson, 34 Me. 96. In this case the note provided for the payment of a certain sum to an insurance company or order, "with such additional premium as may arise on policy, No. 50." The court said, in considering this instrument:

"The defendants in this case have promised to pay two several sums; one certain and definite, the other uncertain and contingent. The defendants' liability, being for both these sums, is obviously for an unascertained and indefinite amount.

"It is insisted in argument, that the plaintiff may abandon all claim for the additional premium, which is uncertain and proceed only for the certain sum expressed in the contract. Undoubtedly he may take judgment for any sum less than the amount due, and in that mode abandon a portion of his legal claims, but that still leaves the contract in its original state, and can in no way affect its legal construction. He could not erase the clause relating to the additional premium, without thereby making such an alteration in the instrument declared on, as would discharge the defendants.

"In Smith v. Nightingale, 2 Stark. (Eng.) 375, the promise was to pay the payee sixty-five pounds and all other sums that may be due him, and it was claimed for the plaintiff, to whom the interest in the contract had passed by indorsement, that he might disregard the latter clause and recover on the certain sum set forth in his contract as indorsee, but the court decided otherwise. Davis v. Wilkinson, 10 Ad. & El. (Eng.) 98."

A similar case in the same State is that of Marrett v. Equitable Ins. Co., 54 Me. 537, where a premium note for a sum certain, "and such additional premium as may become due," on a policy named, and at a time therein specified was held not negotiable.

In Iowa, under section 2085 of the Code, which provides that "instruments by which the maker promises to pay a sum of money in property or labor, or acknowledges property, or labor, or money to be due to another, are negotiable whenever it is manifest from their terms that such was the intent of the maker," does not render a bill of exchange negotiable, when it is uncertain as to the amount to be paid. Culbertson v. Nelson, 93 Iowa, 187, 61 N. W. 854, 57 Am. St. Rep. 266, 27 L. R. A. 222.

In the case of Smith v. Marland, 59 Iowa, 645, 13 N. W. 852, a note given for a corn-crusher, and containing a

b. *What constitutes certainty as to sum; statutory provision.*— The Negotiable Instruments Law contains the following provision,[55] more or less declaratory of the existing law as established by judicial decisions, and similar in many respects to the English Bills of Exchange Act of 1882:[56]

"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 installments; or

"3. By stated installments, with a provision that upon default "in payment of any installment 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 pay-"ment shall not be made at maturity."

c. *Payment of interest.*— The agreement to pay interest is a mere incident or accessory to the debt itself, and where the debtor reserves an alternative right to pay interest with coin or paper, the negotiability of the instrument is not affected thereby.[57] An instrument which, in its terms and form, is a negotiable instrument, does not lose its character of negotiability because it also recites that an additional rate of interest will be paid after ma-

provision that "the payee or his indorsee has full power to declare this note due, and take full possession of said property at any time they may deem themselves insecure, even before the maturity of this note, and sell the same where this note is payable, on five days' notice in writing," was held not negotiable, for the reason that the amount recoverable on the note is uncertain. See also Gaar v. Louisville Banking Co., 11 Bush (Ky.), 180; Cushman v. Haines, 20 Pick. (Mass.) 132; Palmer v. Ward, 6 Gray (Mass.), 340; American Nat. Bank v. Sprague, 14 R. I. 410; Bacon v. Bates, 53 Vt. 30.

In Indiana, under Rev. Stat. 1881, § 5501, providing that all notes or instruments in writing, signed by any person who promises to pay money, or acknowledges money to be due, shall be negotiable by indorsement, it was held that an agreement to pay interest on a certain sum during the lifetime of the payee or his wife was assignable by indorsement. Whorter v. Norris, 9 Ind. App. 490, 34 N. E. 854.

In South Dakota a promissory note having a statement written on its face that it is to be discounted at a certain per cent. if paid before maturity was held to be nonnegotiable, for, at the time of its execution, it is impossible to ascertain what amount will be required to pay it, without considering the discount, depending upon a condition uncertain of fulfilment. National Bank of Commerce v. Feeney, 12 S. D. 156, 80 N. W. 186, 76 Am. St. Rep. 594.

55. Neg. Inst. L. (N. Y.), § 21. For same section in statutes of other States see Appendix.

56. § 9 (1). Subd. 5 of the above section of the Negotiable Instruments Law was not contained in the English Bills of Exchange Act.

57. Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534.

turity.[58] And the fact that a bill provides that it shall bear interest from date in case of its nonpayment at maturity will not affect its negotiability;[59] the requirement that negotiable paper should be for a precise amount applies rather to the principal amount than to ancillary and incidental additions of interest.[60] A note is negotiable, notwithstanding it is on its face usurious.

58. Towne v. Rice, 122 Mass. 67.

Additional rate of interest after maturity.— In the case of De Haas v. Roberts, 59 Fed. 853, a certain instrument, made in the State of Kansas, contained a promise to pay to K. or order, five years after date, a sum certain, "with interest at 8 per cent., payable semi-annually, as per annexed coupons; both principal and interest payable at K.'s bank, in Topeka." It recited that both "this note" and the coupons were to be construed by the laws of Kansas in every particular, and were secured by a mortgage on land, and provided that they should draw 12 per cent. interest after maturity; that in default of payment of any coupon the principal should become due, and the amount of such defaulted coupon should be added to the principal, and the whole bear interest at 12 per cent. It was held that this was a negotiable instrument.

In the case of Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603, it was held that a provision in a promissory note for the payment of interest on interest after maturity did not render such note nonnegotiable. See also Parker v. Plymell, 23 Kan. 402.

The provision of a note drawing interest at 7 per cent., that if not paid when due, it shall draw interest at 10 per cent., "from date until paid" does not make the amount so uncertain as to render the note nonnegotiable. Crump v. Berdan, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345; Russell v. Klink, 53 Mich. 161; Smith v. Crane, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20; Kirkwood v. First Nat. Bank, 40 Neb. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958. But in the case of Hegeler v. Comstock, 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393, it was held that a note for a sum certain, "with interest from date until paid, at 10 per cent. per annum, 8 per cent. if paid when due" is not negotiable under section 4457 of the Compiled Laws of South Dakota, providing that a negotiable instrument shall contain no conditions not certain of fulfilment.

59. Interest if not paid at maturity.— In the case of Hope v. Barker, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 337, a promissory note, negotiable in terms, contained the words "without interest thereon, if paid at maturity; if not paid at maturity to bear ten per cent. interest from date;" it was held that such words did not deprive the instrument of its character of negotiability. The court said: "Interest is but an incident to the debt, and it is a thing as to which it is usual to contract even in negotiable paper. Surely it cannot be maintained that a note ceases to be negotiable because of the addition of such words as 'with interest from maturity at the rate of eight per cent. per annum.' This is but another way of expressing an agreement that if the note is not paid at maturity it shall from that time bear interest at the rate of eight per cent. per annum. The only difference in the case just supposed and the one at hand is that here the principal is to bear interest from the date of the note if not paid at maturity, instead of bearing interest from and after maturity. In both cases the amount to be paid is fixed, definite, and certain." See also Christian County Bank v. Goode, 44 Mo. App. 129.

An acceptance of a bill of exchange, with interest after maturity, is a contract to pay a sum certain at maturity and is, therefore, negotiable, for the provision as to interest becomes operative only after maturity. Farmers' Nat. Bank v. Sutton Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 6 U. S. App. 312, 17 L. R. A. 595.

60. Goodin v. Buhler, 57 Mo. App. 63.

But where a promissory note was made payable "with interest the same as savings banks pay," it was held nonnegotiable, because the rate of interest paid by a savings bank upon its deposits must be determined by the amount of the income of the bank, and, unless it can be shown by evidence that the rates of interest of all the banks which were intended by the parties have been the same during the whole period for which interest is to be computed, it is impossible to determine what rate of interest was intended by the promise; the instrument, therefore, lacks "that degree of certainty in regard to the amount of money to be paid which is requisite to constitute a negotiable promissory note." [61]

d. *Payment in installments.*— The provisions of the Negotiable Instruments Law as to the effect of payment by installments are not new in that law but have been declared by the courts in a number of cases.[62] Where a promissory note is payable by installments, subject to a condition that on default being made in payment of the first installment, the whole amount shall become immediately payable, the note is assignable within the Statute 3 & 4 Anne, chapter 9, and on default being made by the maker in payment of the first installment, an indorser is liable for the whole amount.[63] In case of such a note where it is provided that in case of default in payment of an installment the holder might treat it as due immediately, it was held that the option must be exercised within a reasonable time.[64] And it would seem that the time of the payment of each installment should be definitely indicated in the instrument.[65] The reservation in a note to pay it in installments at any time before maturity does not in any way affect the certainty of the amount required to be paid.[66]

61. Whitwell v. Winslow, 134 Mass. 343.

62. Oridge v. Sherbourne, 11 Mees. & W. (Eng.) 374; Commercial Bank v. Crenshaw, 103 Ala. 497, 15 South. 741; Van Buskirk v. Day, 32 Ill. 260; Wright v. Irwin, 33 Mich. 32; Riker v. Sprague Mfg. Co., 14 R. I. 402, 51 Am. Rep. 413.

63. Carlon v. Kennealy, 12 Mees. & W. (Eng.) 139, 13 L. J. Exch. (Eng.) 64; Cooke v. Horn, 29 L. T. (N. S.) (Eng.) 369; Miller v. Biddle, 13 L. T. (N. S.) (Eng.) 334.

A note which states that it is payable to the order of the payee, at a certain fixed time, and states further that it is one of a series of notes given for cars sold by the payee to the maker, and is to become due upon the failure to pay any one of the series, and that it is agreed that the title of the cars shall remain in the payee, until all the notes are paid, is a valid negotiable promissory note. Chicago Ry. Equipment Co. v. Merchants' Nat. Bank of Chicago, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

64. Crossmore v. Page, 73 Cal. 213, 14 Pac. 787, 2 Am. St. Rep. 789.

65. Moffat v. Edwards, C. & M. (Eng.) 16, 41 E. C. L. (Eng.) 15; Commercial Bank v. Crenshaw, 103 Ala. 497, 15 South. 741.

66. Riker v. Sprague Mfg. Co., 14 R. I. 402, 51 Am. Rep. 413.

e. *Provision for exchange.*— The provision of the Negotiable Instruments Law that a sum payable is a sum certain, although it is to be paid with exchange at a fixed rate, or at the current rate, is not a doctrine of universal acceptance, particularly where the rate of exchange provided for is of some other place than the place of payment.[67] It would seem that, independent of the statute, the better doctrine is that bills and notes drawn in one place and payable in another at a rate of exchange not fixed in the instrument itself but at a current rate of exchange at a place other than that of payment are contingent in amount and, therefore, nonnegotiable; the weight of authority is evidently in favor of this proposition.[68] Many of the text-writers and the courts of a number of the States have, however, maintained that instruments containing

67. Flagg v. School District, No. 7, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363, where it was held that an instrument providing for the payment of exchange, on a point other than the place of payment, in addition to principal and interest, is not a negotiable instrument; and one who purchases the same before maturity for value, and without notice of any defense thereto, nevertheless takes it subject to the defense of want of consideration, good as between the original parties to the instrument. The court in this case argues at length the question of the effect of providing for exchange. It is an argument well worthy of consideration and seems almost convincing as against the principle laid down in the statute.

68. **Nonnegotiability of instruments** providing for the payment of exchange, see the following cases:

United States.— Hughitt v. Johnson, 28 Fed. 865; Second Nat. Bank v. Basuir, 65 Fed. 58, 12 C. C. A. 517, 27 U. S. App. 541; Windsor Sav. Bank v. McMahon, 38 Fed. 283, 3 L. R. A. 192.

Canada.— Palmer v. Fahnstock, 9 U. C. C. P. 172; Saxton v. Stevenson, 23 U. C. C. P. 503; Cazet v. Kirk, 4 Allen (9 N. Brunsw.), 543.

Illinois.— Lowe v. Bliss, 24 Ill. 168, 76 Am. Dec. 742.

Indiana.— Nicely v. Commercial Bank, 15 Ind. App. 563, 44 N. E. 572, 57 Am. St. Rep. 245; Nicely v. Winnebago Nat. Bank (Ind. App.), 47 N. E. 476; John Church Co. v. Spurrier (Ind. App.), 50 N. E. 93.

Iowa.— Culbertson v. Nelson, 93 Iowa, 187, 61 N. W. 854, 27 L. R. A. 222, 57 Am. St. Rep. 266.

Missouri.—Fitzharris v. Leggatt, 10 Mo. App. 527. But in the case of Christian County Bank v. Goode, 44 Mo. App. 129, it was held that the fact that a bill of exchange provides for payment of exchange will not affect its negotiability, where the bill is made payable at the place where it is drawn.

North Carolina.—First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604.

North Dakota.—Flagg v. School District No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363.

Pennsylvania.— Philadelphia Bank v. Newkirk, 2 Miles, 442.

South Carolina.— Read v. McNulty, 12 Rich. L. 445, 78 Am. Dec. 467; Carroll County Savings Bank v. Strother, 28 S. C. 504, 6 S. E. 313.

Payment of exchange on New York. — In Read v. McNulty, 12 Rich. L. (S. C.) 445, 78 Am. Dec. 467, the instrument provided for payment to certain parties or order at a definite place and for value received, "with exchange on New York." This was held not to be a promissory note because the exchange was not constantly fixed by law but fluctuated from day to day with the changes of commerce. The court says: "This, if the instrument be supported as a note of hand, is equivalent to saying that that is a good note of hand which imports a promise to pay one sum to-day and another to-morrow — a thing incompatible with the character of a commercial paper."

such a provision are negotiable.[69] The framers of the uniform Negotiable Instruments Law presumably weighed the authorities both for and against the negotiability of instruments containing such a provision and apparently concluded that the preponderance was in favor of their negotiability. By the adoption of this law the question has ceased to be a live one in more

This case states the real criticism to be made upon the provision of the section. If the rate of exchange be fixed by the instrument itself, there can be no reasonable objection. But where it is at the current rate at a place other than that of payment, the reasoning of the above-cited case seems to be impregnable. See also Chandler v. Calvert, 87 Mo. App. 368.

69. The text-writers most frequently quoted as being in favor of the negotiability of bills and notes containing provisions for the payment of exchange are: Daniel (Neg. Inst., § 54), Randolph (Com. Paper, § 200), and Tiedeman (Com. Paper, § 28a), It is said by Mitchell, J., in Hastings v. Thompson, 54 Minn. 184, 55 N. W. 968, 21 L. R. A. 178: "Upon examination of the reports and text-books, it is surprising how little direct authority of any value is to be found as to the effect of the addition of such a provision to an instrument for the payment of money. Daniel, Randolph, and Tiedeman state, in general, that such a provision does not affect the commercial or negotiable character of the paper, but none of them discuss it at any length, and all of them treat of the question as if it only went to the negotiability of the instrument, whereas the real question lies back of that, and is whether they are promissory notes or bills of exchange at all."

In favor of negotiability.— The following cases are in favor of the negotiability of instruments containing a provision as to the payment of exchange: Bradley v. Lill, 4 Biss. (U. S.) 473; Smith v. Kendall, 9 Mich. 241, 80 Am. Dec. 83; Johnson v. Frisbie, 15 Mich. 286; Orr v. Hopkins, 3 N. M. 25, 1 Pac. 181; Whittle v. Fond du Lac Nat. Bank (Tex. Civ. App.), 26 S. W. 1106; Leggett v. Jones, 10 Wis. 35; Morgan v. Edwards, 53 Wis. 599, 11 N. W. 21.

The strongest authority for the doctrine of negotiability, where an instrument is to be payable at a current rate of exchange at a place other than the place of payment, is to be found in Hastings v. Thompson, 54 Minn. 184, 55 N. W. 968, 21 L. R. A. 178. The court, in upholding such a provision, says:

"While the rate of exchange is not always the same, and while it is technically true that resort must be had to extrinsic evidence to ascertain what it is, yet the current rate of exchange between two places at a particular date is a matter of common commercial knowledge, or at least easily ascertainable by any one, so that the parties can always, without difficulty, ascertain the exact amount necessary to discharge the paper. It seems to us that, within the spirit of the rule requiring precision in the amount to be paid, a provision for the payment of the current rate of exchange, in addition to the principal amount, does not introduce such an element of uncertainty as deprives the instrument of the essential qualities of a promissory note."

The case last cited was distinguished in the case of First Nat. Bank v. Slette, 67 Minn. 425, 69 N. W. 1148, where an instrument containing a promise to pay "by New York or Chicago Exchange," and the court said: "If this instrument can be construed as an absolute promise to pay in money 'with exchange,' it is negotiable, otherwise not. * * * In the case at bar the note is not payable at any particular place, and the promise is, not to pay a given number of dollars in money 'with'— that is, plus — the current rate of exchange, but it is to pay the sum named in the note by New York or Chicago Exchange. The holder of this instrument cannot demand payment thereof in money, plus the cost of exchange; for the maker is not bound to discharge his obligation except by means of inland bills on New York or Chicago."

than a majority, at least in importance, of the jurisdictions of this country. The English Bills of Exchange Act contains a similar provision. It is likely that the great preponderance of authority in favor of the negotiability of such instruments, occasioned by the adoption of the uniform law in so many important States, will have a perceptible influence in modifying the course of judicial decision upon this much-controverted question in those States where the law is yet to be adopted. This will certainly be a desirable result. There is no branch of the law where fixed and settled rules are more to be desired than in that respecting the rights and liabilities of parties to, and the construction and effect of, commercial paper. It may with propriety be observed in this connection that one strong argument in favor of the adoption of the uniform law of negotiable instruments is the fact that by it many controverted and unsettled rules pertaining to the use of such instruments in commercial transactions are fixed and determined. Where an instrument providing for the payment of exchange is payable at the place where it is drawn,[70] or where the rate of exchange provided for is that of the place of payment,[71] there would not be any objection to the character of the instrument as a negotiable promissory note or bill of exchange, under the law as it exists independent of statute.

f. *Costs of collection and attorney's fees.*— Here, as in the case of an instrument containing a provision for the payment of exchange, the statute has declared a fixed and determined rule in contravention of a large number of decisions of courts of the highest respectability. As the statute stands "the sum payable is a sum certain * * * although it is to be paid (5) with costs of collection or as attorney's fee, in case payment shall not be made

70. Hill v. Todd, 29 Ill. 101; Christian County Bank v. Goode, 44 Mo. App. 129; Orr v. Hopkins, 3 N. M. 45, 1 Pac. 181.

71. Bullock v. Taylor, 39 Mich. 137, 33 Am. Rep. 356. In this case a promissory note made at Mt. Pleasant, Mich., and payable at the "Second National Bank, East Saginaw," contained a promise to pay a sum certain, "with current exchange or express charges." Judge Cooley said: "We quite agree with counsel for the plaintiff, that the provision for the payment of exchange or express charges is merely nugatory. By the agreement as well as by the terms of the notes, they were made payable at East Saginaw, and it, therefore, became the duty of the promisors to be at any expense necessary in the transmission of the money to that place. Whether they sent by draft or by express, the expense would equally fall upon them. and an express promise to pay it could add nothing to their liability. The provision on the subject may have been inserted in the notes for a more perfect understanding of the agreement, but the surety could not complain of it, because it could not in any manner add to his liability, or vary his undertaking."

at maturity." [72] It is somewhat difficult to logically conclude that a note or bill containing a stipulation for unliquidated attorney's fees or for an uncertain amount of costs of collection provides for the payment of a sum certain. It must be admitted, however, that there are a great many cases upholding the negotiability of such a provision. In many of these cases it will be found that attorney's fees or costs are fixed at a definite sum or a sum ascertainable upon the face of the instrument. The cases which support the negotiability of an instrument containing such a stipulation proceed on the theory that so long as the amount payable is certain up to the time of maturity and dishonor, it is not essential after that, when the instrument has become non-negotiable for other reasons, that the amount should continue certain. But this leaves out of account the real contract of the indorser or drawer which is to pay the amount called for by the instrument in the event of its dishonor, and that that amount should be made certain. Moreover, a bill or note may retain much of its negotiable character, even after dishonor, and may circulate with many of the main attributes of a proper bill or note payable upon demand.[73] But without regard to the absolute correctness of the rule as declared in the statute, in view of the almost hopeless confusion of the law as established by the courts of the several States, the stability of the rule as so declared will do much toward simplifying commercial transactions. Uniformity of legislation upon this subject will produce a beneficial result in the way of promoting certainty in the construction of the

72. Neg. Inst. Law (N. Y.), § 21. See *ante*, p. 199, and Appendix, *post*.

73. Leavitt v. Putnam, 3 N. Y. 494.

Payment of attorney's fees.— In the case of Roads v. Webb, 91 Me. 406, 40 Atl. 128, the court, in considering this question, said: "A more formidable objection is the provision for the payment of 'attorney's fees.' It is said that, if the note should be paid at maturity, there would be no attorney's fees. This is true. But a note which, by its terms, is negotiable under the rules of the law, does not lose that characteristic until merged in a judgment. The only infirmity attending its negotiation after maturity is that the indorser takes it subject to the same defense that the maker could have made against the original payee. A note cannot be negotiable before maturity, and not negotiable after that, by reason of the terms of the note itself. After these notes were dishonored and had been placed in an attorney's hands, his fees commenced to run. How much they would be, depended upon the service then rendered and to be rendered. But, until merged in judgment, they were still negotiable, if negotiable at any time after their creation. Hence arose an uncertainty in the amount due. That uncertainty attached to the notes in their inception, although attorney's fees would not accrue until after dishonor. The notes provided for the payment of such uncertain fees in case they should accrue, and thus rendered the amount the makers were liable to pay in one event uncertain. This infirmity destroyed the negotiable quality of the notes." Citing Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74.

terms of commercial paper, which, as has been said in respect to the provision for the payment of exchange, should be one of the cardinal features of mercantile law. It may be well to consider the several authorities arrayed on both sides of this question; such a consideration will remove all doubt as to the advisability of establishing by statutory enactment a fixed rule as to the effect of including in commercial paper a provision as to the payment of attorney's fees and cost of collection, if the sum mentioned is not paid at maturity. Perhaps the best and most conclusive argument in favor of the negotiability of an instrument containing such a provision is that of Mr. Justice McClellan in the Alabama case of Montgomery v. Crossthwait, an extract of which is included in the footnote.[74] We have also inserted in the footnotes a list of

74. 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140. The following is an extract from the opinion in this case:

Costs of collection.— "One of the prominent questions presented by this record is, whether the stipulation in a promissory note to pay all costs of collecting, if not paid at maturity, destroys its negotiability. Upon no other question in the law, perhaps, are the authorities so irreconcilably and, at the same time, so equally divided, both in respect to the number of adjudged cases and the respectability of the courts upon either hand. [Citing cases for and against this proposition.]

"The question has never been determined in this State. It was mooted somewhat in the case of Hanover Nat. Bank v. Johnson, 90 Ala. 549, and dismissed with an indication, on the part of the present writer, unfavorable to the negotiability of such instruments. Such was the inclination of my mind at that time. A more careful investigation into the adjudged cases, and especially a more critical consideration of the reasons upon which the divergent conclusions of other courts are made to rest, have produced the contrary conviction, and lead me to adopt the view first advanced by the Indiana and Kentucky courts, and which has since received the sanction of all recognized texts which discuss the point. Tiedeman on Commercial Paper, § 28b; 1 Randolph on Commercial Paper, §§ 205, 206; 1 Daniel on Negotiable Instruments, §§ 62, 62a; Parsons on Notes and Bills, 146, 147; 2 Am. & Eng. Encyc. of Law, 324.

"The cardinal principle that the sum to be paid must be certain in amount, and not dependent upon contingencies, is fully recognized and accommodated in this doctrine. It is true the stipulation involves a contingency, in that there may or may not be any costs of collection to be paid, depending primarily upon failure to pay the note at maturity, and, secondarily, upon whether the note should be paid, even after dishonor, without resort to attorneys or legal proceedings. It is true, also, that the amount of such costs, if any, is uncertain. But it is fully assured that no costs will be incurred before maturity; and no costs will have to be paid at all, unless there is default in the payment of the sum promised at maturity; and the paper ceases by reason of that fact alone to be a circulating medium, performing in a sense the functions of money. So that as long as the paper, considered apart from the stipulation, would be negotiable, it will have that character, notwithstanding the stipulation. Looked at in this way, stipulated attorney's fees and the costs of collection after maturity stand upon the same footing as to contingency of liability therefor, and uncertainty as to the amount thereof, as do protest fees, attorney's tax fees, court costs, and statutory damages, in the event a resort is had to legal remedies to enforce payment; and it is not conceivable why the former class of charges should destroy negotiability, cases both for[75] and against[76] the negotiability of such instruments.

while the latter confessedly do not. Stoneman v. Pyle, 35 Ind. 103, 9 Am. Rep. 637; Gaar v. Louisville Banking Co., 11 Bush (Ky.), 180, 21 Am. Rep. 209. The Pennsylvania court has said that a 'promissory note is a courier without luggage, traveling on the wings of the wind, and should not be lumbered up' with provisions of the class under consideration. Another high authority has declared that a stipulation for attorney's fees is 'not luggage, but ballast,' and does not clog the circulation of the paper, but facilitates its progress. To further pursue the metaphor, it were, we think, more apt to say that the stipulation is neither luggage or ballast, and neither impedes or facilitates the flight of the paper through the transactions of commerce, since all persons are presumed to deal with it upon the assumption that it will be paid at maturity; but is for the well-being of the 'courier,' when its monetary functions have been fully discharged, and its journey as a circulating medium has been brought to an end by default in payment at maturity."

75. Negotiability.— The following cases are cited as being in favor of the negotiability of instruments containing the stipulation referred to in the text:

United States.— Wilson Sewing Machine Co. v. Moreno, 7 Fed. 806; Howenstein v. Barnes, Fed. Cas. No. 6,786, 5 Dill. 482; Bank of British North America v. Ellis, 2 Fed. 44; Adams v. Addington, 16 Fed. 89; Schlesinger v. Arline, 31 Fed. 648; Farmers' Nat. Bank v. Sutton Mfg. Co., 52 Fed. 191, 3 C. C. A. 1, 6 U. S. App. 312, 17 L. R. A. 595.

Alabama. — First Nat. Bank v. Slaughter, 98 Ala. 602, 14 South. 545, 39 Am. St. Rep. 88.

Arkansas.—Overton v. Matthews, 35 Ark. 146; Trader v. Chidester, 41 Ark. 242, 48 Am. Rep. 38.

Colorado.— Cowing v. Cloud (Ct. of App.), 65 Pac. 417.

Georgia. — Stapleton v. Louisville Banking Co., 95 Ga. 802, 23 S. E. 81; Jones v. Crawford, 107 Ga. 318, 33 S. E. 51, 45 L. R. A. 105.

Indiana.—Stoneman v. Pyle, 35 Ind. 103, 9 Am. Rep. 637; Hubbard v. Harriman, 38 Ind. 323; Proctor v. Baldwin, 82 Ind. 370.

Illinois.— Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428; Nickerson v. Sheldon, 33 Ill. 372, 85 Am. Dec. 280.

Iowa. — Shenandoah Nat. Bank v. Marsh, 89 Iowa, 273, 56 N. W. 458, 48 Am. St. Rep. 381; Sperry v. Hove, 32 Iowa, 184.

Kansas.— Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603; Seaton v. Scovill, 18 Kan. 433, 26 Am. Rep. 779.

Kentucky.— Gaar v. Louisville Banking Co., 11 Bush, 180, 21 Am. Rep. 209.

Louisiana.— Dietrich v. Bayhi, 23 La. Ann. 767.

Mississippi.— Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 South. 394.

Montana.— Commerce Bank v. Fuqua, 11 Mont. 285, 28 Pac. 291, 14 L. R. A. 588; this case was held to be modified by sections 3991–3997 of the Civil Code, and that under such statutes a note containing a stipulation for the payment of attorney's fees is nonnegotiable; Stadler v. First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

Nebraska.— Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Roberts v. Snow, 27 Neb. 425, 43 N. W. 241; Aultman v. Stout, 15 Neb. 586, 19 N. W. 464; Kemp v. Klaus, 8 Neb. 24; Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811.

Oregon.— Bean v. Kutschan, 24 Ore. 28, 32 Pac. 763.

South Dakota.— National Bank of Commerce v. Feeney, 9 S. D. 550, 70 N. W. 874; Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439.

Tennessee.— Oppenheimer v. Farmers & Merchants' Bank, 97 Tenn. 19, 36 S. W. 705.

Texas.— Hamilton Gin & Mill Co. v. Sinker, 74 Tex. 51, 11 S. W. 1056.

Washington.— Second Nat. Bank v. Anglin, 6 Wash. 403, 33 Pac. 1056.

76. Nonnegotiability.— The following cases are cited as being in favor of the nonnegotiability of instruments containing such stipulation:

§ 39. Time of payment.

a. *In general.*— An instrument to be negotiable must be payable on demand, or at a fixed or determinable future time.[77] It is so universally the custom in commercial transactions to particularly specify the day of payment that cases involving an application of this rule are not often under consideration. There are many mercantile customs which have modified the extent and manner of construing and applying this rule. The rule in its original form required certainty as to time of payment; but under the forms adopted by commercial usage, and by the operation of the rule that what can be made certain is certain, bills and notes payable on demand, at sight, or upon presentment, are deemed at once certainly due when demand is made, although no one can say with certainty when that time will be.[78] But the failure to state the time when an instrument is payable can only affect its character

California.— Findlay v. Potts, 131 Cal. 385, 63 Pac. 694; Adams v. Seaman, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224; Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110.

Maine.— Roads v. Webb, 91 Me. 406, 40 Atl. 128.

Maryland.— Maryland Fertilizing & Mfg. Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750.

Michigan.— Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74, 13 Am. St. Rep. 341; Cayuga County Nat. Bank v. Purdy, 56 Mich. 6, 22 N. W. 93.

Minnesota.— Jones v. Radatz, 27 Minn. 240, 6 N. W. 800.

Missouri.— Law v. Crawford, 67 Mo. App. 150; First Nat. Bank v. Gay, 71 Mo. 627; McCoy v. Green, 83 Mo. 626; Samstag v. Conley, 64 Mo. 476; Creasy v. Gray, 88 Mo. App. 454.

North Carolina.— First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604.

North Dakota.— First Nat. Bank v. Laughlin, 4 N. Dak. 391, 61 N. W. 473.

Pennsylvania.— Johnston v. Speer, 92 Pa. St. 227, 34 Am. Rep. 675; Woods v. North, 84 Pa. St. 407, 24 Am. Rep. 201; Sweeney v. Thickstun, 77 Pa. St. 131.

South Carolina.— Sylvester-Bleckley Co. v. Alewine, 48 S. C. 303, 26 S. E. 609.

South Dakota.— Johnson v. Schar, 9 S. Dak. 536, 70 N. W. 874; Chandler v. Kennedy, 8 S. Dak. 56, 65 N. W. 439.

Wisconsin.—First Nat. Bank v. Larsen, 60 Wis. 206, 19 N. W. 67, 50 Am. Rep. 365; Peterson v. Stoughton State Bank, 78 Wis. 113, 47 N. W. 368; Morgan v. Edwards, 53 Wis. 599, 11 N. W. 21, 40 Am. Rep. 781.

77. Neg. Inst. Law (N. Y.), § 20. See Appendix.

78. Parsons on Notes and Bills, p. 38; Stillwell v. Craig, 58 Mo. 24, 30.

Story on Promissory Notes (§ 29) says: "But there is a class of cases which, at first view, seem to import that payment is only to be made upon the occurrence of events which may never happen, and yet which are uniformly held to be absolutely payable at all events. Thus, if a note be made payable at sight, or at ten days after sight, or on ten days after notice, or on request, or on demand, in all these and the like cases the note will be held valid as a promissory note and payable at all events, although, in point of fact, the payee may die without ever having presented the note for sight, or without having given any notice to, or made any request or demand upon, the maker for payment. But the law, in all cases of this sort, deems the note to admit a present debt to be due to the payee, and payable absolutely and at all events, whenever or by whomsoever the note is presented for payment according to its purport."

of negotiability; it will still exist as a valid and binding evidence of indebtedness as between the immediate parties thereto.[79]

b. *Payment in installments.*— We have already seen that certainty as to the sum payable by a negotiable instrument is not affected by the fact that it is payable in installments.[80] And the fact that an instrument specifies that it is payable at the call of the payee in installments does not change its character or destroy its negotiability.[81] As for example, it has been held that a written promise to pay a certain sum of money to a railroad company, or order, in such installments and at such times as the directors of the company may, from time to time, assess or require, is a valid, negotiable promissory note, being, in fact, payable on demand, or in installments on demand.[82] And where an instrument contained a promise to pay " seven dollars monthly in the following manner, to wit, seven dollars five days after date, and seven dollars on the first of each succeeding month for twelve months from date, for the privilege of advertising purposes," it was held to be a promissory note.[83]

c. *Payable on demand; statutory provision.*— The Negotiable Instruments Law contains the following:

"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

79. Husbrook v. Wilder, 1 Pin. (Wis.) 643; Francis v. Castleman, 4 Bibb (Ky.), 282; Russell v. Whipple, 2 Cow. (N. Y.) 436; Mitchell v. Culver, 7 Cow. (N. Y.) 336.

In the case of Brooks v. Hargreaves, 21 Mich. 254, it was in effect held that an obligation payable in money, the time of which cannot be made certain by any attainable means, is not a negotiable promissory note.

80. See § 38 (*d*), *ante*, p. 199.

81. Van Buskirk v. Day, 32 Ill. 260.

82. White v. Smith, 77 Ill. 351, 20 Am. Rep. 251. In this case the note was in the following form: "For value received, I promise to pay to the Monticello Railroad Co., or order, the sum of fifty dollars, to be paid in such installments and at such times as the directors may from time to time assess or require." The court cited as an authority the case of Goshen Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 217, and said: "The promise there was to pay the company $125 for five shares of the capital stock of the corporation, in such manner and proportion and at such time and place as the president, directors, and company should from time to time require. It was held that the note was a good promissory note within the statute, the statute there, relative to promissory notes, being the same in substance as that of 3 & 4 Anne; that the note was payable absolutely, and not depending on any contingency; that it was in effect payable on demand." See also Stillwell v. Craig, 58 Mo. 24; Wright v. Irwin, 33 Mich. 32.

83. Chase v. Behrman, 10 Daly (N. Y.), 344; Chase v. Senn, 13 N. Y. Supp. 266.

"overdue, it is, as regards the person so issuing, accepting or in-"dorsing it, payable on demand." [84]

The expressions "at sight" or "on presentation" are synonymous with the expression "on demand." It has been held in England that the expression "after sight," in a bill of exchange, means after acceptance or protest for nonacceptance, and not after a mere private exhibition to the drawee, because the "sight" must appear in a legal way.[85] But if a note is made payable "after sight," the expression merely imports that payment is not to be demanded until it has been again exhibited to the maker.[86]

d. *Instruments expressing no time for payment.*— An instrument in which no time for payment is specified is, according to all authorities, independent of the statute, payable forthwith.[87] The

84. Neg. Inst. L. (N. Y.), § 26. For the same section in the statutes of other States see Appendix. The English Bills of Exchange Act, 1882 (§ 10), contains a provision from which this section was probably derived. See Appendix.

Note payable when payor and payee mutually agree.— In the case of Page v. Cook, 164 Mass. 116, 41 N. E. 115, a promissory note in the following form was under consideration:

"$500.

"BOSTON, Mass., *May* 1, 1891.

"On demand after date, I promise to pay to the order of H. B. P. five hundred dollars, payable when payor and payee mutually agree. Value received. (Signed)

"GRACE V. COOK."

It was held that the words "when payor and payee mutually agree" are to be construed as meaning that it is payable on demand when and after the payor ought reasonably to have agreed. The court said: "The promise to pay is absolute. It is only the time of payment which is left to future agreement. Evidently it is expected from the tenor of the note that the parties will agree, and that the time will be fixed and that the note will be paid. But no time is fixed within which the agreement is to be made. The law would, therefore, imply a reasonable time. Besides it is the payment, not the nonpayment, of the note for which the parties are providing. If the payor does not, within a reasonable time, agree when the note shall be paid, there is nothing unjust nor at variance with the real meaning of the contract in holding that the payee may thereupon demand payment, and if the note is not paid, proceed to collect it."

85. Campbell v. French, 6 T. R. (Eng.) 212.

86. Holmes v. Kerrison, 2 Taunt. (Eng.) 323; Sturdy v. Henderson, 4 B. & Ald. (Eng.) 592; Sutton v. Toomer, 7 B. & C. (Eng.) 416. It has also been held in this country that the provision in the bill making it payable five days after sight means five days after acceptance, and not five days after presentment for acceptance. Mitchell v. De Grand, Fed. Cas. No. 9,661, 1 Mason, 176.

87. *California.*— Keyes v. Fenstermaker, 24 Cal. 329.

Georgia.— Freeman v. Ross, 15 Ga. 252.

Indiana.— Osborne v. Fulton, 3 Blackf. 233.

Iowa.— Green v. Drebilbis, 1 G. Greene, 552.

Kentucky.— Payne v. Mattox, 1 Bibb, 164; Kendal v. Talbott, 1 A. K. Marsh. 321.

Louisiana.—Burthe v. Donaldson, 15 La. 382.

Maine.— Shirley v. Todd, 9 Me. 83; Porter v. Porter, 51 Me. 376.

Minnesota.— Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910.

Missouri.—St. Charles Bank v. Hunt, 25 Mo. App. 170.

New York.— Wheeler v. Warner, 47 N. Y. 519, 7 Am. Rep. 478; Cornell v. Moulton, 3 Den. 12; Gaylord v. Van principle that an instrument which does not specify the time of payment is payable immediately, is not affected by a provision therein for payment of interest at a certain rate, after a certain event, and making the instrument due and collectible in case of a default in the payment of such interest.[88] Certificates of deposit,[89] checks,[90] and due bills,[91] when issued in the usual form,

Loan, 15 Wend. 308; Herrick v. Bennett, 8 Johns. 374.

Oregon.— Dodd v. Denny, 6 Ore. 157.

Pennsylvania.— Messmore v. Morrison, 172 Pa. St. 300, 34 Atl. 450; Hall v. Toby, 110 Pa. St. 318, 1 Atl. 369.

Texas.— Chambers v. Hill, 26 Tex. 472; Salinas v. Wright, 11 Tex. 572.

88. **Instrument due on default of payment of interest.**— In the case of Roberts v. Snow, 27 Neb. 45, 43 N. W. 241, the instrument was in the following form: "For value received, I hereby promise to pay A. B., or order, $400, with 10 per cent interest per annum, payable semi-annually in advance, in default of prompt payment of the interest for thirty days after it is due, then this note, principal and interest, shall be due and collectable, without defalcation or discount, together with an attorney fee of 10 per cent for collection, signed, B. L. S." The court said: "If it cannot be treated as a promissory note, payable upon demand, then the only event which could occur by which the note could be made to mature, according to its own language, would be a default for thirty days in the payment of the semi-annual interest; and if such default should never be made the note would never mature, and, therefore, could never be collected except by the voluntary payment of the maker. This evidently was not the intention of the parties to the instrument." See also in this connection Holmes v. West, 17 Cal. 623; Meador v. Dollar Sav. Bank, 56 Ga. 605; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297; First Nat. Bank v. Price, 52 Iowa, 570, 3 N. W. 639; Clark v. Skeen, 61 Kan. 526, 60 Pac. 327, 78 Am. St. Rep. 337; Wilson v. Campbell, 110 Mich. 580, 68 N. W. 278; Hope v. Barker, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387; Jones v. Brown, 11 Ohio St. 601.

89. Mitchell v. Wilkins, 37 Minn. 335, 33 N. W. 910.

Certificates of deposit.— In Massachusetts, however, a certificate of deposit, not designating a time of payment, but payable on return of the certificate, was held not to be a promissory note payable on demand. Shute v. Pacific Nat. Bank, 136 Mass. 487.

The only conflict of authority in respect to such certificates is as to whether or not they are negotiable promissory notes. The preponderance of authority is in favor of the doctrine that they are to be treated as promissory notes. The following cases may be cited as upholding this doctrine: Miller v. Austin, 54 U. S. 218, 14 L. Ed. 119; Renfro v. M. & M. Bank, 83 Ala. 425, 3 South. 776; Brummagin v. Tallant, 29 Cal. 503, 89 Am. Dec. 61; Auten v. Crahan, 81 Ill. App. 502; Kirkwood v. Bank, 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444; Pardee v. Fish, 60 N. Y. 265; Frank v. Wessels, 64 id. 155; Curran v. Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827.

The following cases support the doctrine that such certificates of deposit, unless otherwise specified, are payable on demand: Tripp v. Curtenius, 36 Mich. 494, 24 Am. Rep. 610; Beardsley v. Webber, 104 Mich. 88, 62 N. W. 173; Hunt v. Devine, 37 Ill. 137; Lynch v. Goldsmith, 64 Ga. 42.

90. A check is always payable on presentation and demand. Morrison v.

91. **Due bills.**— In the case of Sackett v. Spenser, 29 Barb. (N. Y.) 180, an instrument in the following form: "Due A. Y., or bearer, $340, for value received, with interest, at Leicester's office, in Rochester. Dated, October 4, 1851. (Signed) S. S.," was held to be payable immediately. In the case of Smith v. Allen, 5 Day (Conn.), 337, where the defendant stated in writing that there was due to the plaintiff a certain sum, the instrument was held to import an express promise to pay on demand. See also Lee v. Balcome, 9 Colo. 216, 11 Pac. 74; Huyck v. Meador, 24 Ark. 191.

and specifying no time of payment, are due from the date thereof, and are payable on demand.

A note given to an insurance company, in terms payable in such portions and at such times as the directors may require, is construed to be, in legal effect, payable on demand;[92] the same is true where a note is made payable at the maker's convenience, he to be the sole judge of such convenience.[93]

e. *Instruments indorsed when overdue.*— It is generally conceded by the authorities that where there is an indorsement after maturity, a note or bill, as to the indorser, becomes payable within a reasonable time upon demand.[94] And while a demand is necessary in such cases, it has been held that where a note was protested and afterward sold by the indorsers, without erasing their indorsement, they will be held responsible for the payment of the same without further notice.[95]

f. *What constitutes determinable future time; statutory provision.*— The Negotiable Instruments Law contains the following

Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

Distinction between check and bill of exchange.— In the case of Bull v. Bank, 123 U. S. 105, 8 Sup. Ct. 62, Judge Field said: "When an instrument is drawn upon a bank or a person engaged in the banking business and merely directs the payment to a party of a specified sum of money, which is at the time on deposit with the drawee, *without designating a future day of payment*, the instrument is to be treated as a check. The chief points of difference are that a check is always drawn on a bank or banks; no days of grace are allowed; the drawer is not discharged by the laches of the holder in presenting it for payment unless he can show he has sustained some injury by the default; *it is not due until payment is demanded*," etc. See also Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Smith v. Janes, 20 Wend. (N. Y.) 192, 32 Am. Dec. 527; Harker v. Anderson, 21 Wend. (N. Y.) 372; Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464; Bowen v. Newell, 8 N. Y. 190; Salt Springs Bank v. Syracuse Sav. Inst., 62 Barb. (N. Y.) 101.

The English Bills of Exchange Act (§ 73) defines a check as a bill of exchange drawn on a banker and payable on demand.

92. Howlands v. Edmunds, 24 N. Y. 307; Colgate v. Buckingham, 39 Barb. (N. Y.) 177.

93. Smithers v. Junker, 41 Fed. 101.

94. Leavitt v. Putnam, 3 N. Y. 494.

95. St. John v. Roberts, 31 N. Y. 441.

Presentment where overdue bill or note is accepted or indorsed.— The English Bills of Exchange Act, 1882 (§ 10 [2]), provides that "Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand."

Chalmers, commenting on this provision, says: "Before this enactment the English law on the subject dealt with, was very obscure; but it had been held in the United States that where a bill was indorsed after maturity, the indorser was entitled to have it presented for payment, and to receive notice of dishonor in the event of nonpayment, within a reasonable time" Citing Patterson v. Todd, 18 Pa. St. 433; Essenlow v. Dillenback, 22 Hun (N. Y.), 23.

"Aliter, if an indorser took up a dishonored bill, and reissued it on his original indorsement, for his liability was then already fixed (Citing St. John v. Roberts, 31 N. Y. 441). The present clause of the above section gives effect to the American rule."

provision,[96] declaratory, for the most part, of the common law, and apparently derived from a similar provision contained in the English Bills of Exchange Act of 1882,[97] with the exception of subdivision 2, which is not contained in that act:

"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."

g. Instrument payable at fixed period after date or sight.— Nearly all negotiable instruments are made payable at a fixed period after date or sight. Mr. Byles[98] has said: " The expression 'after sight,' on a bill of exchange, 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. But if a note is made 'after sight,' the expression merely imports that payment is not to be demanded till it has been again exhibited to the maker; for a note being incapable of acceptance, the word 'sight' must, on a note, bear a different meaning from the same word on a bill." It has been held in an interesting and well-considered Illinois case that a note in which the parties had inserted a specific date of payment and had also specified in detail an executory consideration which might never be performed was a negotiable promissory note.[99]

96. Neg. Inst. Law (N. Y.), § 23. See Appendix for same section of statutes of other States. As to construction of this section see Third Nat. Bank v. Spring, 28 Misc. (N. Y.) 9, 59 N. Y. Supp. 794, where it was held that the section did not apply to a conditional sale note.

97. English Bills of Exchange Act, 1882, § 11.

98. Byles on Bills (16th ed.), p. 91, citing Campbell v. French, 6 T. R. (Eng.) 212.

99. **Fixed date of payment as affected by executory consideration, etc.** — The case referred to in the text is Siegel, Cooper & Co. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 23 N. E. 417, 19 Am. St. Rep. 51, in which the facts were as follows: The note was given by Siegel, Cooper & Co., in form following:

"$300. CHICAGO, *March* 5, 1887.

"On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars, for the privilege of one framed advertising sign, size x inches, one end of each of one hundred and fifty-nine street cars of the North Chicago City Railway Company, for a term of three months from May 15, 1887.

"(Signed) SIEGEL, COOPER & CO."

h. *Instrument payable on or before a certain date.*— Where an instrument is payable at the option of the maker or acceptor on or before a certain date it is quite uniformly regarded as negotiable,

This note was indorsed by Dalziel, the payee, to the Chicago Trust and Savings Bank, for value, on the day of its execution. It appeared that before the time when the privilege of advertising was to commence, Dalziel forfeited any right to use the cars in the manner indicated, and the privilege specified was never furnished appellants. Upon the trial it was insisted that the instrument was a simple contract only and that failure of consideration was available, therefore, against the indorsee of the paper for value and before due. The court, however, held that the note was negotiable, and being payable on a specific date and in the hands of an innocent party for value could be recovered upon. The Supreme Court affirmed the judgment. We have deemed it important in this connection to give the following extracts from the opinion of the court in that case:

"It is not contended that the indorsee had any other notice than that contained in the instrument itself, and it is apparent that at the time of its indorsement, which was the day of its execution, no right to the consideration had accrued to the makers. It is a promise to pay a certain sum of money at a day certain, for a consideration thereafter to be rendered, and depends for its validity upon the implied promise of the payee to furnish the consideration at the time and in the manner stipulated; that is, it is a promise to pay a sum certain on a particular day in consideration of the promise of the payee to do and perform on his part. A promise is a valuable consideration for a promise.

"But the question remains, whether the statement or the recital of the consideration on the face of the instrument impairs its negotiability, and in this instance amounts to a condition precedent. The mere fact that the consideration for which a note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract or promise on the part of the payee, will not destroy its negotiability, unless it appears, through the recital, that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid. Daniel on Negotiable Instruments, §§ 790–797; Davis v. McCready, 17 N. Y. 230, 70 Am. Dec. 461; State Nat. Bank v. Cason, 39 La. Ann. 865; Goodloe v. Taylor, 13 N. C. 458; Stevens v. Blunt, 7 Mass. 240. * * *

"The doctrine of those cases, where there are both a certain day of payment and one more or less contingent, need not be here invoked; for the time of payment in the instrument under consideration is not made to depend upon the happening or not happening of any event, but is specific and certain, and must occur by the efflux of time, alone.

"If it be conceded, as it must, that a condition inserted in a promissory note, postponing the day of payment until the happening of some uncertain or contingent event, will destroy its negotiability, and render the instrument a mere agreement, yet under the authorities, if by the instrument the maker promises to pay a sum certain at a day certain to a certain person or his order, such instrument must be regarded as negotiable, although it also contains a recital of the consideration upon which it is based, and although it further appear that such consideration, if executory, may not have been performed. Here the money was payable, absolutely, on the first day of July, 1887, a time when the contract for the advertising could not have been completed. If the instrument had remained the property of the payee, and upon its maturity and performance to that time, suit had been brought, it is clear that no plea of partial failure of consideration could have been sustained, for the reason that the entire term had not then expired. No analysis of the instrument itself is necessary. The most careful examination of it will fail to disclose a condition precedent to the payment of the money at the time stipulated. Nor is there anything in the recital of because payment thereof cannot be compelled before the date of maturity, and, therefore, there is nothing uncertain as to the date of payment, as far as the liability of the indorser or drawer is con-

the consideration to put the indorsee upon inquiry at the time the indorsement was made. Indeed, it is clear that at the time no inquiry would have led to notice that Dalziel would fail to comply with his contract on the 15th of May thereafter, when the term was to commence. All that the recitals would give notice of was, that the note was given in consideration of an agreement on the part of the payee that the privilege of advertisement named should be enjoyed by the makers for three months from May 15, 1887. Giving to the language employed its broadest possible meaning, it cannot be construed as notice to the indorsee of the future breach of the contract by Dalziel. The presumption of law would be, that the contract would be carried out in good faith, and the consideration performed as stipulated. The makers had put their promissory note into the hands of Dalziel upon an expressed consideration which they were thereafter to receive, and for the performance of which they had seen fit to rely upon the undertaking of Dalziel, and we are aware of no rule by which they can hold this indorsee for value before due and before the time of performance was to begin, chargeable with notice that the promise upon which the makers relied would not be kept and performed. Wade on Notice, § 94*a;* Loomis v. Mowry, 8 Hun (N. Y.), 312; Davis v. McCready, 17 N. Y. 230, 92 Am. Dec. 461."

The foregoing case should be collated with Home Bank v. Drumgoole, 109 N. Y. 63, 15 N. E. 747. In that case the firm of Guy & Amery contracted with the defendant to make, put up, complete, and paint a wire fence for the price of $1,150. This contract was entered into in writing on the 24th of July, 1883. On the 31st day of July, 1883, G. & A. drew upon the defendant the following order:

"$1,150.

"NEW YORK, *July* 31, 1883.

"Forty days after date pay to the order of Guy & Amery, eleven hundred and fifty dollars, and charge the same to account of contract.

"On account of contract when completed and satisfactory.

"GUY & AMERY.

"To Rev. Father DRUMGOOLE, No. 2 Lafayette Place."

This order was accepted by the defendant by writing upon the face thereof "Accepted," and subscribing his name thereto. On the day of its date G. & A. indorsed and delivered the note over to plaintiff, the order was at the expiration of the time specified therein, to wit, 12th of September, 1883, presented to the defendant for payment, which was refused, and the action was brought to recover the amount payable. The defense relied upon was that the work which G. & A. contracted with the defendant to do was not fully performed and that, therefore, the money upon the order had not, therefore, become due and payable. Upon this ground plaintiff was nonsuited at the trial. While the Court of Appeals held on this ground that the nonsuit was improper, it did not hold that the order was not a bill of exchange expressly payable in forty days whether the contract was completed or not. The court says:

"It was drawn by the contractors to their own order, and accepted by the defendant before any work under the contract had been done. It is against every probability that he intended to accept the order and obligate himself absolutely to pay the contract price, whether the work was performed or not. It was the clear intention of the parties that the money specified in the order should be paid when the contract was completely performed, and not before; and by accepting the order the defendant became obligated to pay it only according to its tenor and effect, and he was not, therefore, obligated to pay prior to the performance and completion of the contract. It is quite true that the specification of forty days after date as the time for payment of the order produces some doubt and confusion. But the time was probably inserted with the expectation that the contract would be performed, as it could have been, cerned.[1] But if the note or bill is payable before maturity at the option of the payee or holder it becomes uncertain as to the time of payment and is, therefore, nonnegotiable.[2] And in Massachusetts,

within that time, so that the money should not, in any event, be payable in a shorter time. It is difficult to give any proper meaning to the words 'on account of contract when completed,' if the amount was to be absolutely payable at the end of forty days, whether the contract was then completed or not."

This case, however, is clearly distinguishable from Siegel v. Chicago, etc., Bank, *supra*, because in the New York case, reading the terms of the whole contract together, it seems to be clear that there was no intention to pay until the work had been fully performed. In this respect it differs widely from the Illinois case.

1. **Payments "on or before."**— It was held in the case of Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197, that a promise "to pay on or before" a day named states the time for payment with sufficient certainty for the purpose of a promissory note. A note so drawn is due on the day named and not before, and the maker may pay it sooner, but this would only be a payment in advance of his legal liability.

A promissory note wherein the maker promises to pay a certain sum "six months after date or before, if made out of the sale of" an article therein named, is absolute at the expiration of the six months whether the amount has been made by such sale or not. Walker v. Woolen, 54 Ind. 164, 23 Am. Rep. 639. See also Ernst v. Steckman, 74 Pa. St. 13; Cota v. Buck, 7 Metc. (Mass.) 588.

See generally as to instruments payable on or before a certain date, Charlton v. Reed, 61 Iowa, 166, 16 N. W. 66; Duncan v. City of Louisville, 13 Bush (Ky.), 378, 26 Am. Rep. 201; First Nat. Bank v. Skeen, 101 Mo. 683, 14 S. W. 732, 11 L. R. A. 748; Curtis v. Horn, 58 N. H. 504; Jordan v. Tate, 19 Ohio St. 586; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99; Leader v. Plante, 95 Me. 339, 50 Atl. 54; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297; Gill v. First Nat. Bank (Tex. Civ. App.), 47 S. W. 751.

In the case of First Nat. Bank v. Skeen, *supra*, a note payable "on or before" a certain day was under consideration. The court, after considering the object and purposes of bills of exchange and the rules relating to their use, said: "Having in view the reasons upon which these rules are founded, it seems obvious that a certainty of ultimate payment should not be considered impaired by the intervention of an option in favor of the maker to discharge his obligation at an earlier time. The paper still retains a fixed date when the promise to pay must be performed. It is no more uncertain for practical purposes than a bill drawn, for example "at sight," or "on demand," neither of which phrases has ever been held to diminish negotiability. Yet, with regard to bills so drawn, the holder exercises the unquestioned option of fixing the time when the direction to pay becomes absolute."

2. **Payments before maturity at option of holder.**— The rule as expressed in the text is accepted as true by the majority of the cases. First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604; Carrol County Sav. Bank v. Strother, 28 S. C. 504, 63 S. E. 313; Morgan v. Edwards, 53 Wis. 599, 11 N. W. 21, 40 Am. Rep. 781.

In the case of Mahoney v. Fitzpatrick, 133 Mass. 151, 43 Am. Rep. 502, a promissory note payable "on demand or in three years from this date," with interest at a certain rate "during said term, or for such further time as said principal sum or any part thereof shall remain unpaid," was held not negotiable. The court said: "Assuming the true construction to be that the promise contained in the note is to pay in three years at all events, and sooner if demand is made by the holder, the question is presented whether a note payable at a time named therein or earlier, at the option of the holder, shown by a demand made, is negotiable. The ob-

and in some of the other States, it has been held that a note payable at a future day certain, or earlier in the option of the maker,

jection is that there is no certain time of payment fixed by the note. To be negotiable, a note must be payable at a time certain. The time of payment may be fixed by being named in the note or made to depend upon some event which must certainly happen. Thus, a note payable at a certain period after the death of the maker is negotiable because the time of payment depends upon an event which must certainly happen. So, a note payable on or at a certain period after presentment or actual demand made is negotiable because the presentment or demand, being an act of the holder, contemplated in the making of the note, and necessary to give it effect, is deemed to be a certain event. In the instrument under consideration, a time and event are named, either of which without the other would make certain the time of payment; so, if both were used in connection to fix one time, as three years after demand, the note would be payable at a time certain. But they are used to designate two separate times, at either of which the note may, and at either of which it may not, become payable. It is not negotiable as payable at the time named, because whether it would become payable at the expiration of the three years is made to depend upon the uncertain event of a demand, and while the time is certain to come, it is uncertain whether the note will then become payable. It is not negotiable as payable upon the happening of a certain event within the three years, because it is not certain that a demand will be made,— no demand being necessary to hold the maker, and the instrument itself, assuming that such demand may not be made. It is not a note payable at a named time, because it may become payable before that; whether it will become payable by lapse of time or by demand is uncertain and contingent, depending upon the option of the holder. A note payable at a future day certain or earlier, at the option of the maker or of a stranger, is not payable at a time certain, and is not negotiable. (Way v. Smith, 111 Mass. 523; Stults v. Silva, 119 Mass. 137.) The case at bar comes within the principle of these decisions. A negotiable note includes not only the contract between the maker and holder, but also the contracts between the indorsee and the indorsers and maker. The objections to the negotiability of a note payable at a fixed time, or earlier, at the option of the holder, are as great as to a note payable at such time or earlier, at the option of the maker. In the latter case the note may be paid before the time named; in the former, it may become payable before that time. In the one case the time when the note may become payable is fixed, and it cannot become payable at any other time."

There are a number of cases, however, that hold contrary to the last case cited, the most important being that of Protection Ins. Co. v. Bill, 31 Conn. 534, where it was held that the rule that a note, to be negotiable, must be payable absolutely, means only that it must appear on its face that the maker's promise will be at some time absolutely enforceable, and where the event upon which the time and duty of payment depend is one over which the holder will have entire control, there is no such uncertainty regarding it as renders the note nonnegotiable. In the case of Louisville Banking Co. v. Howard, 123 Ala. 380, 26 South. 207, 82 Am. St. Rep. 126, it was held that the negotiability of a note is not affected, when made payable at a bank, by a stipulation authorizing it to appropriate on the note before its maturity, moneys of the maker on deposit in the bank. See also Hurd v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; Smilie v. Stevens, 39 Vt. 315; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160.

Where a note is made payable in installments, and provides that, upon failure to pay any one of such installments, it shall become due at the option of the holder, it is not thereby rendered nonnegotiable. See cases cited under § 39 (*b*), *ante*, and also Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958; Clark v. Skeen, 61 Kan.

is not payable at a time certain and is not negotiable.[3] In these cases no distinction is made between instruments payable at a certain date or earlier in the option of the holder and those instruments payable earlier at the option of the maker. The better reasoning seems to be in favor of holding a note payable at a fixed time or earlier in the option of the maker as due and payable on the day named and not before, and, therefore, negotiable.[4] The Negotiable Instruments Law has been adopted in Massachusetts, and the rule as declared in the cases cited has, therefore, been modified if not overruled by statutory enactment.[5]

i. *Instrument payable at a fixed time after a specified event.*—The provision of the Negotiable Instruments Law that an instrument payable at a fixed period after the occurrence of a specified event, certain to happen, although the time of happening be uncertain, is payable at a determinable future time, and is, therefore, certain as to time of payment, is not new, but is declaratory of the law as laid down by the courts. It was decided early in the eighteenth century that if the event on which the instrument is to become payable must inevitably happen some time or other, it is of no importance how long the payment may be in suspense.[6] As where a note made payable a certain definite time after the death of the maker's father was held to be a negotiable promissory note.[7]

526, 60 Pac. 327, 78 Am. Dec. 337. See *contra*, Kimball County v. Mellon, 80 Wis. 133, 48 N. W. 1100.

3. Way v. Smith, 111 Mass. 523; Stults v. Silva, 119 Mass. 137; Mahoney v. Fitzpatrick, 133 Mass. 151, 43 Am. Rep. 502.

In the case of Brook v. Hargreaves, 21 Mich. 254, 260, it was held that a note which may become payable at a time which cannot be made certain by any attainable means cannot be regarded as negotiable. A negotiable promissory note must be payable at a time which must certainly arrive in the future, upon the happening of some event, or the completion of some period not depending upon the future volition of any one.

4. Mattison v. Marks, 31 Mich. 421, 18 Am. Rep. 197.

5. Rev. Laws of Mass., 1902, chap. 73, § 21.

6. Colehan v. Cooke, Willes (Eng.), 393; Gross v. Nelson, 1 Burr. (Eng.) 226.

7. **Notes payable upon death of a person.**—In Colehan v. Cooke, Willes (Eng.), 393 (1742), the action was upon notes made payable by the defendant to a party therein named, or his order, a certain definite time after the death of the father, which notes were, after the death of the father, indorsed over to the plaintiff. It was held that these were negotiable promissory notes, because the time of payment was certain to arrive. To the objection that the value of the notes could not be ascertained, Willes, J., says that, when the age of a person is known, the value of his life can be calculated, and that, at all events, when the life of a man can be insured its value will be ascertained.

A leading case on this subject is Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487. In that case the instrument sued upon read as follows:

"$1,976, 90-100.

"BROOKLYN, *Feb.* 8th, 1871.

"One year after my death, I hereby direct my executors to pay to Joseph Hegeman, his heirs, executors, or assigns, the sum of nineteen hundred and

In a New York case it was held that a note payable ninety days after the dissolution of a partnership and the settling of the partnership books was not negotiable, because, while the partnership must be dissolved at some time, the books may never be settled.[8] And a note payable a certain time after peace between the United States and the Confederate States was restored, was held not contingent upon the occurrence of an uncertain event, since peace must come at some time, and that the note was, therefore, negotiable.[9]

j. *Instrument payable upon a contingency.*— We have already considered in this chapter the nonnegotiability of an instrument payable upon a contingency.[10] There are a few other cases which might be cited here as bearing upon the question of certainty as to time of payment. A note payable to a person "when he is 21 years old" is uncertain, as the person may never live to attain that age, and the note is, therefore, nonnegotiable.[11] But it will be otherwise, if, from the other language of the instrument, it can be gathered that a period is absolutely fixed for the payment of the money at all events, and that the age of the party is referred to not as a contingent event, but merely as a mode of ascertaining that

seventy-six dollars and ninety cents, being the balance due him for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day, without interest.

"CORNELIA W. HEGEMAN."

The maker of the note died December 3, 1888, leaving a will which was duly probated, and a year thereafter the plaintiff presented the draft to the executors and demanded payment, which was refused. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled in the Special Term, which decision was affirmed by the General Term, and the case was carried to the Court of Appeals. The Court of Appeals held that the instrument was a promissory note and that the addition of the words that the money was due to the payee for cash advanced simply stated the origin of the indebtedness of the maker, and that the time was absolutely fixed.

An even more striking case was that of Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845. In that case the instrument was in this form: "Thirty days after death I promise to pay Cornelius Carnwright fifteen hundred dollars, with interest. (Signed) Cornelius Carnwright." The Court of Appeals held that the promise was, in substance, that thirty days after the maker's death his estate should pay the sum promised by him in the note, but that the note was not negotiable because it contained no words showing that it was payable to the order of the payee. See also Conn v. Thornton, 36 Ala. 536; Bristol v. Warner, 19 Conn. 7; Shaw v. Camp, 160 Ill. 425, 43 N. E. 608; Price v. Jones, 105 Ind. 543, 55 Am. Rep. 230; Crider v. Shelby, 95 Fed. 212; Miller v. Western College of Toledo (Ill.), 52 N. E. 432.

8. Sackett v. Palmer, 25 Barb. (N. Y.) 179.

9. Mortee v. Edwards, 20 La. Ann. 236.

10. See § 36, *ante*.

11. Kelly v. Hemingway, 13 Ill. 604, 56 Am. Dec. 474; Rice v. Rice, 43 App. Div. (N. Y.) 548, 60 N. Y. Supp. 97.

period.[12] And it has been held that a written engagement to pay a certain sum so many days after the defendant's marriage is not a negotiable promissory note, for possibly he may never marry.[13] And a written obligation for the payment of a sum of money "when the estate of M. is settled up" is not negotiable or assignable, as there is no legal certainty that event will ever happen.[14] It may then be stated as a general proposition that an instrument promising to pay a sum of money at a day uncertain, upon a contingency not inevitable, is not negotiable.[15]

k. *Instrument payable on day certain, or on happening of event.* — Where an instrument contains a promise to pay at a certain fixed date, or before such time if a specified event occurs, it is generally held to be negotiable.[16] In such a case the absolute promise to pay at a fixed time is not affected by the conditional promise to pay upon the happening of the contingency. The conditional promise not being performed, the absolute promise to pay at the expiration of the time specified remains in full force.[17]

l. *Effect of provision for extension of time.*—A provision contained in an instrument to the effect that the time of payment may be extended indefinitely as the parties may agree makes the time of payment depend upon a contingency, and, therefore, destroys the negotiability of the instrument.[18]

12. Story on Promissory Notes, § 28.

13. Beardsley v. Baldwin, 2 Stra. (Eng.) 1151.

14. Husband v. Epling, 81 Ill. 172, 25 Am. Rep. 273.

15. Tradesmen's Nat. Bank v. Green, 57 Md. 602. In the case of Specht v. Beindorf, 56 Neb. 553, 76 N. W. 1059, 42 L. R. A. 429, a promissory note containing a promise to pay "if elected county commissioner," was held nonnegotiable.

16. Walker v. Woolen, 54 Ind. 164; Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808.

In the case of Stevens v. Blunt, 7 Mass. 240, it was held that a note payable to S., or order, on a certain day, "or when he completes the building according to contract," is negotiable. To similar effect is Cota v. Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464; Ernst v. Steckman, 74 Pa. St. 13, 15 Am. Rep. 542; Goodlow v. Taylor, 10 N. C. 458; Commercial Bank of Salina v. Crenshaw, 103 Ala. 497, 15 South. 741; Cesne v. Chidester, 85 Ill. 523; Pemberton v. Hoosier, 1 Kan. 108; Gardner v. Barger, 4 Heisk. (Tenn.) 668; Smith v. Ellis, 29 Me. 422.

17. Walker v. Woolen, 54 Ind. 164.

18. **Agreement to extend time.**—In the case of Glidden v. Henry, 104 Ind. 278, 1 N. E. 369, the note under consideration provided, "and further expressly agree that the payee or his assigns may extend the time of payment thereof from time to time indefinitely, as he or they see fit, and receive interest in advance or otherwise, from the maker or indorsers, for any extension or forbearance so made." The court said: "From an inspection of the note it is impossible to tell when it may mature, because it is impossible to know what extension may have been, or may be hereafter, agreed upon. No definite time is fixed, nor is the maturity of the note dependent upon an event that must inevitably happen. The condition is not that something may happen or be done that will mature the note before the time named, thus leaving that time as fixed and

§ 40. Instrument must be payable to order or bearer.

a. *In general.*—An instrument to be negotiable must be payable to order or bearer.[19] The name of the person to whom the note is payable, or upon whom the bill is drawn, should be clearly expressed and made known upon the face of the instrument, because parol evidence is not admissible to show to whom it is payable; and in instruments designed for circulation, it is of the highest importance to know to whom its obligations apply, and from whom a title can be securely derived.[20] Under the English law it is provided that a bill is payable to order or bearer which is expressed to be so payable, or is payable to a particular person, and does not contain words expressly or impliedly prohibiting transfer.[21] Independent of statute in the several States in this country, it is well settled that a negotiable instrument must be payable to order or bearer, and that such instrument is not negotiable unless these words, or words of similar legal import, appear therein.[22] The

certain, if the thing do not happen or be done; but the condition is that the time named may be displaced by another uncertain and indefinite time, as the parties may agree."

In the case of McClelland v. Norfolk Southern Co., 110 N. Y. 469, 18 N. E. 237, it was held that certain coupons which were cut from railroad bonds, containing a provision that the time of payment of principal and interest might be postponed by a vote of the majority of the holders of a series of bonds issued simultaneously with those from which the coupons were cut, were not negotiable instruments. See also Coffin v. Spencer, 39 Fed. (C. C.) 262; Armiston L. & T. Co. v. Stickney, 108 Ala. 146, 19 South. 63, 31 L. R. A. 234; Woodberry v. Roberts, 59 Iowa, 348, 13 N. W. 312, 44 Am. Rep. 685; Rosenthal v. Rambo (Ind. App.), 62 N. E. 637; Smith v. Van Blarcom, 45 Mich. 371, 8 N. W. 90; Second Nat. Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194, 17 Atl. 603, 12 Am. St. Rep. 860, 4 L. R. A. 190.

19. Neg. Inst. Law (N. Y.), § 20(4).

20. Story on Promissory Notes, § 35.

21. Byles on Bills (16th ed.), p. 96.

Under the English law as it existed prior to the Bills of Exchange Act (§ 8), it was necessary that the bill or note contain one or the other of the words "order" or "bearer," in order to be negotiable. Smith v. Kendall, 6 B. R. (Eng.) 123.

22. Words "order" or "bearer" or similar words must appear, see the following cases:

United States.— Sherman Bank v. Apperson, 4 Fed. 25.

Connecticut.— Bacus v. Danforth, 10 Conn. 297.

Delaware.— Fernon v. Farmer, Harr. 32; Hallis v. Vander Grift, 5 Houst. 521.

Georgia.— Reed v. Murphy, 1 Ga. 236; Hamilton v. Grangers' L. & H. Ins. Co., 65 Ga. 750. (In this State, by sections 3675 and 3682 of the Code of 1895, an agreement containing a promise to pay money is negotiable by indorsement in the same manner as a promissory note or bill of exchange, and under these sections it has been held that a note not containing any words of negotiability was so far negotiable by indorsement of the payee in blank as to pass the title to a *bona fide* holder. National Bank v. Leonard, 71 Ga. 805, 18 South. 32.)

Indiana. — Musselman v. McElhenny, 23 Ind. 4, 85 Am. Dec. 445.

Maryland. — Yingling v. Kohlhass, 18 Md. 148.

Missouri.— Davis v. Holm, 34 Mo. App. 332.

New York.— Bruce v. Wescott, 3

omission of the words "or order or bearer," in a bill of exchange or promissory note, only affects the negotiability of the instrument; such words are not essential to the validity of such instrument if it possesses all the other requisites.[23]

b. *What are words of negotiability.*— The words "or order," "or bearer," are so commonly used in commercial instruments that they are sometimes supposed to be essential to negotiability. But it has been said, "in order to make a promissory note or other obligation for the absolute payment of a sum certain, on a certain day, negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity."[24] 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 per-

Barb. 374; Mechanics' Bank v. Straiton, 3 Keyes, 365, 35 Abb. Pr. (N. S.) 11; Maule v. Crawford, 14 Hun, 193.

Ohio.— Smurr v. Forman, 1 Ohio, 272.

Pennsylvania.— Gerard v. La Coste, 1 Dall. 194.

South Carolina.— Pepoon v. Stagg, 1 Nott & McC. 102.

South Dakota.— Searles v. Seipp, 6 S. D. 472, 61 N. W. 804.

23. Louisville, etc., R. R. Co. v. Caldwell, 98 Ind. 245.

Negotiability as an essential element.— A promissory note without words of negotiability may be declared upon as a note within the statute. Downing v. Backenstoes, 3 Cai. (N. Y.) 137; Payne v. Moelke, 53 How. Pr. (N. Y.) 273.

In the case of Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845, it was held that a promissory note containing no words of negotiability is within the statute, providing that the promise to pay to a person or order, or to the bearer, is due and payable as expressed in such note, and that the payees or indorsees may maintain actions for the sums of money mentioned therein against the makers and indorsers of the same, respectively, in like manner as in cases of inland bills of exchange, and not otherwise. Therefore, the note, without such words of negotiability, imports a consideration; and the presumption of the consideration, from the possession and production of such note by the payees, is sufficient to sustain a recovery on it by them, where the transaction which resulted in giving the note is not disclosed by the evidence.

Among other cases holding that words of negotiability are not essential to the validity of a promissory note or bill of exchange, are: Bates v. Butler, 46 Me. 387; Sibley v. Phelps, 6 Cush. (Mass.) 172; Brady v. Chandler, 31 Mo. 28; Cummings v. Freeman, 2 Humph. (Tenn.) 143; Arnold v. Sprague, 34 Vt. 402.

24. Wilson County v. Third Nat. Bank, 103 U. S. 770, 26 L. Ed. 488. In this case the bonds in question were payable to the railroad company, or holder, if the bond were transferred by the signature of the president of the company, and the court said that this was equivalent to making the bonds payable to the company or order when they bore the indorsement of the president.

In United States v. White, 2 Hill (N. Y.), 59, 37 Am. Dec. 374, a promissory note was made payable "to the order of the indorser named," and that was held to be negotiable.

In Dutchess County Ins. Co. v. Hatchfield, 1 Hun (N. Y.), 675, a bond payable to a payee in blank, his executor, administrator, or assigns, was held negotiable.

son.[25] As a rule for the construction of instruments the Negotiable Instruments Law has provided that "the instrument need "not follow the language of this act, but any terms are sufficient "which clearly indicate an intention to conform to the require- "ments hereof." [26] In view of this statutory rule it is clear that the words "or order," "or bearer," are not essential to negotiability if the intent of the parties to provide for such negotiability be clearly indicated.

c. *When payable to order; (1) statutory provision.*— The Negotiable Instruments Law contains the following:

"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 cer- "tainty." [27]

This section of the act has preserved the old rule that an instrument is payable to order when it is drawn payable to the order of a specified person or to him or his order. The English Bills of Exchange Act [28] provides in accordance with Scotch law that "a bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable."

It would seem that this change might, with propriety, have been adopted. The interests of the commercial public require that instruments should be, as far as possible, negotiable, and the reason for putting the word "order" in the instrument, to make it negotiable, seems to be founded upon technicality.

While it may have been doubted at one time whether a note payable to the order of A. B. was equivalent to one payable to A. B.

25. United States v. White, 2 Hill (N. Y.), 59, 37 Am. Dec. 374; Putnam v. Crymes, 1 McMul. (S. C.) 9; Raymond v. Middleton, 29 Pa. St. 529, 36 Am. Dec. 250.

26. Neg. Inst. Law (N. Y.), § 29. See Appendix.

27. Neg. Inst. Law (N. Y.), § 27. See Appendix.

28. English Bills of Exchange Act, § 8. See Appendix.

or order, it has long been settled that a note payable to a man and his order, or to his order only, is one and the same thing.[29]

(2) *Instrument payable to drawer or maker.*— An instrument payable to the drawer or maker has no legal inception until it is indorsed by the payee.[30] It then becomes negotiable by delivery, in the same manner as an instrument payable to bearer.[31] The practice of issuing such paper has now become very common, and its validity, when indorsed by the maker or drawer, is not questioned. Statutes have been in existence for many years in many of the States to the effect that notes made payable to the order of the maker or of a fictitious person shall, if negotiated by the maker, have the same effect and be of the same validity, as against the maker and all persons having knowledge of the facts, as if made payable to the bearer.[32] In those States in which the Negotiable Instruments Law has been adopted such statutes have been superseded by the section of that law above quoted.

29. Howard v. Palmer, 64 Me. 86, 92; Durgin v. Bartol, 64 Me. 473; Huling v. Hogg, 1 Watts & S. (Pa.) 418; Sherman v. Goble, 4 Conn. 246.

30. **Instrument payable to order of maker or drawer.**—Lea v. Branch Bank, 8 Port. (Ala.) 119; Heywood v. Wingate, 14 N. H. 73; Moses v. Lawrence County Bank, 149 U. S. 298, 13 Sup. Ct. 900; Blatchford v. Millikin, 35 Ill. 434; Kayser v. Hall, 85 Ill. 511, 28 Am. Rep. 624; Pickering v. Cording, 92 Ind. 306, 47 Am. Rep. 145, in which the court said: "When an instrument in the form of a promissory note, negotiable by the law merchant, is made payable to the order of the maker himself, it is incomplete; indeed, it is a nullity, until it has been indorsed by the maker. A promissory note must have a maker, and it must have a payee who is another person than the maker. Until a promissory note made payable to the order of the maker has been indorsed and delivered by the maker, there is no payee or promisee, and the instrument is in the nature of a written promise to pay to the person to whom the maker shall, by indorsement, order payment to be made. By special indorsement a particular person may be made payee as if his name were originally inserted as such in the note. The maker's indorsement in blank will make the equivalent to a note payable to bearer." See also Dubois v. Mason, 127 Mass. 37, 34 Am. Rep. 335; Norfolk Nat. Bank v. Griffin, 107 N. C. 173, 11 S. E. 1049, 22 Am. St. Rep. 868.

31. Scull v. Edwards, 13 Ark. 24, 56 Am. Dec. 294; Smalley v. Wright, 44 Me. 442, 69 Am. Dec. 112; Pitcher v. Barrows, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 153; Winona Bank v. Wofford, 7 Miss. 711, 14 South. 262.

32. **Payable to order of fictitious person.**—In New York (1 R. S. 768, § 5, repealed by Neg. Inst. Law [1897, chap. 612]), it was provided that promissory notes made payable to the order of the maker, or of a fictitious person, if negotiated by him, shall have the same validity, as against him and "all persons having knowledge of the facts, as if payable to the bearer." It was held, under this statute, that the facts of which a person must have knowledge, in order to give the note efficacy against him, are simply that the note is payable to the order of the maker, or of a fictitious person. Irving Nat. Bank v. Alley, 79 N. Y. 536. It was also held in this case that a note payable to the order of the maker, as against an accommodation indorser having knowledge of this fact, is to be considered as if payable to the bearer, and is valid, although negotiated without the

A bill of exchange, drawn by one upon himself, may be regarded as an accepted bill.[33] And it has also been held that a commercial paper in the form of a bill of exchange, but showing on its face that the drawer and drawee are the same person, may be treated by the holder as a promissory note; and that although he may elect to treat it as a bill of exchange, the drawer cannot probably compel him to so treat it.[34] But it has been held in a leading New York case that such an instrument could not be treated as a bill of exchange, but must be declared on as a promissory note.[35] The Negotiable Instruments Law has provided that "where in a bill the drawer and drawee are the same person the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note."[36] A similar provision is also contained in the English Bills of Exchange Act.[37]

(3) *Instruments drawn by agent, officer, or partner.*— For the same reason as in the case of a bill drawn by a person upon himself, a bill drawn by an agent upon his principal is in legal effect a promissory note, and open in the hands of a transferee to all defenses which the principal had against the payee.[38] And where a draft is drawn by a resident agent of a corporation upon a non-

indorsement of the payee. See also Missouri Rev. Stat. 1899, § 459; Lowrie v. Zunkel, 49 Mo. App. 153; St. Charles Nat. Bank v. Payne, 111 Mo. 291, 49 Atl. 153, 33 Am. St. Rep. 520.

California Civ. Code, § 3102, is to a similar effect. See Main v. Hilton, 54 Cal. 110.

33. Bill payable to drawer deemed accepted.—In the case of Cunningham v. Wardwell, 12 Me. 466, a bill of exchange was drawn by the drawer upon himself, and the court said: "The drawer undertakes that the bill shall be accepted. As it was here drawn upon himself, he also sustained the relation of drawee. And if in both capacities, which he assumed upon signing the bill, he undertook that the bill should be accepted and paid, of which the bill itself is evidence, it is accepted. A promise to accept an existing bill, if made upon an executed consideration, or if it influence any person to take or retain the bill, it is as to the person to whom the promise is made in one case, and as to him whom it influenced on the other, a complete acceptance." See also Randolph v. Parish, 9 Port. (Ala.) 76; Wildes v. Savage, Fed. Cas. 17,653; Bank of British North America v. Barling, 46 Fed. 357; Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15; Rice v. Hogan, 8 Dana (Ky.), 133.

34. Brazelton v. McMurray, 44 Ala. 323; Patillo v. Mayor, 70 Ga. 715; De Vaugh v. Hangabrook, 73 Ga. 809; Bradley v. Mason, 6 Bush (Ky.), 603; Indiana & Illinois Central R. R. Co. v. Davis, 20 Ind. 6, 83 Am. Dec. 303; Maux Ferry Gravel Road Co. v. Barnegan, 40 Ind. 361; Dougall v. Cowles, 5 Day (Conn.), 511; Commonwealth v. Butterick, 100 Mass. 12, 97 Am. Dec. 65.

35. Fairchild v. Ogdensburgh, etc., R. Co., 15 N. Y. 337, 69 Am. Dec. 606.

36. Neg. Inst. Law (N. Y.), § 214. See Appendix.

37. English Bills of Exchange Act, 1882, § 5 (2).

38. Stafford v. Bratcher, 4 Ky. Law Rep. 996; McCormick v. Hickey, 24 Mo. App. 362; Raymond v. Mann, 45 Tex. 301; Bailey v. Southwestern R. Bank, 11 Fla. 266.

resident agent of the same corporation it may be treated as a bill of exchange as sued on in the same manner.[39] And where a duly authorized officer of a corporation makes an order upon the proper financial officer thereof, such order may, in the option of the holder, be treated as the promissory note of the corporation.[40] But if such an order be deemed a bill of exchange no formal acceptance by the corporation is required, because the act of drawing is itself an acceptance.[41] It has been held that an order drawn by a corporation upon its treasurer in favor of a third person is a clear acknowledgment of indebtedness in favor of the drawee, and is in effect a note, and may be sued on as such.[42]

(4) *Instrument payable to order of drawee.*— An instrument requesting the drawee to pay a sum to his own order is generally held to be a valid bill of exchange. Such validity is not to be destroyed because of the fact that the drawee and payee are one and the same person.[43] As has been said by Judge Story in the case of Wildes v. Savage:[44] "An instrument is not the less a bill

39. Hazard v. Cole, 1 Idaho, 276.

40. Wetumpka & C. R. Co. v. Bingham, 5 Ala. 657; Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15; Marion & M. R. Co. v. Hodge, 9 Ind. 163; Indiana & Ill. Cent. R. Co. v. Davis, 20 Ind. 6, 83 Am. Dec. 303; Rio Grande Extension Co. v. Coby, 7 Colo. 299, 3 Pac. 481. In the case of Dennis v. Table Mt. Water Co., 10 Cal. 369, it was held that where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and non-payment is necessary to hold the corporation. The draft in such a case is only an order of the corporation upon itself. See also Mobley v. Clark, 28 Barb. (N. Y.) 390.

41. Hasey v. White Pigeon Beet-Sugar Co., 1 Doug. (Mich.) 193.

42. Marion & M. R. Co. v. Hodge, 9 Ind. 163.

43. Holsworth v. Hunter, 10 B. & C. (Eng.) 449, 21 E. C. L. (Eng.) 110; Witte v. Williams, 8 S. C. 290, 28 Am. Rep. 294.

44. 1 Story (U. S.), 22.

Instrument drawn upon one's self as bill of exchange.— In Commonwealth v. Butterick, 100 Mass. 12, Butterick was indicted for forging the name of S., as an indorser on a bill of exchange drawn by defendant on himself, payable to his own order and accepted and indorsed with his own name above the name of S. In passing upon the sufficiency of the indictment, Foster, J. (p. 16), says: "Upon principle, as well as by the authorities cited by the attorney-general, we entertain no doubt that an order for the payment of money drawn by one in his own favor on himself, and by himself accepted and indorsed, may be treated as a bill of exchange, and so described in an indictment. Such instruments are well known in commerce; especially in the case of mercantile firms which have branches in different cities, all composed of the same partners. Perhaps such a bill may also be declared upon as a promissory note. But we agree with the Court of Queen's Bench in the latest English case on the question, decided in 1852, that 'it is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or a bill of exchange.' Lloyd v. Oliver, 18 Q. B. (Eng.) 471. It is sufficient that the instrument was in the form of, and purported to be, a bill of exchange; and the defendant might be convicted of forging this indorsement, if all the other names were also forged or were those of fictitious personages."

of exchange because all the parties to it in the character of drawers, payees, and drawees are not different persons. A bill drawn by a person payable to his own order has always been deemed to be a bill of exchange in the commercial sense of the phrase, and it would not cease to be such a bill if it should be indorsed by the drawer payable to the drawee. * * * Where the bill is negotiable, and contains a drawer, a payee, and a drawee, it is, in a commercial sense, a bill of exchange, although one or more of the parties shall fill a double character." The English Bills of Exchange Act provides that a bill may be drawn payable to, or to the order of, the drawee.[45]

(5) *Instrument payable to joint payees.*— An instrument may be payable to two or more payees jointly. Where a note is so made payable to two or more persons, it imports *prima facie* a joint and coequal interest in the two payees; but this does not preclude proof of the true transaction, and that the consideration moved from them in separate and unequal amounts and values.[46] In such a case, a transfer of the instrument can only be made by the joint indorsement of all the payees, unless they are in fact partners.[47]

(6) *Instrument payable to one or some of several payees.*— It is provided in the Negotiable Instruments Law that an instrument may be drawn to the order of one or some of several payees.[48] If this provision means that an instrument payable in the alternative to one or some of several payees is negotiable, it would seem to have changed the rule, for it has generally been held that instruments payable in the alternative to one person or another are not negotiable, because the payee is not certain.[49] It is not clearly apparent that the framers of the Negotiable Instruments Law intended to modify the rule as to alternative payments; it seems better to construe the statute as intending to cover a promise to pay to several persons whose interests are common, or to any one or more of them. If this be the correct interpretation, there has been no change made in the law, since the rule has always been that where a promise to pay is made to several persons who may be identified one with the other as having a common interest in

45. English Bills of Exchange Act, 1882, § 5 (1). See Appendix.

46. Tisdale v. Maxwell, 59 Ala. 40.

47. Ryhiner v. Feickert, 92 Ill. 305, 34 Am. Rep. 130.

48. Neg. Inst. L. (N. Y.), § 27 (5).

49. Musselman v. Oakes, 19 Ill. 81, 68 Am. Dec. 583; Bennington v. Dinsmore, 2 Gill (Md.), 348; Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360.

And in the case of Noxen v. Smith, 127 Mass. 485, it was held that a promissory note payable to "the trustees" of a church "or their collector," is not negotiable.

the transaction, or to any one of them as representing them all, there is in such case no uncertainty as to the payee, and the instrument is, therefore, negotiable.[50]

(7) *Instrument payable to holder of an office for the time being.*— A negotiable instrument may be drawn payable to the order of the holder of an office for the time being.[51] This provision of the law was intended to declare the general rule that where an instrument was payable to a person holding a position of a representative character that he may be regarded as the payee of the instrument in behalf of all the persons whom he represents.[52]

(8) *Payee to be indicated with reasonable certainty.*— There is no necessity that the payee should be actually named, provided he can be ascertained definitely. The important point is that there should be no uncertainty about the existence of the person who can give a full release and receipt for the instrument. The general rule is that it is sufficient if there is in fact a payee who is so designated that he can be ascertained.[53] It is impossible to lay

50. Blanckenhagen v. Blundell, 2 B. & Ald. (Eng.) 217.

Payable in alternative to one of several payees.—In the case of Holmes v. Jacques, L. R., 1 Q. B. (Eng.) 376, the note in controversy was payable to "the trustees of" etc., or "their treasurer for the time being." The court, per Blackburn, J., said: "I think the true construction of this instrument is that it merely means: I promise to pay to the trustees, or their agent for the time being (the latter being what is implied by law), and I give notice that the treasurer is such agent. Thus carrying out the intimation of Bayley, J., in Blanckenhagen v. Blundell, 2 B. & Ald. (Eng.) 217, that if there had been any community of interest stated between the payees so as in any respect to identify the one with the other, it is possible that an action might have been maintained on the note."

In the case of Noxen v. Smith, 127 Mass. 485, the note sued upon was payable to the trustees of the Methodist Episcopal church or their collector, and it was held that the rule making notes nonnegotiable which are payable in the alternative did not apply in this instance, because the two persons named were not strangers to each other, but one was clearly the agent of the other to collect the money.

In the case of Atlantic Mut. Fire Ins. Co. v. Young, 38 N. H. 451, it was held that a promise contained in a deposit note given by the insured to a mutual fire insurance company upon the issuing of a policy to him "to pay to the company, or to their treasurer," the assessment which may be ordered by the directors, is not a promise in the alternative to one of two distinct parties. The court said: "The promise is to the company to pay them, and the insertion of the words "or their treasurer," merely introduces a stipulation that the payment agreed to be made to them shall be considered as made to them, so as to fulfil the contract, if made to the person who may then be their treasurer." See also Gaytes v. Hibbard, Fed. Cas. 5,287, 5 Biss. 99.

51. Neg. Inst. L. (N. Y.), § 27 (6).

52. Davis v. Garr, 6 N. Y. 124, in which case a written instrument by which D. promises to pay money to W. D. and M., "trustees of the Apalachicola Land Company, or their successors in office, or order," was held to be a promissory note.

53. Adams v. King, 16 Ill. 169, 61 Am. Dec. 64. The court, in this case, said: "The general rule in relation to bills of exchange and promissory notes requires that the person to whom they are made payable shall be

down any fixed rule to determine the degree of certainty required in designating the payee; reference should be made to the different cases to find expressions which have been held as sufficient or insufficient to designate the payee. A note payable to the estate of a deceased person has been held to be sufficiently certain as to the payee to render it valid.[54] But there are a number of other

specified; but this may be done without inserting the name; for that is certain which may be rendered certain; and if the payee be so certainly designated or referred to as to be easily ascertainable by allegations and proofs, the promise will be valid." See also Blackman v. Layman, 63 Ala. 547, 35 Am. Rep. 57; Turner v. Eldridge, 6 Ala. 821; Moody v. Threlkeld, 13 Ga. 55; Smith v. Bridges, 1 Ill. 18; Chenot v. Lefevre, 8 Ill. 637; Greenhow v. Boyle, 7 Blackf. (Ind.) 56; Smith v. Marland, 59 Iowa, 645, 13 N. W. 852; Gordon v. Anderson, 83 Iowa, 224, 49 N. W. 86, 12 L. R. A. 483; Brown v. Gilman, 13 Mass. 158.

An instrument made payable to the "St. Bt. Juda, owners or order," is a good promissory note, as it can be shown who are the owners of the steamboat Juda, and the note would be payable to them, or their order. Moors v. Anderson, 8 Ind. 18.

54. **Instrument payable to estate.**— The case of Shaw v. Smith, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348, contains the best discussion of this doctrine, although, in some respects, it goes further than many other cases. The instrument sued upon was as follows:

"$126.00.

"BELCHERTOWN, *July* 19, 1873.

"For value received, I promise to pay F. P. Bridgman's estate, or order, one hundred and twenty-six dollars on demand, with interest annually.

"(Signed) EUGENE BRIDGMAN."

"Witness: A. BRIDGMAN."

On this question the court said as follows:

"The defendant contends that the instrument sued on is not a promissory note, for want of a sufficiently definite payee, and he cites two decisions which sustain him in this connection. (Lyon v. Marshall, 11 Barb. 241; Tittle v. Thomas, 30 Miss. 122.)

"But this would be too strict an application of the doctrine that the person to whom a note is payable must be clearly expressed. It is an equally general rule, that it is sufficient if there is in fact a payee, who is so designated that he can be ascertained. (Story on Notes, § 36.)

"The illustrations of the manner in which this rule has been applied are numerous. Thus, written promises have been held to be valid notes or bills of exchange, though made payable to bearer (Grant v. Vaughan, 3 Burr. [Eng.] 1516); or to persons designated simply by their office, without naming them, *e. g.*, the treasurer of the First Parish in H. or his successor in said office (Buck v. Merrick, 8 Allen [Mass.], 123); the trustees of a particular church (Noxon v. Smith, 127 Mass. 485; Holmes v. Jacques, L. R., 1 Q. B. [Eng.] 376); the manager of the Provincial Bank of England (Robertson v. Sheward, 1 Man. & G. [Eng.] 511); the treasurer-general of the Royal treasury of Portugal (Soares v. Glyn, 8 Q. B. [Eng.] 24); the executors of the late W. B. (Hamilton v. Aston, 1 C. & K. [Eng.] 679); the administrators of a particular estate (Moody v. Threlkeld, 13 Ga. 55; Adams v. King, 16 Ill. 169); the trustees acting under the will of the late Mr. W. B. (Megginson v. Harper, 2 Cr. & M. [Eng.] 322). Also to the heirs of a particular person, even though that person was living at the time (Bacon v. Fitch, 1 Root [Conn.], 181; Lockwood v. Jessup, 9 Conn. 272; Cox v. Beltzhoover, 11 Miss. 142); to a business name adopted by the person in interest (Bryant v. Eastman, 7 Cush. [Mass.] 111; Brown v. Parker, 7 Allen [Mass.], 337); and to the steamboat Juda and owners (Moore v. Anderson, 8 Ind. 18). So, a bill which was indorsed to a person who was already deceased was held valid in the hands of his legal representatives. (Murray v. East India Co., 5 B. & Ald. [Eng.] 204.) More literally cases holding that an instrument made payable to the estate of a person is not good as a promissory note, on the ground that the terms of such instrument do not point with legal certainty to any person as payee, and that it is impossible to ascertain whether the instrument was intended to apply to the administrator or to the distributees of the estate, or to the parties entitled to his real estate; and this uncertainty can only be explained by the introduction of parol evidence as to the intention of the makers, which would be inadmissible.[55] But where a note is made payable to the estate of a deceased person, it is evidence of a debt which the executor may recover as assets of the estate.[56] And a promissory note which is payable to the executor of the estate of a deceased person is valid.[57] A comparatively recent New York decision is to the effect that a promissory note, to the order of the estate of a certain person, was in substance a note payable to a fictitious payee, and if negotiated by the maker was payable to the bearer.[58] It will not destroy the validity of a bill or note if it be made payable to a payee who is not designated by the name of a person.[59]

directly opposed to the two decisions relied on by the defendant, are Peltier v. Babillion, (45 Mich. 384, 8 N. W. 99), where a written promise payable to the order of J. V. Mehling estate was held to be a good note, and McKinney v. Harter, (7 Blackf. [Ind.] 385), which was substantially similar. See also Storm v. Stirling, (3 El. & Bl. [Eng.] 832; s. c., *sub nom.* Cowie v. Stirling, 6 El. & Bl. [Eng.] 333); Yates v. Nash, 8 C. B. N. S. [Eng.] 581), where a promise to the officer for the time being of a society was held too indefinite, though the general rule as applied in other cases was recognized.

"In the case before us, the promise was to pay to F. B. Bridgman's estate, or order. He was dead, and administrators had been appointed. There could be no doubt that the promise was intended to be one of which the administrators could avail themselves. They were in existence, and were ascertainable. If the administrators of his estate had been made the payees, without naming them, there can be no shadow of question that it would have been sufficient. It savors of too much refinement to hold that the instrument was not a valid promissory note for want of a sufficiently definite payee."

But in the case of Stern v. Eichberg, 83 Ill. App. 442, it was held that a promissory note payable to the estate of a deceased person is valid, not only as a promissory note but also as evidence of an indebtedness; and where the payee named in such note was "the estate of Samuel Eichberg," it was held to afford a designation by which the payee can be ascertained.

55. Tittle v. Thomas, 30 Miss. 122, 64 Am. Dec. 154; Wayman v. Torreyson, 4 Nev. 124; Lyon v. Marshall, 11 Barb. (N. Y.) 241.

56. Hendricks v. Thornton, 45 Ala. 299; McKinney v. Harter, 7 Blackf. (Ind.) 385.

57. Moody v. Threlkald, 13 Ga. 55; Adams v. King, 16 Ill. 169, 61 Am. Dec. 64.

58. Lewisohn v. Kent, 87 Hun (N. Y.), 257, 33 N. Y. Supp. 826.

59. Moore v. Anderson, 8 Ind. 18. See also Hart v. Taylor, 70 Miss. 655, 12 South. 553, in which a written obligation reciting that the maker is bound to "Millsap College or its assigns if it shall be permanently located at Jackson," was held to be a negotiable promissory note.

d. *When payable to bearer.*—(1) *Statutory provision.*— The Negotiable Instruments Law contains the following provision:

"An 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 nonexist-" ing 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." [60]

The English Bills of Exchange Act provides that "a bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.[61] The word "bearer" means the person in possession of the bill or note which is payable to bearer.[62]

(2) *Instrument made expressly payable to bearer.*— It is the ordinary practice in commercial transactions to expressly provide for the payment of a negotiable instrument to bearer, if such is the desire. Probably any other word having the same meaning as bearer would be equally efficacious. Thus the word "holder" has been held synonymous with and equivalent to the word "bearer." [63]

(3) *Instrument payable to order of fictitious person.*— Subdivision 3 of the above section of the Negotiable Instruments Law is a substitute for a somewhat similar provision contained in the statutes of a number of the States. For instance in New York, it was provided that a note made payable to the order of a fictitious person shall, if negotiated by the maker, have the same effect and be of the same validity as against the maker and all persons hav-

60. Neg. Inst. L. (N. Y.), § 28. For same section in statutes of other States see Appendix.

61. English Bills of Exchange Act, 1882, § 8 (3).

62. Neg. Inst. L. (N. Y.), § 2.

63. "Holder" means "bearer."— Putnam v. Crymes, 1 McMullen (S. C.), 9, 6 Am. Dec. 250, in which case the court said: "The word 'bearer' is usually inserted in a negotiable note, transferable by delivery. But without it the maker of the note can make it transferable by delivery, either by circulation, or using a word of precisely the same import; as if the note were made payable to A. B., or to any one to whom he may deliver it, or to any one who might hold the same by delivery. In both cases the bearer would be sufficiently meant and designated, although the word was not used. If it was the intention of the maker to make it payable to any one who acquires possession by delivery, he has no right to complain when it is presented to him without the written transfer. 'Holder' is a word of the same import as 'bearer,' and both may acquire title by lawful delivery,

ing knowledge of the funds, as if payable to bearer.[64] Under the common law a bill payable to a fictitious person or his order was neither in effect payable to the order of the drawer nor to the bearer, unless it was shown that the circumstance of the payee being a fictitious person was known to the acceptor.[65] To show that the acceptor was aware that the payee was a fictitious person, evidence is admissible of the circumstances under which he accepted other bills payable to fictitious persons.[66]

The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existing person, but upon the intention underlying the act of the maker in inserting the name. The rule as to an instrument payable to the order of a fictitious or nonexisting person applies only to paper put in circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration. It cannot be treated

according to the terms of the contract. All the law requires is that the paper must have negotiable words on its face, showing it to be the intention to give it a transferable quality by delivery; otherwise the instrument must be transferred by written indorsement, if payable to order; or sued on by the original payee, if there are no negotiable words at all."

64. N. Y. Rev. Stat., pt. 2, chap. 4, tit. 2, § 5, repealed by the Negotiable Instruments Law.

The English Bills of Exchange Act (§ 7 [3]) provides that "where the payee is a fictitious or nonexisting person, the bill may be treated as payable to bearer." This provision was held, in the case of Bank of England v. Vagliano (1891), App. Cas. 107, to change the law upon this subject in England.

65. Bennett v. Farnell, 1 Campb. (Eng.) 130; s. c., id. 180.

Historical statement.— It is said by the annotator of Campbell's Reports (1 Campb. [Eng.] 133), that almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co. and Gibson & Co., who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. One of the cases which first put this point directly in issue was Minet v. Gibson, 3 T. R. (Eng.) 481. The unanimous opinion of the court was that, where the circumstance of the payee on a bill being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after this the Court of Common Pleas declared the same rule in Collis v. Emet, 1 H. Bl. (Eng.) 313.

Minet v. Gibson was carried up to the House of Lords. There, Eyre, C. B., Heath, J., and Lord Thurlow, C., dissenting, a majority of the court affirmed the judgment. See 2 Parl. Cas. 48.

66. Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 35 N. E. 982, 37 Am. St. Rep. 596, 23 L. R. A. 584. In this case checks were drawn by the cashier of a bank in favor of customers of the bank, but without their knowledge, and without intending them to have any interest therein; the cashier then forged their indorsements and delivered the checks to third persons to be collected for his benefit. The bank was held liable for the checks thus drawn by its cashier. The court said: "If the checks had been drawn directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law, and the only real parties were the firms in New York, to whom the cashier sent them in such form that they could draw the money upon them."

as payable to the bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to the fictitious person.[68] Where a note is made payable to a firm, and no such firm exists, the person to whom such note was given may assume such firm name and indorse the note in the name of such firm, and it will be a good indorsement in the hands of an innocent holder, who may collect the same of the maker.[69]

(4) *When name of payee does not purport to be that of any person.*— Independent of the statute, the rule is that the validity of a negotiable instrument is not destroyed because it is made payable to an impersonal payee, as where a bank check or draft read, "Pay to bills payable or order," or to a number or order, it was held to be payable to the bearer.[70] Such instruments are payable to bearer on the ground that the use of the words "or order" indicates an intention that the paper shall be negotiable. A common way of making checks payable to bearer is to make them payable to "Cash," and there never has been any question as to the validity of such instruments. But a check for the payment of money "to the order of, or on sight," without specifying any payee or leaving any blank, has been held not to be a check.[71]

(5) *When only a last indorsement is in blank.*— It has always been the rule that an instrument indorsed in blank is transferable by delivery only in the same manner as an instrument payable to

68. Shipman v. State Bank, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821, 12 L. R. A. 791; Irving Nat. Bank v. Alley, 79 N. Y. 536; Turnbull v. Bowyer, 40 N. Y. 456.

In the case of Armstrong v. Nat. Bank, 46 Ohio St. 512, 15 Am. St. Rep. 655, the general rule was held not to apply, because the plaintiff had drawn a check on the defendant bank payable to William Brown, who was represented to her to be an actual person; it was said by the court: "If the fictitious character of the payee is unknown to the drawer, whoever indorses the paper in that name with intent to defraud, perpetrates a forgery and the indorsement is void, a general intent to defraud being sufficient to constitute the offense."

A note or bill which, although bearing the indorsement of the payee, has been negotiated by the drawer for his benefit, the payee not being a party to the transaction, may be treated as if drawn payable to a fictitious person. Coggil v. American Exch. Bank, 1 N. Y. 113, 49 Am. Dec. 310.

69. Blodgett v. Jackson, 40 N. H. 21.

70. Mechanics' Bank v. Straiton, 3 Abb. N. Y. Ct. App. Dec. 269. See also Willitts v. Phœnix Bank, 2 Duer (N. Y.), 121, in which case three certified checks payable to the order of "bills payable" and one "to the order of 1658," were under consideration. The court said: "As the required order could not in either case possibly be given, the checks, unless transferable by delivery, were payable to no one, and were void upon their face. The law is well settled that a draft payable to the order of a fictitious person, inasmuch as title cannot be given by an indorsement, is, in judgment of law, payable to bearer, and it seems to us quite manifest that in principle these decisions embrace the present case."

71. McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410.

bearer.[72] And it has been held that where a note indorsed in blank by the payee, is afterward transferred by an indorsement in full, it is still transferable by a delivery and the party to whom it is so transferred may make title by filling up the blank indorsement to himself and striking out subsequent ones.[73]

§ 41. Additional provisions not affecting negotiability.

a. *Statutory provision.*— The Negotiable Instruments Law contains the following:

"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 in- " strument 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." [74]

We have already considered the effect of a promise or order to

72. *Alabama.*— Carter v. Lehman, 90 Ala. 126, 7 South. 735.
Arkansas — Sterling v. Bender, 7 Ark. 201, 44 Am. Dec. 539.
California.— Curtis v. Sprague, 51 Cal. 239.
Illinois.— Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Morris v. Preston, 93 Ill. 215; Palmer v. Marshall, 60 Ill. 289.
Indiana.— Grimes v. Piersol, 25 Ind. 246.
Kentucky.— Caruth v. Thompson, 16 B. Mon. 572, 63 Am. Dec. 559.
Louisiana.— Merz v. Kaiser, 20 La. Ann. 377.
Maine.— McDonald v. Bailey, 14 Me. 101.
Maryland.— Lucas v. Byrne, 35 Md. 485.
Massachusetts.— Lindsay v. Chase, 104 Mass. 253; Little v. O'Brien, 9 Mass. 423.
Michigan.— Howry v. Eppinger, 34 Mich. 29.
Missouri.— Jacoby v. Ross, 12 Mo. App. 577.
Nebraska.— Everett v. Tidball, 34 Neb. 803, 52 N. W. 816.
New York.— Mitchell v. Hyde, 12 How. Pr. 460; Beall v. General Electric Co., 16 Misc. 611, 38 N. Y. Supp. 527.
North Carolina.— French v. Barney, 23 N. C. 219.
Pennsylvania.— Gunnis v. Weigley, 114 Pa. St. 191, 6 Atl. 465.
South Carolina.— Hanks v. Dunlap, 10 Rich. Eq. 139.
Texas.— Greneaux v. Wheeler, 6 Tex. 515.

73. Watervliet Bank v. White, 1 Den. (N. Y.) 608.

74. Neg. Inst. Law (N. Y.), § 24. For reference to sections of law in other States see Appendix.

do an act in addition to the payment of money.[75] In this section we will consider the effect of provisions for (1) the sale of collateral securities; (2) for confession of judgment if instrument is not paid at maturity; (3) for a waiver of the benefits of a law intended for the protection of the obligor, and (4) for an option in the holder to require something to be done in lieu of the payment of money.

b. *Provision authorizing sale of collaterals.*— We have already referred to the effect of a provision in an instrument, authorizing the sale of certain collaterals, upon the unconditional character of the order or promise to pay.[76] The above section of the Negotiable Instruments Law has evidently adopted the rule as laid down by the courts, for it seems well settled in every jurisdiction that although it may appear on the face of the note that its payment is secured by collaterals in personal property, or mortgage of real property, yet if otherwise in proper form, it is negotiable.[77]

75. See § 37 (*f*), *ante*.

76. See § 37 (*f*), *ante*.

77. Heard v. Dubuque County Bank, 8 Neb. 10,' 30 Am. Rep. 811.

Notes secured by collateral.— The leading New York case on this subject is, perhaps, that of Arnold v. Rock River, etc., R. Co., 5 Duer (N. Y. Super. Ct.), 207. In this case the instrument sued upon was in the following terms:

"$5,000.

"NEW YORK, *January* 31*st*, 1853.

"Six months after date, the Rock River Valley Union Railroad Company promises to pay to the order of A. Hyatt Smith and J. Bodwell Doe, for value received, at the Hanover Bank of this city, five thousand dollars, having deposited with Elisha Peck, as collateral security and pledge for the payment of this note, ten bonds of the said railroad company, of one thousand dollars each, numbered as follows — 758, 759, 760, 761, 762, 763, 776, 783, 784, 786 — and we hereby give the said Peck full power and authority, on the nonpayment of this note at maturity, or at any time thereafter, to sell said bonds at the brokers' board, in this city, or at public or private sale, or so many as shall pay this note, on giving six days' notice, by advertising in the Journal of Commerce, in this city, and apply the proceeds of said bonds to the payment of this note; and in case the proceeds thereof, after paying the principal and interest due thereon, with all expenses of sale, shall be insufficient, we hold ourselves bound to pay the balance on demand.

"A. HYATT SMITH, *President*.

(L. S.) "WM. A. LAWRENCE, *Secretary*."

It was contended that the instrument given in evidence was not a promissory note, but an agreement, on the part of the company, to pay the difference between what the bonds might bring on a sale and $5,000, should the proceeds of such sale be less than that sum, and the expenses of the sale; and that the defendants, Smith and Doe, were not liable thereon.

The court said: "The only important question is this: Is an entire contract, part of which is, in form, a good promissory note, but which also contains a special contract, in relation to the money promised to be paid, a good promissory note, negotiable by statute, as to so much of the contract as is, in form, a promissory note?

"By this instrument, ten bonds are pledged, as security for the payment of the $5,000. By it, Elisha Peck is made a trustee, to hold and sell the bonds, and apply the proceeds. The mode of sale is agreed upon; and, on pursuing the mode specified, the maker

An instrument in terms and form a negotiable promissory note does not lose that character because it recites that the maker has deposited collateral security for its payment, which he agrees may

agrees, to pay the balance that may remain, after applying the proceeds in satisfaction of all expenses of the sale, and in reduction of the principal and interest due thereon. See Allen v. Dykers & Alstyne, 3 Hill (N. Y.), 593.

"The terms of this contract do not modify that part which contains a promise to pay, absolutely, to the order of the persons named in it, a sum certain, and on the day specified.

"The only objection is, that it contains a contract, collateral to the promise to pay the $5,000, by which the maker of the paper may be subjected to a liability, which the law would not impose, upon the mere fact, of a deposit of the bonds as collateral security, without any special agreement as to the manner of selling them.

"It will hardly be pretended, that, in the absence of any special agreement, the pledge of stocks, deposited as security for the payment of a note of the pledgor, discounted by him, could sell, in the manner, and upon the notice, specified in this contract, and apply the proceeds, first, to pay all expenses of such sale, and the residue on account of the principal and interest, and then, as a matter of course, recover the balance due on the note. The pledgor of the stocks would not be concluded by a sale, made in such a manner, and on such a notice, in the absence of any special contract in relation to it. * * *

"In the present case, the collateral, or additional contract, which the instrument embodies, relates solely to the money promised to be paid. It provides a security for the payment of the money, prescribes the mode of converting the security, how the proceeds shall be applied, and the extent of the maker's liability under the collateral contract, after the security shall have been exhausted in the manner stipulated.

"If this collateral contract had been written on a separate instrument, although executed and delivered contemporaneously with the note, the fact of its having been so made would not affect the negotiable character of the note itself. The pledge, or collateral security for the payment of the note, would in equity belong to every successive *bona fide* holder of the note for value. Although, therefore, the indorsement of the note would not, in law, transfer any title or right to the security created by the collateral contract, yet, in equity, it would work such a transfer. As this collateral, or additional contract, does not, in any respect, modify any clause of the note itself, nor affect in any manner the liability of any party to it, as such party (unless it deprives the note of its negotiable character as such, which is the point to be determined), we do not see that any injurious consequences can result, from holding, that the note, notwithstanding the addition of such contract, continues as to its negotiability, unaffected by it.

"Such an instrument is quite different from one which, in addition to a note perfect in form, should contain a contract having no relation to the money promised to be paid, and wholly independent of it. If the additional contract was for the sale or leasing of land, or the sale or exchange of personal property, or related to any other distinct and independent subject, there would be many reasons for declaring the instrument not negotiable, which can have no application to that under consideration.

"Instruments like the present are of common use. The persons indorsing them undoubtedly intend to stand in the position, and to incur the liabilities of indorsers of commercial paper, and if charged at all, to be charged by the means by which the liability of all indorsers becomes fixed. Allowing an instrument, like that in suit, to be treated and enforced as a negotiable note cannot be made a precedent for holding instruments negotiable, which, in addition to containing a promise for the absolute payment of money, contain promises for the performance of other acts, having no reference to, or connection with, the money promised to be paid."

be sold in a specified manner.[78] But it has been held a note containing an agreement that if there shall be any depreciation prior to the maturity of the note, in the collateral security, the payee or holder may call for such further security as he deems satisfactory, is not a negotiable promissory note.[79] A note otherwise negotiable is not rendered nonnegotiable by a stipulation contained therein, retaining legal title to the property for which it was given, as security for its payment.[80] This proposition is not without opposition; it has been held that an agreement to pay a sum certain as the purchase price of property sold, with an option on the part of the payee to take possession of the property in case of default in payment, lacks that degree of certainty which is essential for a negotiable promissory note.[81]

78. Knipper v. Chase, 7 Iowa, 145; Bank of Carroll v. Taylor, 67 Iowa, 572, 25 N. W. 810; Mumford v. Tolman, 54 Ill. App. 471; Biegler v. Merch. Loan & Trust Co., 62 Ill. App. 560; Duncan v. City of Louisville, 13 Bush (Ky.), 378, 26 Am. Rep. 201; Collins v. Bradbury, 64 Me. 37; Towne v. Rice, 122 Mass. 67; Blumenthal v. Jassoy, 29 Minn. 177, 12 N. W. 517; Cox v. Cayan, 117 Mich. 599, 76 N. W. 96; Goss v. Emerson, 23 N. H. 38; Ilsley v. Smedes, 15 Daly (N. Y.), 488, 8 N. Y. Supp. 470; Valley Nat. Bank v. Crowell, 148 Pa. St. 284, 23 Atl. 1068, 33 Am. St. Rep. 824; Farmers' Bank of Mercersburg v. Crowell, Idem.; Craft v. Bunster, 9 Wis. 503.

79. Lincoln Nat. Bank v. Perry, 66 Fed. 887, 14 C. C. A. 273, 32 U. S. App. 15.

In the case of Continental Nat. Bank v. Wells, 73 Wis. 332, 41 N. W. 409, it was held that a note for a specified sum due at a certain time is rendered nonnegotiable by an alternative contract therein, that the payee may sell the collateral securities mentioned therein, and, if those decline in value, he may sell them before the note would otherwise be due, in which case the proceeds of sale, less its expenses, shall be applied on the debt, and, if a deficiency remain, it shall be due forthwith.

80. **Provision as to retention of title of consideration of note.**— See the following cases: Mott v. Havana Nat. Bank, 22 Hun (N. Y.), 354; First Nat. Bank v. Slaughter, 98 Ala. 602, 14 South. 545, 39 Am. St. Rep. 88; Howard v. Simpkins, 69 Ga. 773; Chicago Ry. Equipment Co. v. Merchants' Nat. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349; Heard v. Dubuque Co. Bank, 8 Neb. 10, 30 Am. Rep. 811; Kimball County v. Mellon, 80 Wis. 133, 48 N. W. 1100.

In the case of Third Nat. Bank v. Bowman-Spring 50 App. Div. 66, 64 N. Y. Supp. 410, the claim was made by the defendant that a note was not negotiable because of the matter following the ordinary form of a promissory note, viz.: The waiver of protest; the agreement that the title of the property for which the note was given should remain in the payees until the note was fully paid; the statement that no person was authorized to receive payment of the note, unless it was presented and the amount paid duly indorsed at the time, and that no agent was authorized to extend the time for payment or to renew the note. After citing Arnold v. Rock River Valley Union R. Co., 5 Duer (N. Y.), 207; Mott v. Havana Nat. Bank, 22 Hun (N. Y.), 354; Hodges v. Schuler, 22 N. Y. 114; Frank v. Wessels, 64 N. Y. 155, the court said: "We are aware of no authorities in this State in conflict with those here referred to, and they hold that where a note contains a promise to pay a certain sum of money, at a certain time absolutely, the addition of provisions similar to those in the note in suit does not render the note nonnegotiable."

81. **Nonnegotiability of such instruments.**— In the case of Wright v.

c. *Provision authorizing confession of judgment.*— The rule, as declared in the Negotiable Instruments Law, that the negotiable character of an instrument, otherwise negotiable, is not affected by a provision which authorizes a confession of judgment if the instrument is not paid at maturity, is new to the State of New York and many of the Eastern States. The custom of inserting such a provision in negotiable instruments has apparently never been considered by the courts of those States. It has been held in the State of Pennsylvania that a note payable to bearer authorizing any attorney to enter a judgment in favor of the holder for the amount of the note with costs, coupled with a release of errors and a waiver of stay of execution, and of the right of an inquisition and an appraisement is not a negotiable note.[82] But in many of the Western States the rule is different, and it would seem that a provision for the confession of judgment is quite often inserted and has been generally accepted as not affecting the negotiability of the instrument.[83] It is uniformly held that a power of attorney

Traver, 73 Mich. 493, 41 N. W. 517, 3 L. R. A. 50, a promissory note specified the property for the purchase price of which the note was given, and contained the sentence: "The conditions of this note are, if not paid when due, the property for which it is given shall be the property of A. J. Mowry." The court said: "The instrument before us has more the appearance of a contract of sale, with the title reserved in the property to the seller until paid for, than it has of a promissory note. The naming of the property for which it was given, standing alone does not hurt it as a promissory note. But coupled with the clause, 'The conditions of this note are,' etc., it has the effect to render the instrument a contract, and not a promissory note. No one can tell from the reading of this instrument whether the payment therein mentioned is certain and unconditional or not. This condition seems to provide, as before said, an option in the purchaser. It may be said that this could not have been the intent of the parties to the instrument, that the purchaser should have the use of the property for one year free of charge; but it may also be said, on the other hand, that the maker could not have intended that, if he failed to pay on or before the day therein named, he should lose the property, and also have the payment of the whole sum enforced against him. The instrument is uncertain and capable of two constructions as to its terms. The court erred in calling it a promissory note."

See also Bannister v. Rouse, 44 Mich. 428, 6 N. W. 879; Nat. Bank of Syracuse v. Armstrong, 25 Minn. 530; Wright v. Shimek, 8 Kan. App. 350, 55 Pac. 464; Jones v. Dulick, 8 Kan. App. 855, 55 Pac. 522.

82. Overton v. Tyler, 3 Barr (Pa.), 346; Sweeney v. Thickstun, 77 Pa. St. 131. And in other States see Richards v. Barlow, 140 Mass. 216, 6 N. E. 68; Brewing Co. v. McKittrick, 86 Mich. 191, 48 N. W. 1086; Law v. Crawford, 67 Mo. App. 150.

83. Osborn v. Hawley, 19 Ohio, 130; Clements v. Hull, 35 Ohio St. 141; Spence v. Emerine, 46 Ohio St. 433, 15 Am. St. Rep. 634; Nickerson v. Sheldon, 33 Ill. 372; Gehlbach v. Nat. Bank, 83 Ill. App. 129; Tolman v. Janson, 106 Iowa, 455, 76 N. W. 732; Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 605. In the case last cited it was held that an agreement added to a promissory note authorizing the legal holder to have judgment by confession at any time thereafter, for the stipulated damages and attorney fees, does not render the amount the maker must pay so uncertain as to destroy the ne-

to confess judgment must be strictly construed,[84] and whether the power can be executed for the benefit of a holder of a note other than the payee must depend upon the language of the power itself.[85] If the note is in itself perfect, without conditions, it may remain negotiable, although the power of attorney to confess judgment may not, by its terms, operate in favor of an indorsee or transferee of the note.[86]

d. *Waiver of benefits of a law intended for protection of obligor.* — It has been generally held in those jurisdictions where the subject has been before the courts for consideration, that a provision in a negotiable instrument waiving the benefit of exemption, homestead, and valuation and appraisement laws does not impair the negotiable character of the instrument.[87] The fact that a note, otherwise negotiable, contains a provision for the payment of attorney's fees, and waives all exemptions, and stipulates that the

gotiability of the note, but simply gives the holder an additional remedy to enforce the payment, and a remedy which facilitates rather than incumbers its circulation.

84. Cushman v. Welsh, 19 Ohio St. 536; Manufacturers & Mechanics' Bank v. St. John, 5 Hill (N. Y.), 497.

85. **In whose favor confession may be made.**— In the case of Spence v. Emerine, 46 Ohio St. 433, 21 N. E. 866, 15 Am. St. Rep. 634, the note contained the following provision: "And we jointly and severally hereby authorize any attorney-at-law, at any time after the above sum becomes due, with or without process, to appear for us in any court of record in the State of Ohio and confess judgment against us for the amount due thereon, with interest and costs, and to release all errors and the right of appeal;" it was held that this power of confession of judgment could not operate in favor of a holder to whom the payee transferred it by delivery although the note was made payable to a definite person or bearer. This is on the principle that in all cases of special agency an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power.

In Marsden v. Soper, 11 Ohio St. 503, the warrant of attorney under which judgment was confessed purported to authorize such confession "in favor of any holders of this obligation" at any time after the same became due; but the court questioned whether such a warrant of attorney would be legally operative to authorize the confession of a judgment in favor of an indorsee of such note. And in Cushman v. Welsh, 19 Ohio St. 536, the power was conferred by the terms of the instrument to confess judgment only "in favor of the legal holder of the note," and it was decided that a warrant of attorney for the confession of such a judgment did not authorize a confession of judgment on such a note in favor of the owner or holder thereof, without an indorsement thereon by the payee, as provided by the statute, transferring the legal title to such owner and holder of the note.

In Clements v. Hull, 35 Ohio St. 141, the authority given by the power of attorney was "to confess judgment in favor of the holder of said note." There it was held that the confession of judgment might be executed in favor of an equitable owner and holder to whom a note payable to a designated payee had been transferred by delivery, without indorsement.

86. Osborn v. Hawley, 19 Ohio, 130.

87. A note is not rendered nonnegotiable by the addition of the following stipulation, viz.: "We do hereby relinquish and waive the benefit of all laws exempting real and personal property from levy and sale." Hughitt v. Johnson, 28 Fed. 865; Lyon v. Martin, 31 Kan. 411.

property for which it was given shall remain as security for the debt, does not destroy its negotiability.[88] In a Pennsylvania case,[89] it was urged that the words in a promissory note, "waiving the right of appeal, and of all valuation, appraisements, stay, and exemption laws," destroy its negotiability. The court said: "In what way? They do not contain any condition or contingency, but, after the note falls due and is unpaid and the maker is sued, facilitate the collection by waiving certain rights which he might exercise to delay or impede it. Instead of clogging its negotiability it adds to it, and gives additional value to the note."

e. *Option with holder requiring something in lieu of money.*— The rule that the negotiability of an instrument is not affected by a provision giving the holder an election to require something to be done in lieu of payment of money is well established, independent of the provisions of the Negotiable Instruments Law. As we have already observed, if there appears upon the face of the instrument any contingency which would make it payable in anything other than money, it loses its negotiable quality;[90] but where the debtor promises to pay in money, and he has no election to do anything else, but the choice is left with the holder as to receiving something other than money, the negotiable quality of the instrument is not affected.[91]

88. First Nat. Bank v. Slaughter, 98 Ala. 602, 14 South. 545, 39 Am. St. Rep. 88.

89. Zimmerman v. Anderson, 67 Pa. St. 521, 5 Am. Rep. 447. In this case the action was upon the following note:

"$125.00.

"TOWNSHIP OF BUFFALO, *March* 25, 1868.

"Six months after date I promise to pay E. W. Lowe, or order, one hundred and twenty-five dollars, for value received, with interest, waiving the right of appeal and of all valuation, appraisement, stay and exemption laws.

"MOSES ANDERSON."

Indorsed: "E. W. LOWE."

90. See § 37 (e), *ante*.

91. *In New York*, an instrument by which a railroad corporation promises to pay a certain sum, or upon the surrender of the instrument, together with the interest warrants not due, to the treasurer, to issue certain shares of stock in exchange therefor, has been held to be a negotiable promissory note on the ground that the option was with the holder. Hodges v. Shuler, 22 N. Y. 114.

So an instrument in the following form: "Four months after date, I promise to pay to the order of M. fifty-five dollars, at my store (or in goods on demand) value received," has been held a negotiable promissory note. The court lays down the rule, that if there appears upon the face of the note any contingency which would make it payable in anything other than the money, then it loses its negotiable quality, but where the debtor promises to pay in money and he has no election to do anything else, but the choice is left with the holder as to receiving something other than money, the negotiable quality of the instrument is not affected. Hosstatter v. Wilson, 36 Barb. (N. Y.) 307.

In the case of Dinsmore v. Duncan, 57 N. Y. 573, a note issued by the United States contained a statement,

§ 42. Omissions not affecting validity and negotiability.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "The validity and negotiability of an instrument "are not affected by the fact that:

"1. It is not dated; or

"2. It does not specify the value given; or that any value has "been given therefor; or

"3. It does not specify the place where it is drawn or the place "where it is payable." [92]

b. *Necessity of date.*— Since the date of an instrument generally regulates the time when it becomes due, it should be clearly expressed.[93] A date, however, has never been deemed essential to the validity of a negotiable instrument,[94] for where such an instrument has no date, the time, if necessary to be inquired into, will be computed from the date it was made and issued.[95] The date of a negotiable instrument is merely *prima facie* evidence of the time of its inception. It has no real inception until it is delivered, and for all legal purposes it is to be considered as made on the day it is delivered. So where an instrument is not dated the time when it is due should be computed from the time of its delivery.[96] The written date on a negotiable instrument is only presumptive evidence of the actual time of its execution.[97] It has

viz.: "At maturity convertible, at the option of the holder, into bonds redeemable, at the pleasure of the government at any time after five years and payable twenty years from July 15, 1868, with interest at 6 per centum per annum, payable semi-annually in coin." It was objected that the note was in the alternative, and that, accordingly, it did not fall within the definition of a negotiable instrument. The court said: "But in these cases (Atkinson v. Manks, 1 Cow. [N. Y.] 691; Cook v. Satterlee, 6 Cow. [N. Y.] 108; Matthews v. Houghton, 2 Fairf. [Me.] 377) the alternative was with the debtor, so that it could not be said that the instrument was payable absolutely and at all events. No case was cited, nor is it believed can any be found, in which where the note is payable absolutely, as far as the debtor is concerned, and the creditor has an option to convert the obligation of the debtor into another and different one, it is held to be not negotiable, so long as the creditor has not exercised his option."

92. Neg. Inst. L. (N. Y.), § 25. For the same section in the statutes of other States see Appendix.

93. Chitty on Bills, p. 148; Story on Promissory Notes, § 45.

94. *Alabama.*— Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332.

California.— Collins v. Driscoll, 69 Cal. 550, 11 Pac. 244.

Illinois.— Archer v. Claflin, 31 Ill. 306.

Indiana.— Seldonridge v. Connable, 32 Ind. 375.

New Jersey.— Vander Vere v. Odgburn, 2 N. J. L. 63.

New York — Mechanics & Farmers' Bank v. Schuyler, 7 Cow. 338.

Texas.— Wexel v. Cameron, 31 Tex. 614.

Vermont.— Michigan Ins. Co. v. Levenworth, 30 Vt. 11.

95. Giles v. Bourne, 6 Mau. & Sel. (Eng.) 73; Seldonridge v. Connable, 32 Ind. 375.

96. Cowing v. Altman, 71 N. Y. 435.

97. Germania Bank v. Distler, 67 Barb. (N. Y.) 333, 4 Hun (N. Y.), 633, affd. in 64 N. Y. 642; Breck v.

been held that where a note is intended to bear date as of the time of its execution, but is wrongly dated by mistake, the mistake may be corrected, except as to an innocent purchaser or indorser, who would be prejudiced by the correction.[98]

c. *Use of words "for value received," or equivalent.* The usual method of specifying the value given as a consideration for a negotiable instrument is by the words "value received." The rule as declared by the Negotiable Instruments Law to the effect that the omission of the words "value received," or their equivalent, does not affect the validity or negotiability of an instrument, is the same as that which existed prior to the enactment of such law, and also as that which exists in those States where the law has not yet been adopted.[99] The insertion of such words can only be important, since, when inserted, they import that value has been received by the maker from the payee, and raises a positive presumption of a legal consideration, sufficient to sustain the promise; a presumption liable to be rebutted, but which, until rebutted, will prevail in favor of the payee and any subsequent holder.[1] But a promissory note, although not expressing on its face to have been given for value received, is *prima facie* evidence of consideration, and, therefore, it can make no difference whether the words "value received" be or be not inserted.[2]

Cole, 4 Sandf. (N. Y. Super. Ct.) 79; Emery v. Vinall, 26 Me. 295; Cumberland Bank v. Maybery, 48 Me. 198; Bayley v. Tabor, 5 Mass. 286; McSparran v. Neeley, 91 Pa. St. 17.

98. Alimich v. Downey, 45 Minn. 460, 48 N. W. 197.

99. *Alabama.*— Johnson v. Johnson, Minor, 263.

California.— People v. McDermont, 8 Cal. 288.

Colorado.— Cowan v. Hallack, 9 Colo. 572, 13 Pac. 700; Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369.

Connecticut — Bristol v. Warner, 19 Conn. 7. But in the case of Edgerton v. Edgerton, 8 Conn. 6, it was held that a promissory note not expressed to be for "value received" is not a specialty, importing a consideration.

Georgia.— Mitchell v. Rome R. Co., 17 Ga. 574.

Massachusetts.—Townsend v. Derby, 3 Metc. 363; Dean v. Carruth, 108 Mass. 242.

New Hampshire.— Martin v. Stone, 29 Atl. 845.

New York.— Kimball v. Huntington, 10 Wend. 675; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845; Bruyn v. Russell, 52 Hun, 17; Kinsman v. Birdsell, 2 E. D. Smith, 395; Underhill v. Phillips, 10 Hun, 591.

1. Story on Promissory Notes, § 51.

2. Stacker v. Hewitt, 2 Ill. 207. See also Story on Promissory Notes, § 51, citing Hatch v. Trayes, 11 Ad. & E. (Eng.) 702.

There are cases, however, to the effect that the omission of such words, or words of equivalent import, will destroy the presumption of consideration, as between the original parties. Bourne v. Ward, 51 N. E. 191; Edgerton v. Edgerton, 8 Conn. 6; Saxton v. Johnson, 10 Johns. (N. Y.) 417.

In the case of Courtney v. Doyle, 10 Allen (Mass.), 122, the promissory note under consideration did not purport to have been given for a valuable consideration, and long after its delivery and acceptance it was signed by another person as promisor and the

d. *Omission of place of execution or payment.*— The validity or negotiability of an instrument has never been held to be affected by failure to state the place where made, or the place where it is to be paid.[3] Where the note is not made payable at any particular place and the maker has a known residence within the State, in order to charge the indorsers the holder must demand payment at such address.[4] Contrary cases, however, have held that where no place of payment is specified, the place where the instrument is executed is the place of payment, and that demand must be made at such place.[5]

date altered; it was held that such new signer was not liable upon the note without proof of a new consideration.

Proof of consideration.— In the case of Bruyn v. Russell, 52 Hun (N. Y.), 17, 4 N. Y. Supp. 784, the plaintiff produced a promissory note which contained the words, "for value received," and upon the outset, anticipating an attack by the defendants upon the consideration, attempted to establish such consideration affirmatively. It was held that if the plaintiff had rested her case upon the presumption of consideration, which the note itself imported, the burden would have been cast upon the defendant to overthrow this presumption, but having undertaken to establish the consideration affirmatively, the presumption of a valid consideration was no longer of any avail.

On a later trial of the same case, the payee gave no evidence of the existence of a consideration, except the production of the note and the proof of the maker's signature. Defendants then called a witness who testified to a conversation with the plaintiff, in which she stated that the note was a gift. Held, under this evidence, that plaintiff was not entitled to recover. The court, in this case, quotes from Perley v. Perley, 144 Mass. 104, 10 N. E. 726, to the effect that while the production of a note and proof of defendant's signature make a *prima facie* case for plaintiff, the burden of proof still remains upon the plaintiff to prove consideration, and if there is any evidence upon this on behalf of the defendant, plaintiff must show, upon a preponderance of the whole evidence, that the note was given for a valuable consideration. Bruyn v. Russell, 60 Hun (N. Y.), 280, 14 N. Y. Supp. 591.

3. **In general, the place or date in a** bill or note is not material; it is proper, however, in all cases to insert the name of the place where the bill is really made, and when the drawer is not a person well known in the commercial world, it is desirable for him to mention the number of his house and the street in which he resides, in order that the holder may be the better enabled to find him out, in case his responsibility is doubted, or in case acceptance or payment should be refused by the drawee. Chitty on Bills, p. 147. See Story on Promissory Notes, § 49.

It has been laid down that in all cases the drawer ought to name the place of payment, either in the body or subscription of the bill; but this is not essential, and in general the drawer merely subscribes the address of the drawee, without pointing out any place of payment, and then the bill is considered payable, and should be presented at the residence of the drawee at the time the bill was made, or to him personally anywhere. Chitty on Bills, p. 151.

4. Anderson v. Drake, 14 Johns. (N. Y.) 114; Campbell v. Clark, Fed. Cas. 2,355; Rudolph v. Brewer, 96 Ala. 189, 11 South. 314; Hartford Bank v. Green, 11 Iowa, 476; Blossman v. Mather, 5 La. Ann. 335; *In re* Parisian C. & S. Co.'s Estate, 173 Pa. St. 507, 34 Atl. 224; Freese v. Brownell, 35 N. J. L. 285, 10 Am. Rep. 239; Overland Gold-Mining Co. v. McMaster, 19 Utah, 177, 56 Pac. 977.

5. Lewis v. Headley, 36 Ill. 433, 87 Am. Dec. 227; Ricketts v. Pendleton, 14 Md. 320; Warner v. Citizens' Nat.

§ 43. Instruments bearing seal.

a. *General rule.*— As a general rule, independent of the statute, a sealed promissory note is not negotiable.[6] Wherever a sealed note is not made negotiable by statute, it is to be treated as a specialty,[7] and it has been held to be correctly described as a bond.[8] Though not a valid negotiable promissory note, it is a valid contract, and the payee may recover on it according to the terms of the agreement.[9] If such sealed instruments are assignable, an assignee may recover thereon in the same manner as the payee, but he takes the same subject to every legal defense arising from the contract,[10] and must declare thereon as upon any other contract.[11] The rule does not, however, apply to sealed instruments issued by municipalities or private corporations;[12] and it has been generally held that the commercial paper of a corporation does not lose the quality of negotiability by having attached thereto the corporate seal.[13]

Bank, 6 S. D. 152, 60 N. W. 746; Blodgett v. Duryea, 32 Vt. 361.

6. *United States.*— United States Bank v. Donnally, 33 U. S. 361, 8 L. Ed. 974.

Delaware.— Conine v. Junction & B. R. Co., 3 Houst. 288, 89 Am. Dec. 230.

Indiana.— Lewis v. Wilson, 5 Blackf. 370.

Michigan.— Rawson v. Davidson, 49 Mich. 607, 14 N. W. 565.

Minnesota.— Brown v. Jordhal, 32 Minn. 135, 19 N. W. 650, 50 Am. Rep. 560; Helfer v. Alden, 3 Minn. 332.

New York.— Merrit v. Cole, 9 Hun, 98; Clark v. Farmers' Woolen Mfg. Co., 15 Wend. 256.

Oregon.— Osborne v. Hubbard, 20 Ore. 318, 25 Pac. 1021.

Pennsylvania.— Folwell v. Beaver, 13 Serg. & R. 311; Bancroft v. Haines, 31 Wkly. Notes Cas. 248.

South Carolina.— Parks v. Duke, 2 McCord, 380; Foster v. Floyd, 4 McCord, 159.

Vermont.— Read v. Young, 1 D. Chip. 244.

Wisconsin.— Parkinson v. McKim, 1 Pin. 214.

7. Clark v. Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256; Warren v. Lynch, 5 Johns. (N. Y.) 240.

8. Duncan v. McAffee, 3 Ill. (2 Scam.) 559.

9. Maber v. Massias, 2 W. Bl. (Eng.) 1072; Edwards on Bills and Notes, p. 209.

10. Jerome v. Whitney, 7 Johns. (N. Y.) 322.

11. Steele v. Oswego Cotton Mfg. Co., 15 Wend. (N. Y.) 265; Brown v. Lockhart, 1 Miss. 409.

12. Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381; Winfield v. Hudson, 28 N. J. L. 255; Morris Canal Co. v. Lewis, 12 N. J. Eq. 323; County of Beaver v. Armstrong, 44 Pa. St. 63; Mason v. Frick, 105 Pa. St. 162, 51 Am. Rep. 191; Stevens v. Philadelphia Ball Club, 142 Pa. St. 52, 21 Atl. 797; Mackay v. St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881; Central Nat. Bank v. Charlotte, etc., R. Co., 5 S. C. 156, 22 Am. Rep. 12.

13. *In New York* the rule seems to have been firmly established in the case of Chase Nat. Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164, where the proposition in the text seems to have been laid down.

As to municipal bonds, see Bank of Rome v. Village of Rome, 19 N. Y. 20; Dinsmore v. Duncan, 57 N. Y. 573. In Mercer County v. Hacket, 1 Wall. (U. S.) 83, the United States Supreme Court held county bonds under seal to be negotiable instruments. Mr. Justice Grier said, in speaking of the bonds issued under seal: "But there is nothing immoral or contrary to public policy in making them negotiable if the necessities of commerce require that they should be so. A

b. *Statutory rule.*— The Negotiable Instruments Law has declared that the validity and negotiable character of an instrument are not affected by the fact that it bears a seal.[14] Such declaration fixes the rule in all States where the law has been adopted.[15] But before the enactment of such law it was provided by statute in many of the States that a promissory note under seal was negotiable.[16]

§ 44. Date of instrument.

a. *In general.*— We have already seen that the validity and negotiable character of an instrument are not affected by the fact that it is not dated.[17] Notwithstanding this rule, the date is very important as a matter of convenience, for in most cases they are made payable so many months or days after date.[18] Although the

mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or issuing any species of security not known in the last century."

As to corporate bonds under seal, see Brainerd v. N. Y. & H. R. Co., 25 N. Y. 496, in which the court said: "The point of objection, when it is sought to bring such securities within the law of commercial paper, is that, being under seal, they are deeds, and commercial instruments are simple contracts. But when such obligations are issued to secure the payment of money upon time, and contain on their face an expression showing that they are intended to pass from one person to another, and thus to perform the office of bills and notes or of money, as the words 'bearer,' or 'assigns,' or 'holder,' or the like, the courts of this country, with a single exception, and those of this State, without any exception, have concurred in attaching to them the attributes of commercial paper." But see Clark v. Farmers' Woolen Mfg. Co., 15 Wend. (N. Y.) 256, where it is held that the effect of affixing the seal of a corporation to a contract is the same as where a seal is affixed to the contract of an individual, and that a corporate promissory note under seal is, therefore, nonnegotiable. This case is clearly overruled by the cases above cited.

14. Neg. Inst. Law (N. Y.), § 25 (5). For same section in statutes of other States see Appendix.

15. For list of States which have adopted the Negotiable Instruments Law see Appendix.

16. In Pennsylvania, Virginia, Georgia, Arkansas, Missouri, and Mississippi, sealed instruments, as well as notes, are made negotiable by statute; and in Arkansas all agreements and contracts in writing, for the payment of money or property, are made assignable. 3 Kent's Comm. 73.

In many other States, as in Ohio, Iowa, Kansas, Nebraska, Kentucky, Texas, North and South Dakota, Montana, and Mississippi, the use of a seal or scrawl, or other semblance of a seal, by any private person in making an instrument, does not in any way affect it or vary the rights of the parties.

17. Neg. Inst. Law (N. Y.), § 25 (1). For same section in statutes of other States see Appendix.

18. Story on Promissory Notes (§ 45) contains the following: "Great practical difficulties must, however, arise in many cases, from the omission of the date, and, therefore, it rarely occurs, except from inadvertence or mistake. Thus, if a note be payable in a certain number of days after its date, it is plain that the omission must create great embarrassment and difficulty in ascertaining when the note was actually made and delivered to the payee. In such a case the time will be computed from the day when it was issued or made, or if that cannot be exactly ascertained, from the day when its existence can first be established."

date is not material to the validity of an instrument, if it has been inserted it cannot be altered without the consent of all the parties.[19]

b. *Presumption as to date; statutory provision.*— The Negotiable Instruments Law contains the following: "Where the in-"strument 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."[20] This statutory provision is clearly a declaration of the common-law rule. The date of an instrument in writing is only presumptive evidence of the time of its actual execution; and whenever fraud or mistake is alleged, this presumption may be contradicted by parol evidence.[21] This is an application to commercial paper of the general rule that whenever the time of the execution of any writing, even of the most solemn kind, becomes material, it may be proved by parol, not merely to supply an omission, where the paper itself is without date, but in opposition to the date when it contains one.[22]

c. *Antedated and postdated instruments.*— The general rule as obtained from all the authorities is that declared by the following section of the Negotiable Instruments Law: "The instrument is "not invalid for the reason only that it is antedated or postdated, "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:"[23] Mr. Edwards has stated the law as follows: "It is common to date bills and notes on the day they are made, but there is no legal objection, either to antedating or postdating them; nor is the fact that a note postdated is negotiable before the day of its date a legal ground of suspicion, so as to put the indorsee upon inquiry, and subject him to the equities existing between the original parties."[24] A promissory note cannot be antedated for the purpose of evading a stat-

19. Martin v. Miller, 4 T. R. (Eng.) 320.

20. Neg. Inst. L. (N. Y.), § 30. For the same section in statutes of other States see Appendix.

21. Germania Bank v. Distler, 67 Barb. (N. Y.) 333, 4 Hun, 633, affd. in 64 N. Y. 642; Almich v. Downey, 45 Minn. 460, 48 N. W. 197.

22. Draper v. Snow, 20 N. Y. 331. In the case of Breck v. Cole, 4 Sandf. (N. Y.) 79, Judge Duer said: "The date of an instrument in writing is only presumptive evidence of the time of its actual execution; and it is settled and familiar law that this presumption, whenever fraud or mistake is alleged, may be contradicted by parol evidence."

23. Neg. Inst. L. (N. Y.), § 31. For the same section in statutes of other States see Appendix.

24. Edwards on Bills and Notes, p. 151.

ute,[25] nor to effect a fraudulent design.[26] But where there is no dishonest intention or fraudulent purpose a note may be dated as of a day antecedent to that on which it is put in circulation; and no presumption will arise from that circumstance to impeach its validity.[27]

In the case of Almich v. Downey, Vanderburgh, J., says: "If a note is antedated or postdated by the maker, it is a valid contract from the time of its delivery; and since it is competent to express the agreement of the parties in that way, the courts will construe the instrument according to its terms; and if, when delivered, it is by its date overdue, it will then be treated as a demand note."[28] Postdating a check does not affect its validity.[29]

25. Bayley v. Taber, 5 Mass. 286.

26. Lansing v. Gaine, 2 Johns. (N. Y.) 300.

27. Richter v. Selin, 8 Serg. & R. (Pa.) 425; Mitchell v. Culver, 7 Cow. (N. Y.) 336; Brewster v. McCardell, 8 Wend. (N. Y.) 478.

28. 45 Minn. 460, 48 N. W. 197.

Wrong date corrected.— In this case a six months' note was dated June 25, 1886, but was actually executed June 25, 1887, the date expressed being a mistake. In addition to the extract from the opinion of the court in this case contained in the text the court said: "But where the note is intended to bear date as of the time of its discovery, that is the true date; and if by mistake another date is written on the face of the note, the mistake may be corrected, except as to an innocent indorsee or purchaser who would be prejudiced by the correction, and the mistake may be shown by parol. (2 Parsons on Notes and Bills, 514.) As it clearly appeared

29. Frazier v. Trow's Printing & Bookbinding Co., 24 Hun (N. Y.), 281, affd. in 90 N. Y. 678.

Postdated checks.— It was claimed in the above case, on behalf of the defendant, that the instruments in controversy were void as legal obligations because they were issued before the time when they respectively bore date, and cases were cited in the argument containing intimations that such should be the legal principle applicable to them. The court said: "Those cases, however, have not followed, and no reason seems to exist for holding that an instrument of this nature may not lawfully be issued as of a date subsequent to the time of its delivery. It then contains all the elements of a contract, but payment upon it can only be demanded upon the day of its date, or some day succeeding that time, and so they have been regarded by the courts of this State." Citing Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304. This case was subsequently taken to the Court of Errors where the determination made by the Supreme Court was affirmed, and notwithstanding the fact that the instrument was postdated, it was held to be valid and payable on the day of its date. Mohawk Bank v. Broderick, 13 Wend. (N. Y.) 133; Salter v. Burt, 20 Wend. (N. Y.) 205. See also Weld v. Savings Bank, 158 Mass. 339, 33 N. E. 519; Burns v. Kahn, 47 Mo. App. 215.

There are many cases in this country and in England holding that a postdated check is a bill of exchange payable on a future day; hence it has been held that a postdated check issued by a person who has authority only to issue checks does not bind the firm. Hedley v. Bainbridge, 3 Q. B. (Eng.) 316. See also Forster v. McKreth, 36 L. J. Exch. (Eng.) 95, 4 Eng. Rul. Cas. 210; Bowen v. Newell, 8 N. Y. 190. But in the following cases such an instrument has been held to be a check: *In re* Brown, 3 U. S. 502; Champion v. Gordon, 70 Pa. St. 474; Way v. Towle, 155 Mass. 374, 29 N. E. 506.

d. *When date may be inserted; statutory provision.*— The Negotiable Instruments Law contains the following provision: "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 instru-"ment 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." [30] The authority conferred upon the holder of a negotiable instrument to insert therein the true date of issue or acceptance, is based upon the same reason as the authority vested in a person in possession of such an instrument to complete it by filling up the blanks therein.[31] When a person executes a negotiable instrument with the date blank, the instrument carries on its

that the note was given in 1887, and the wrong year inserted in the date by mistake, the note, by intendment of law, was payable in six months from June 25, 1887; and if negotiated and indorsed to the plaintiff before due, in good faith and for value, the defense of want of consideration is not available; and the mistake may in such case be shown as well by the indorsee as the payee of the note. (Drake v. Rogers, 32 Me. 524; Germania Bank v. Distler, 4 Hun (N. Y.), 633, affd. in 64 N. Y. 642; 1 Daniel on Negotiable Instruments, § 83; 1 Edwards on Bills and Notes, § 171.)"

In the case of McSparran v. Neeley, 91 Pa. St. 17, 26, a note was executed on the 24th of January, 1872, and was dated January 24, 1871. The court said: "As a final ground of defense, the irregularities appearing on the face of the note have been urged as sufficient to defeat the plaintiff's claim. By mistake it was antedated, and it was not stamped until after it was negotiated. It was conceded that the validity of an instrument is not affected by an error in the date, even if it is not dated at all; the time will be computed from the day when it was issued or made, or, if that cannot be exactly ascertained, from the day when its existence was first established. In both cases they will be valid in point of law unless some statute exists to the contrary; and where the purposes of justice require it, the real date may be inquired into and effect given to the instrument. But while this has been conceded, it has been argued that the error should have created suspicion and lead to inquiry. * * * But in the case of State Bank v. McCoy, 19 P. F. Smith (Pa.), 204, Judge Williams held that 'even if the evidence had made out a case of gross carelessness on the part of the bank, that alone would not have been sufficient to defeat his title to the note. There must have been proof that the bank took it *mala fide* or with notice of the fraud.' And it was said in Morehead v. Gilmore, 27 P. F. Smith (Pa.), 118, that 'the latest decisions both in England and in this country, have set strongly in favor of the principle that nothing but real evidence of knowledge or notice of fraud or *mala fides* can impeach the *prima facie* title of the holder of negotiable paper taken before maturity.' The facts show here neither knowledge by the indorsee, notice to him, nor fraud or bad faith on his part, and the apparent defects in the note cannot stand in the place of requisite affirmative proof." See also Collin v. Driscoll, 69 Cal. 550, 11 Pac. 244; Baldwin v. Freydendall, 10 Ill. App. 106; Cochran v. Duffy, 5 Week. Law Bul. (Ohio) 646.

30. Neg. Inst. L. (N. Y.), § 32. For the same section in statutes of other States see Appendix.

31. Neg. Inst. Law (N. Y.), § 33.

face an implied authority in any successive holder to fill up the blank.[32]

§ 45. Instruments in blank; completion by holder and effect thereof.

a. *In general.*— It is a principle generally recognized by the law merchant, that where an incomplete instrument is delivered to another by the party primarily liable, with an authority, express or implied, to put the instrument in circulation as negotiable paper, any holder may fill up the blanks and perfect the instrument, provided nothing is inserted which is not essential to the completeness of the instrument.[33]

32. **Filling in blank date.**— In New York the leading case on this point seems to be that of Page v. Morrell, 3 Keyes (N. Y.), 117, 33 How. Pr. 244, 3 Abb. Dec. 433. In this case the facts were:

The note was made on June 10, 1859, for the sum of $50, payable thirty days after date; it was dated "June," but with a blank for the day of the month. Thus, "June , 1859." In this condition the note was indorsed by the defendant Nellis for the accommodation of the makers, and on the 10th day of June the makers transferred it, for value, to one Wiles. On the 15th of the month, Wiles transferred the note to the plaintiffs, for value, and they, without the knowledge of any of the other parties thereto, filled the blank with the date with the figure "1," so as to make it "June 1, 1859."

The court said: "There can be no doubt that, if the same day of the month had been inserted by the makers when they negotiated the note to Wiles, without the knowledge of the indorser, the note would not thereby have been rendered invalid, as against the indorser; and so if the day had been inserted by Wiles, with the express direction or consent of the maker. In such case, the note, when indorsed, being perfect in every respect but the date, and that having been left blank, the makers would have had an implied authority from the indorser, to insert any day of the month they might think proper. (Mitchell v. Culver, 7 Cow. [N. Y.] 336; M. & F. Bank v. Schuyler, Id. 337, note.) Such authority results from the general rule, that an indorsement on a blank note, without sum, or date, or time of payment, will bind the indorser, for any sum, payable at any time, which the person, to whom the indorser trusts it, chooses to insert. The date of a note is no exception to this rule, although it is not essential to the validity of a note that the date be expressed; for, where a note has no date, the time, if necessary, may be inquired into, and will be computed from the day it was issued. But it is essential to the free and uninterrupted negotiability of a note that it should be dated and, therefore, all the parties to a note intended for circulation, are presumed to consent that a person, to whom such a note is intrusted for the purpose of raising money, may fill up the blank with a date. (Ib.) And a blank, left for the day of the month, may be filled with any day in that month, there being no fraud, or express direction to the contrary."

See also the following cases:

United States.— Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Michigan Bank v. Eldred, 9 Wall. 544, 19 L. Ed. 763.

Arkansas.— Overton v. Matthews, 35 Ark. 146, 37 Am. Rep. 9.

Illinois.— Gill v. Hopkins, 18 Ill. App. 74.

Indiana.— Emonds v. Meeker, 55 Ind. 321.

Massachusetts.— Andrus Bank v. Kimball, 10 Cush. 373.

Missouri.— Goodman v. Simonds, 19 Mo. 106.

Pennsylvania.— Hepler v. Mt. Carmel Sav. Bank, 97 Pa. St. 420, 39 Am. Rep. 813.

33. **Completion of imperfect instrument by holder.**— In the case of Weyerhauser v. Dun, 100 N. Y. 150, 2 N. E. 274, it was held that one who signs or indorses a

And it has been held that while as between the original parties the authority must be strictly exercised, as between the party primarily liable and an innocent third person the person to whom the instrument was intrusted must be deemed to have been the agent of the party who committed such instrument to his custody, and he is, therefore, bound by the agent's act, even though the authority is departed from.[34] This rule, however, is not without

note in blank, to be used as a security, authorizes the person to whom it is delivered, to fill the blanks in respects essential to the completeness of the note as such; but, in the absence of express authority or consent, no authority can be implied from the delivery, to insert a special agreement not so essential. Where, therefore, in a note, which was indorsed for the accommodation of the maker, blanks were left for the date, the time the note was to run, the payee and the principal sum, it was held that while the maker had authority to fill these blanks, the indorsement conferred no authority to write in the note an agreement *that after maturity it should draw a special rate of interest, greater than the regular rate*, although the law of the State where the note was made permits special agreements to be made for the rate specified. See also McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372.

See also the following *New York cases:* Hardy v. Norton, 66 Barb. 527; Harris v. Berger, 15 N. Y. St. Rep. 389; Kitchen v. Place, 41 Barb. 465; Van Duzer v. Howe, 21 N. Y. 531; Page v. Morrell, 3 Keyes, 117.

Other cases upholding the doctrine of the text are:

United States.— Angle v. North West. M. L. Ins. Co., 92 U. S. 330, 23 L. Ed. 556; Pittsburg Bank v. Neal, 22 How. 96, 16 L. Ed. 323; Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Viollet v. Patton, 5 Cranch, 142, 3 L. Ed. 61; Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377; National Exchange Bank v. White, 30 Fed. 412.

Alabama.— Robertson v. Smith, 18 Ala. 220; Decatur Bank v. Spence, 9 Ala. 800.

Connecticut.— Mahaiwe Bank v. Douglas, 31 Conn. 170, where it was held that a draft in blank could not be altered so that it became a note.

Illinois.— White v. Allward, 35 Ill. App. 195.

Indiana.— Gothrup v. Williamson, 61 Ind. 599; Gillaspie v. Kelley, 41 Ind. 158, 13 Am. Rep. 318; Spitler v. James, 32 Ind. 202, 2 Am. Rep. 334; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15.

Iowa.— Iowa College Trustees v. Hill, 12 Iowa, 462.

Kansas.—Lowden v. National Bank, 38 Kan. 533, 16 Pac. 748.

Kentucky.— Jones v. Shelbyville, etc., Ins. Co., 58 Ky. 58.

Maine.— Breckenridge v. Lewis, 84 Me. 349, 30 Am. St. Rep. 353; Kellogg v. Curtis, 65 Me. 59; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427.

Massachusetts.— Ives v. Farmers' Bank, 2 Allen, 236; Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67.

Mississippi.— Davis v. Lee, 26 Miss. 505, 59 Am. Dec. 267; Barnes v. Reynolds, 5 Miss. 114.

Missouri.— Farmers' Bank v. Garten, 34 Mo. 119.

North Carolina.— McArthur v. McLeod, 51 N. C. 475.

Ohio.— Riley v. Johnson, 8 Ohio, 526.

Pennsylvania.— Simpson v. Boyard, 74 Pa. St. 351.

Tennessee.— Frazier v. Gains, 2 Baxt. 92.

Texas.— Jones v. Prumm, 6 Tex. 170.

Virginia.— Douglas v. Scott, 8 Leigh, 43.

Wisconsin.— Snyder v. Van Doren, 46 Wis. 602, 1 N. W. 285, 32 Am. Rep. 739.

34. *In the New York* case of Redlich v. Dall, 54 N. Y. 234, the note sued upon was as follows:

"NEW YORK, *September 30th*, 1868.

"Three months after date, I promise to pay to the order of myself six hundred and seventy-nine dollars and twenty cents at value received.

"(Signed) N. DOLL."

dissent. Thus, in a case where there was no restriction upon the issue of an instrument, but there was a blank preceding the amount, and the blank was filled up, increasing the amount intended, it was held that an innocent third party could not recover.[35]

We have already considered the authority of a holder to insert in an undated instrument the true date of issue and acceptance.[36] If a bill or note contains a blank for the name of the payee, the person to whom it is negotiated may fill in the blank by inserting his own name;[37] and when a note is signed and sent out in blank,

It further appeared that this note had been delivered to one Istel as a receipt for two drafts which had been given by Istel to Doll for collection; that it was agreed between the original parties that the instrument should not have the force of a promissory note, but should be merely a memorandum of the transaction growing out of defendant's undertaking to collect the draft. Shortly after the delivery of the note Istel put a revenue stamp upon it and after the word "at" inserted the words "Bull's Head Bank, New York," and negotiated the same. It was held that in the hands of a *bona fide* holder for value it was enforceable against the maker.

Place of payment, if a blank is left therefor, may be inserted by the holder See Winter v. Poole, 104 Ala. 580, 16 South. 543; Canon v. Grigsby, 116 Ill. 151, 5 N. E. 362, 56 Am. Rep. 769; Gillaspie v. Kelley, 41 Ind. 158; Marshall v. Drescher, 68 Ind. 359. No implied authority where blank does not indicate that it was for the purpose of being filled with the place of payment. McCoy v. Lockwood, 71 Ind. 319; Dater v. Simon, 5 Ohio Dec. 377; Wessell v. Glenn, 108 Pa. St. 104, and the following additional *New York cases:* Kitchen v. Place, 41 Barb. 465; Waggoner v. Millington, 8 Hun, 142; McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372.

Time of payment.— A blank for expressing time of payment may be filled if authority be shown. Ivory v. Michael, 33 Mo. 398; Ives v. Farmers' Bank, 84 Mass. 236; Lowden v. Schoharie County Bank, 38 Kan. 533, 16 Pac. 748; Hunt v. Adams, 6 Mass. 519; Farmers' Nat. Bank v. Thomas, 79 Hun, 595, 29 N. Y. Supp. 837.

Violation of confidence on the part of the person interested with an instrument executed in blank does not relieve the maker or drawer of his liability. "No rule can be better settled than the one which determines that he who signs his name to a blank piece of paper, with intent to be filled up as a note or indorsement, will be liable, although the person interested therewith shall violate the confidence reposed in him, by filling it up with another sum, or using it for another purpose than the one intended." *Per* Goldthwait, J., in Roberts v. Adams, 8 Port. (Ala.) 297, 33 Am. Dec. 291. See also Geddes v. Blackmore, 132 Ind. 551, 32 N. E. 567; Smith v. Wyckoff, 3 Sandf. Ch. (N. Y.) 77; Lambert v. Carroll, Wright (Ohio), 108; Van Dusen v. Howe, 21 N. Y. 531.

35. Knoxville Nat. Bank v. Clark, 51 Iowa, 264, 33 Am. Rep. 129. See also Fordyce v. Kosminski, 49 Ark. 40, 4 Am. St. Rep. 16; Exchange Nat. Bank v. Bank of Little Rock, 58 Fed. 140, 22 L. R. A. 686.

36. Section 44, *d, ante*.

37. The rule is that where a blank is left in a bill or note for the name of the payee, there is an implied authority to the holder to fill up the instrument, and make it in fact what it was designed to be. Gothrup v. Williamson, 61 Ind. 599; Armstrong v. Harshman, 61 Ind. 52, 28 Am. Rep. 665; Rich v. Starbuck, 51 Ind. 87; Thompson v. Rathbun, 18 Ore. 202, 22 Pac. 837.

As between the maker and innocent third parties it is not a defense to an action on a note that the name of the payee is left blank, the person to whom it was intrusted being deemed the agent of the maker, with full authority fo fill such blank. First Nat. Bank of Decatur v. Johnston, 97 Ala. 655, 11 South. 690.

Filling in name of payee.— Among other cases providing that the holder of a note is authorized to fill in a the person signing is bound for the amount inserted in the note to one having no notice of the facts, although it was understood that the sum should be less than that inserted.[38] As a summary of the doctrine relative to the execution of negotiable instruments in blank the following extract from an opinion by Whitehouse, J., in the case of Market and Fulton National Bank v. Sargent:[39] "It is well settled and familiar law that, if one affixes his signature to a printed blank for a promissory note and intrusts it to the custody of another for the purpose of having the blanks filled up and thus becoming a party to a negotiable instrument, he thereby

blank for the payee with his own name are: Weston v. Myers, 33 Ill. 424; Wilson v. Kinsey, 49 Ind. 35; Jennings v. Bass, 88 Ky. 397, 11 S. W. 293, 21 Am. St. Rep. 344; Dunham v. Clogg, 30 Md. 284; Schoaler v. Tilden, 71 Mo. 580; Aiken v. Cathcart, 3 Rich. L. (S. C.) 133, 45 Am. Dec. 764; Seay v. Tennessee Bank, 3 Sneed (Tenn.), 558, 67 Am. Dec. 579; Brummel v. Enders, 18 Gratt. (Va.) 873; Frank v. Lilienfield, 33 Gratt. (Va.) 377; Van Etta v. Evenson, 28 Wis. 33, 9 Am. Rep. 486.

38. Insertion of amount.— The following cases are cited as authorizing the insertion of the amount for which the instrument is given when left blank:

Alabama.— Brahan v. Ragland, 3 Stew. 247; Roberts v. Adams, 8 Port. 297, 33 Am. Dec. 291.

Connecticut.— Norwich Bank v. Hyde, 13 Conn. 279.

Illinois.— Young v. Ward, 21 Ill. 223; Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120.

Indiana.— Eichelberger v. Old Nat. Bank, 103 Ind. 401, 3 N. E. 127.

Kentucky.— Smith v. Moberly, 10 B. Mon. 266, 52 Am. Dec. 543; Jones v. Shelbyvile, etc., Ins. Co., 58 Ky. 58; Smith v. Lockridge, 8 Bush, 423; Woolfolk v. Bank of America, 10 Bush, 504.

Maine.—Market & Fulton Nat. Bank v. Sargent, 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376.

Mississippi.— Johnson v. Blasdale, 9 Miss. 17, 40 Am. Dec. 85; Fanning v. Farmers & Merchants' Bank, 16 Miss. 139.

Missouri.— Tumilty v. Missouri Bank, 13 Mo. 276; Mackey v. Basil, 50 Mo. App. 199.

Ohio.—Schryver v. Hawkes, 22 Ohio St. 308; Selser v. Brock, 3 Ohio St. 302.

Tennessee.—Grissom v. Fite, 1 Head, 332; Frazier v. Gains, 2 Baxt. 92.

Virginia. — Jordan v. Nielson, 2 Wash. 164.

Wisconsin.— Johnson Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177.

In New York it has been held that a party who intrusts another with his acceptance in blank is responsible to a *bona fide* holder, even though the acceptance has been filled in for a greater amount than that which has been fixed as a limit by the acceptor. Van Duser v. Howe, 21 N. Y. 531.

Where a defendant indorsed a promissory note for the maker's accommodation, and delivered it to the maker with the time and place of payment in blank, it was held that the maker had the implied authority to fill in the blanks by inserting any time or place he chose, but that he was not authorized to insert the words "with interest," as that was not necessarily within the implied intent of the delivery. McGrath v. Clark, 56 N. Y. 34.

A note intended to be made for $800 was indorsed by the payee for the maker's accommodation, and delivered to him. By mistake the words, "hundred dollars," were omitted, so that it purported to be a note for "eight ———." It was held that the maker had implied authority to insert the words "hundred dollars." Boyd v. Brotherson, 10 Wend. (N. Y.) 93. See also Ogden v. Pope, 18 N. Y. Supp. 140; Mitchell v. Culver, 7 Cow. (N. Y.) 336.

39. 85 Me. 349, 27 Atl. 192, 35 Am. St. Rep. 376.

confers the right, and such instrument carries on its face an implied authority, to fill up the blanks and complete the contract at pleasure, as to names, terms, and amount, so far as consistent with its printed words. As to all purchasers for value without notice, a person to whom a blank note is thus intended must be deemed the agent of the signer, and the act of perfecting the instrument is deemed the act of the principal. An oral agreement between such principal and agent limiting the amount for which the note shall be perfected cannot affect the rights of an indorsee who takes the note before maturity for value, in ignorance of such agreement, with a different amount written in it."

b. *Statutory provision.*— The Negotiable Instruments Law contains the following, which, as will be seen, is substantially a statutory declaration of the general rule:

"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 instru-"ment 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." [40]

c. *Incomplete instrument not delivered.*— The Negotiable Instruments Law contains the following: "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." [41] The statute evidently declares the general rule. It is a well-established rule that in order to make an incomplete instrument, which has been filled up contrary to

40. Neg. Inst. L. (N. Y.), § 33. For the same section in the statutes of other States see Appendix. The English Bills of Exchange Act, 1882 (§ 20), contains substantially the same provisions as the above section.

41. Neg. Inst. L. (N. Y.), § 34. See Appendix. As to what constitutes delivery, see next section.

instructions, available in the hands of a holder in due course, the instrument must have been delivered.[42]

§ 46. Delivery.

a. *Statutory provision.*— The Negotiable Instruments Law contains the following provision:

"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,

42. **Filling blanks in instrument not yet delivered.**— The leading English case illustrating this proposition is that of Baxendale v. Bennett, L. R., 3 Q. B. D. 525, 4 Eng. Rul. Cas. 637. The defendant there signed a blank acceptance and gave it to one Holmes to fill in his name and then to use it for the purpose of raising money on it. Holmes sent the blank acceptance back to defendant without using it. It was stolen from the possession of the defendant by some person not a servant of his, filled up by a different person from him to whom the original acceptance was given and to whom he had returned it. On these facts the trial court held that the defendant had been guilty of negligence and was, therefore, liable upon the bill to the plaintiff, who was a *bona fide* holder. But this judgment was reversed by the appellate court on the ground that the defendant, while he might have been guilty of negligence, should not be held liable for a loss occasioned, as it was, by the commission of a crime. The court (*per* Bramwell, L. J.) said: "It must be admitted that the cases of Young v. Grote (4 Bing. 253), and Ingham v. Primrose (7 C. B. N. S.) 82), go a long way to justify this judgment; but in all those cases, and in all others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

"But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the Bank of Ireland v. Evans' Trustees (5 H. L. C. 389) shows under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument; but those who complained of the negligence were the parties immediately affected by the forged instrument."

In New York it has been said: "It is clear that there must be some authority expressed or implied by an actual delivery for future use of the instrument. So where bonds negotiable in form were in an imperfect condition, in that they did not state where they were to be paid or in what national money, nor the principal nor the interest, the filling out of such words by one without authority is not available as against the corporation, even in the hands of a *bona fide* holder." Ledwich v. McKim, 53 N. Y. 307.

In Michigan it was said by Christiancy, J., in the case of Burson v. Huntington, 21 Mich. 415, 4 Am. Rep.

"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."[43]

In treating this question, it will be convenient to divide the subject into the following subdivisions: (1) the necessity of delivery; (2) what constitutes delivery; (3) mode of delivery; and (4) presumption of valid delivery.

b. *Necessity of delivery.*— It is an elementary rule that an instrument is not complete and effectual until it has been delivered, or until that has been done which is legally equivalent to a delivery. An actual or constructive delivery, being the final act in the execution of a note, is as essential to impart validity to the paper as is the signature of the maker. Until that is done it is a nullity.[44] The delivery of a negotiable instrument is an essential and integral part of its execution.[45] Such an instrument has no

497, that: "The wrongful act of a thief or a trespasser may deprive the holder of his property in a note which has once become a note or property, by delivery, and may transfer the title to an innocent purchaser for value. But a note in the hands of the maker before delivery is not property, nor the subject of ownership, as such; it is, in law, but a blank piece of paper. Can the theft or wrongful seizure of this paper create a valid contract on the part of the maker against his will where none existed before? There is no principle of the law of contracts upon which this can be done, unless the facts of the case are such that, in justice and fairness, as between the maker and the innocent holder, the maker ought to be estopped to deny the making and delivery of the note."

43. Neg. Inst. L. (N. Y.), § 35. For the same section in statutes of other States see Appendix.

44. Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319.

The following cases may be cited as sustaining this proposition:

United States.— Wells-Fargo Co. v. Van Sickle, 64 Fed. 944.

Illinois.— King v. Flemming, 72 Ill. 21, 22 Am. Rep. 131; First Nat. Bank v. Strang, 72 Ill. 559.

Indiana.— Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Mahon v. Sawyer, 18 Ind. 73.

Iowa.— Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331.

Maryland.—Deveries v. Shumate, 53 Md. 211.

Michigan. — Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497.

Minnesota.— Stein v. Passmore, 25 Minn. 256.

Missouri.— Carter v. McClintock, 29 Mo. 464; Fogg v. School District of Sedalia, 75 Mo. App. 159.

New York — Cowing v. Altman, 71 N. Y. 435, 27 Am. Rep. 70; Gale v. Miller, 54 N. Y. 536; Marvin v. McCullum, 20 Johns. 288; Hall v. Wilson, 16 Barb. 548.

Wisconsin.— Chipman v. Tucker, 38 Wis. 43, 20 Am. Rep. 1.

45. Mitchell v. Connolly, 13 Ark. 414; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Russell v. Whipple, 2 Cow. (N. Y.) 536; Burbank v. French, 12 Wis. 376. A negotiable instrument stolen from the maker before it has become effective as an obligation by actual or con-

legal inception until it is delivered to some person as an evidence of indebtedness.[46] Until delivery, a contract arising from the negotiable instrument may be revoked, and it has been held that although delivery may be made through the mails, there is a right of stoppage *in transitu* which applies to commercial paper as well as to merchandise *in transitu*.[47] If a promissory note, signed by the maker, be by him placed in the hands of his agent for delivery to the payee, whether conditional or not, as long as it remains in the hands of the agent it is undelivered and may be recalled by the maker.[48]

c. *What constitutes delivery.*—The Negotiable Instruments Law defines delivery as a "transfer of possession, actual or con-"structive, from one person to another." [49] It is not always easy to determine the acts which constitute a delivery by construction of law. It is not indispensable that the delivery of a negotiable instrument should be made directly to the payee; if it is made to

structive delivery, cannot be enforced by any subsequent holder. Salley v. Terrill, 95 Me. 553, 50 Atl. 896, 55 L. R. A. 730.

46. Usurious consideration.—In the case of Catlin v. Gunter, 11 N. Y. 368, it was held that a note delivered by the maker without consideration therefor to a third person, to enable the latter to raise money thereon for the maker or himself, has no legal inception in his hands. If he negotiate the loan upon an usurious consideration, it is void. And in the case of Marvin v. McCullum, 20 Johns. (N. Y.) 288, a note was made payable to James Averill, or bearer, with interest, and never delivered to the payee, but transferred to a third person. It was held that the note had its inception when so transferred, and that it was, therefore, competent for the maker to show that the transfer was made as security for an usurious loan. The reason given for this decision is that the note does not constitute a contract, and has no binding force until it is delivered; and so, when indorsed by the payee for the accommodation of the maker, it being made for discount at a particular bank, it is rendered void if discounted by another bank at an usurious rate. See also Powell v. Waters, 8 Cow. (N. Y.) 669.

47. Muller v. Pondir, 55 N. Y. 325, 14 Am. Rep. 259. See also Roberts v. McGrath, 38 Wis. 52; Hillsdale College v. Thomas, 46 Wis. 661. The title in a check sent by mail and never received by the payee remains in the sender. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326.

In the case of Giddings v. Giddings, 51 Vt. 227, 31 Am. Rep. 682, a note was delivered by the maker to a third person, with directions that it should be handed back to the maker if he called for it; otherwise to be delivered after his death. Not being recalled during his lifetime, the delivery was considered sufficient. See also Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178; Gardner v. Merritt, 32 Md. 78, 3 Am. Rep. 115; Worth v. Case, 42 N. Y. 362.

In the case of Fanning v. Russell, 94 Ill. 386, the taking of a note by a father in his daughter's name as payee, with the intention of making a gift to the daughter, was held to give the latter no vested interest in the note before it is delivered to her, but that the note remained the absolute property of the father. See also Hatton v. Johnson, 78 Ind. 466.

48. Deveries v. Shumate, 53 Md. 211, 216.

49. Neg. Inst. Law (N. Y.), § 2.

some one else for his benefit, such delivery is sufficient.[50] Mitchell, J., in the case of Purviance v. Jones,[51] says:

"While it is not indispensable that there should have been an actual transfer of the instrument from the maker to the payee, yet, to constitute a delivery, it must appear that the maker, in some way, evidenced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use. The acts which consummate the delivery of a promissory note are not essentially different from those required to complete the execution of a deed. Act and intention are the two elements essential to the delivery of a deed, which is ordinarily effected by the simple manual transfer of possession from the grantor to the grantee, with the intention of passing the title and relinquishing all power and control over the instrument itself. The final test is, Did the maker do such acts in reference to the deed or other instrument as evince an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee?"

d. *Mode of delivery.*—(1) *In general.*— By depositing a note in the mail, with the intent that it shall be transmitted to the payee in the usual way, the maker parts with his dominion and control over it and the delivery is, in legal contemplation, complete.[52]

50. Gordon v. Adams, 127 Ill. 223, 19 N. E. 557.

Intent controls.— In the case above cited, the court said: "In determining the question of delivery, the intent of the parties with respect thereof is the controlling element. This intention may be shown by direct proof, or by proof of the acts and declarations of the parties evincing such intent, or may be inferred from the circumstances shown, which are sufficient to create the presumption of delivery. Thus, if a deed or note is found in the possession of the grantee or payee, its delivery will be presumed." See also Weber v. Christen, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68; Stone v. French, 37 Kan. 145, 14 Pac. 530, 1 Am. St. Rep. 257; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Streissguth v. Kroll (Minn.), 90 N. W. 577.

51. 120 Ind. 162, 21 N. E. 1099, 16 Am. St. Rep. 319. In this case the maker of the note refused, when requested, to execute a mortgage to secure a debt, and assignd as a reason that he had signed a note and left it in the bank for plaintiff's benefit. There was no finding that the note had been left with the bank for the plaintiff's benefit or that the latter had taken any action respecting the same, but such a note was found among the intestate's private papers after his death, with the writing on the back stating that the note was explained in the statement signed by intestate. The court held that there was nothing in the facts found to indicate that the testator had ever surrendered control of the note. An intent to deliver is not sufficient. Drum v. Benton, 13 App. (D. C.) 245.

52. Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530, 27 Am. St. Rep. 777. See also Kirkman v. Bank of America, 2 Coldw. (Tenn.) 397.

In the case of Buhler v. Galt, 35 Ill.

Where a note was made for a good consideration, without the knowledge of the payee, and delivered to him in a sealed envelope with instructions not to open it during the lifetime of the maker, and that it should be returned to the maker upon his request, it was held that upon the death of the maker the note became a valid claim against his estate.[53] A delivery to an agent of the payee constitutes a delivery to the payee.[54] But it has been held that leaving a check upon the desk of a clerk without his knowledge is not a delivery to the clerk's employer, unless it is actually received by the clerk or his employer.[55]

(2) *Conditional delivery.*— The doctrine of the Negotiable Instruments Law that a 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, has been established both in this country and in England by a long line of authorities. In conformity with the general law of contracts, it has been settled, in most common-law jurisdictions, that as between the immediate parties and those having notice thereof, a negotiable instrument may be delivered upon conditions, the observation of which between the parties is essential to its validity, and that these conditions may be established by parol evidence where the agreement was oral.[56] There are, however, a number of decisions which hold,

App. 225, it was held that, where a drawer of a check, without the request of the payee, deposits such check in the mail for transmission to the payee, the title thereto remains in the drawer until it reaches the hands of the payee.

53. Worth v. Case, 42 N. Y. 362; North v. Case, 2 Lans. (N. Y.) 264. And where a note payable to a certain person is found among the maker's papers after his death, it cannot be sued on by the payee. Cann v. Cann's Heirs, 45 W. Va. 563, 31 S. E. 923.

54. Scott v. State Bank, 9 Ark. 36.

Delivery to agent.— In the case of Shaw v. Camp, 160 Ill. 425, 43 N. E. 608, it appeared that, while the payee of a note was absent, the maker delivered it, without conditions, to a banker and broker of the payee, with directions to deliver it to the payee upon his return; such banker had in his possession other papers of the payee for safe-keeping; the note was placed by the banker in the private envelope of the payee and deposited in a safety box in the bank. It was held that there was a sufficient delivery of the note. See also Security Co. v. Ball, 107 Ind. 165, 1 N. E. 567.

55. Kinne v. Ford, 52 Barb. (N. Y.) 194, affd. in 43 N. Y. 587. The reason was stated as that, if the clerk, for any reason, does not consent to the delivery of the check, either from mental infirmity or lack of attention, or any physical incapacity, there is no delivery to him. Delivery is a thing in which both parties must join. The minds of both parties must concur. See also Chicopee Bank v. Philadelphia Bank, 8 Wall. (U. S.) 641; Whyte v. Rosencrantz, 123 Cal. 634, 56 Pac. 436; Gross v. Arnold, 177 Ill. 575, 52 N. E. 867.

56. **Conditional delivery.**— Marston v. Allen, 8 Mees. & W. (Eng.) 494, 11 L. J. Exch. (Eng.) 122; Wake v. Harrop, 6 H. & N. (Eng.) 775, 30 L. J. Exch. (Eng.) 273; Adams v. Jones, 12 Ad. & El. (Eng.) 455, 9 L. J. Q. B. (Eng.) 407; Bell v. Lord Ingestre, 12 Q. B. (Eng.) 317, 17 L. J. Q. B. (Eng.) 71, 4 Eng. Rul. Cas.

contrary to the decided weight of authority, that there can be no conditional delivery in escrow to the payee. These decisions proceed upon the theory that the proof of such conditional delivery

203; Quebec Benk v. Halman, 110 U. S. 178, 4 Sup. Ct. 76, 28 L. Ed. 111; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; McFarland v. Sikes, 54 Conn. 250, 7 Atl. 408; Perley v. Perley, 144 Mass. 104, 10 N. E. 726; Sweet v. Stevens, 7 R. I. 375; Breeden v. Grigg, 8 Baxt. (Tenn.) 163; Alexander v. Wilkes, 11 Lea (Tenn.), 221.

In the case of Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563, it was held that a note extended in contemplation of a proposed transaction, which could be valid only on condition of the approval of a certain attorney, becomes void upon his advising the maker to have nothing to do with it. See also Hooper v. Eiland, 21 Ala. 714; Murray v. Kimball, 10 Ind. App. 184, 37 N. E. 734; Deveries v. Shumate, 53 Md. 211.

A check was delivered to one person, with directions to deliver the same to another when a certain contract should be executed for the sale of land. The check was delivered, although the contract was never drawn up. As soon as the defendant learned of the delivery, he notified the plaintiff that he would not pay the check. It appeared that the terms under which the check had been deposited were known to the plaintiff. It was held that the defendant was not liable on the check. Hoyt v. McIntire, 50 Minn. 466, 52 N. W. 918.

In New York one of the leading cases is that of Bookstaver v. Jayne, 60 N. Y. 146, where, in an action upon a promissory note against an indorser, the defendant set up in his answer that he indorsed the same as security for a debt due from the maker to the plaintiff, upon the agreement of the plaintiff to discontinue a suit brought by him for the recovery of the debt. This agreement was violated. The court, in discussing the question of the admissibility of parol evidence to vary the terms of the instrument, said: "An instrument not under seal may be delivered upon conditions, the observation of which, as between the parties, is essential to its validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. While this parol evidence is not admissible to vary the effect of the undertaking, or merely to show that it was to be renewed, yet, when the note does not contain the whole contract, and is made in pursuance of a contract, it is competent to show what the contract was, and the purpose for which it was made."

Where at the time a note was discounted there was a distinct understanding between the maker and the bank discounting that the former should incur no liability by signing the note, it was held that he was not liable thereon to the bank that discounted it. Garfield Nat. Bank v. Colwell, 58 Hun (N. Y.), 169, 10 N. Y. Supp. 864.

The decision in that case was based upon that of Benton v. Martin, 52 N. Y. 570, and Seymour v. Cowing, 4 Abb. Ct. App. Dec. (N. Y.) 200, 1 Keyes (N. Y.), 532. And see also the case of Higgins v. Ridgway, 153 N. Y. 130, 47 N. E. 32, affg. 90 Hun (N. Y.), 398, to the same effect.

Where a note and collateral security thereto were given by the maker under a mistake as to the personalty of the party receiving them, and were accepted by such person fraudulently, with knowledge of the maker's mistake and of the rights of a third person thereto, the note is void in its inception. Bergmann v. Salmon, 79 Hun (N. Y.), 456, 29 N. Y. Supp. 968, affd. in 150 N. Y. 575, 44 N. E. 1121.

Where renewal notes are given, although interest may be added and the time extended, such notes are subject, in the hands of the original holders, to the same defenses as the original debt. Earle v. Robinson, 91 Hun (N. Y.), 363, 36 N. Y. Supp. 178.

For a further discussion of the rules as to conditional delivery and proof of parol agreements, affecting the enforcement of unsealed contracts, see Chapin v. Dobson, 78 N. Y. 74; Eastman v. Shaw, 65 N. Y. 522; Englethorn v. Reitlinger, 122 N. Y. 76, 25 N. E.

varies the terms of a written contract.[57] Where a person signs the note under a condition that the signatures of other persons shall be obtained, he is liable thereon although such signatures are not obtained,[58] if the payee or the holder has no knowledge that such was the agreement; but it is otherwise where the payee has knowledge of the agreement.[59]

e. *Presumption of valid delivery.*—(1) *Conclusive as to holder in due course.*— As a general rule possession of a promissory note or bill of exchange implies delivery.[60] According to the pre-

297; Bradley v. Washington, etc., Packet Co., 13 Pet. (U. S.) 89; Juillard v. Chaffee, 92 N. Y. 529; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127.

In the case of Washington Savings Bank v. Furguson, 43 App. Div. (N. Y.) 74, 59 N. Y. Supp. 295, the court distinguishes between parol conditions impeaching consideration entirely and like conditions limiting and postponing the liability of the person asserting them, and says: "It is apparent that there is nothing in these cases which militates against the general rule to which we have previously referred. In all the other cases cited the real question was as to the consideration. In none of them was it held that parol evidence could be given of a condition affecting the tenor of the contract obligation. Conditions relating to the delivery of the note may be shown, but not conditions affecting the character of the delivered obligation. The one goes to the existence and vitality of the contract. The other, conceding its existence and vitality, would annex a parol condition thereto, varying its contract essence. Here the defendant admits the delivery of the note, and that it was so delivered for value. It is immaterial, under the circumstances, whether that value went to him or to the Arkell Company. When the note was so delivered for value it had upon it the defendant's indorsement, given for the accommodation of the Arkell Company. He even admits that that accommodation indorsement imported a qualified liability. The case is thus clearly reduced to an attempt by parol to vary and minimize the contract obligation. It is clear that it must fail. There is no merit whatever in either of the alleged counterclaims and no point is made with regard to them which calls for special consideration."

57. In the case of Garner v. Fite, 93 Ala. 405, 9 South. 367, it was held that parol evidence could not be received to show that a promissory note, expressing on its face an unconditional promise to pay money, was delivered to the payee in escrow, or subject to a condition subsequent, which was never performed. See also Hurt v. Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823; Massmann v. Holscher, 49 Mo. 87; Henshaw v. Dutton, 59 Mo. 139; s. c., 67 Mo. 666; Jones v. Shaw, 67 Mo. 667; Clanin v. Esterly Machine Co., 118 Ind. 374, 21 N. E. 35; Carter v. Moulton, 51 Kan. 9, 32 Pac. 633, 37 Am. St. Rep. 259.

58. Taber v. Mechanics' Nat. Bank, 48 Ark. 454, 3 S. W. 805; Bonner v. Nelson, 57 Ga. 433; Clark v. Bryce, 64 Ga. 486; Stricklin v. Cunningham, 58 Ill. 203; Micklewait v. Noel, 69 Iowa, 344, 28 N. W. 630; Ward v. Hackett, 30 Minn. 50, 14 N. W. 578; Garvey v. Marks, 134 Mo. 1, 34 N. W. 1108; North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. 479; Miller v. Gambie, 4 Barb. (N. Y.) 146.

59. Jordan v. Lofton, 13 Ala. 547; Belleville Sav. Bank v. Bowman, 124 Ill. 200, 16 N. E. 210; Coffman v. Wilson, 2 Metc. (Ky.) 542; Perry v. Patterson, 5 Humph. (Tenn.) 132, 42 Am. Dec. 424.

But the case of Clanin v. Esterly Machine Co., 118 Ind. 372, 21 N. E. 35, is opposed to this doctrine.

60. Mitchell v. Conley, 13 Ark. 114; Williams v. Williams, 13 Ark. 421; Garrigus v. Home, etc., Soc., 3 Ind. App. 91, 28 N. E. 1009; Bellows v. Folsom, 4 Rob. (N. Y.) 43; Napier v. Mayhew, 35 Ind. 276; Brooks v. Allen, 62 Ind. 401.

Where a maker impliedly admits

ponderance of authority, one who has purchased for value, in good faith, in the usual course of business, and before maturity, a negotiable instrument complete upon its face, and not avoided by forgery or statutory prohibition, has good title in the person from whom he took it, even though such person may have acquired it by fraud, by theft, or by robbery.[61] The rule as declared in the Negotiable Instruments Law is clearly that of the law merchant; the rights of *bona fide* holders of commercial paper is a matter for consideration in another part of this work.[62]

f. *Presumption of intentional delivery by placing signature on instrument.*— The provision of the Negotiable Instruments Law relating to this subject is the same as that contained in the English Bills of Exchange Act.[63] Where the signature of the maker of a note is impliedly admitted, the production of the note by a plaintiff in an action thereon, with proof of its indorsement by the payee, is *prima facie* proof of delivery.[64] The inference that a note was delivered which arose from its possession by the payee may be counteracted by proof that the delivery was based on some contingency that had not yet happened.[65] The right to the possession and full beneficial interest in an unindorsed negotiable paper may pass by manual delivery of the paper, and, in the absence of testimony tending to disprove that the notes were delivered, the presumption will obtain that one in the possession of such paper

his signature, the production of the note by the plaintiff, with proof of the indorsement of the payee, is *prima facie* proof of delivery. Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497. See also Hensel v. Chicago, St. P., M. & O. R. Co., 37 Minn. 87, 33 N. W. 329.

61. This proposition will be discussed hereafter. See *post*, chap. IV. The proposition of the text is maintained in the following cases: Goodwin v. Robarts, L. R., 10 Exch. (Eng.) 337 (where scrip had been dishonestly pledged by agent of owner); Worcester County Bank v. Dorchester, etc., Bank, 10 Cush. (Mass.) 488 (case of stolen unissued bank bills); Cooke v. United States, 91 U. S. 389 (case of acceptance of forged bills purporting to be acceptor's own); Gould v. Seger, 5 Duer (N. Y.), 268 (note wrongfully taken); Shipley v. Carroll, 45 Ill. 285 (note stolen); Kinyon v. Wohlford, 17 Minn. 239; Goodman v. Simonds, 20 How. (U. S.) 343.

62. See chap. VI, *post*.

63. English Bills of Exchange Act, 1882, § 21(3), which provides that "where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

64. Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Hensel v. Chicago, St. P., M. & O. R. Co., 37 Minn. 87, 33 N. W. 329; Newcomb v. Fox, 1 App. Div. 389, 37 N. Y. Supp. 294, affd. in 154 N. Y. 754; Cox v. Adams, 2 Ga. 158; Fairthorne v. Garden, 1 Houst. (Del.) 197; McCallum v. Driggs, 37 Fla. 277; Dietrich v. Mitchell, 43 Ill. 40; Brooks v. Allen, 62 Ind. 401; Napier v. Mayhew, 35 Ind. 276.

65. Hurt v. Ford (Mo.), 36 S. W. 671.

came rightfully into possession.[66] It has been held that, where a note was fraudulently put in circulation, in order to hold the maker, intentional delivery, or at least gross negligence, must be shown.[67] But this principle is not supported either by argument or the weight of authority.[68]

§ 47. Construction where instrument is ambiguous.

a. *In general.*— The Negotiable Instruments Law has given the force of law to a number of rules which have existed, for the most part, in the common law in nearly every jurisdiction. These statutory rules will be discussed in their order and a number of cases will be cited indicating their force and effect. Additional rules of construction, not included in the statute, have been declared by a number of decisions, and these will also be given due consideration.

b. *Discrepancy between words and figures expressing amount.*— The rule as declared in the Negotiable Instruments Law is that: "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 un-"certain, reference may be had to the figures to fix the amount." [70] This is also the rule as it exists in England by virtue of the English Bills of Exchange Act.[71] This seems to have been a rule early established in commercial law, and has always been accepted by text-writers and the courts as a true rule of interpretation.[72] The

66. Martin v. Martin, 174 Ill. 371, 51 N. E. 691, 66 Am. St. Rep. 290.

67. Benson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Palmer v. Poor, 121 Ind. 135, 984, 6 L. R. A. 469.

68. See cases cited in note 61, *ante*.

70. Neg. Inst. Law (N. Y.), § 36, subd. 1. See Appendix, indicating sections of law in other States.

71. English Bills of Exchange Act, 1882, § 9 (2). See Appendix.

72. **Discrepancy between words and figures.**—Saunderson v. Piper, 5 Bing. N. C. (Eng.) 425. In this case a bill was expressed in figures to be drawn for £245; but in words for two hundred pounds, although a stamp was affixed applicable to the higher amount. It was held that evidence to show that the words "and forty-five" had been omitted by mistake was not admissible, but that the acceptance must be taken to be for two hundred pounds only. Tindal, C. J., said: "The evidence in question not being admissible, we cannot shake the rule of commercial writers, that where a difference appears between the figures and the words of the bill, it is safer to attend to the words. If we take the authorities of those writers where we have none of our own, this is a good bill for the sum expressed in the body, and, therefore, I am of the opinion that the plaintiff is entitled to judgment for £200.

The commercial writers, among whom the most authoritative is Marius, have all declared that the rule of the text is the most advantageous for commercial interests. Marius (4th ed., p. 33) has said: "A bill of exchange, though written in few words, and contained in a small piece of paper, yet is of great weight and concernment in point of trade between rule arises from the fact that it is usual to write the sum in figures in the corner or margin of a note or bill, and also to express it in words in the body thereof; if any discrepancy or ambiguity exists between these figures and words, the words are to control.[73] The figures constitute no part of the note or bill, but are inserted merely for convenience of reference. The contract is in every way complete without the use of such figures.[74] The above provision of the statute also declares the general rule that where a defect exists in the amount stated in the body of the note, the figures upon the margin may be referred to for the purpose of removing any ambiguity, or even to supply the amount which had been wholly omitted in the body of the instrument.[75]

merchant and merchant, and, therefore, ought to be written very plain and legible, and without any blots, or mending, or altering of any word thereof, that so there may not arise any doubt or scruple in the payment thereof; and, therefore, it is that usually merchants do write the sum that is to be paid as well in figures as in words at length, as you may observe by the several forms of bills of exchange contained in this treatise; and if it so fall out, that through unadvisedness, or error of the pen, the figures of the sum, and the words at length of the sum, that is to be paid upon any bill of exchange do not agree together, either that the figures do mention more, and the words less, or that the figures do specify less, and the words at length more, in either, or in any such like case, you ought to observe and follow the order of the words mentioned at length, and not in figures, until further order be had concerning the same, because a man is more apt to commit an error with his pen in writing a figure than he is in writing of a word; and also because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and a breviat thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had; and, although it may so fall out that the sum mentioned in figures in the letter of advice, and the sum mentioned in figures in the bill of exchange, do agree, yet if the sum mentioned in words at length in the same bill do disagree, you ought to follow the order mentioned in words at length in the bill, and not the order in figures, for the reason before alleged."

73. Parsons on Notes and Bills, p. 26; Mears v. Graham, 8 Blackf. (Ind.) 144; Rockville Nat. Bank v. Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236.

74. **Marginal figures.**— In the case of Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652, a bill of exchange was stated in words to be drawn for three hundred and seventy-five dollars and ninety-four cents, but the figures in the margin were $175.94. The clerk of the bank discounting the bill had altered the figures to conform to the written words, and the defendant, therefore, objected to its admission in evidence, as avoided by the alteration. The court said: "We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it. If this is so, any alteration of the figures cannot avoid the contract, because it is no alteration, either material or immaterial, in the contract. See to same effect Rockville Nat. Bank v. Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Riley v. Dickens, 19 Ill. 29; Corgan v. Frew, 39 Ill. 31, 89 Am. Dec. 286; Poorman v. Mills, 39 Cal. 345, 2 Am. Rep. 451.

75. **When marginal figures may be referred to.**—Burnham v. Allen, 1 Gray (Mass.), 496; Sweetzer v. French, 13 Metc. (Mass.) 262; Corgan v. Frew, 39 Ill. 31, 89 Am. Dec. 286; Petty v. Fleischel, 31 Tex. 169, 98 Am. Dec.

c. *When interest begins to run if no date is specified.*— The Negotiable Instruments Law also provides that: "Where the "instrument provides for the payment of interest, without specify-"ing 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." [76] A similar provision is contained in the English Bills of Exchange Act of 1882.[77] Issue, as here used, means the first delivery of the instrument, complete in form, to a person who takes it as a holder.[78] The rule as declared in the statute seems to be the rule as laid down by the authorities. It is a general rule of commercial law that where a note is made payable with interest, without specifying the rate, or the time from which the interest is to be computed, the note carries interest from the date of its complete execution, or its issue, at the legal rate fixed by law.[79] There is some conflict of authority as to the time when

524. But in Hollen v. Davis, 59 Iowa, 444, 13 N. W. 113, 44 Am. Rep. 688, it was held that there could be no recovery at law upon an instrument in the form of a promissory note, but stating no amount in the body of the note, even though figures were set forth in the margin.

An Indiana case of some note is often cited in connection with this rule of construction. In Witty v. Michigan Mut. Life Ins. Co., 123 Ind. 411, 24 N. E. 141, 18 Am. St. Rep. 327, a promissory note contained no words indicating the number of dollars to be paid in the body of the note, but the amount was specified in figures on the margin. Berkshire, J., said: "We know, as a part of the commercial history of the country, that the universal practice has been, for a period so long that the memory of man runneth not to the contrary, to represent by superscription in figures upon all obligations for the payment of money the amount or sum which is written in the body of the instrument. The superscription is always intended to represent the amount found in the body of the instrument, and not a different amount; if, therefore, an obligation is found where there is a promise to pay " dollars," but the number of dollars in the body of the instrument is blank, and the margin of the instrument is found to contain a superscription which states the number of dollars, why, in view of the usage or custom which has so long prevailed, should the body of the instrument not be aided by the superscription? We think, in such a case, the figures found in the margin should be taken as the amount which the obligor intended to obligate himself to pay, and the obligation enforced accordingly. We do not think, in such a case, that the courts would be justified in disregarding the evident intention of the parties as indicated by the superscription upon the paper, and in holding the instrument void for uncertainty, or on the ground that it is not a perfect writing. And especially are we of the opinion stated, in view of the liberal statute which we have on the subject of promissory notes, and other written obligations and their negotiation."

76. Neg. Inst. Law (N. Y.), § 36, subd. 2. For sections of statute in other States see Appendix.

77. English Bills of Exchange Act, 1882, § 9, subd. 3.

78. Neg. Inst. Law (N. Y.), § 2. For statutes in other States see Appendix.

79. Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369. See also Campbell Printing Press Co. v. Jones, 79 Ala. 475; Dewey v. Bowman, 8 Cal. 145; Smith v. Goodlet, 92 Tenn. 230, 21 S. W. 106; Belford v. Beatty, 145 Ill. 414, 34 N. E. 254; Miller v. Cavanaugh, 99 Ky. 377, 35 S. W. 920; Bogan v. Calhoun, 19 La. Ann. 472; Pittman v.

interest begins to run on a note payable on demand, where no time is specified in the note when such interest will commence.[80] The better rule, and that apparently supported by the weight of authority, is that a promissory note, payable on demand, providing for the payment of interest, bears interest from its date, without a demand.[81]

d. *Failure to date.*— Where the instrument is not dated it will be considered to be dated as of the time it was issued.[82] We have already considered the effect of the omission of a date upon the validity and negotiable character of an instrument.[83] The rule stated in the Negotiable Instruments Law is one long established in commercial law.[84] While the failure to date a note would not affect its validity or negotiability, and would be payable at a time to be determined by or computed from the date of its issue or delivery, yet it would seriously impede its untrammeled transfer, and materially affect its value as commercial paper.[85]

e. *Conflict between written and printed provisions.*— The statute has enacted the general rule in respect to all contracts estab-

Barrett, 34 Mo. 84; Richardson v. Ellett, 10 Tex. 190.

Where there is a variance between the terms of a note and of a mortgage given as security, providing for the time of payment and the rate of interest, the rate must control, since the mortgage is only a mere incident following the debt, the obligation of which is contained in the note. Hutchinson v. Benedict, 49 Kan. 545, 31 Pac. 147; Keys v. Lardner, 55 Kan. 331, 40 Pac. 644. See also Railway Co. v. Sprague, 103 U. S. 756.

80. Gaylord v. Van Loan, 15 Wend. (N. Y.) 308; Pate v. Gray, Fed. Cas. No. 10,794*a*; Packer v. Roberts, 40 Ill. App. 613; Whitton v. Swope, 11 Ky. 160. There are a number of decisions to the effect that, where a note payable on demand was not made payable with interest, interest does not begin to run until payment has been demanded. Sanford v. Crocheron, 8 Civ. Pro. R. (N. Y.) 146; Bishop v. Sniffen, 1 Daly (N. Y.), 155; Patrick v. Clay, 4 Bibb (Ky.), 246; Nelson v. Cartmel, 6 Dana (Ky.), 7; Cannon v. Beggs, 1 McCord (S. C.), 370, 10 Am. Dec. 677.

81. Pate v. Gray, Fed. Cas. No. 10,794*a*; Causin v. Taylor, 4 Ark. 408; Francis v. Castleman, 4 Bibb (Ky.), 282; Paine v. Caswell, 68 Me. 80, 28 Am. Rep. 21; Colby v. Bunker, 68 Me. 524.

82. Neg. Inst. Law (N. Y.), § 36, subd. 3. See Appendix for statute in other States.

83. Neg. Inst. Law (N. Y.), § 25, subd. 1.

84. In an action on a foreign bill of exchange, it was held, in De La Courtier v. Bellamy, 2 Show. (Eng.) 422, that, if the date be omitted, the court will intend that was dated at the time it was stated to have been drawn. See also Giles v. Bourne, 6 Mau. & Sel. 73; Hague v. French, 3 B. & P. 173.

In general, it is not essential to a note that it should be dated; and if there be no date, it will be considered as dated at the time it was made. 1 Parsons on Notes and Bills, p. 41. See Seldonridge v. Connable, 32 Ind. 375; Richardson v. Ellett, 10 Tex. 190.

85. In the case of Mitchell v. Culver, 7 Cow. (N. Y.) 336, 338, Sutherland, J., said: "Although it is not essential to the legal validity of a note, that it should be dated, yet we all know that it is necessary to its free and uninterrupted negotiability. A note without a date will not be discounted at our banks, nor pass in the money market without previous inquiry."

lished at an early date by Lord Ellenborough.[86] The Negotiable Instruments Law provides that "where there is a conflict between "the written and printed provisions of the instrument, the written "provisions prevail."[87]

f. *Doubt as to whether instrument is bill or note.*— The Negotiable Instruments Law provides that "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."[88] And it is also provided that "where in a bill a drawer and drawee are the same "person, or where the drawee is a fictitious person or a person not "having capacity to contract, the holder may treat the instrument, "at his option, either as a bill of exchange or a promissory note."[89] The latter proposition has already been discussed under other headings.[90] The former rule of construction is one which has been generally accepted by the courts and is fully recognized in all jurisdictions.[91]

g. *When person deemed indorser.*— The Negotiable Instruments Law provides that "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."[92] The rights and liabilities of indorsers will be considered in a subsequent chapter.[93] It is also provided in the Negotiable Instruments

86. **Reason for rule.**— In the case of Robertson v. French, 4 East (Eng.), 130, 136, where a partly-written and partly-printed insurance policy was in controversy, Lord Ellenborough said: "The only difference between policies of assurance and other instruments, in this respect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired, from use and practice, a known and definite meaning, and that the words superadded in writing (subject always to be governed in point of construction by the language and terms with which they are accompanied), are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."

87. Neg. Inst. Law (N. Y.), § 36, subd. 4. See Appendix for statutes of other States.

88. Neg. Inst. Law (N. Y.), § 36, subd. 5.

89. Neg. Inst. Law (N. Y.), § 214.

90. See § 7, *ante*.

91. **Where an instrument is so ambiguously worded that it is doubtful whether it was intended for a bill or for a note, the holder may treat it at his option as either.** Chalmers on Bills of Exchange (5th ed.), p. 9. See Edis v. Bury, 6 B. & C. (Eng.) 433; Fielder v. Marshall, 30 L. J. C. P. (Eng.) 158; Allen v. Mawson, 4 Campb. (Eng.) 115.

92. Neg. Inst. Law (N. Y.), § 36, subd. 6. See Appendix for same section in statutes of other States.

93. See *post*, §§ 83–87.

Law that: "A person placing his signature upon an instrument "otherwise than as 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." [94] The rules here stated would seem to be the result of a consideration of somewhat conflicting authorities respecting the effect of the signature upon commercial paper of a person other than the holder or maker. It has always been held in New York State that when any one, other than the maker or holder, signs his name in blank upon the back of a negotiable note, the inference is that he intends to become liable as indorser.[95] But in Massachusetts a different rule has existed; it has there been held that a person signing in blank a negotiable note to which he is not a party, is liable not as an indorser, but as a maker, or as a surety, according to the nature of the transaction.[96] A number of States had followed Massachusetts in this respect.[97] The Negotiable Instruments Law has evidently changed the Massachusetts rule, as will be noticed hereafter.

h. *Words "I promise to pay" in instrument signed by two or more persons.*— It is also provided in the Negotiable Instruments Law that "Where an instrument containing the words 'I promise

94. Neg. Inst. Law (N. Y.), § 113. See Appendix for same section in statutes of other States.

95. Phelps v. Vischer, 50 N. Y. 69; Bacon v. Burnham, 37 N. Y. 614; Spies v. Gilmore, 1 N. Y. 321.

In the case of Coulter v. Richmond, 59 N. Y. 478, 481, Church, Ch. J., said: "There is considerable diversity of sentiment among the courts of the different States as to the nature of the contract implied by a blank indorsement of a negotiable note before delivery to the payee. In some of the States such an indorser is *prima facie* regarded as a guarantor, in others an indorser, and in others a joint promisor. In this State it has been repeatedly held, and is too strongly settled by authority to be disturbed, that a person making such an indorsement is presumed to have intended to become liable as a second indorser, and that, on the face of the paper, without explanation, he is to be regarded as second indorser, and, of course, not liable upon the note to the payee, who is supposed to be the first indorser. As the paper itself furnishes only *prima facie* evidence of this intention, it is competent to rebut the presumption, by parol proof that the indorsement was made to give the maker credit with the payee." See also Moore v. Cross, 19 N. Y. 227.

96. Mois v. Bird, 11 Mass. 436; Union Bank v. Willis, 8 Metc. (Mass.) 504; Riley v. Gerrish, 9 Cush. (Mass.) 104; Pemberton Bank v. Lougee, 108 Mass. 371. It must be noticed, however, that the doctrine prevailing in Massachusetts, that a person whose name is written on the back of a note may, by implication of law, be charged as a maker or upon a guaranty, has often been disapproved by the Supreme Court of that State, and it has intimated that, if it were not so firmly established, such a person might more properly be regarded as a second indorser. Union Bank v. Willis, 8 Metc. (Mass.) 504.

97. Massey v. Turner, 2 Houst. (Del.) 79; Sturtevant v. Randall, 53 Me. 149, 155; Colburn v. Averill, 30 Me. 310; Woodman v. Boothby, 66 Me. 389; Walz v. Alback, 37 Md. 404; Stagg v. Linnenfelser, 59 Mo. 336; Rothschild v. Grix, 31 Mich. 150; Peckham v. Gilman, 7 Minn. 446.

"'to pay' is signed by two or more persons, they are deemed to be "jointly and severally liable thereon."[98] A similar provision is contained in the English Bills of Exchange Act.[99] There is no doubt that the rule of construction as thus declared in the statute is the general rule as established by the authorities.[1] It may be well to note, as will be more fully discussed hereafter, that in an action upon an instrument, signed by two or more comakers, one may aver and prove by parol evidence that he signed merely as surety, and that such fact was known to the plaintiff, before the equities arose, through which such evidence becomes admissible. This is because the parol contract of suretyship is merely collateral to the written contract.[2]

§ 48. Liability of person signing in trade or assumed name.

a. *Statutory provision.*— The Negotiable Instruments Law provides that " No person is liable on the instrument whose signature " does not appear thereon, except as herein otherwise expressly " provided. But one who signs in a trade or assumed name will be " liable to the same extent as if he had signed in his own name." [3]

98. Neg. Inst. Law (N. Y.), § 36, subd. 7. See Appendix for same section in statutes of other States.

99. English Bills of Exchange Act, 1882, § 85 (2).

1. "I promise to pay," signed by two or more makers.— Monson v. Drakeley, 40 Conn. 552, 16 Am. Rep. 74. In this case the note was in the following form:

"WOODBURY, *March* 17, 1868.
"For value received I promise to pay Daniel S. Lemmon sixteen hundred dollars, with interest at six per cent., and all taxes.
"GEORGE A. MONSON,
"FRANK S. MONSON,
"STILES F. MONSON,
"ROBERT I. DRAKELEY."

The court said: "An inspection of the paper discloses nothing inconsistent with the fact that the signatures were all written at the same time, upon the same consideration, and for the same purpose. Although the promise is expressed by the use of the singular pronoun "I," the intention of all the signers to become joint and several original makers is uncontradicted by anything on the face of the note, and such is the legal interpretation of such a promise signed at the same time by several, when the character and object of their signatures is unexplained." See also the following cases:

Indiana.— Maiden v. Webster, 30 Ind. 317; Groves v. Stephenson, 5 Blackf. 584.

Massachusetts. — Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27.

New Hampshire.— Ladd v. Baker, 26 N. H. 76, 57 Am. Dec. 355.

New York.— Ely v. Clute, 10 Hun, 35; Hopkins v. Lane, 4 Thomp. & C. 311; Partridge v. Colby, 19 Barb. 248.

Ohio.— Wallace v. Jewell, 21 Ohio St. 163, 8 Am. Rep. 48.

South Carolina.— Barnett v. Skinner, 2 Bailey, 88.

Vermont.— Arbuckle v. Templeton, 65 Vt. 205, 25 Atl. 1095.

Wisconsin.— Dill v. White, 52 Wis. 456, 9 N. W. 404.

See cases cited in Century Digest, Vol. 7, " Bills and Notes," § 257.

2. Gillett v. Taylor, 14 Utah, 390, 46 Pac. 1099, 60 Am. St. Rep. 890.

3. Neg. Inst. Law (N. Y.), § 37. See Appendix for same section in statutes of other States.

This is substantially the same as a provision of the English Bills of Exchange Act.[4]

b. *Reason and application of rule.*— No person is liable as drawer, indorser, or acceptor, or maker of a bill, or note, unless he has signed it as such; but signing a trade or assumed name is as binding as a man's real name.[5] A person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intends to bind himself thereby.[6] This rule only applies to cases where the assumed name is one by which the signer intends to bind himself, or where the name is one under which he has held himself out to the world or carried on business.[7] If a person signs an assumed name under other circumstances he is liable *ex delicto* for deceit, or in an action for breach of warrant of authority, where he signs as an agent for a fictitious principal.

4. English Bills of Exchange Act, 1882, § 23(1).

5. Byles on Bills (16th ed.), § 38.

6. **Signing in trade or assumed name.**— One of the leading New York cases on this subject is that of Brown v. Butchers & Drovers' Bank, 6 Hill (N. Y.), 443. Brown was sued as indorser of a bill, upon which the indorsement was made with a lead pencil, and in figures, thus, "1. 2. 8.," no name being written. Evidence was given strongly tending to show that the figures were in Brown's handwriting, and that he meant they should bind him as indorser, though it also appeared he could write. The court below charged the jury that, if they believed the figures upon the bill were made by Brown, as a substitute for his proper name, intending thereby to bind himself as indorser, he was liable. The jury found a verdict for the plaintiffs below, on which judgment was rendered, and Brown thereupon brought error. Nelson, Ch. J., in his opinion, said: "It has been expressly decided that an indorsement written in pencil is sufficient (Geary v. Physic, 5 B. & C. [Eng.] 234), and also that it may be made by a mark. George v. Surrey, 1 Moo. & M. (Eng.) 516. In a recent case in the King's Bench, it was held that a mark was a good signing within the Statute of Frauds; and the court refused to allow an inquiry into the fact whether the party could write, saying that would make no difference. Baker v. Dening, 8 Ad. & El. (Eng.) 94. And see Harrison v. Harrison, 8 Ves. (Eng.) 186; Addy v. Grix, 8 Ves. (Eng.) 504. These cases fully sustain the ruling of the court below. They show, I think, that a person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name, and he intend to bind himself."

In Jones v. Home Furnishing Co., 9 App. Div. (N. Y.) 103, 41 N. Y. Supp. 71, a note made payable to the "National Publishing Company," which was a name assumed by the plaintiff in carrying on his business and represented nothing else, was given for value. It was held that the defendant was estopped from alleging that the notes were made payable to a fictitious payee.

7. Melledge v. Boston Iron Co., 5 Cush. (Mass.) 158; Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240; Bank of Genesee v. Patchin Bank, 19 N. Y. 312.

CHAPTER IV.

Consideration.

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§ 52. Fraud and Mistake.

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§ 49. Necessity of consideration.

a. *In general.*— Whatever may be the law as to the presumption existing in favor of the validity and value of the consideration of commercial paper it must not be thought that, as between the immediate parties to a negotiable instrument, an actual, valid, and valuable consideration can be dispensed with.[8] The presumption as to the validity and value of the consideration only affects the proof; the burden of proof being thereby shifted from the person to whom the instrument is payable, to the person who is liable thereon.[9] In seeking to recover on a simple contract, it is a general rule that the plaintiff must allege and prove that the

8. Story on Promissory Notes, § 181. And see Oldacre v. Stuart, 122 Ala. 405, 25 South. 38.

9. Story says, in his work on Promissory Notes, § 181: "Promissory notes, like bills of exchange, enjoy, as has already been suggested, the privilege, conceded to no other unsealed instruments, of being presumed to be founded upon a valid and valuable consideration. Hence, between the original parties, and, *a fortiori*, between others, it is wholly unnecessary to establish that a promissory note was given for such a consideration; and the burden of proof rests upon the other party to establish the contrary, and to rebut the presumption of validity and value, which the law raises for the support of negotiable paper. Still, however, this does not dispense, as we shall presently see, with the existence of an actual, valid, and valuable consideration to support the note; but it only shifts the burden of proof from the plaintiff to the defendant."

contract was made on good consideration. But to this rule commercial paper is an exception.[10] It would seem then that as between a promisor and a promisee of a promissory note, or the drawer and drawee of a bill of exchange, a lack of a legal consideration would be a good defense in an action on such note or bill.[11]

b. *Want or failure of consideration as a defense.*— As between the original parties to a bill or note want of consideration is a good defense, and this is so although the words for value received are contained in the instrument.[12] This defense is available in any

10. Byles on Bills (16th ed.), 140, where it is said: "In the case of other simple contracts, the law presumes that there was no consideration until a consideration appear; in the case of contracts on bills and notes, a consideration is presumed till the contrary appear, or at least appear probable."

11. **Lack of consideration, when may be shown.**— In the case of Parish v. Stone, 14 Pick. (Mass.) 378, 25 Am. Dec. 378, the court said: "It is now well settled that to support a promise or other contract, not under seal, as a contract binding in law, there must be a legal consideration; and, in the application of this rule, it is quite immaterial whether the contract be by parol or in writing. The law, however, attributes so much force and effect to the formal written contract, and to the words 'value received,' as to presume, in the absence of proof, that there was a valuable consideration for the promise; and, if the promisor would avail himself of the defense that it was without consideration, it lays the burden of proof upon him satisfactorily to show that. But when the facts are disclosed, the burden of proof comes to be of little importance. It has therefore been the established rule of law, that in a suit upon a promissory note, against the promisor, by the promisee, or by an indorsee, without value given, or taking the note under such circumstances as to enable him to stand only upon the rights of the promisee, it is competent for the promisor to show, by way of defense, that the promise was gratuitous, and made without any legal consideration."

See also Bliss v. Negus, 8 Mass. 46; Hill v. Buckminster, 5 Pick. (Mass.) 393; Dickinson v. Hall, 14 Pick. (Mass.) 217, 25 Am. Dec. 390; Dyer v. Homer, 22 Pick. (Mass.) 257; Corlies v. Howe, 11 Gray (Mass.), 127.

In New York the rule has been laid down that if, in an action on a promissory note, evidence is introduced, tending to prove that a valid consideration did not exist, the burden of establishing the consideration upon the whole case rests upon the plaintiff, and the question should be determined upon the actual facts, instead of upon the presumption which the note affords. Carnwright v. Gray, 57 Hun (N. Y.), 98, 11 N. Y. Supp. 278, affd. in 127 N. Y. 92, 27 N. E. 835. See also Bruyn v. Russell, 60 Hun (N. Y.), 280, 14 N. Y. Supp. 591; Addison v. Enoch, 48 App. Div. (N. Y.) 111, 62 N. Y. Supp. 613; Rice v. Rice, 43 App. Div. (N. Y.) 458, 60 N. Y. Supp. 97; in the latter case it was held that where a note recites "for value received" this may be taken as an admission available against the signer sued upon it, although it does not have the effect of changing the burden of proof as to the existence of a consideration, which must be established by the plaintiff by a fair preponderance of proof.

12. **Want of consideration.**— It has been said in a New York case that a defense to a written promise to pay, which rests upon the single ground of the absence of a valuable consideration, does not deserve much favor in a court of justice. The rule of law which permits such a defense is almost peculiar to our own jurisprudence, and is condemned by the general sense of legislators and jurists, as well as of merchants. Fitch v. Redding, 6 N. Y. Super. Ct. (4 Sandf.) 130.

The consideration of a promissory note is always inquirable into between court, whether of law or equity.[13] This want of consideration may be total or partial; in the former case it affects the entire validity of the instrument, and in the latter case it only affects such validity *pro tanto*.[14] So also a failure of consideration is, in most jurisdictions, deemed a valid defense in an action on a note or bill.[15] But there is more difficulty as to a partial failure

the original parties. Slade v. Halsted, 7 Cow. (N. Y.) 322. If there is no consideration for a note it is a *nude pact*, and void as between the original parties to it. Pearson v. Pearson, 7 Johns. (N. Y.) 26; Schoonmaker v. Roosa, 17 Johns. (N. Y.) 301, 304, where the court said: "The consideration of a promissory note, as between the original parties themselves, may be inquired into; and if there is no consideration for the promise, it is *nudum pactum*, and cannot be enforced at law."

And see generally the following cases:

United States.—Bank of British No. Am. v. Ellis, Fed. Cas. No. 859; National Bank v. Brush, 6 Fed. 132.

Alabama.— Wynne v. Whisenant, 37 Ala. 46.

California.— Fisher v. Salmon, 1 Cal. 413, 54 Am. Dec. 297.

Connecticut. — Litchfield Bank v. Peck, 29 Conn. 384; Bunnell v. Butler, 23 Conn. 65.

Georgia.— Radcliffe v. Biles, 94 Ga. 480, 20 S. E. 359.

Illinois.— Forbes v. Williams, 13 Ill. App. 280.

Indiana.— Bush v. Brown, 49 Ind. 573, 19 Am. Rep. 695; Barner v. Moorehead, 22 Ind. 354.

Iowa.— Simpson Centenary College v. Tuttle, 71 Iowa, 596, 33 N. W. 74.

Kansas.— Blood v. Northup, 1 Kan. 28.

Maryland.— Beall v. Pearre, 12 Md. 550.

Massachusetts.— Hill v. Buckminster, 5 Pick. 391; Parish v. Stone, 14 Pick. 378, 25 Am. Dec. 378; Dickinson v. Hall, 14 Pick. 217, 25 Am. Dec. 390; Dyer v. Homer, 22 Pick. 257; Allen v. Furbish, 4 Gray, 504, 64 Am. Dec. 87.

Michigan.— Holland v. Hoyt, 14 Mich. 238.

Minnesota.— Ruggles v. Swanwick, 6 Minn. 526.

Missouri.— Harwood v. Brown, 23 Mo. App. 69.

Nebraska.— Smith v. Kinney, 32 Neb. 162, 49 N. W. 341; Feller v. Penrod, 57 Neb. 463, 77 N. W. 1085.

Pennsylvania. — Clement v. Reppard, 15 Pa. St. 111.

Tennessee.— Walker v. McConnico, 10 Yerg. 228.

13. Radcliffe v. Biles, 94 Ga. 480, 20 S. E. 359.

14. Allaire v. Hartshorne, 21 N. J. L. 665; Chitty on Bills (8th ed.), chap. 3, § 1, pp. 79–83; Bayley on Bills (5th ed.), 494; Story on Promissory Notes, § 187.

15. Story on Promissory Notes, § 187.

In New York the rule has existed from an early period that, if the object for which a note is given fail, no recovery can be had on the note. Denniston v. Bacon, 10 Johns. (N. Y.) 198; Jones v. Swan, 6 Wend. (N. Y.) 589. See also Britton v. Hall, 1 Hilt. (N. Y.) 528; Sawyer v. Chambers, 44 Barb. (N. Y.) 42; Bookstaver v. Jayne, 60 N. Y. 146.

The following cases are to the effect that failure of consideration is a good defense in an action on a bill or note:

United States.— Martin v. Bartow Iron Works, Fed. Cas. No. 9,157; Scudder v. Andrews, Fed. Cas. No. 12,564.

Connecticut.— Howe v. Raymond, 74 Conn. 68, 49 Atl. 854.

Delaware.—Mills v. Gilpin, 2 Harr. 32.

Illinois.— Capps v. Smith, 4 Ill. 177; Sturgis v. Miller, 80 Ill. 241.

Indiana.— In the case of Cornwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611, it was held, in an action upon a note given for bank notes, that a failure of consideration could not be based on the depreciation of the bank notes unless it be shown that the de-of consideration; in such case the rule in England and in many of the American States is that unless the facts are such that the amount to be deducted because of the partial failure can be definitely computed, or unless the amount is liquidated or in the nature of a certain debt, such partial failure of consideration will constitute no defense.[16] There are many States where a partial failure of consideration is permitted as a valid defense, although

fendants were unapprised of such depreciation when they made the note.

Iowa.— Swan v. Ewing, 1 Morris, 344.

Kansas.— Dodge v. Oatis, 27 Kan. 762.

Maine.— Folsom v. Mussey, 8 Me. 400, 23 Am. Dec. 522.

Massachusetts.— Hawks v. Truesdale, 12 Allen, 564.

Michigan.— Perkins v. Brown, 115 Mich. 41, 72 N. W. 1095.

Mississippi.— Campbell v. Brown, 7 Miss. 106; Pollen v. James, 45 Miss. 129; Stigler v. Anderson, 12 South. 831.

New Hampshire.— Pike v. Taylor, 49 N. H. 124.

North Carolina.— Washburn v. Picott, 14 N. C. 390.

Vermont.— Plumb v. Niles, 34 Vt. 230.

Where the article for which a note was given has proved of no value, it is no defense as a failure of consideration. Reed v. Prentiss, 1 N. H. 174, 8 Am. Dec. 50.

16. *England.*— Tricky v. Larne, 6 M. & W. 278; Sully v. Frean, 10 Exch. 535; Warwick v. Nairne, 10 Exch. 762. See also Chitty on Bills (8th ed.), pp. 85–88.

United States.— Greenleaf v. Cook, 2 Wheat. 13; Packard v. Clark, Fed. Cas. No. 10,656, 2 Sawy. 546; Elminger v. Drew, Fed. Cas. No. 4,416, 4 McLean, 388.

Alabama.— Lee v. White, 4 Stew. & P. 178.

Arkansas.— Desha v. Robinson, 17 Ark. 228.

California.— Reese v. Gordon, 19 Cal. 147.

Indiana.— Case v. Grim, 77 Ind. 565.

Maine.— Lloyd v. Jewell, 1 Me. 352, 10 Am. Dec. 73; Thompson v. Mansfield, 43 Me. 490.

New Hampshire.—Fletcher v. Chase, 16 N. H. 38.

North Carolina.— Washburn v. Picott, 14 N. C. 390; Evans v. Williamson, 79 N. C. 86.

Vermont.— Cragin v. Fowler, 34 Vt. 326, 80 Am. Dec. 680.

Partial failure is pro tanto a defense where the sum to be deducted can be ascertained by a computation. Pulsifer v. Hotchkiss, 12 Conn. 234; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380; Riddle v. Gage, 37 N. H. 519, 75 Am. Dec. 151; Wardsworth v. Smith, 23 Me. 562; Stevens v. Johnson, 28 Minn. 172, 9 N. W. 677.

Where the defendant relies on a partial failure of consideration as a defense, he must show to what extent the consideration has failed; and if he does not do so, the plaintiff will be entitled to the full amount of the note. Bisbee v. Torinus, 26 Minn. 165, 2 N. W. 168.

Rule as to real estate.— A partial failure of title constitutes no defense to a suit on a note given for real property. Wentworth v. Goodwin, 21 Me. 150; Morrison v. Jewell, 34 Me. 146; Thompson v. Mansfield, 43 Me. 490. To constitute a valid defense to a note given for the conveyance of real estate, there must be a total and entire failure of title. Jenness v. Parker, 24 Me. 289; Hodgdon v. Golden, 75 Me. 293, 295. See also Reddick v. Mickler, 23 Fla. 335, 2 South. 698; Peden v. Moore, 1 Stew. & P. (Ala.) 71, 21 Am. Dec. 649. The rule is otherwise under a statute permitting the defense of a partial failure of consideration; Schuchman v. Knoebel, 27 Ill. 175. And also where there was a failure to comply with the terms of a contract for the sale of lands in accordance with which the note was given. Ewing v. Wrightman, 52 App. Div. (N. Y.) 416, 65 N. Y. Supp. 187.

the amount be unliquidated,[17] and in some States such partial failure is declared a defense by statute.[18]

c. *Statutory rule as to absence or failure of consideration.*— The Negotiable Instruments Law provides that: "Absence or fail- " ure 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."[20] As we have already said, the better rule at common law seems to have been that a partial failure of consideration was available as a defense *pro tanto,* only when it was a matter capable of definite computation, and not mere unliquidated damages. The statute has changed this rule in all those jurisdictions where it has been adopted.

d. *Requirement of consideration in case of acceptance or indorsement.*— An acceptance creates a contractual relationship between the acceptor and payee or holder of a bill of exchange which binds the acceptor to pay a certain sum of money to such payee or holder, whether the acceptor has or has not funds in his hands belonging to the drawer.[21] This contract must be based upon a valuable consideration;[22] but this consideration is not insuf-

17. **Partial failure** of consideration is allowed as a defense in Massachusetts, even though the damages be unliquidated. Harrington v. Stratton, 22 Pick. (Mass.) 510; Parish v. Stone, 14 Pick. (Mass.) 198; Perley v. Balch, 23 Pick. (Mass.) 283; Howard v. Ames, 3 Metc. (Mass.) 308; Goodwin v. Morse, 9 Metc. (Mass.) 278; Stacy v. Kemp, 97 Mass. 166; Wentworth v. Dows, 117 Mass. 14.

A similar rule exists in New York (Sill v. Rood, 15 Johns. (N. Y.)), where it was held that where a note is given for the price of a chattel, the defendant may, where the defense goes to the whole cause of action, show deceit in the sale, and thus avoid the note. In Spalding v. Vander Cook, 2 Wend. (N. Y.) 431, it was held that the partial failure of the consideration of a promissory note might be given in evidence to reduce the damages, where a part of the articles for which the note was given were manufactured in an unskilful manner, and not in compliance with the terms of the contract. See also Barton v. Stewart, 3 Wend. (N. Y.) 236; McAllister v. Reab, 4 Wend. (N. Y.) 483; Judd v. Dennison, 10 Wend. (N. Y.) 512; Payne v. Cutler, 13 Wend. (N. Y.) 605.

Among the decisions of other States may be cited Herbert v. Ford, 29 Me. 546; Rasberry v. Moye, 23 Miss. 320; Wyckoff v. Runyon, 33 N. J. L. 107.

18. Among these States are Illinois (see Schuchman v. Knoebel, 27 Ill. 175); Indiana (see Webster v. Parker, 7 Ind. 185); Georgia (see Martin v. Barton Iron Works, Fed. Cas. No. 9,157); Missouri (see Barr v. Baker, 9 Mo. 850); New Hampshire (see Nichols v. Hunton, 45 N. H. 470).

20. Neg. Inst. Law (N. Y.), § 54. See Appendix for same section of statutes of other States.

21. Flournoy v. First Nat. Bank, 79 Ga. 810, 2 S. E. 547; Heaverin v. Donnell, 15 Miss. 245, 45 Am. Dec. 302; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956; Raborg v. Peyton, 2 Wheat. (U. S.) 385, 4 L. Ed. 268.

22. Cameron v. Chappell, 24 Wend. (N. Y.) 94; Hollister v. Hopkins, 13 Hun (N. Y.), 210.

ficient because it moves from the drawer and not from the payee,[23] nor is it any defense that there was no consideration as between the drawer and payee.[24] The only requirement is that the acceptor shall have received some valuable consideration for his acceptance,[25] except in the case of an accommodation acceptance, where the fact that there was no consideration for an acceptance of a bill of exchange does not affect the liability of the acceptor.[26] The acceptance of the bill implies a sufficiency of consideration. A bill of exchange itself implies a representation by the drawer that the drawee is in funds to meet it, and the contract of the former is that the latter will accept and pay according to the terms of the bill; the subsequent acceptance constitutes an admission of the truth of the representation, which the drawee and acceptor is not allowed thereafter to retract.[27] There must be a valuable consideration to support an indorsement of a negotiable instrument;[28] but where an indorsement is made for the accommodation of one of the parties, or to give credit to the instrument, the law imputes a consideration.[29] This subject will be further discussed in another section.[30]

23. Hunt v. Johnson, 96 Ala. 130, 11 South. 387.

24. Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555.

25. Hollister v. Hopkins, 13 Hun (N. Y.), 210.

The forbearance necessarily granted the drawer resulting from an acceptance is a sufficient consideration for such acceptance. Mechanics' Bank v. Livingston, 33 Barb. (N. Y.) 458.

26. Townsley v. Sumrall, 2 Pet. (U. S.) 170, 7 L. Ed. 386; Law v. Brinker, 6 Colo. 555; Nowak v. Excelsior Stone Co., 78 Ill. 307; Grant v. Ellicot, 7 Wend. (N. Y.) 227; Arnold v. Spague, 34 Vt. 402.

27. Heuertematte v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657.

28. National Bank of Rising Sun v. Brush, 6 Fed. 132; Newton Wagon Co. v. Diers, 10 Neb. 284, 4 N. W. 995; Fitzhugh v. Love, 6 Call (Va.), 5, 3 Am. Dec. 568.

29. As to accommodation indorsements see Bank of United States v. Weisiger, 2 Pet. (U. S.) 331, 481, 7 L. Ed. 441, 492; Brenner v. Gundersheimer, 14 Iowa, 82; Bailey v. Lane, 21 How. Pr. (N. Y.) 475; as to indorsement for credit see Vowell v. Lyles, Fed. Cas. No. 17,021, 1 Cranch C. C. 428. The original consideration passing from the payee to the maker of a note is sufficient to sustain an action against an indorser before delivery. Carroll v. Weid, 13 Ill. 682, 56 Am. Dec. 481; Kracht v. Obst, 14 Bush (Ky.), 34; Rule v. Williams, 7 Ky. L. Rep. 662; Marr v. Johnson, 9 Yerg. (Tenn.) 1.

A promise to deliver coal in the future is a sufficient consideration to support an acceptance of a draft for the purchase price. Knowledge on the part of the bank, when discounting drafts, that they were given in consideration of a promise to deliver coal in the future will not affect its right to enforce payment of them, although the promise is not complied with, if it took the drafts for value before maturity and before the time for the delivery of the coal had arrived. Tradesmen's Nat. Bank v. Curtis, 167 N. Y. 194, 60 N. E. 429, 52 L. R. A. 430.

30. See section 55, *post*.

§ 50. Sufficiency of consideration.

a. *Consideration must be valuable.*— Story defines a valuable consideration as follows: "It may, in general terms, be said to consist either in some right, interest, profit, or benefit, accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility, or act, or labor, or service, on the other side. And, if either of these exists, it will furnish a sufficient valuable consideration to sustain the making or indorsing of a promissory note in favor of the payee or other holder." [31] Without a valuable consideration the contract of a negotiable instrument, as between the original parties thereto, and as between their immediate successors in interest, with knowledge of the defect, cannot be enforced. Any act of the plaintiff from which the defendant derives a benefit, or from which the plaintiff may sustain any detriment or inconvenience, is a sufficient consideration to support a promise.[32] It is not necessary that the promisor should be benefited by the consideration; it will be sufficient if it appear that the consideration is based upon an injury to the promisee caused by the promisor.[33]

b. *Statutory provision as to valuable consideration.* — The Negotiable Instruments Law provides that: "Value is any con-

31. Story on Promissory Notes, § 186.

A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Com. Dig., Action on the Case, Assumpsit, B. 1–15; Currie v. Misa, L. R., 10 Exch. 153, 162.

Byles, in his work on Bills (16th ed.), p. 150, says: "Valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract; or by an antecedent debt or liability, and that whether the bill be payable on demand or at a future time; a lien, also, whether arising from contract or from implication of law, makes the holder a holder for value *pro tanto*. Where value has at any time been given for a bill, the holder is a holder for value as regards the acceptor and all parties to the bill prior to such time. It may suffice to observe here, for the sake of the unprofessional reader, that a consideration is, in general, either some detriment to the plaintiff, sustained for the sake or at the instance of the defendant, or some benefit to the defendant moving from the plaintiff."

32. Holt v. Robinson, 21 Ala. 106, 56 Am. Dec. 240. See also Holley v. Adams, 16 Vt. 206, 42 Am. Dec. 508.

33. Hawxhurst v. Ritch, 6 N. Y. Supp. 134; Matthison v. Hanks, 2 Hill (S. C.), 625, where it was held that a note given for an injury to the payee, caused by an assault and battery committed by the maker, is supported by a good and legal consideration; Wells v. Sutton, 85 Ind. 70.

In the case of Wright v. McKittrick, 2 Kan. App. 508, it was said: "There must, of course, have been a legal and sufficient consideration for the first note, but it is not necessary, a was assumed by the court in the instructions, that the services should have been rendered at the special request of the maker of the note, or that any special benefit should have accrued to him. Any forbearance given, or detriment or loss suffered, by the payee, was sufficient."

"sideration sufficient to support a simple contract. An antecedent "or pre-existing debt constitutes value; and is deemed such "whether the instrument is payable on demand or at a future "time."[34] This is also the rule as stated in the English Bills of Exchange Act,[35] with the exception that it is there provided that an antecedent debt *or liability* is deemed a sufficient consideration. The insertion of the words "or liability" probably extend the law as it existed in England prior to the statute.[36] The rule as stated in the Negotiable Instruments Law is probably a legislative declaration of an existing common-law rule.[37]

c. *Adequacy.*— In the absence of fraud the inadequacy of the consideration of a negotiable instrument is not material, and will constitute no defense in an action thereon.[38] It is not the province of a court of law to look closely to the adequacy or inadequacy of a consideration.[39] It has been stated as a general rule that, "To support a note or other contract, it is not necessary that the consideration therefor shall be equal in pecuniary value to the amount of the obligation incurred by the note or contract. It is enough, generally, that no part of the consideration, upon which it was founded, was wanting at the time the obligation was incurred, and

34. Neg. Inst. Law (N. Y.), § 51. See Appendix for same section in statutes of other States.

35. Eng. Bills of Exch. Act, 1882, § 27 (r.).

36. Chalmers on Bills of Exchange (5th ed.), p. 81.

37. Brooklyn City, etc., R. R. Co. v. Nat. Bank, 102 U. S. 14.

38. *In New York* the following cases may be cited as sustaining the principle of the text: Cowee v. Cornell, 75 N. Y. 91, 99, 31 Am. Rep. 428, where the court says: "Assuming, then, as I think we must, that there was no error as matter of law in the finding of the referee that this note was given for a valuable consideration, and that the *inadequacy of that consideration* is something with which we have no concern if the parties dealt on equal terms, the only point remaining to consider is the relations existing between the parties at the date of the note;" Worth v. Case, 42 N. Y. 362, 369. Mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to a promissory note. Earl v. Peck, 64 N. Y. 596; Miller v. McKenzie, 95 N. Y. 575, 47 Am. Rep. 85; Johnson v. Titus, 2 Hill (N. Y.), 606; Velie v. Titus, 60 Hun (N. Y.), 405, 15 N. Y. Supp. 467; Root v. Strang, 77 Hun (N. Y.), 14, 28 N. Y. Supp. 273; *In re* Flagg's Estate, 27 Misc. (N. Y.) 401, 59 N. Y. Supp. 167.

See also the following cases in other States:

United States.— Boggs v. Wann, 58 Fed. 68.

Georgia.—Anstel v. Rice, 5 Ga. 472.

Illinois.—Forbes v. Williams, 15 Ill. App. 305.

Indiana.— Walford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Wheelock v. Barney, 27 Ind. 462.

Louisiana.— Righter v. Aleman, 4 Rob. 45.

Massachusetts.— Dean v. Carruth, 108 Mass. 242.

New Jersey.— Petty v. Young, 43 N. J. Eq. 654, 12 Atl. 392; Beninger v. Corwin, 24 N. J. L. 257.

Vermont.—Giddings v. Giddings, 51 Vt. 227, 31 Am. Rep. 682.

Virginia.— Loftus v. Maloney, 89 Va. 576, 16 S. E. 749; Jones v. Degge, 84 Va. 685, 5 S. E. 799.

39. Anstel v. Rice, 5 Ga. 472.

that no part of it has subsequently failed. And, as to all considerations founded upon specific articles of property, parted with by the obligee to the obligor, and which have not a specific, fixed, and certain pecuniary value, the court, upon the question of consideration, will not inquire into their actual pecuniary value, but will leave the parties to such estimates thereof as they have formed in making their contract." [40] As an example, where upon an exchange of horses, one person gave to the other his note for what was considered the difference in value, the maker of the note cannot set up as a defense that as a matter of fact the horses were equal in value.[41] While inadequacy of consideration is no defense, it is evidence of *mala fides,* and if there is gross inadequacy it may, in some cases, be deemed conclusive evidence of fraud.[42]

d. *Where rights, interests, or property are valueless.*— In the absence of an express warranty or of fraud the fact that goods given as a consideration of a promissory note are worthless will not affect the validity of such note.[43] But where the consideration consists of an alleged title or interest in a chattel which is proved defective and invalid, the consideration fails, and no recovery can be had upon the instrument based thereon.[44] As where a note

40. Worth v. Case, 42 N. Y. 362, 369.

41. Beninger v. Corwin, 24 N. J. L. 257.

42. Forbes v. Williams, 15 Ill. App. 305; Green v. Lowry, 38 Ga. 548; Abbe v. Newton, 19 Conn. 20.

The rule is well settled by the weight of modern authorities, both in this country and England, that where fraud or illegality in the inception of the note is shown by the maker, the burden of proof is then cast upon the indorsee to show that he is an innocent holder. Jordan v. Grover, 99 Cal. 194, 33 Pac. 889.

Where the parties are competent to contract, relief will not be decreed on the ground of inadequacy of consideration, unless the inequality be so gross as to shock the conscience, and of itself amount to proof of fraud. Jones v. Degge, 84 Va. 685, 5 S. E. 799.

43. O'Neal v. Bacon, 1 Houst. (Del.) 215; Knowles v. Parker, 7 Metc. (Mass.) 30; Lester v. Webb, 5 Allen (Mass.), 45. A note given for the sale of a chattel fraudulently represented by the seller to be of great value, when in fact it was of no value, is without consideration and void. Sill v. Rood, 15 Johns. (N. Y.) 230.

In the absence of any showing of fraud or of warranty, it was held that it was no defense in an action on a note for the price of a cow, that she was worthless at the time of the sale. Bryant v. Pember, 45 Vt. 487.

44. **Sale of free man as slave.**— Cases have arisen where men were sold as slaves and a note given for the purchase price, and it was invariably held that there was an entire failure of consideration, and the payee could not recover. Crawford v. Beard, 4 J. J. Marsh. (Ky.) 187. The court said: "But the sale of a free man for a slave, vests in the purchaser no right, legal, equitable, or moral. It vests in him no right to the person, nor to his services. Every claim of proprietorship, which he prefers to him, is an unauthorized degradation of his legal equality. Every exertion of the authority of a master over him, is a trespass on his rights as a free man. If any advantage should be de-

was given for a lease which was illegal, null, and void, it was held that there was an entire failure of consideration.[45] And where a note, payable in installments, was given for a premium on an insurance policy, which provided that the policy should not be in force and should be wholly void during any default in the payment of any of such installments, it was held that such note was not enforceable because of a want of consideration.[46] Where the consideration of a negotiable instrument consists of real or personal property sold to the obligor, the title of which is not in the obligee, there is such a failure of consideration as will defeat an action upon the instrument.[47] But it is no defense to an action on a note that it was given as part consideration of land sold by the payee, which he covenanted was free from incumbrance, but was subject to a mortgage executed by him for more than the amount of the note.[48]

rived from his constrained service, the purchaser is under a clear moral obligation to reward him for it, and is under no sort of obligation to the vendor. Instead of benefiting the vendor, he injures his vendee by selling to him a free man. * * * If, in such a case, there be not a total failure of consideration, it would be difficult to find a case in which it could be admitted that the consideration had failed entirely." See also Bailey v. Cromwell, 4 Ill. (3 Scam.) 71; Richardson v. McFadden, 13 Tex. 278; Livingston v. Bain, 10 Wend. (N. Y.) 384.

Sale and delivery of personal property is a good consideration although the seller had no title. Linton v. Porter, 31 Ill. 107. But see Bliss v. Clark, 3 Allen (Mass.), 342.

45. Kinzie v. City of Chicago, 3 Ill. (2 Scam.) 187.

46. Yost v. American Ins. Co., 39 Mich. 531. But see Marskey v. Turner, 81 Mich. 62, 45 N. W. 644.

The issuing of a policy of insurance by an insolvent insurance company is a good consideration for a promissory note given for the premium, if the insolvency of the company was not known by its officers or agents at the time. Lester v. Webb, 5 Allen (Mass.), 569.

47. Stark v. Henderson, 30 Ala. 438; French v. Carr, 7 Ill. 664; Davis v. McVickers, 11 Ill. 327, in which the note was given for the purchase price of land which the payee agreed to convey to the maker. The court said: "The agreement to execute a deed was not the real consideration of the notes; the true consideration was the estate agreed to be conveyed. If it is not in the power of the plaintiff to make a good title to the estate, the defendant is not bound to pay the purchase money. He cannot be compelled to pay the notes, unless he can obtain that for which they are given. If he cannot acquire the title to the estate purchased, there is a failure of consideration, which may be set up to defeat a recovery of the notes." Vickroy v. Platt, 7 Kan. 238; Durment v. Tuttle, 50 Minn. 426, 52 N. W. 909; Jones v. Shaver, 6 Mo. 642; Wellman v. Dismukes, 42 Mo. 101; Chaffee v. Garrett, 6 Ohio, 421; Stewart v. Insall, 9 Tex. 397; Roehl v. Pleasants, 31 Tex. 45, 98 Am. Dec. 514; Garrison v. King, 35 Tex. 183; Earnest v. Moline Power Co., 8 Tex. Civ. App. 159, 27 S. W. 734. But see Lough v. Bragg, 18 Minn. 121.

Conveyance of interest.—A note given in consideration of a conveyance by the payee of all his interest in a certain tract of land, is not rendered invalid by the fact that the payee had no interest in the land. Perkins v. Bumford, 3 N. H. 522.

48. Lattin v. Vail, 17 Wend. (N. Y.) 188.

e. *Exchange of commercial paper.*— It is a well-established rule that a promissory note given by the maker, in exchange for a promissory note given by the payee, is for a valuable consideration, and is in no sense an accommodation paper, although made for the mutual accommodation of the parties.[49] And this is so though the note given in exchange is worthless.[50] And it has been held that an indorsement of C.'s note by A. to B. is a good consideration for a note from B. to A., and it is no defense to B.'s note that he failed to recover against C. on the note indorsed to him by A.[51] But a note given in consideration of the sale of another note, void for usury, is without consideration and therefore not enforceable.[52]

f. *Love and affection.*— A consideration founded on love and affection, as that naturally existing between husband and wife, father and son, etc., or upon gratitude, is known as a good consideration, as distinguished from a valuable consideration; and is not of itself sufficient to support the obligation of a bill or note.[53]

49. Whittier v. Eager, 1 Allen (Mass.), 499; Higginson v. Gray, 6 Metc. (Mass.) 212; Backus v. Spalding, 116 Mass. 418; Dockray v. Dunn, 37 Me. 442; Williams v. Banks, 11 Md. 198; Savage v. Ball, 17 N. J. Eq. 142; Mississippi R. Co. v. Scott, 8 Miss. 79; Farber v. National Forge Co., 140 Ind. 54, 39 N. E. 249.

New York cases.— See Odell v. Greenly, 4 Duer, 358; Cohn v. Hussen, 57 N. Y. Super. Ct. 238, 6 N. Y. Supp. 897; Elwell v. Chamberlain, 17 N. Y. Super. Ct. (4 Bosw.) 320, affd. in 31 N. Y. 611; Newman v. Frost, 52 N. Y. 422; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46, affg. 60 Hun, 583, 14 N. Y. Supp. 911; Mutual Loan Assn. v. Brandt, 34 Misc. 400, 69 N. Y. Supp. 652, revd. in 71 N. Y. Supp. 770.

50. Rice v. Grange, 131 N. Y. 149, 30 N. E. 46.

51. Luke v. Fisher, 10 Cush. (Mass.) 271.

52. Sweet v. Spence, 35 Barb. (N. Y.) 44.

53. The leading New York case on this subject is that of Fink v. Cox, 18 Johns. (N. Y.) 145, 9 Am. Dec. 191, where it appeared that a father, from affection, merely, gave to his son a promissory note for $1,000, payable to him or order, sixty days after date. In an action of assumpsit, brought by the son against the executor of his father, to recover the amount of the note, it was held that the action could not be maintained, for it was not a *donatio causa mortis*, nor a valid gift of so much money, but a mere promise to give; and blood or natural affection is not a sufficient consideration to support a simple executory contract. See also Phelps v. Phelps, 28 Barb. (N. Y.) 121; Hadley v. Reed, 58 Hun (N. Y.), 608, 12 N. Y. Supp. 163. See also Head v. Baldwin, 83 Ala. 132, 3 South. 293; Raymond v. Sellick, 10 Conn. 480; Pennington v. Gittings, 2 Gill & J. (Md.) 208; *In re* Campbell's Estate, 7 Pa. St. 100, 47 Am. Dec. 503.

In the case of Kern's Estate, 171 Pa. St. 55, 62, 33 Atl. 129, the court said: "Natural love and affection are a good consideration for an executed contract or gift, and in this State a moral obligation is a good consideration for an express promise, but natural love and affection are not a moral obligation in such sense as will support even an express promise to make a gift." See also *In re* Kline's Estate, 9 Pa. Dist. 386.

In the case of West v. Cavins, 74 Ind. 265, it was held that, while natural love and affection is a good consideration for a deed or an executed contract as between the parties thereto, it is not so for an executory contract;

No recovery can be had on a note executed by a father in favor of a trustee, to secure a settlement on his minor children for their support.[54] But services rendered by a daughter to her father, after she became of age and before her marriage, are a sufficient consideration for a note made to her by her father.[55]

g. *Agreement to marry.*— An agreement to marry, which is afterward fulfilled, is a sufficient consideration for a note made by the intended husband.[56] And it has been held that delay by a man to fulfil a promise to marry, and services rendered to him by the woman during the engagement in purchasing and taking care of his clothing, are a sufficient consideration for a promissory note given by him to her, notwithstanding that other reasons in addition to these may have induced him to give it.[57] A promissory note from a husband to his wife, made after their marriage, either as a gift or in pursuance of a verbal antenuptial contract, is not valid against the maker's estate, either as founded on a valuable consideration, or as a gift *inter vivos.*[58]

h. *Gratuities and agreements to contribute.*— An agreement or promise to make a gift in the future, not being based upon a valuable consideration, is not enforceable, even when put in the form of a promissory note.[59] While it has generally been held that a note or bill may be made the subject of a valid *donatio causa mortis* by the payee;[60] it is nevertheless a well-established rule that a maker or drawer cannot give his own note or bill as a *donatio causa mortis.*[61]

nor will the desire of a testator to rectify an inequality in the provisions of his will constitute a sufficient consideration to support a note given to one of his brothers for that purpose only.

54. Gates v. Renfroe, 7 La. Ann. 569.

55. Gamwell v. Mosely, 11 Gray (Mass.), 173.

56. Wright v. Wright, 54 N. Y. 437; Banfield v. Rumsey, 4 Thomp. & C. (N. Y.) 322. But a mere engagement to marry is not of itself sufficient. Blanshaw v. Russell, 52 N. Y. Supp. 963, citing Whitaker v. Whitaker, 52 N. Y. 368; Cloyes v. Cloyes, 36 Hun (N. Y.), 145.

57. Prescott v. Ward, 10 Allen (Mass), 203. But an expectation on the part of the payee that the maker would marry her is not sufficient consideration to support the note. Raymond v. Sellick, 10 Conn. 480.

58. Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608.

59. Phelps v. Phelps, 28 Barb. (N. Y.) 121; Fink v. Cox, 18 Johns. (N. Y.) 145; Kirkpatrick v. Taylor, 43 Ill. 207; Williams v. Forbes, 114 Ill. 167, 28 N. E. 463; Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608; Shaw v. Camp, 160 Ill. 425, 43 N. E. 608; Johnston v. Griest, 85 Ind. 503; Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365.

60. Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415; Jones v. Deyer, 16 Ala. 226; Connor v. Root, 11 Colo. 183, 17 Pac. 773; Stevenson's Admr. v. King, 81 Ky. 425; Kiff v. Weaver, 94 N. C. 274.

61. *In New York* the case of Whitaker v. Whitaker, 52 N. Y. 368, is

An exception exists in many jurisdictions in case of a promissory note given by the maker to a church, college, or other like institution, upon the faith of which money has been expended or obligations have been incurred; in such cases the notes cannot be defended on the ground of want of consideration.[62] The reason for this exception is generally placed upon the ground that the expenditure of money or the assumption of liability by the donee on the faith of the promise constitutes a valuable and sufficient consideration.[63] In some cases, however, it has been asserted that

frequently cited as sustaining this proposition. In that case the defendant produced a note signed by the deceased, for $4,000, payable to the defendant one day after date. The only consideration claimed for the note was that the defendant, aside from her household duties, had aided in the out-of-door work upon her husband's farm, and that the deceased gave the note for the purpose of providing for her support and maintenance. The court said: "The text-books all substantially agree that a meritorious consideration is insufficient to justify the interference of equity to enforce an executory promise for the benefit of a wife or child. It seems to me the true policy of the law to avoid giving life in equity to this sort of last will. It is a method most open to fraud. Although a will requires two witnesses, a note requires none. It requires no great skill so to counterfeit a man's signature as to find witnesses to believe in its genuineness; and a little strength is then added by what is well regarded as the weakest evidence, oral confession, of the deceased. While a man lives, a legal obligation rests upon him to sustain his wife and children. When he dies, the law declares what is the proper share of his property — the legal and equitable share — that belongs to each of them. If either claim more, the claim should be founded in the law. If it do not allow enough, it may be safely enlarged by statute." See also Matter of James, 146 N. Y. 78, 40 N. E. 876; Sheldon v. Button, 5 Hun (N. Y.), 110; Dodge v. Pond, 23 N. Y. 69; Carr v. Silloway, 111 Mass. 24; Warren v. Durfee, 126 Mass. 338; Loring v. Sumner, 23 Pick. (Mass.) 98; Bartlett's Petition, 163 Mass. 509, 40 N. E. 899; Tracey v. Alvord, 118 Cal. 654, 50 Pac. 757; Flitt v. Pattee, 33 N. H. 520; Holly v. Adams, 16 Vt. 338; *In re* Sutch's Estate, 201 Pa. St. 305, 50 Atl. 943.

62. Barnes v. Perine, 12 N. Y. 18; Hammond v. Shepard, 29 How. Pr. (N. Y.) 188; Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500. In this last case A. agreed to contribute a sum of money for the purpose of discharging a mortgage on church property, on the consideration that the church would raise the balance by voluntary subscription, and the church, through its pastor, as its agent, promised to, and did, make the effort, and performed the condition; it was held that the promise became obligatory, and a note given in fulfilment thereof was based upon a sufficient consideration. See also Bryan v. Dyer, 28 Ill. 188; Johnston v. Wabash College, 2 Ind. 555; Roche v. Roanoke Class. Sem., 56 Ind. 198; Garrigus v. Home, etc., Missionary Soc., 3 Ind. App. 91, 28 N. E. 1009; Wisner v. McBride, 49 Iowa, 220; Simpson College v. Bryan, 50 Iowa, 293; Trustees of Amherst Acad. v. Cowles, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; Coch v. Lay, 38 Mo. 147; *In re* Helfenstein, 77 Pa. St. 328, 18 Am. Rep. 449; Filomath College v. Hartless, 6 Ore. 158; Irwin v. Lombard University, 56 Ohio St. 9, 46 N. E. 63.

63. **Reason for rule.**— In the case of Barnes v. Perine, 12 N. Y. 18, a subscription was made by the defendant for the purpose of building a church. The terms of such subscription prescribed the amount to be collected and how such amount was to be paid, and other matters pertaining to the building of the church. The terms of this subscription were complied with. In an action upon such subscription, it was maintained that it was without

the donor or subscriber is precluded from denying the validity of the consideration under the doctrine of estoppel.[64]

i. *Moral obligation as consideration.*—A mere moral obligation is not a sufficient consideration to support a promissory note between the parties to such obligation. There must be a consideration esteemed valuable at law, before an express promise can

consideration. The court, in discussing this question, said: "A consideration for an undertaking may consist of a benefit or advantage to the promisor, or any obligation, harm, inconvenience, or disadvantage incurred by the promisee upon the faith of the promise; and, in the absence of fraud or other undue influence, the validity of the promise does not ordinarily depend upon the amount or value of the consideration as an equivalent for the thing promised. No pecuniary benefit resulted to the defendant from the building of the new house of worship, and he was in no wise interested in the enterprise, except as the entire public were interested in a matter intimately affecting the highest interests of all, and there is therefore no consideration of benefit to the defendant which will uphold the promise. The evidence, however, discloses a good consideration, in the acts done and the obligations incurred by the promisee upon the strength of the promise of the defendant and at his request." See also McCauley v. Billenger, 20 Johns. (N. Y.) 89; Hamilton College v. Stewart, 1 N. Y. 581.

Where a voluntary promise to pay money, expressly or impliedly, either imposes upon the promisee some obligation, or requests of the promisee the performance of services upon the strength of the promise, if the conditions are met, there is a consideration which will suffice to uphold the agreement, and the promisee may compel payment. Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325; Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352, in which case an action upon a subscription could not be maintained, because "there was no evidence, express or implied, on the face of the subscription paper or any evidence outside of it that the corporation or its trustees, did or undertook to do anything on the invitation or request of the subscribers."

64. Doctrine of estoppel.—This seems to be the view of the matter taken by the Iowa Supreme Court in the case of Simpson v. Tuttle, 71 Iowa, 596, 33 N. W. 74, where the court said: "Where a note, however, is based upon a promise to give for the support of the objects referred to, it may stil be open to this defense (want of consideration) unless it shall appear that the donee has, prior to any revocation, entered into engagements, or made expenditures based upon such promise; so that he must suffer loss or injury if the note is not paid. This is based upon the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration." See also Reinensnyder v. Gans, 110 Pa. St. 17, 2 Atl. 425; Ricketts v. Scothorn, 57 Neb. 51, 77 N. W. 365.

But while a note, amounting to a mere gift, is open to the defense of want of consideration, yet that defense cannot be made to it if money has been expended or liabilities have been incurred in reliance upon the note. If money has been expended or liabilities have been incurred, which, by legal necessity, must cause loss or injury to the person so expending money or incurring liability if the note is not paid, the donor or maker thereof is in good conscience bound to pay; and the gift will be upheld on the ground of estoppel, and not by reason of any valid consideration in the original undertaking. Miller v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797. See also Pratt v. Baptist Soc., 93 Ill. 475, 34 Am. Rep. 187; Beach v. First M. E. Church, 96 Ill. 177; Hudson v. Green Hill Sem., 113 Ill. 618; Cottage Street M. E. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286.

create or revive a legal liability.[65] And a mere moral obligation, although coupled with an express promise, is not a sufficient consideration unless founded on a former legal liability.[66] It has been held that a promissory note executed by a guardian to make good a loss which his ward had suffered and for which such guardian was not legally, but perhaps morally, obligated to pay, was based upon a sufficient consideration and was binding upon the guardian.[67] And also where the statute of limitations has run against a claim, it has been held that a note given therefor is based upon a sufficient consideration, although there is no legal liability upon the maker to pay the claim.[68]

j. *Advancements to heir.*— An advancement is an irrevocable gift in anticipation of the share of the heir in the estate;[69] what is given as an advancement becomes the absolute property of the child to whom it is made. The father has no claim upon it, and cannot recover it. It therefore follows that an advancement previously given and received constitutes no consideration for a promissory note subsequently executed by the child to the father.[70]

k. *Notes for patent rights.*— It has been generally held that a note for a patent right which is of no value, either because it is useless or because the patent is void, is without consideration and therefore not enforceable.[71] The fact that the vendor believed, at the time of the sale, that the patent was valid is not material.[72] It should be noticed, in this connection, that an invention which is not useful cannot be patented, and therefore a patent for a use-

65. Nightingale v. Barney, 4 G. Greene (Iowa), 106; Eagan v. Eagan, 55 Hun (N. Y.), 610, 8 N. Y. Supp. 899.

66. Nash v. Russell, 5 Barb. (N. Y.) 556.

67. Scott v. Carruth, 9 Yerg. (Tenn.) 418.

68. McKelvey v. Tait, 3 Rich. Law (S. C.) 339; Fall v. Dial, 14 S. C. 247; Wheaton v. Wilmarth, 13 Metc. (Mass.) 422.

69. *In re* Miller's Will, 73 Iowa, 123, 34 N. W. 769; *In re* Lyon's Estate, 70 Iowa, 375, 30 N. W. 642.

70. Marsh v. Chown, 104 Iowa, 556, 73 N. W. 1046.

71. Tilson v. Gatling, 60 Ark. 114, 29 S. W. 35; Higgins v. Strong, 4 Blackf. (Ind.) 182; Mullikin v. Latchem, 7 Blackf. (Ind.) 136; New v. Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; First Nat. Bank v. Peck, 8 Kan. 660; Bierce v. Stocking, 11 Gray (Mass.), 174; Lester v. Palmer, 4 Allen (Mass.), 145; Keith v. Hobbs, 69 Mo. 84; Joliff v. Collins, 21 Mo. 338; Cummings v. Leedy, 114 Mo. 454, 21 S. W. 804; Earl v. Page, 6 N. H. 477, 26 Am. Dec. 711; Saxton v. Dodge, 57 Barb. (N. Y.) 84; Darst v. Brockway, 11 Ohio, 462; Rowe v. Blanchard, 18 Wis. 441, 86 Am. Dec. 783; Clough v. Patrick, 37 Vt. 421.

In New York it has been held that if, at the time of the improvement of a machine, it was useful and valuable, the consideration of a note given by a purchaser for the right to vend, etc., is not impeached by showing that a subsequent improvement of the original machine had rendered the improvement valueless. Harmon v. Bird, 22 Wend. 113.

72. Dickins v. Hall, 14 Pick. (Mass.) 217, 25 Am. Dec. 390.

less invention is void.[73] If an invention is useful, in the sense that it may be applied to some practical or beneficial purpose, it is patentable, and the degree of its utility or practical value does not affect the validity of the patent. If there is a valid patent, in this sense, the court will not inquire into the adequacy of the consideration.[74]

1. *Acts and services deemed sufficient consideration.*— A note, the consideration for which was the promise of the payee never again to refer to or speak of the maker's criminal intimacy with the payee's wife, is valid and enforceable.[75] The good-will in a partnership or other business is a sufficient consideration;[76] as is also the naming a child after the promisor.[77] So also a promissory note made payable on condition that the payee shall abstain from intoxicating liquors during a specified time, imports a sufficient consideration on proof that its terms have been complied with.[78] A note may be given for services to be rendered, and upon the rendition of the services the consideration becomes complete and will be sufficient to sustain the validity of the note, even if the services are not equal in value to the amount of the note.[79] Services rendered out of kindness, and without expectation of reward, although of value, are not a sufficient consideration to

73. Corning v. Burden, 15 How. (U. S.) 270; Lowell v. Lewis, Fed. Cas. 8,568, 1 Mason, 185, 186; Bedford v. Hunt, Fed. Cas. 1,217, 1 Mason, 303, 304; Roberts v. Ward, Fed. Cas. 11,918, 4 McLean, 565; Kneass v. Schuylkill Bank, 4 Wash. C. C. 12.

74. Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Myers v. Turner, 17 Ill. 179; Hildreth v. Turner, 17 Ill. 184.

75. Wells v. Sutton, 85 Ind. 70.

76. Searing v. Tye, 4 E. D. Smith (N. Y.), 197; Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269; Early v. Reed, 60 Mo. 528.

77. Walford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Diffenderfer v. Scott, 5 Ind. App. 243, 32 N. E. 87; Eaton v. Libbey, 165 Mass. 218, 42 N. E. 1127.

78. Lindell v. Rakes, 60 Mo. 249, 21 Am. Rep. 395.

79. Miller v. McKenzie, 95 N. Y. 575, 47 Am. Rep. 85; Cowee v. Cornell, 75 N. Y. 91; Earl v. Peck, 64 N. Y. 596.

Attorney's services.— Promissory notes given for services to be rendered in behalf of a client by an attorney are valid. As to effect of death of attorney before completion of services, see Coe v. Smith, 1 Smith (Ind.), 88; Hardin v. McKittrick, 5 J. J. Marsh. (Ky.) 667.

Where an attorney accepted a note as a retainer for his services in defending a person against a prosecution which abated by the suicide of the defendant, it was held that as the nonperformance resulted from the act of the obligor himself, there was no failure of the consideration. Mitcherson v. Dozier, 7 J. J. Marsh. (Ky.) 53, 22 Am. Dec. 116. See also Headley v. Good, 24 Tex. 232. But in Agnew v. Walden, 84 Ala. 502, 4 South. 672, where a note was given to attorneys for services to be rendered in defending the maker for the crime of homicide, and before the trial the maker was killed by a mob, it was held that there was a partial failure of consideration and the fact that the maker of such a note left the State and was never tried does not affect the payee's right to recover on the note. Adams v. Johnson, 11 Ky. L. Rep. 137.

support a note.[80] But the consideration is not affected by the fact that the services were rendered without an express promise to pay.[81]

m. *Release and waiver of rights or interests.*— Where a person has a valid and subsisting right or interest in property, a waiver or release thereof is a sufficient consideration for a promissory note made to such person.[82] As in the case of a note given to the owner of the equity of redemption in real property, to prevent the sale of such equity,[83] or of a note given for the release of a homestead right.[84] And the release by a wife of her dower interests in lands owned by her husband is a sufficient consideration for a note made to her.[85] The release of a future contingent interest in certain land under the will of a deceased ancestor, is sufficient consideration for a note given therefor, whether he had in fact any interest in the land or not.[86] But a note by a father to his son for the relinquishment of the son's interest in the father's estate cannot be sustained.[87]

n. *Pre-existing or antecedent debts.*—(1) *In general.*— Under the Negotiable Instruments Law: "An antecedent or pre-existing "debt constitutes value; and is deemed such whether the instru-"ment is payable on demand or at a future time." [88] Independent of the statute it has always been held in this country that a pre-existing debt is a sufficient consideration for a promissory note.[89]

80. Blanshan v. Russell, 52 N. Y. Supp. 963; Allen v. Bryson, 67 Iowa, 591, 56 Am. Rep. 358.

81. Root v. Strang, 77 Hun, 14, 28 N. Y. Supp. 273.

Services rendered in promoting the election of a candidate to an office, but not at the request of such candidate, are not sufficient to sustain a note given therefor. Dearborn v. Bowman, 3 Metc. (Mass.) 155. But services rendered by a daughter for her father, after she became of age and before her marriage, are a sufficient consideration for a note to her by her father. Gamwell v. Mosely, 11 Gray, 173.

And where a child has been emancipated, the services of such child for the father will constitute a sufficient consideration to sustain a promissory note therefor. Phelps v. Hopkinson, 61 Ill. App. 400.

82. Sykes v. Laferry, 27 Ark. 407.

83. Bradbury v. Blake, 25 Me. 397; Shade v. Creviston, 93 Ind. 591.

84. Nims v. Bigelow, 45 N. H. 343; Hooker v. McIntosh, 76 Miss. 693, 25 South. 866.

85. Sykes v. Chadwick, 18 Wall. (U. S.) 141, 21 L. Ed. 824; Nichols v. Nichols, 136 Mass. 256; Gruver v. Walkup, 55 Neb. 544, 75 N. W. 1091; Yazel v. Palmer, 81 Ill. 82; Citizens' Bank v. Bolen, 121 Ind. 301.

86. Brooks v. Wage, 85 Wis. 12, 54 N. W. 997.

87. Loring v. Sumner, 23 Pick. (Mass.) 98. But see Weston v. Hight, 18 Me. 281.

88. Neg. Inst. L. (N. Y.), § 51. See Appendix for same section in statutes of other States.

89. Wooley v. Cobb, 165 Mass. 503, 43 N. E. 497; Thompson v. Gray, 63 Me. 228; Wilkie v. Chandon, 1 Wash. St. 355, 25 Pac. 464; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177; Mohlman Co. v. McKane, 60 App. Div. (N. Y.) 546, 69 N. Y. Supp. 1046; Petrie v. Miller, 57 App. Div. (N. Y.) 17, 67 N. Y. Supp. 1042.

(2) *When holder is holder for value.*— The question has frequently arisen as to whether a pre-existing debt is a sufficient consideration for the transfer of a bill or note so as to render the transferee a *bona fide* holder, and has been the subject of much discussion. There would seem to be no controversy in cases where the debt exists coupled with a surrender or relinquishment of security held as collateral for the debt,[90] or where the creditor agrees to forbear in the pursuit of his legal remedies respecting the debt;[91] in both of such cases the consideration is sufficient to support the notes and to make their transferees holders for value and free from all equities existing between the original parties. There is, however, a pronounced conflict of authority as to the rights of a transferee of a bill or note, transferred in payment of a pre-existing debt, where there has been no relinquishment of collateral nor any forbearance of remedies; but it may probably be said that the weight of authority is in favor of the proposition that such a bill or note when transferred before maturity, without notice of equities, is transferred for value, and the holder takes it free from defenses or set-off existing between the original parties.[92] There is even greater conflict of authority

In the case of Carter v. Odom, 121 Ala. 162, 25 South. 774, it was held that when a creditor takes a note of his debtor with accommodation indorsements in payment of an antecedent debt, he is a purchaser for value in due course of business, equally as if he had advanced money on the faith of it.

The payment of a debt, owed by the drawee to the drawer of an order for the payment of money, is a sufficient consideration for the promise of the drawee to pay the order. Durkee v. Conklin, 13 Colo. 313, 57 Pac. 486.

90. **Rule in New York.**— Where the owners of a note due in a few days, which was deposited for collection with the bank where it was payable, withdrew it from the bank and surrendered it to the maker on receiving from him his note payable in three months, indorsed by a third person, it was held that such payees were holders for value to the amount of the note surrendered, and that they were entitled to recover this amount against the indorser, notwithstanding the delivery of the note to them was a diversion of it by the maker from the purpose for which it had been indorsed, they having received it without notice of such diversion. Youngs v. Lee, 12 N. Y. 551. See also Stalker v. McDonald, 6 Hill (N. Y.), 93; Bank of Salina v. Babcock, 21 Wend. (N. Y.) 499; Meads v. Merchants' Bank, 25 N. Y. 143, 149; Justh v. Nat. Bank of Commonwealth, 56 N. Y. 478; Chrysler v. Renois, 43 N. Y. 209; Blair v. Hagemeyer, 26 App. Div. (N. Y.) 219, 49 N. Y. Supp. 965; Chapman v. Ogden, 165 N. Y. 642, 59 N. E. 1120.

In other States the following cases may be cited: Le Breton v. Pierce, 2 Allen (Mass.), 8; Allaire v. Hartshorne, 21 N. J. L. 665; First Nat. Bank of Rochester v. Bentley, 27 Minn. 87, 6 N. W. 422; Heath v. Smelting Co., 39 Wis. 146; Stevens v. Campbell, 13 Wis. 375.

91. Worcester Nat. Bank v. Cheeney, 87 Ill. 602.

92. Among the many cases which may be cited as supporting this proposition are:

United States.—Brooklyn City, etc., R. R. Co. v. Nat. Bank, 102 U. S. 14, 26 L. Ed. 61; Cummings v. Mead, Fed. Cas. 3,476; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865.

upon the question as to whether a note transferred before maturity *as mere collateral security* for the payment of a pre-existing debt is transferred for value and constitutes the transferee a holder for value; it is practically an impossibility to deduce any general

Alabama.— Mobile & M. R. Co. v. Felrath, 67 Ala. 189; Bank of Mobile v. Hall, 6 Ala. 639, 41 Am. Dec. 72.

California.— Sackett v. Johnson, 54 Cal. 107.

Georgia.— Bond v. Central Bank, 2 Ga. 92.

Illinois.— Mix v. National Bank, 91 Ill. 20, 33 Am. Rep. 44; Worcester Nat. Bank v. Cheeney, 87 Ill. 602.

Maine.— Homes v. Smyth, 16 Me. 177, 33 Am. Dec. 650.

Michigan.— Outhwaite v. Porter, 13 Mich. 533.

Minnesota.— Stevenson v. Hyland, 11 Minn. 198.

New Jersey.—Allaire v. Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

New York.— Bank of St. Albans v. Gilliland, 23 Wend. 311, 35 Am. Dec. 566; Brown v. Leavitt, 31 N. Y. 113.

North Carolina.— Reddick v. Jones, 6 Ired. 107.

North Dakota.— Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293.

Ohio.—Carlisle *v.* Wishart, 11 Ohio, 172.

Pennsylvania.—Kirkpatrick v. Muirhead, 16 Pa. St. 117; Bardsley v. Delp, 88 Pa. St. 420.

Texas.— Herman v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632.

Vermont.— Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 129. For other cases on this subject see Century Dig., "Bills and Notes," Vol. 7, § 924.

Actual payment and absolute discharge of an antecedent debt is a valuable consideration for the transfer of commercial paper, and cuts off prior equities. Mayer v. Heidelbach, 123 N. Y. 332, 339, 25 N. E. 416, where Finch, J., said: "I have no doubt as to the soundness of the first proposition. It was explicitly conceded in Coddington v. Bay, 5 Johns. (N. Y.) 57; 20 id. 637, which originated the difference between the courts of this State and the concurring views of the Federal courts and those of England. While it was in that case ruled that the transfer of negotiable paper as collateral security merely for an antecedent debt did not make the creditor a holder for value within the rule cutting off prior equities, it was yet asserted that such result followed where, among other things, some existing debt was satisfied thereby. And that, I think, was a natural and logical conclusion from the reasoning upon which the decision rested. The argument was that the holder of the paper merely as collateral lost nothing by its failure, since his debt all the time remained, his original position was unchanged, and he had simply failed to get an added security, himself parting with nothing. It is apparent that the reasoning fails, whenever, as a result of the new contract, the original debt has been actually extinguished, when the paper has been both transferred and accepted as payment, and the debt has been discharged within and by force of the act and concurrent intention of both parties. And so we have steadily decided. (Bank of St. Albans v. Gilliland, 23 Wend. (N. Y.) 311; Young v. Lee, 12 N. Y. 551; Philbrick v. Dallett, 2 J. & S. (N. Y.) 388 · Gould v. Segree, 5 Duer (N. Y.), 260; Brown v. Leavitt, 31 N. Y. 113; P. Ins. Co. v. Church, 81 id. 218; Button v. Rathbone, Sard & Co., 118 id. 666, 23 N. E. 122.) These cases, and many more like them, however differing in their facts, and although the earlier ones have been more or less criticised, yet agree, as I read them, in the doctrine that where the pre-existing debt is actually and absolutely extinguished in consideration of a negotiable paper transferred, the transferee is protected against prior equities. In asserting that as the result of the decisions in this State and elsewhere the Federal court in B. & N. R. R. Co. v. N. Bank, (102 U. S. 31), and Mr. Daniel in his text-book on Negotiable Instruments (§§ 831 and 832)) are fully and fairly supported by the line of adjudged cases."

rule which can be universally applied in face of all this mass of confused authority.[93]

o. *Debt of a third person.*— A note or bill given in payment of a debt due by a third person to the payee is supported by a sufficient consideration and will bind the maker or drawer.[94] As a note given by a father in payment of a claim against his son, and a discharge of such claim, is based upon a sufficient consideration,[95] as is also a note by a wife in payment of an antecedent debt of her husband.[96] But in any event there must be a surrender or discharge of the claim for the payment of which the note or bill is made.[97] And it has been held that the suspension of the right of a creditor to enforce payment of his debt is a sufficient consideration for the promise of a third person to pay it.[98] But if a third per-

93. See cases cited Cent. Dig., "Bills and Notes," Vol. 7, § 913.

94. Byles on Bills (16th ed.), p. 152, in which it is said: "A subsisting debt due from a third person is a good consideration for a bill or note payable at a future day; and so is a debt due from the defendant and a third person. If the debt of the third person is extinguished by the bill or note being taken in satisfaction, there is a good consideration, though the instrument be payable on demand."

In New York it has been held that where a trustee invested trust funds in the corporate stock of a corporation, and the beneficiaries afterward threatened to sue the corporation to recover the amount so invested, and the president, to prevent the suit, gave his note for the amount, such note is supported by a sufficient consideration. Struthers v. Smith, 85 Hun, 261, 32 N. Y. Supp. 905. See also Carney v. Downey, 2 N. Y. St. Rep. 707; Stack v. Weatherwax, 32 Hun, 615, 5 N. Y. Supp. 510.

In other States the following cases may be cited: Crowder v. Reed, 80 Ind. 1; Henry v. Ritenour, 31 Ind. 136; Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998; Swift v. Crocker, 21 Pick. (Mass.) 241; Wren v. Hoffman, 41 Miss. 616; Brainerd v. Capelle, 31 Mo. 428; Horn v. Fuller, 6 N. H. 511; Leonard v. Duffin, 94 Pa. St. 218; Shabata v. Johnston, 53 Neb. 12, 73 N. W. 278; Murphy v. Illinois Trust & Sav. Bank, 57 Neb. 519, 77 N. W. 1102.

95. Seymour v. Prescott, 69 Me. 376; Crombie v. McGrath, 139 Mass. 550, 2 N. E. 100.

96. Thompson v. Gray, 63 Me. 376; Leonard v. Duffin, 94 Pa. St. 218.

97. Surrender of claim.— Wren v. Hoffman, 41 Miss. 616; Harris v. Harris, 180 Ill. 157, 54 N. E. 180. In the case of Ward v. Barrows, 86 Me. 147, 29 Atl. 922, the defendant gave the plaintiff a due bill as a memorandum of the amount due the plaintiff as wages from a corporation of which the defendant was president; it was held that the due bill was without consideration inasmuch as the plaintiff neither assigned to the defendant nor released his claim for wages, nor took the due bill in payment of such wages. And in the case of Richardson v. Fields, 124 Ala. 535, 26 South. 981, a promissory note executed by the directors of a corporation in their individual names for an antecedent debt of the corporation without other consideration than the debt itself was held void as against the makers of the note for want of consideration. See also Currier v. Clark, 15 Colo. App. 6, 60 Pac. 958.

And where the debt is one which has been discharged in bankruptcy a note therefor by a third person is invalid because of want of consideration. McElven v. Sloan, 56 Ga. 208.

98. Thompson v. Gray, 63 Me. 376; Harris v. Harris, 180 Ill. 157, 54 N. E. 180.

son, without any consideration personal to himself, gives his promissory note to a creditor as collateral security to the mere naked debt of another, without any circumstance of advantage to the debtor, or disadvantage to the creditor, the note is without consideration.[99]

p. *Debts against estate of decedent.*— A promissory note made by a widow in payment of a claim against her deceased husband is void for want of consideration if the husband left no estate or assets.[1] But if the deceased husband left an estate, although insolvent, a surrender to the widow of a claim against the estate is a sufficient consideration to support her promissory note for the amount.[2] Where a widow, who was the principal legatee of her husband, executed a note in consideration of the settlement of a suit involving a large portion of her husband's estate, it was held that the note was supported by a sufficient consideration.[3] But in case there is misrepresentation or fraud upon the part of the creditor to induce the widow to give her note in payment of such claim, the note will be deemed invalid for want of consideration.[4] The surrender of a decedent's note is a sufficient consideration for a note made by the heirs of the decedent.[5]

q. *Settlement of doubtful claim.*— If a claim is clearly illegal and unfounded, and no proceedings have been instituted thereon, a note given in settlement thereof is without consideration.[6] If

99. Turle v. Sargent, 63 Minn. 211, 65 N. W. 349; Richardson v. Field, 124 Ala. 535, 26 South. 981.

1. Williams v. Nichols, 10 Gray (Mass.), 83; Kircher v. Sprenger, 4 Pa. Dist. 144. The personal note of the executrix of an insolvent estate, given for the balance of a claim of a creditor of the estate, after he had received the dividend to which he was entitled, as a general creditor, is without consideration. Paxson v. Neilds, 137 Pa. St. 385, 20 Atl. 1016.

2. Nowlin v. Wesson, 93 Ala. 509, 8 South. 800; Wilton v. Eaton, 127 Mass. 174.

In the case of Carpenter v. Page, 144 Mass. 315, 10 N. E. 853, it was held that a promissory note given by a widow in payment of her deceased husband's debt, and received as such at her request by his creditor, who receipts his bill against her husband's estate upon which no administration has been granted, is founded upon a sufficient consideration. See also Reuter v. Sullivan (Tex. Civ. App.), 47 S. W. 683; Taylor v. Clark (Tenn.), 35 S. W. 442.

3. Young v. Shepard's Estate, 124 Mich. 552, 83 N. W. 403.

A note given by heirs for a debt of their ancestor which was enforceable against his estate, although it had ceased to be a lien on his realty, is not without consideration. Safe Deposit & Trust Co. v. Wright, 105 Fed. 155, 44 C. C. A. 421.

4. Maull v. Vaughn, 45 Ala. 134.

5. Safe Deposit & Trust Co. v. Wright, 105 Fed. 155, 44 C. C. A. 421; Whelan v. Swain, 132 Cal. 389, 64 Pac. 560; Union & Planters' Bank v. Jefferson, 101 Wis. 452, 77 N. W. 889.

6. Bullock v. Ogden, 13 Ala. 346; Tucker v. Ronk, 43 Iowa, 80. But in order to defend such a note on the ground that the claim was unfounded the defendant must show this clearly. Sullivan v. Collins, 18 Iowa, 228. See also Gunning v. Royal, 59 Miss. 45, 42 Am. Rep. 350; Fuller v. Green, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600.

there be any reasonable doubt about the validity of the claim, a compromise thereof is a sufficient consideration for a note, and in an action on such a note the invalidity of the claim compromised cannot be asserted.[7] Ignorance of the maker's rights in respect to an alleged liability will not affect the validity of a note given on account of such liability.[8] A note given by the treasurer of a corporation in consideration of the discharge of a disputed claim against such corporation is valid.[9]

Where a note is given in settlement of a claim which is the subject of litigation, there is no question about the sufficiency of the consideration.[10] Where a note is given in compromise and settlement of a claim in suit, in the absence of fraud or knowledge on the part of the plaintiff that his suit was fictitious, it is no defense to an action upon the note that there was a good and meritorious defense to the original claim.[11]

7. Curry v. Davis, 44 Ala. 281; Tyson v. Woodruff, 108 Ga. 368, 33 S. E. 981; Keefe v. Vogle, 36 Iowa, 87; Cobb v. Arnold, 8 Metc. (Mass.) 403; Easton v. Easton, 112 Mass. 438.

8. **Ignorance of maker's rights.**— In the case of Bennett v. Ford, 47 Ind. 264, it was held that it was no defense to a suit on a promissory note that the defendant gave the note in ignorance of the law, believing himself to be liable for the injury done by his runaway team, when he was not so liable. See also Pickel v. St. Louis Chamber of Commerce, 80 Mo. 65.

Where it appeared that the defendant had believed himself not liable to pay the plaintiff's claim, but the plaintiff's attorney insisting that he was bound, prevailed upon him to execute a note for the amount, the defendant will be required to pay the note, where it does not appear that the defendant relied upon the attorney's opinion and there was no evidence tending to show fraud or imposition by the plaintiff's attorney. Daily v. Jessup, 72 Mo. 144.

A note given in settlement of claims of doubtful validity is valid if the maker had knowledge of all the facts affecting their validity at the time of the execution of the note. Mory v. Laird, 108 Iowa, 670, 77 N. W. 835. And see Hillenbrand v. Shippen, 22 Ky. L. Rep. 652, 58 S. W. 525; General Electric Co. v. Nassau Electric R. Co., 161 N. Y. 656, 57 N. E. 1110.

9. National Bank v. Foster, 85 Hun (N. Y.), 376, 32 N. Y. Supp. 1031.

10. Wyatt v. Evins, 52 Ala. 285; Jones v. Rittenhouse, 87 Ind. 348; Brown v. Ladd, 144 Mass. 310, 10 N. E. 839; Grant v. Chambers, 30 N. J. L. 323; Brooklyn Bank v. Wearing, 2 Sandf. Ch. (N. Y.) 1; Wesselman v. Stuart, 30 Misc. (N. Y.) 808, 61 N. Y. Supp. 1110.

11. **Compromise of claims.**— In the case of Feeter v. Weber, 78 N. Y. 334, the court said: "There would be very little use in compromising controversies, if, after such compromise, the whole matter remained open, and it were a good defense to a note given in settlement that a meritorious defense existed to the original claim. Where facts out of which a defense arises are known to the party making the claim, and fraudulently concealed from, and unknown to the other party at the time of the compromise, such fraud may be shown; but, in the absence of any such fraud, evidence of the mere fact that a defense existed is not admissible." Citing Stewart v. Ahrenfeldt, 4 Denio (N. Y.), 189; Russell v. Cook, 3 Hill (N. Y.), 504. See also Smith v. Richards, 29 Conn. 332; Spielberger v. Thompson, 131 Cal. 55, 63 Pac. 132.

r. *Forbearance.*— Forbearance to prosecute a legal claim is a sufficient consideration to support a promissory note.[12] And an agreement whereby the payee of a note forbears to contest a will is supported by sufficient consideration.[13] But a forbearance to sue for what one has no legal right to recover is not a sufficient consideration for a note.[14]

s. *Extension of time.*— Extension of time upon an indebtedness is sufficient consideration for a promissory note given as collateral therefor.[15] A new note payable one day after date, given in consideration of the surrender of a former note past due, is upon a sufficient consideration. The legal forbearance for one day is sufficient to support the new note. The law does not weigh the *quantum* of the consideration.[16] An agreement to extend the time of payment of the debt of a third party is a sufficient consideration for a promise to pay that debt.[17] The extension of time for the payment of a mortgage is a lawful consideration for a promissory note for an additional sum.[18] The agreement for delay need

12. Anstell v. Rice, 5 Ga. 472; Jennison v. Stafford, 1 Cush. (Mass.) 168, 48 Am. Dec. 55; Robertson v. Gould, 11 id. 55; Abbott v. Fisher, 124 Mass. 414; Lavell v. Frost, 16 Mont. 93, 40 Pac. 146.

In New York in the case of Mechanics & Farmers' Bank v. Wixson, 42 N. Y. 438, the plaintiff demanded that a certain bank should pay or secure certain moneys due and to become due, and also to return certain notes held by the bank for collection. The defendants requested the plaintiff not to take legal action for the collection of the indebtedness accrued nor to withdraw the notes held for collection, and in consideration of plaintiff's granting this request, defendants executed and delivered and plaintiff accepted a promissory note payable in one month. It was held that the forbearance to sue and to withdraw the notes held for collection was a valid consideration, rendering the defendants liable on the note. See also Lewis v. Rogers, 34 N. Y. Super. Ct. 64; Grocers' Bank v. Penfield, 7 Hun (N. Y.), 279, affd. in 69 N. Y. 502, 25 Am. Rep. 231; Meltzer v. Doll, 91 N. Y. 365.

13. Hindert v. Schneider, 4 Ill. App. 203.

14. Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 504; Salck v. Moss, Dud. (Ga.) 161.

15. Rockafellow v. Peat, 40 Ark. 69; Jewell Belting Co. v. Rogers, 84 Ill. App. 249 (revd. on other grounds, 56 N. E. 1017); Gates v. Hamilton, 12 Iowa, 50; Atherton v. Marcy, 59 Iowa, 650, 13 N. W. 759; Union Banking Co. v. Martin's Est., 113 Mich. 521, 71 N. W. 867; Whitt v. Bailey, 22 Ky. L. Rep. 1015, 59 S. W. 514; Cox v. Sloan, 158 Mo. 430, 57 S. W. 1052; Red River Valley Nat. Bank v. North Star Boot & Shoe Co., 8 N. D. 432, 79 N. W. 880; Jarvis v. Roentgen, 59 Mo. App. 75; Brainerd v. Harris, 14 Ohio, 107, 45 Am. Dec. 525; Gorder v. Freehold Bank (Pa.), 7 Atl. 144; Ballard v. Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664.

16. Whelan v. Swain, 132 Cal. 389, 64 Pac. 560.

17. Germania Bank v. Michaud, 62 Minn. 459, 65 N. W. 70, 30 L. R. A. 286; Harris v. Harris, 180 Ill. 157, 54 N. E. 180; Union Banking Co. v. Martin's Est., 113 Mich. 521, 71 N. W. 867.

18. Hubbard v. Fletcher, 61 Minn. 148, 63 N. W. 612; Foster v. Wise, 27 La. Ann. 538; Hancock v. Hodgson, 3 Scam. (Ill.) 329.

not be express; the taking of the new note, payable at a future day, imposes upon the payee the duty of waiting until the maturity of the new note.[19]

t. *Fluctuating balances.*— A fluctuating balance may form a consideration for a bill or note.[20] As where bills or notes are deposited as a security for the balance of an account current, the successive balances form a shifting consideration for the bill or note.[21] But where the account has been settled or transferred prior to the execution of the note, the consideration of course fails, and the note is invalid.[22]

§ 51. Illegality of consideration.

a. *In general.*— An action cannot be maintained upon a note given for an illegal consideration.[23] At common law considerations are illegal which (1) violate the rules of religion or morality, or (2) are such as contravene public policy. As stated by Mr. Byles:[24] "Though the law does not pretend to enforce religious or moral obligations as such, yet it seizes every opportunity of countenancing them; and therefore will not assist a man whose claim of redress is founded on their violation." Many acts in themselves immoral are made by statute illegal considerations for the support of commercial paper.

b. *Immorality.*— A note given for future illicit cohabitation is invalid,[25] although if it be given in consideration of past cohabitation it is enforceable.[26] If it be given for both past and future illicit cohabitation it is void.[27] So the rent of lodgings, knowingly let for the purpose of prostitution, is an illegal consideration.[28]

19. Whelan v. Swain, 132 Cal. 389, 64 Pac. 560.

20. Byles on Bills (16th ed.), p. 151; Pease v. Hirst, 10 B. & C. (Eng.) 122; Colleridge v. Farquharson, 1 Stark. (Eng.) 259; Richards v. Macey, 14 M. & W. (Eng.) 484.

21. Byles on Bills (16th ed.), p. 151; Atwood v. Crowdie, 1 Stark. (Eng.) 483.

22. Johnson v. Mitchell, 14 Colo. 227, 23 Pac. 452; First Nat. Bank v. Henry, 156 Ind. 1, 58 N. E. 1057.

23. Ketchum v. Scribner, 1 Root (Conn.), 95; Parsons v. Randolph, 21 Mo. App. 353; Brisbane v. Lestarjette, 1 Bay (S. C.), 113.

24. Byles on Bills (16th ed.), p. 161.

25. Singleton v. Bremar, 1 Harp. (S. C.) 201; Massey v. Wallace, 32 S. C. 149, 10 S. E. 937; Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748; Walker v. Gregory, 36 Ala. 180.

26. Brown v. Kinsey, 81 N. C. 245; Burgen v. Straughn, 7 J. J. Marsh. (Ky.) 583; People v. Hayes, 70 Hun, 111, 24 N. Y. Supp. 194; affd., 140 N. Y. 484, 35 N. E. 951.

27. Massey v. Wallace, 32 S. C. 149, 10 S. E. 937.

28. Girardy v. Richardson, 1 Esp. (Eng.) 13; Howard v. Hodges, Selw. N. P. (7th ed.) 68. Rent for houses used for prostitution cannot be recovered. Dougherty v. Seymour, 16 Colo. 289, 26 Pac. 823; Ralston v. Boady, 20 Ga. 449; Ashbrook v. Dale, 27 Mo. App. 649; Hunstock v. Palmer, 4 Tex. Civ. App. 459, 23 S. W. 294.

And it has been held that a note and chattel mortgage given for furniture sold for use in a house of prostitution, with the knowledge of the vendor, are void as based upon an illegal consideration;[29] although it would be otherwise where the vendor had no knowledge of such illegal use.[30] A note by a husband to his wife, upon the promise of the wife to withdraw all opposition to proceedings for divorce instituted by him, is founded upon an illegal consideration.[31]

c. *Against public policy.*— Commercial paper based upon considerations which contravene public policy are void.[32] Among such considerations are those in restraint of marriage,[33] in general restraint of trade,[34] for the perpetration or concealment of crime,[35] for the commission of a fraud upon the public,[36] for the purchase

29. Reed v. Brewer (Tex. Civ. App.), 36 S. W. 99.

30. In the case of Schankel v. Moffatt, 53 Ill. App. 382, it was held that notes and a chattel mortgage given for furniture of a house of ill-fame are not illegal, where there is no requirement in the contract of sale that the house shall be kept as a disorderly house in order to pay the notes, or that any part of the debt is to be paid from the proceeds of prostitution.

31. Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208.

32. Foley v. Speir, 100 N. Y. 552. The public policy of the nation must be determined by its constitution, laws, and judicial decisions. United States v. Trans-Missouri Freight Assn., 58 Fed. 58, 7 C. C. A. 15. If it be merely doubtful whether an agreement be at variance with the public interest, it is not void; it must be clearly and undoubtedly in contravention of public policy. Byles on Bills (16th ed.), p. 161; Richardson v. Mellish, 2 Bing. (Eng.) 229.

33. Conrad v. Williams, 6 Hill (N. Y.), 444; Sterling v. Stinnickson, 5 N. J. L. 756; Chalfant v. Payton, 91 Ind. 202, 46 Am. Rep. 586. And the same is true as to agreements for the payment of money upon aiding or facilitating a divorce or separation. Appeal of Seeley, 56 Conn. 202, 14 Atl. 291; Hamilton v. Hamilton, 89 Ill. 349; Gaines v. Poor, 3 Metc. (Ky.) 503, 48 Am. Dec. 425; Adams v. Adams, 25 Minn. 72; Wilde v. Wilde, 37 Neb. 981, 56 N. W. 724; Irvin v. Irvin, 169 Pa. St. 529, 32 Atl. 445, 29 L. R. A. 292.

34. Chappel v. Brockway, 21 Wend. (N. Y.) 157; Dunlop v. Gregory, 10 N. Y. 241; Saratoga Co. Bank v. King, 44 N. Y. 87; Greenfield v. Gilman, 140 N. Y. 168; Stewart v. Erie & W. Trans. Co., 17 Minn. 372; Morris River Coal Co. v. Barclay Coal Co., 68 Pa. St. 173.

35. Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815. In this case it was sought to recover money paid upon a note given wholly or partly to compound a felony, and it was held that the action could not be maintained, although the note was procured by fraud and undue influence, and the court said: "We cannot agree with the doctrine that if the plaintiff was influenced by the duress of the defendant, and at the same time both parties intended the compounding of a felony, they were not *in pari delicto*. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect." See also Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340.

36. Bloss v. Bloomer, 23 Barb. (N. Y.) 604; Materne v. Horwitz, 50 N. Y. Super. Ct. 41, affd. in 101 N. Y. 469.

and sale of so-called "Bohemian Oats" at an exorbitant price,[37] for services performed as a lobbyist,[38] for the appointment, resignation, or breach of duty of a person in a position of trust,[39] or for influencing in any way the actions of a person occupying an official position.[40] And a bill or note given to a creditor to induce him to withdraw his opposition to his debtor's discharge in bankruptcy or insolvency proceedings, is invalid as based upon a consideration

37. McNamara v. Gargett, 68 Mich. 454, 36 N. W. 218; Davis v. Seeley, 71 Mich. 209, 38 N. W. 901.

38. *In New York*, see Harris v. Roof, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Brown v. Brown, 34 Barb. (N. Y.) 533; Mills v. Mills, 40 N. Y. 543; Cary v. Western Union Tel. Co., 47 Hun (N. Y.), 610; Cheeseborough v. Conover, 140 N. Y. 382, 35 N. E. 633, where it was held that it is the right of every citizen who is interested in any proposed legislation to employ an agent for compensation payable to him, to draft his bill and explain it to any committee, or to any member of a committee, or of the legislature, and ask to have it introduced; and contracts which do not provide for more, and services which do not go farther, violate no principle of law or rule of public policy; Harris v. Simonson, 28 Hun (N. Y.), 318.

In other jurisdictions the following cases are applicable: Trist v. Child, 21 Wall. (U. S.) 441, 22 L. Ed. 623; Coquillard v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Houlton v. Dunn, 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737; Spalding v. Ewing, 149 Pa. St. 375, 24 Atl. 219, 15 L. R. A. 727.

39. **Appointment of administrator.**—Porter v. Jones, 52 Mo. 399; Aycock v. Braun, 66 Tex. 201, 18 S. W. 500. As to resignation or relinquishment of right of administration, see Cunningham v. Cunningham, 18 B. Mon. (Ky.) 19, 68 Am. Dec. 718; Ellicott v. Chamberlain, 38 N. J. Eq. 604, 48 Am. Rep. 327; Staunton v. Parker, 19 Hun (N. Y.), 55; Withers v. Ewing, 40 Ohio St. 400; Bowers v. Bowers, 26 Pa. St. 74, 67 Am. Dec. 398. Note to secure resignation from public office is void. Meacham v. Dow, 32 Vt. 721; Eddy v. Capron, 4 R. I. 394, 67 Am. Dec. 541.

Breach of duty.— Bond to indemnify executors against contemplated *devastavit* of estate is invalid. Moss v. Cohen, 11 Misc. 184, 32 N. Y. Supp. 1878; s. c., 15 Misc. 108, 36 N. Y. Supp. 265. As to indemnity in other cases, see Shotwell v. Hamblin, 23 Miss. 156, 55 Am. Dec. 83; not necessarily void, Griffiths v. Hendenburgh, 41 N. Y. 464; Martin v. Bollenbaugh, 42 Ohio St. 508, unless act indemnified is unlawful, Anderson v. Farns, 7 Blackf. (Ind.) 343; Stark v. Raney, 18 Cal. 622; Harrington v. Crawford, 61 Mo. App. 221; Greenwood v. Colcock, 2 Bay (S. C.), 67; Barnes v. Jackson, 2 Sneed (Tenn.), 416; Perkins v. Proud, 62 Barb. (N. Y.) 420; Webber's Executors v. Blunt, 19 Wend. (N. Y.) 188.

Payment of fines or costs by note not illegal, see Town of Stonington v. Powers, 37 Conn. 439; Blain v. Hitch, 70 Ga. 275; Stafford v. Jackson, 14 N. H. 16. But it has been held that since the taking of a note for the payment of fines imposed by a magistrate is in violation of a public duty, the note is void as against public policy. Kingsbury v. Ellis, 4 Cush. (Mass.) 578; Bills v. Comstock, 12 Metc. (Mass.) 468; Kendrick v. Crowell, 38 Me. 42; McCartney v. Wilson, 17 Kan. 294.

40. *In New York* it has been held that a note given to procure an officer to violate his official duty is against public policy and void in the hands of the original payee, or any subsequent holder thereof with knowledge of its character. Devlin v. Brady, 36 N. Y. 531. But see Lyon v. Mitchell, 36 N. Y. 235, 93 Am. Dec. 502.

A bond given to a third party for the purpose of influencing the action of an alderman in the discharge of his duties is void. Cook v. Shipman, 24 Ill. 614; s. c., 51 Ill. 316.

Facts to warrant finding that officer was improperly influenced, see Barry v. Capen, 151 Mass. 99, 23 N. E. 735, 6 L. R. A. 808.

which contravenes public policy.[41] Considerations impeding the course of public justice, as dropping a criminal prosecution for a felony or misdemeanor, or suppressing evidence are illegal as against public policy.[42] It would be impossible, within the scope of this work to exhaustively discuss the many questions relating to considerations contravening public policy. Such a discussion belongs more properly to works on contracts, and reference should be made to the principles contained in such works relating to considerations for ordinary contracts, to determine the rules controlling the legality of the consideration of commercial paper.

d. *In violation of statute.*— Statutory enactments have made many acts illegal as considerations for the support of commercial paper. Usurious provisions contained in commercial paper render them void and unenforceable against the maker, in all those

41. *In New York* it was held at an early date that if an insolvent give his note for the debt to a creditor, upon the understanding that the creditor sign the insolvent's petition, the note is void, as being against the policy, and in fraud of the law. Payne v. Eden, 3 Caines (N. Y.), 213; Waite v. Harper, 2 Johns. (N. Y.) 386; Wiggin v. Bush, 12 Johns. (N Y.) 306. And the same is true of a note given by a third person to a creditor of the bankrupt. Yeomans v. Chatterton, 9 Johns. (N. Y.) 295; Bell v. Leggett, 7 N. Y. 176.

In other States the following cases support the illegality of such a consideration: Marble v. Grant, 73 Me. 423; Case v. Gerrish, 15 Pick. (Mass.) 49; Harvey v. Hunt, 119 Mass. 279; Blasdel v. Fowle, 120 Mass. 447, 21 Am. Rep. 533; Walker v. Mayo, 143 Mass. 42; Winn v. Thomas, 55 N. H. 294; Sharp v. Teese, 9 N. J. L. 352; Fulton v. Day, 63 Wis. 112, 23 N. W. 99.

42. Byles on Bills (16th ed.), p. 162. See Nerot v. Wallace, 3 T. R. (Eng.) 17; Fallows v. Taylor, 7 T. R. (Eng.) 475; Edgcombe v. Rodd, 5 East (Eng.), 294. Merely refraining from prosecution, on taking from a defaulting debtor a bill indorsed by him, is not necessarily compounding a crime. Flower v. Sadler, L. R., 9 Q. B. D. (Eng.) 83.

An agreement based on compounding a crime is void. Winne v. Whisenant, 37 Ala. 46; Wolf v. Fletemeyer, 83 Ill. 418; Morril v. Goodenow, 65 Me. 178; Taylor v. Jacques, 106 Mass. 291; Clark v. Ricker, 14 N. H. 44; Haynes v. Rudd, 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815.

And a note given for money loaned to be applied, with the knowledge of the lender, to suppress a prosecution for a crime, is void. Plumer v. Smith, 5 N. H. 553, 22 Am. Dec. 478; as is also a note to suppress a search of maker's house for a certain time. Merrill v. Carr, 60 N. H. 114.

Nature of offense must be public, involving moral turpitude and affecting public morals. Bowen v. Buck, 28 Vt. 308. Notes to compound misdemeanors void, Jones v. Rice, 35 Mass. 440, 29 Am. Dec. 612; Gray v. Siegler, 2 Strobh. (S. C.) 117; to prevent prosecution for adultery, Drennan v. Douglas, 102 Ill. 341, 40 Am. Rep. 595; in satisfaction of damages for an assault is valid, Matthison v. Hanks, 2 Hill (S. C.), 625; but to suppress prosecution for forgery is void, Oxford Bank v. Kirk, 90 Pa. St. 49; Welborn v. Norwood, 1 Tex. Civ. App. 614, 20 S. W. 1129; Ring v. Windsor Co. Mut. Fire Ins. Co., 51 Vt. 563; for seduction or rape, Smith v. Richards, 29 Conn. 232; Armstrong v. Lester, 43 Iowa, 159; for embezzlement, Crowder v. Reed, 80 Ind. 1; Smith v. Steely, 80 Iowa, 738, 45 N. W. 912; Roll v. Raquet, 4 Ohio, 400, 22 Am. Dec. 759; Groesbeck v. Marshall, 44 S. C. 538, 22 S. E. 743; Peckham v. Van Bergen, 10 N. Dak. 43, 84 N. W. 566.

jurisdictions where usury laws have been enacted;[43] but a bill or note which is not usurious at its inception will not be affected, as far as the liability of the maker is concerned, by any subsequent usurious transaction in respect to such bill or note between other than the original parties.[44] Wagers are declared by statute in most States to be illegal, and notes or bills given therefor are based upon illegal considerations and are void.[45] A note for money loaned for gambling purposes with the knowledge of the lender is generally held within the prohibition.[46] Although it is otherwise where the money loaned was used for the payment of a gambling debt.[47] A bill or note for liquors sold contrary to the revenue or

43. Wilkie v. Roosevelt, 3 Johns. (N. Y.) 206, 2 Am. Dec. 149; Young v. Berkely, 2 N. H. 410; Lynchburg Nat. Bank v. Scott, 91 Va. 652.

44. Cram v. Hendricks, 7 Wend. (N. Y.) 569. In the case of Munn v. Commission Co., 15 Johns. (N. Y.) 44, 8 Am. Dec. 219, it was held that if a bill be free from usury as between the immediate parties to it, no after transaction with another person can, as respects those parties, invalidate it. So that such a bill may be sold to a purchaser for an amount less than the face and legal interest thereon for the time it has to run, and such purchaser may recover the full amount of the maker or acceptor. See also Oakley v. Boorman, 21 Wend. (N. Y.) 593; Curtis v. Leavitt, 15 N. Y. 173, 218; Nichols v. Fearson, 7 Pet. (U. S.) 107; Corcoran v. Powers, 6 Ohio St. 19; King v. Johnson, 3 McCord L. (S. C.) 365; Armstrong v. Gibson, 31 Wis. 61, 11 Am. Rep. 599.

45. **Negotiable instruments for gambling debts.**— A check given for a gambling debt is void. Cunningham v. Gans, 79 Hun (N. Y.), 434; Denniston v. Cook, 12 Johns. (N. Y.) 376; Irwin v. Marquette (Ind. App.), 59 N. E. 38. And so is a note given in the place of a protested check given for a gambling debt. Hollingsworth v. Moulton, 53 Hun (N. Y.), 91, 6 N. Y. Supp. 392, affd. in 119 N. Y. 612, 23 N. E. 1143. See also Shirley v. Howard, 53 Ill. 453; Brittain v. Duling, 15 B. Mon. (Ky.) 138; Crawford v. Storms, 41 Miss. 540; Turner v. Peacock, 13 N. C. 303; Lagonda Nat. Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634; Giddens v. Lea, 3 Humph. (Tenn.) 133; Knight v. Gregg, 26 Tex. 506; Swinney v. Edwards, 8 Wyo. 54, 55 Pac. 306, 80 Am. St. Rep. 916.

Renewal notes.— If notes secured by mortgage, given for the purchase price of slot machines, are void, because such sale constitutes an illegal gambling contract, and are subsequently surrendered, and new notes secured by the mortgage are given in lieu of the originals, the new notes are also illegal and void, and subject to the same defenses as the original notes. Kuhl v. Gally Universal Press Co., 123 Ala. 452, 26 South. 535.

Notes, etc., for dealing in futures are generally held to be based on illegal considerations. See Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; Scheider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164; Davis v. Davis, 119 Ind. 511, 21 N. E. 1112; Sprague v. Warren, 26 Neb. 326, 41 N. W. 1113, 3 L. R. A. 679; Story v. Salomon, 71 N. Y. 420; Snoddy v. American Nat. Bank, 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 469; Seeligson v. Lewis, 65 Tex. 215, 57 Am. Rep. 215; Oliphant v. Markham, 79 Tex. 543, 15 S. W. 569, 23 Am. St. Rep. 363. It must be shown that neither party intended that the commodity purchased should be delivered at the future time specified. Thompson v. Ide, 6 R. I. 217; Eggleston v. Rumble, 66 Hun, 627, 20 N. Y. Supp. 819.

46. Peck v. Briggs, 3 Den. (N. Y.) 107; Ruckman v. Bryan, 3 Den. (N. Y.) 340; Plank v. Jackson, 123 Ind. 424, 26 N. E. 568; White v. Buss, 3 Cush. (Mass.) 448.

47. Wyman v. Fiske, 3 Allen (Mass.), 238, 80 Am. Dec. 66; Hoyt

excise laws is based upon an illegal consideration;[48] and in general, it may be said that any bill or note based upon the performance of an act which is expressly prohibited, or which is within the true meaning of such prohibition, is void.[49]

§ 52. Fraud and mistake.

a. *Fraud.*— Fraud avoids every contract.[50] If the consideration of a note or bill can be shown to be vitiated by fraud, and the maker or drawer had no knowledge of such fraud, or received no benefit from the contract, but as soon as he discovered the fraud elected to repudiate the contract, he may successfully defend a suit brought against him by the party to whom such note or bill was given.[51] If there is a total fraud in the consideration of a promissory note, it has been held that there was an adequate remedy at law by defense against the note in suit.[52] If a person is induced by false representations to execute his note to another, the note is without consideration;[53] but if the facts concerning a consideration

v. Cross, 108 N. Y. 76, 14 N. E. 801; Ballard v. Green, 118 N. C. 390, 24 S. E. 777; as to money paid at request of a loser, see White v. Yarborough, 16 Ala. 109; Jones v. Sevier, 1 Litt. (Ky.) 50, 13 Am. Dec. 218; but see Scollans v. Flynn, 120 Mass. 271.

48. Creekmore v. Chitwood, 7 Bush (Ky.), 319; Kessel v. Albetis, 56 Barb. (N. Y.) 362; Rahter v. Lancaster Bank, 92 Pa. St. 393; Adams v. Hackett, 27 N. H. 289, 59 Am. Dec. 376.

49. Lewis v. Headley, 36 Ill. 433, 87 Am. Dec. 227. In the case of Foss v. Cummings, 149 Ill. 353, 36 N. E. 553, it was held that under Rev. Stats., chap. 38, § 130, which makes it a penal offense to "corner the market, or attempt to do so," and declares all contracts made for that purpose void, no recovery could be had upon a note given for advances made, and expenses incurred in purchasing corn in pursuance of an agreement or understanding to enhance the price of corn. And see generally as to considerations based upon acts in violation of statute, Brown v. Tarkington, 3 Wall. (U. S.) 377, 18 L. Ed. 255; Davidson v. Lanier, 4 Wall. (U. S.) 447, 18 L. Ed. 377; Pacific Guano Co. v. Mulleen, 66 Ala. 582; Coyle v. Campbell, 10 Ga. 570; Johnston v. McConnell, 65 Ga. 129; Rash v. Farley, 12 Ky. L. Rep. 913, 15 S. W. 862; Van Meter v. Spurrier, 94 Ky. 22, 21 S. W. 337; Wheeler v. Russell, 17 Mass. 258; St. Paul & Minneapolis Trust Co. v. Jenks, 57 Minn. 248, 59 N. W. 299; Carlton v. Bailey, 27 N. H. 230; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 296.

50. As was said by the Lord Chief Baron in the case of Rogers v. Hadley, 32 L. J. Exch. (Eng.) 248: "Fraud cuts down everything. The law states it is against fraud to the extent of breaking through almost every rule, sacrificing every maxim, getting rid of every ground of opposition. The law so abhors fraud that it will not allow technical difficulties of any kind to interfere to prevent the success of justice and truth."

51. Byles on Bills (16th ed.), p. 157; Mills v. Oddy, 2 C., M. & R. (Eng.) 103.

52. Barkhamsted v. Case, 5 Conn. 528; see also Litchfield v. Peck, 29 Conn. 384; Knotts v. Preble, 50 Ill. 226, 99 Am. Dec. 514; Fleming v. Greene, 48 Kan. 646, 30 Pac. 11; First Nat. Bank v. Howe, 1 Mont. 604.

53. Conklin v. Vail, 31 Ill. 166; Hall v. Marks, 56 Ill. 125; Beall v. January, 62 Mo. 434; Jones v. Dana, 24 Barb. (N. Y.) 395; Hickson v. Early, 62 S. C. 42, 39 S. E. 782. But

were or should have been known to the maker from other sources, there is no valid defense.[54] Where a note is given for a greater amount than that which is due, or which is lawfully payable, induced by the fraudulent representations of the payee, a recovery can be had only on the amount actually due or payable.[55] We have already stated that gross inadequacy of consideration is admissible as evidence of fraud;[56] and if the inadequacy of consideration and other circumstances prove the fraud, the note will be deemed void.[57]

b. *Fraudulent as to creditors.*— An instrument given in fraud of third persons is as invalid as in the case of instruments where the fraud directly affects the parties thereto. The cases most frequently arising under this head are those where bills or notes are given to defraud creditors. Such notes are fraudulent and void as to such creditors,[58] and in many cases have been held to be void as between the parties themselves.[59] A promissory note given in payment of the price of property for the purpose of defrauding creditors is illegal and void as to the consideration and the payee cannot recover upon such note.[60]

the fraud affecting the value of the consideration alone is not sufficient. Taft v. Meyerscough, 92 Ill. App. 560.

54. Sullivan v. Collins, 18 Iowa, 228; Sachleben v. Heintze, 117 Mo. 520, 24 S. W. 54; Daily v. Brennan, 87 Wis. 36, 57 N. W. 963. If the representations were a mere matter of opinion, the maker of the note being as well informed in regard to the facts as the payee, there is no fraud. Jackson v. Stockbridge, 29 Tax. 394, 94 Am. Dec. 290. See also Walton Guano Co. v. Copelan, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268; State Bank v. Gates, 114 Iowa, 323, 86 N. W. 311.

55. Haycock v. Rand, 5 Cush. (Mass.) 26; Collins Iron Co. v. Burkam, 10 Mich. 283; Brown v. North, 21 Mo. 528; Bean v. Jones, 8 N. H. 149; Griffiths v. Parry, 16 Wis. 218; Still v. Snow, 66 Vt. 277, 29 Atl. 250.

56. See *ante*, § 50, *c*.

57. Byles on Bills, p. 57.

Inadequacy of consideration.— The case of Soloman v. Turner, 1 Stark. (Eng.) 51, was where the plaintiff gave a promissory note for some pictures. It was proposed to prove that the sum for which the note was given infinitely exceeded the value of the pictures. Lord Ellenborough said: "I will not admit the evidence for the purpose of reducing the damages, by showing that the pictures were of an inferior value; but if you can, by the inadequacy of the value and other circumstances, prove fraud on the part of the plaintiff, so as to show that there was no contract at all, the evidence will be admissible. If it falls short of that, it will be unavailing."

58. Butler v. Miller, 73 Me. 151, 40 Am. Rep. 348; Bryant v. Mansfield, 22 Me. 360.

59. A promissory note given to one creditor in consideration of an agreement in fraud of the maker's other creditors is void as between the parties. Fay v. Fay, 121 Mass. 561; Howe v. Litchfield, 3 Allen (Mass.), 443; Walker v. Mayo, 143 Mass. 42, 8 N. E. 873; Hamilton v. Skull, 25 Mo. 165, 69 Am. Dec. 460; Harwood v. Knapper, 50 Mo. 456.

60. **Notes in fraud of creditors.**— A note which is given for property transferred to the drawer for the purpose of defrauding the creditors of the payee cannot be enforced in the hands of the payee against the drawer. Church v. Muir, 33 N. J. L. 318.

In New York it was held, in an action on a promissory note, brought by one not a *bona fide* holder, that the maker may defend on the ground that

c. *Mistake.*— If, through the mutual mistake of the parties to a note, the consideration is wrongly expressed, or the note is based upon a consideration which does not exist, equity will grant relief to the maker as against the payee or any other holder having notice of such mistake,[61] as where a note was executed by mistake for a debt not due by the maker, it was held that such mistake was a good defense in an action on such note as against the payee, but not as against an innocent purchaser for value before maturity.[62]

§ 53. Presumption of consideration.

a. *Statutory rule.*— The Negotiable Instruments Law provides that: "Every negotiable instrument is deemed *prima facie* to have "been issued for a valuable consideration; and every person whose "signature appears thereon to have become a party thereto for "value."[63] This seems to be a statutory declaration of the general rule that contracts under seal or executed pursuant to a statute, promissory notes, and inland bills of exchange enjoy a privilege not conceded to other instruments, of being presumed to be founded upon a valuable consideration.[64]

the note was given for lands sold to defraud creditors, though the maker himself was a party to the fraud. Nellis v. Clark, 4 Hill (N. Y.), 424; Johnson v. Moreley, Hill & Den. (N. Y.) 29; Niver v. Best, 10 Barb. (N. Y.) 369; Williams v. Schreiber, 14 Hun (N. Y.), 38.

61. **Mistake as to consideration.**— In an action on a promissory note given on a settlement of account, it is a good defense that the balance was produced by a mistake, when in truth nothing was due. Mercer v. Clark, 3 Bibb (Ky.), 224. And the defendant may show in such a suit that the note was executed by mistake for too large an amount. Claxon v. Demaree, 13 Bush (Ky.), 172. See also Kennedy v. Goodman, 4 Neb. 585, 16 N. W. 834.

An expectation and belief of a great benefit to result to the promisor from the transaction which was the consideration for a promissory note, or the fact that it was given under a mutual mistake of fact on the part of the parties, not in reference to any material fact, but of some future, imaginary, or speculative event, does not constitute a defense to the action on such note, unless there is fraud or misrepresentation. Cartwright v. Gardner, 5 Cush. (Mass.) 273.

62. Reardon v. Moriarty, 30 La. Ann. 120; Beland v. Anheuser-Busch Brewing Assn., 157 Mo. 593, 58 S. W. 1.

63. Neg. Inst. L. (N. Y.), § 50. For same section in statutes of other States see Appendix. This section has been construed and applied in Bringman v. Von Glahn, 71 App. Div. (N. Y.) 537, 75 N. Y. Supp. 845.

64. *In New York*, the following are the leading authorities on this proposition: Carnwright v. Gray, 127 N. Y. 91, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845; Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487; Raubitschek v. Blank, 80 N. Y. 478; Langley v. Wadsworth, 99 N. Y. 61, 1 N. E. 106; White v. Davis, 62 Hun (N. Y.), 622, 17 N. Y. Supp. 548. The following cases in other States are cited as supporting this proposition:

Alabama.— Bird v. Wooley, 23 Ala. 717; Martin v. Foster, 83 Ala. 213, 3 South. 422.

California.— Poyrier v. Gravel, 88 Cal. 79, 25 Pac. 962; Younglove v. Cunningham, 43 Pac. 755.

b. *Presumption as to nonnegotiable instruments.*— It is generally held that negotiability is not an essential characteristic of a promissory note or bill of exchange; there are many cases to the effect that nonnegotiable notes and bills import a consideration, in the same manner and to the same extent as if they were negotiable.[65] There are cases, however, holding that promissory notes, not negotiable and not purporting to be for value received, do not imply a consideration.[66] The question would seem to be controlled in every instance by the statutes of the State, or upon the view held by the courts therein, as to the status of such instruments at common law.[67]

Colorado.—Perot v. Cooper, 17 Colo. 80, 28 Pac. 391.

Connecticut.— Bristol v. Warner, 19 Conn. 7.

Georgia.— Rowland v. Harris, 55 Ga. 141; Feagan v. Cureton, 19 Ga. 404.

Illinois.— Nickerson v. Sheldon, 33 Ill. 372, 85 Am. Dec. 280.

Indiana.— Louisville, E. & St. L. R. Co. v. Caldwell, 98 Ind. 245; Keesling v. Watson, 91 Ind. 578.

Iowa.—McCormack Mach. Co. v. Jacobson, 77 Iowa, 582, 42 N. W. 499.

Maine.— Small v. Clewley, 62 Me. 155, 16 Am. Rep. 410.

Massachusetts.— Perley v. Perley, 144 Mass. 104, 10 N. E. 726; Dean v. Carruth, 108 Mass. 242.

Michigan.— Manistee Nat. Bank v. Seymour, 64 Mich. 59, 31 N. W. 140.

Minnesota.— Nichols v. Dedrick, 61 Minn. 513, 63 N. W. 1110; Hayward v. Grant, 13 Minn. 165, 97 Am. Dec. 228.

Missouri.— Rittenhouse v. Ammerman, 64 Mo. 197, 27 Am. Rep. 215; Bogie v. Nolan, 96 Mo. 85, 9 S. W. 14.

New Hampshire.— Adams v. Hackett, 27 N. H. 289, 59 Am. Dec. 376; Shaw v. Shaw, 60 N. H. 565.

Pennsylvania.— Eckel v. Murphy, 15 Pa. St. 488, 53 Am. Dec. 607.

Texas.— Newton v. Newton, 77 Tex. 508, 14 S. W. 157.

65. Payne v. Noelke, 53 How. Pr. (N. Y.) 273. In the case of Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845, it was held that a promissory note whether negotiable or not imports a consideration. And in this case the court cites the New York statute upon the subject and remarks that such statute was a substantial re-enactment of the Statute of Anne (3 & 4 Anne, chap. 9) which, under the English rule, was held to include within its terms a nonnegotiable note. The court said: " Promissory notes and inland bills of exchange were, by virtue of these laws, put upon an equality. They were made negotiable, if they contained words of negotiability, but whether negotiable or not, and whether they expressed value received or not, it was no longer necessary in actions thereon to aver and prove consideration." See also Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487; Kimball v. Huntington, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; Mitchell v. Rome R. R. Co., 17 Ga. 574; Caples v. Branhan, 20 Mo. 244, 64 Am. Dec. 183; Langhorst v. Doble, 5 Week. L. Bul. (Ohio), 933; Arnold v. Sprague, 34 Vt. 402.

66. Bristol v. Warner, 19 Conn. 7; Courtney v. Doyle, 10 Allen (Mass.), 122; Bourne v. Ward, 51 Me. 191; Siddle v. Anderson, 45 Pa. St. 464; Averett v. Booker, 15 Gratt. (Va.) 163, 76 Am. Dec. 203.

67. *In Indiana*, in the case of Tibbetts v. Thatcher, 14 Ind. 86, the court said: "As a general rule, all negotiable paper is presumed to have been given upon a sufficient consideration, and this rule obtains whether the paper sued on be negotiable under the law merchant, or assignable under the provisions of a statute."

In Durland v. Pitcairn, 51 Ind. 426, it was held that a written promise to pay money, whether it be a promissory note negotiable by the law merchant, or a note payable upon condition, and therefore assignable only under the statute, imports a sufficient consideration, and in a complaint

c. *Expressed consideration.*— The words "value received" in a negotiable instrument import, or are *prima facie* evidence of consideration, not only between the parties but also as against third persons.[68] Where such words are included in a negotiable instrument, it does not affect the right of the maker or other persons to defend on the ground of want, failure, or illegality of the consideration.[69] Where an indorsement upon a note is to the effect that it was indorsed by the payee for value received, the presumption is that the indorsee paid the apparent value of the note to the indorser.[70] We have already seen that it is unnecessary to insert such words in a negotiable instrument, and that the character of such instrument is not affected by the omission.[71]

d. *Burden of proof.*— Where there is a presumption of consideration, or where the consideration is expressed, the burden of proving want, failure, or illegality of consideration is upon the defendant.[72] But if in an action on a bill or note it is admitted or proved that the consideration for the instrument or for its acceptance, indorsement, or subsequent negotiation is tainted with fraud or illegality, the burden of proof is shifted, and the pre-

thereon, consideration need not be averred.

In the case of Louisville, E. & St. L. R. Co. v. Caldwell, 98 Ind. 245, it was held that words of negotiability, such as "payable to order" or "bearer," are not essential to the validity of a bill of exchange, or written order for the payment of money, which possesses the other requisites of such an instrument. And in an action upon such a bill or order, it is not necessary to aver in the complaint, or prove upon the trial, consideration thereof, because the instrument itself imports consideration."

68. Mandeville v. Welsh, 5 Wheat. (U. S.) 277, 5 L. Ed. 87. See also Bourne v. Ward, 51 Me. 191; Parish v. Stone, 14 Pick. (Mass.) 198; Ganwell v. Moseley, 11 Gray (Mass.), 173; Parsons v. Frost, 55 Mich. 230; Sawyer v. McLouth, 46 Barb. (N. Y.) 350; Holliday v. Lewis, 14 Hun (N. Y.), 478; Howell v. Wright, 41 Hun (N. Y.), 167; Stronach v. Bledsoe, 85 N. C. 473.

69. Bruyn v. Russell, 60 Hun (N. Y.), 280; Rice v. Rice, 43 App. Div. (N. Y.) 458, 60 N. Y. Supp. 97.

70. Waldrip v. Black, 74 Cal. 409, 16 Pac. 226.

71. See *ante*, § 42 (*c*), p. 242.

72. *United States.*— Packwood v. Clark, Fed. Cas. 10,656, 2 Sawy. 546; Lipsmeier v. Vehslage, 29 Fed. 175.

Alabama.— Martin v. Foster, 83 Ala. 213, 3 South. 422.

Georgia.— Rowland v. Harris, 55 Ga. 141.

Indiana.— Beeson v. Howard, 44 Ind. 413.

Iowa.—Smith v. Griswold, 95 Iowa, 684, 64 N. W. 624.

Maine.— Sawyer v. Vaughn, 25 Me. 336.

Massachusetts.— Jennison v. Stafford, 1 Cush. 168, 48 Am. Dec. 594.

Michigan.— Stevens v. McLachlan, 120 Mich. 285, 79 N. W. 627.

New York.— Raubitschek v. Blank, 80 N. Y. 478; Howell v. Wright, 41 Hun, 167.

Ohio.— Dalrymple v. Wyker, 60 Ohio St. 108, 53 N. E. 713.

Oregon.— Flint v. Phipps, 16 Ore. 437, 19 Pac. 543; Sayre v. Mohney, 35 Ore. 141, 56 Pac. 526.

Pennsylvania.— Conmey v. Macfarlane, 97 Pa. St. 361.

Texas.— Newton v. Newton, 77 Tex. 508, 14 S. W. 157.

For other cases see Cent. Dig., Vol. 7, Bills and Notes, § 1654.

sumption in favor of the validity of the consideration ceases unless the holder can prove that subsequent to the alleged fraud or illegality he, or some other person from whom he derived title, gave value in good faith for the bill or note.[73] Notwithstanding that the consideration in a note is expressed, if there is equally strong evidence adduced by the defendant that there was no consideration to that on behalf of the plaintiff that there was such consideration, the plaintiff must fail.[74]

73. Byles on Bills (16th ed.), p. 141.

74. Bruyn v. Russell, 60 Hun (N. Y.), 280, 14 N. Y. Supp. 591; Small v. Clewley, 62 Me. 155, 16 Am. Rep. 410; Perley v. Perley, 144 Mass. 104, 10 N. E. 726; Smith v. Edgeworth, 3 Allen (Mass.), 233; Manistee Nat. Bank v. Seymour, 54 Mich. 59, 31 N. W. 140; Bogie v. Nolan, 96 Mo. 85, 9 S. W. 14.

Rule as to burden of proof.— In the case of Powers v. Russell, 13 Pick. (Mass.) 69, 96, the chief justice says: "It was stated here that the plaintiff had made out a *prima facie* case and therefore the burden of proof was shifted and placed upon the defendant. In a certain sense this is true. When the party having the burden of proof establishes a *prima facie* case and no proof to the contrary is offered he will prevail. Therefore, the other party, if he would avoid the effect of the *prima facie* case, must produce evidence of equal or greater weight to balance or control, or he will fail. Still, the proof upon both sides applies to the affirmative or negative of one and the same proposition or issue of fact, and the party, whose case requires the proof of that fact, has all along the burden of proof. It does not shift, though the weight in either scale may at times preponderate. But when the party having the burden of proof gives competent *prima facie* evidence of a fact, and the adverse party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and distinct proposition, which avoids the effect of it, then the burden of proof shifts and rests upon the party proposing to show the latter fact."

This rule was applied in the case of Delano v. Bartlett, 6 Cush. (Mass.) 364, 367, where the court says: "Apply this rule to the present case and it is quite clear that the instruction to the jury was entirely correct. It was incompetent upon the plaintiff to prove a consideration for the note, which was the foundation of the suit. That was a part of her case, and the burden was on her to establish that fact. But the note itself was *prima facie* evidence of a consideration; so that by producing the note, the plaintiff made a *prima facie* case. That evidence, if not rebutted, would be sufficient to maintain the plaintiff's case. But it was competent for the defendants to rebut this evidence on the part of the plaintiff, and thus to avoid the *prima facie* case made by her. Accordingly the defendants did offer evidence to rebut the evidence on the part of the plaintiff, and to show that there was no consideration. The evidence on both sides applied to the affirmative or negative of the same issue or proposition of fact, a consideration for the note, and the plaintiff's case requiring her to establish that fact, the burden of proof was all along on her to satisfy the jury, upon the whole evidence in the case, and the fact of the consideration for the note." See also other Massachusetts cases above cited.

Illegality of consideration.—The burden of proving illegality of the consideration for the note or bill is upon the maker who sets up such defense. Pixley v. Boynton, 79 Ill. 351; Emery v. Estes, 31 Me. 155; Hapgood v. Needham, 51 Me. 442; Pratt v. Langdon, 97 Mass. 97, 93 Am. Dec. 61; Wyman v. Fiske, 3 Allen (Mass.), 238, 80 Am. Dec. 66.

§ 54. Holder for value.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where value has at any time been given for an instrument, the holder is deemed a holder for value in respect to all "parties who become such prior to that time."[75] This provision appears to have been derived from the English Bills of Exchange Act, where substantially the same language is used.[76] The statute is declaratory of the existing rule. Story says: "Every person is, in the sense of the rule, treated as a *bona fide* holder for value, not only when he has advanced money or other value for it, but when he has received it in payment of a pre-existing debt, or when he has a lien on it, or has taken it as collateral security for a precedent debt, or for future as well as past advances."[77]

b. *Necessity of payment of value.*— A negotiable instrument in the hands of one who has not parted with value therefor is subject to all the equities and defenses existing between the original parties.[78] To constitute an indorsee of negotiable paper a holder for value, so as to exclude the equities of antecedent parties, he must have relinquished some right, incurred some responsibility, or parted with value upon the credit of the paper at the time of the transfer.[79]

c. *What constitutes value.*— As a general rule, if upon the faith of receiving a negotiable instrument, a person gives up any right or remedy, as the doing of an act which would prevent him from attaching the property of his debtor, he will become a holder for value.[80] A creditor who takes a note to collect, with directions to apply the proceeds upon a debt due to him by the payee of the note, is not a holder for value, but is the agent of the payee, and the note is in his hands subject to all the defenses and equities existing between the original parties.[81] The giving of a negotiable instrument in payment for another similar instrument is a pur-

75. Neg. Inst. L. (N. Y.), § 52. For same section in statutes of other States see Appendix. Section cited and applied in Petrie v. Miller, 57 App. Div. (N. Y.) 17, 67 N. Y. Supp. 1042; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822.

76. English Bills of Exchange Act, 1882, § 27 (2).

77. Story on Promissory Notes (7th ed.), § 195.

78. Sturgis v. Miller, 80 Ill. 241; Martindale v. Hudson, 25 Mo. 422; Colby v. Parker, 34 Neb. 510, 52 N. W. 693; Clark v. Gallagher, 20 How. Pr. (N. Y.) 308.

79. Phœnix Ins. Co. v. Church, 56 How. Pr. (N. Y.) 29. And see s. c., 81 N. Y. 218.

80. Naglee v. Lyman, 14 Cal. 450.

81. Foley v. Smith, 6 Wall. (U. S.) 492, 18 L. Ed. 931; Cummings v. Mead, Fed. Cas. 3,476; Stricklin v. Cunningham, 58 Ill. 293; Waters v. Cooper, 31 Leg. Int. (Pa.) 413.

chase for value and constitutes the purchaser a *bona fide* holder in the same manner as though he had paid money.[82] And the fact that a purchaser gives less for a note than its face value does not change his rights as a holder for value.[83] And the holder of commercial paper, acquired on a usurious consideration, is not a *bona fide* holder, and is not protected against the infirmities of the paper, nor against transactions between the makers or indorsers and third persons, dealing with them without notice, in good faith on a valuable consideration.[84] A bank by merely discounting a bill or note and placing the proceeds to the credit of the payee does not become a holder for value;[85] but where the

82. Mickles v. Calvin, 4 Barb. (N. Y.) 304. In the case of Harrington v. Johnson, 7 Colo. App. 483, 44 Pac. 368, the purchaser of a promissory note gave his check in payment therefor; it was held that, in the absence of any specific acceptance of the check as complete payment, or proof of subsequent payment of the check, the purchaser did not become such a holder for value as to be entitled to protection as an innocent holder. But see Bird v. Harville, 33 Ga. 459; Greenwood v. Lowe, 7 La. Ann. 197; Adams v. Soule, 33 Vt. 538.

83. **Purchase for less than face value.**— Miller v. Crayton, 3 T. & C. (N. Y.) 360; Harger v. Wilson, 63 Barb. (N. Y.) 237; Webster v. Cobb, 17 Ill. 459; Sully v. Goldsmith, 32 Iowa, 397; Citizens' Bank v. Ryman, 12 Neb. 541, 11 N. W. 850; U. S. Nat. Bank v. McNair, 116 N. C. 550, 21 S. E. 389; Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 979.

But where a person for only $5 purchased, shortly before its maturity, a promissory note for $300 and interest for six months, knowing that the maker was in fair credit and able to respond, he is not a *bona fide* holder. De Witt v. Perkins, 22 Wis. 473.

84. **Usurious rate of discount, etc.**— Hart v. Adler, 109 Ala. 467, 19 South. 894; Carlisle v. Hill, 16 Ala. 398. But a party who purchases notes at a large discount of a broker to whom they are made payable is not affected by usury, if he is ignorant of the fact that they were sold to raise money for the maker. Sherman v. Blackman, 24 Ill. 347; Nicholson v. Nat. Bank of New Castle, 92 Ky. 251, 17 S. W. 627, 16 L. R. A. 223; Oppenheimer v. Farmers & Merchants' Bank, 97 Tenn. 19, 36 S. W. 705. But see McDonald v. Johnson, 64 Hun, 637, 19 N. Y. Supp. 443; Whedon v. Hogan, 8 Misc. 323, 28 N. Y. Supp. 554.

The rule seems to be settled, that a promissory note to be the subject of sale must be an existing valid note in the hands of the payee, and given for some actual consideration, so that it can be enforced between the original parties; and if not valid in the hands of the payee, cannot be rendered valid by a sale to a *bona fide* purchaser at a rate of interest in excess of the legal rate. Sweet v. Chapman, 7 Hun (N. Y.), 579.

85. Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063; First Nat. Bank v. Nelson, 105 Ala. 180, 16 South. 707.

A bank which discounts a note for a customer, crediting the proceeds thereof to his account, is not a *bona fide* purchaser for value, unless such credit was drawn upon before the maturity of the note, and before notice of facts invalidating it in the hands of the payee. Drovers' Nat. Bank v. Blue, 110 Mich. 31, 67 N. W. 1105.

In New York the rule is as stated in the text. Central Nat. Bank v. Valentine, 18 Hun (N.Y.), 417; Dykeman v. Northbridge, 80 Hun (N. Y.), 258, 30 N. Y. Supp. 164, where it was held that evidence that the proceeds of a note by the cashier of a bank, against an accommodation indorser, were deposited to the "cashier account," is insufficient to constitute the bank a holder for value, the money being still in the possession of the bank.

bank, on the strength of such credit, has relinquished securities in its possession or made advances to or paid the checks of the payee, it becomes a holder for value.[86]

d. *When lien on instrument constitutes lienor a holder for value; statutory provision.*— The Negotiable Instruments Law provides that: "Where the holder has a lien on the instrument, arising "either from contract or by implication, he is deemed a holder for "value to the extent of his lien." [87] A similar provision is contained in the English Bills of Exchange Act.[88] Prior to the statute, and at the present time in those States where the statute has not been enacted, there has been a conflict of authority as to whether a holder of a negotiable instrument as collateral security for a pre-existing debt is a holder for value. The cases upon this question have been cited in a previous note.[89] A banker's lien would protect a bank having possession of the bills or notes of a customer to the extent of the balance due such bank from such customer;[90] and a transfer of such an instrument to any other holder as collateral security for the payment of a debt due such holder from the person who transfers the note, makes the holder a pledgee and gives him a lien to the extent of the debt.[91] Taking the above provision of the Negotiable Instruments Law in con-

86. Market Bank v. Hartshorne, 3 Keyes (N. Y.), 137, 3 Abb. Ct. App. Dec. (N. Y.) 173; Wert v. American Exch. Bank, 44 Barb. (N. Y.) 175; Justh v. National Bank of Commonwealth, 4 Jones & S. (N. Y.) 273, affd. in 56 N. Y. 478; Coppell v. Phillipson, 57 Hun (N. Y.), 592, 10 N. Y. Supp. 901.

Where a bank discounts negotiable paper and places the amount thereof to the credit of depositors having already a balance to their credit, and, before notice of any infirmities, pays out on the checks of the depositors the full amount due thereon, including the discount, it thereby becomes an innocent purchaser for value. Fox v. Bank of Kansas City, 30 Kan. 441, 1 Pac. 789; Dreilling v. First Nat. Bank, 43 Kan. 197, 23 Pac. 94; United States Nat. Bank v. McNair, 114 N. C. 335, 19 S. E. 361.

87. Neg. Inst. L. (N. Y.), § 53. For same section in statutes of other States see Appendix. Section construed and applied, Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822.

88. English Bills of Exchange Act, 1882, § 27, subd. 3.

89. See *ante*, § 50, *n.*

90. Brandas v. Barnett, 3 C. B. (Eng.) 531. In this case it was said that a lien generally is a mere right to hold a thing till a debt is paid, and is therefore distinct from a pledge, because the pledgee has a special property in the thing pledged; but, in the case of a negotiable instrument, the person who has the lien is the holder of the instrument with the corresponding rights and duties, and he therefore has more than an ordinary lien on an ordinary chattel. See also London Chartered Bank of Australia v. White, 4 App. Cas. (Eng.) 413; Johnson v. Robarts, L. R., 10 Ch. (Eng.) 505; National Bank v. Connecticut Mut. L. Ins. Co., 104 U. S. 54; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486; Straus v. Tradesman's Nat. Bank, 122 N. Y. 379, 25 N. E. 372; Clark v. Northampton Nat. Bank, 160 Mass. 26, 35 N. E. 108.

91. Collins v. Martin, 1 B. & P. (Eng.) 648; Attenborough v. Clarke, 27 L. J. Exch. (Eng.) 138.

nection with the provision of section 51 thereof to the effect that "an antecedent or pre-existing debt constitutes value," it would seem that the statute operates to dispose of the conflict between the authorities as to the rights of holders of negotiable instruments deposited or pledged as collateral security for the payment of an antecedent debt. It is now settled in those States which have adopted the act that a note transferred before maturity, to a holder in due course,[92] as collateral security for a pre-existing debt, is transferred for value, and the holder takes it free from defenses or set off, existing between the original parties.

e. *Holder of paper transferred in payment of pre-existing debt.*— Conceding that it is an established rule that an antecedent or pre-existing debt constitutes value, there can be no question but that where paper is transferred in payment of a pre-existing debt, the transferee becomes a holder for value, and takes the paper free from all defenses and equities existing between the original parties.[93] In New York, it would seem to be finally settled that

92. **Holders in due course,** what constitutes, see *post*, § 73, p. 359, and Neg. Inst. Law (N. Y.), § 91. For same section in statutes of other States see Appendix.

93. **Pre-existing debt as valuable consideration.**—In the case of Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865, the numerous cases cited bearing upon this subject in the New York courts were considered. We quote as follows from the opinion of the court in this case: "And why, upon principle, should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances made upon the transfer thereof, but also in payment of, and as security for, pre-existing debts. The creditor is enabled thereby to realize or secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, possibly at a ruinous discount to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal of security to banks in lieu of old securities, discounted by them, which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those in other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts." See also the following cases:

Alabama.— Maybury v. Morris, 62 Ala. 113.

Arkansas.— Tabor v. Nat. Bank, 48 Ark. 454, 3 S. W. 805.

California.— Sackett v. Johnson, 54 Cal. 107.

Illinois.— Mix v. Nat. Bank, 91 Ill. 20, 33 Am. Rep. 44; Saylor v. Daniels, 37 Ill. 331, 87 Am. Dec. 250.

Maine.— Homes v. Smyth, 16 Me. 177, 33 Am. Dec. 650; Norton v. Waite, 20 Me. 175.

where a pre-existing debt has been actually and absolutely extinguished in consideration of the transfer of negotiable paper, the transferee is a holder for value within the rule protecting such holder against prior equities.[94]

§ 55. Accommodation paper.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "An accommodation party is one who has signed an " instrument as maker, drawer, acceptor, or indorser, without re- " ceiving 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." [95] The same provisions are contained in the English Bills of Exchange Act, which is declaratory of the common law.[96]

b. *Nature and object.*— An accommodation note or bill within the meaning of the law merchant is one which is made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to raise money on credit.[97] Where a note is signed by

Missouri.— Hodges v. Black, 76 Mo. 537.

New Jersey.—Armour v. McMichael, 36 N. J. L. 92; Allaire v. Hartshorne, 21 N. J. L. 665, 47 Am. Dec. 175.

North Carolina.— Reddick v. Jones, 28 N. C. 107.

North Dakota.— Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293.

Pennsylvania.— Bardsley v. Delp, 88 Pa. St. 420.

Texas.— Herman v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632.

94. **Taking paper as collateral, or in payment of debt.**— Mayer v. Heidelbach, 123 N. Y. 332, 25 N. E. 416. See also Coddington v. Bay, 20 Johns. (N. Y.) 637, where it was held that, to constitute an indorsee of negotiable paper a holder for value, so as to exclude the equities of antecedent parties, it is sufficient that the transfer should be valid as between the indorser and indorsee, but, in addition, the latter must have relinquished some right, incurred some responsibility, or parted with value, upon the credit of the paper at the time of the transfer.

It was said, in the case of Phœnix Ins. Co. v. Church, 81 N. Y. 218, 222, that, " in accordance with this principle, and upon grounds which are entirely obvious and satisfactory, it has been frequently held that when a creditor takes from his debtor the note of a third person before maturity, in good faith, in payment of, or as collateral security for, a debt, and, in consideration tnereof, gives up collateral securities held therefor, he becomes, to the extent of the collateral surrendered, a holder for value of the paper, and takes it free from the defenses of antecedent parties." Citing Bank of Salina v. Babcock, 21 Wend. (N. Y.) 499; Essex County Bank v. Russell, 29 N. Y. 673; Park Bank v. Watson, 42 N. Y. 490; Chrysler v. Renois, 43 N. Y. 209.

95. Neg. Inst. Law (N. Y.), § 55.

96. English Bills of Exchange Act, 1882, § 28.

97. Pollard v. Huff, 44 Neb. 892, 63 N. W. 58. See also Story on Promissory Notes, § 194.

Accommodation paper is such as is made, accepted, or indorsed by one party for the benefit of another, without consideration; it represents a loan one person for the accommodation of another without solicitation or for the benefit of the payee, the mere fact that there was no consideration as to him does not make him an accommodation maker.[98] The object of an accommodation paper must be a loan of credit to the accommodated party.[99]

c. *Revocable until negotiated.*— An accommodation note has no validity until it has passed into the hands of a third person for value, and until negotiated, the maker of the instrument may revoke the agreement.[1] The death of the accommodation party before the delivery of the instrument is a revocation, and a person becoming possessed of such instrument with knowledge of its accommodation character cannot recover thereon against the estate of the deceased party.[2]

d. *Unauthorized diversion.*— Where an accommodation note is delivered without restrictions as to its use, the person for whose benefit it was made may either negotiate it outright, or as collateral for his individual note.[3] The proceeds of such a note may be applied in payment or security of an antecedent debt.[4] It is not a diversion of an accommodation note given to a payee to enable him to get money at a particular bank, that he procures such

of credit. Carpenter v. Nat. Bank, 106 Pa. St. 170. The fact that the payee requests certain persons to sign so that he can negotiate a note is not of itself sufficient to render such signers accommodation makers. Altman v. Anton, 91 Iowa, 612, 60 N. W. 191.

98. Capitol City State Bank v. Des Moines Cotton Mill Co., 84 Iowa, 561, 51 N. W. 33.

99. Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 310.

The exchange of promissory notes between parties, although made for their mutual benefit and convenience, does not constitute either of them accommodation parties. Whittier v. Eager, 1 Allen (Mass.), 499.

1. Second Nat. Bank v. Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744; Tufts v. Shepard, 49 Me. 312; Macy v. Kendall, 33 Mo. 164; Smith v. Wycoff, 3 Sandf. Ch. (N. Y.) 77.

2. Smith v. Wycoff, 3 Sandf. Ch. (N. Y.) 77.

In the case of Clark v. Thayer, 105 Mass. 216, it was held that one who takes a promissory note in good faith, for value, before it has matured, with knowledge of the previous death of the maker, and without notice of its accommodation character, may recover on it against the maker's estate, even if the indorser, for whose accommodation it was made, put it in circulation fraudulently as against the maker.

3. East River Bank v. Butterworth, 30 How. Pr. (N. Y.) 444, 45 Barb. (N. Y.) 476, affd. in 51 N. Y. 637.

4. Cole v. Saulpaugh, 48 Barb. (N. Y.) 104. See also Dunham v. Gilbert, 29 N. J. L. 521; Brooks v. Hay, 23 Hun (N. Y.), 372; Continental Nat. Bank v. Crosby, 48 Hun (N. Y.), 621, 1 N. Y. Supp. 256; Graf v. Smith, 62 Hun (N. Y.), 621, 16 N. Y. Supp. 892.

In the case of Agawam Bank v. Strever, 18 N. Y. 502, it was held that "where the makers of a note signed by them for the accommodation of others delivered to the latter, it is an inference of law, in the absence of any further evidence of authority or restriction, that they for whose accommodation it was made may put it to any use for their benefit of which it is capable."

note to be discounted at another bank.[5] To constitute an unlawful diversion of an accommodation note, it must be shown that the accommodation party was injured by the diversion of the note from its original purpose, or that the use of such note was not consistent with the agreement on which it was made.[6] A fraudulent diversion of an accommodation paper from the purpose for which it was made is no defense against a *bona fide* holder for value before maturity.[7]

e. *Holders of accommodation paper transferred before maturity.*— Accommodation paper has all the characteristics of other commercial paper in the hands of a holder for value.[8] The knowledge of the holder that the note was for the accommodation of some of the parties thereto is no defense, if he took the note for value before maturity.[9] As stated in an Illinois case:[10] "The

5. Hay v. Jaeckle, 90 Hun (N. Y.), 114, 35 N. Y. Supp. 650; Reed v. Treutman, 53 Ind. 438.

6. Rogers v. Sipley, 35 N. J. L. 86.

7. Goodwin v. Conklin, 85 N. Y. 21.

8. When a negotiable note is made for the accommodation of a payee, and is left with him to be used in the general transaction of his business, it has no vitality while it remains in his possession; but when negotiated by him it stands on an equality with other commercial paper, and the maker is bound primarily and unconditionally for its payment. Connerly v. Planters & Merchants' Ins. Co., 66 Ala. 432.

9. Story on Promissory Notes, § 194.

Knowledge of holder no defense to accommodation party.— The following case are in support of this proposition:

New York.—Cole v. Saulpaugh, 48 Barb. 104; Schepp v. Carpenter, 49 Barb. 542; Ogden v. Raymond, 5 Bosw. (Super. Ct.) 16, affd. in 1 Keyes, 42; First Nat. Bank of Portland v. Schuyler, 7 J. & S. (Super. Ct.) 440; Arnson v. Abrahamson, 16 Daly, 72, 9 N. Y. Supp. 514; Kruelwitch v. Meltener, 13 Misc. 342, 34 N. Y. Supp. 451; Moynihan v. McKeon, 16 Misc. 343, 38 N. Y. Supp. 61; Nat. Bank of North America v. White, 19 App. Div. 390, 46 N. Y. Supp. 555; Citizens' Nat. Bank v. Lilienthal, 40 App. Div. 609, 57 N. Y. Supp. 567; Mechanics' Banking Assn. v. White Lead Co., 35 N. Y. 505; Gordon v. Boppe, 55 N. Y. 665; Holland Trust Co. v. Waddell, 75 Hun, 104; Archer v. Shea, 14 Hun, 493; Garfield Nat. Bank v. Colwell, 57 Hun, 169.

In other States the following cases are in point:

Alabama.— Marks v. First Nat. Bank, 79 Ala. 550.

California.— Leeke v. Hancock, 76 Cal. 126.

Colorado.— Pendleton v. Smissaert, 1 Colo. App. 508, 29 Pac. 521.

Georgia.— Flournoy v. First Nat. Bank, 79 Ga. 810, 2 S. E. 547.

Illinois.— Harlow v. Boswell, 15 Ill. 56; Miller v. Larned, 103 Ill. 562; Holmes v. Bemis, 25 Ill. App. 232, affd. in 124 Ill. 453, 17 N. E. 42; Hodges v. Nash, 43 Ill. App. 638.

Indiana.— Marsh v. Low, 55 Ind. 271; Beach v. State Bank, 2 Ind. 488.

Iowa.— Winters v. Home Ins. Co., 30 Iowa, 172.

Maine.— Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 310.

Maryland.— Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620.

Minnesota.— Tourtelot v. Reed, 62 Minn. 384, 64 N. W. 928.

Nebraska.— Baker v. Union Stock Yards Nat. Bank (Neb.), 89 N. W. 269.

New Jersey.— Duncan v. Gilbert, 29 N. J. L. 52.

North Carolina.—Norfolk Nat. Bank v. Griffin, 107 N. C. 173, 11 S. E. 1049, 22 Am. St. Rep. 868.

Pennsylvania.—Philler v. Patterson, 168 Pa. St. 468, 32 Atl. 26, 47 Am.

10. Miller v. Larned, 103 Ill. 562, 570, 571.

very purpose of making accommodation paper is that the party favored may dispose of it, and unless restricted he may transfer it either before or after maturity, and the maker will be equally bound. The usage in this regard is sanctioned by the practice that has prevailed in mercantile transactions everywhere, in this country and in England. That usage has now the consistence of law. Any other rule would permit the maker of such paper to practice a fraud on persons who should take paper he had put out to be negotiated in the usual course of business. The only safe rule is, that where a bill or note is given, with no restriction as to the mode or time of using it by the party accommodated, and the same has been transferred in good faith in the usual course of business, the holder, if he paid a valuable consideration for it, will be entitled to recover the full amount, although he may have had full knowledge it was accommodation paper."

f. *When paper is transferred after maturity.*— Ordinary commercial paper transferred after its maturity is transferred, as a general rule, subject to all equities and defenses existing between the original parties.[11] The same rule does not exist as to accommodation paper which is transferred after maturity, for in such case the weight of authority, both in this country and in England, seems to be in favor of permitting the holder of paper so transferred to recover thereon from the accommodation party, if he is a holder for value, and the terms under which the accommodation paper was made did not prohibit its use after its maturity.[12] It

St. Rep. 896; Mosser v. Crisswell, 150 Pa. St. 409, 24 Atl. 618; Newbold v. Boraef, 155 Pa. St. 227, 26 Atl. 305.

Vermont.— Farmers & Mechanics' Bank v. Rathbone, 26 Vt. 19, 58 Am. Dec. 200.

An acceptor of drafts for the accommodation of the drawer cannot defend against the same in the hands of the payee or an indorsee, on the ground that he received no consideration, where full consideration was received by the drawer. Levy & Co. v. Kauffman, 114 Fed. 170.

11. See *post*, § 77.

12. **Taking after dishonor.**— One who takes an accommodation note after its dishonor may recover from the maker or indorser, if it be used for the purpose for which it was given. 2 Parsons on Notes and Bills, 28. In the case of Dunn v. Weston, 71 Me. 270, 36 Am. Rep. 310, it was held that, unless there is an agreement restraining the transfer of an accommodation note after due, and it is used for the purpose for which it was given, it is immaterial whether the holder advances money upon it before or after its maturity." See also Redfield & Bigelow's Lead. Cas. 217, where it is said: "The indorser for accommodation is equally bound, whether the transfer is made before or after the paper falls due, or whether the purchaser knew the indorsement was made for accommodation or not. To hold otherwise would be to encourage fraud, and to relieve the party from the very responsibility which he expected to meet, and which upon every principle of justice and fair dealing he should be compelled to abide by."

In New York there is some diversity in the opinions of the courts, although the Court of Appeals seems to have settled the proposition that an cannot be denied, however, that in many States accommodation paper, transferred after maturity, is treated in the same way, and subjected to the same rule as other commercial paper, upon the ground that an accommodation party lends his credit only for the period specified in the instrument, that is until its maturity; and if transferred thereafter such party should not be made liable except as an ordinary party to commercial paper.[13] But many of the leading text-writers have favored the former view,[14] and it seems to us the better reasoning, and the authorities of equal or greater weight are in its support. The maker of an accommodation note holds himself out to the public to be absolutely bound to every person who shall take the same for value.[15] As has been observed in a New York case,[16] " a party who lends his note without limitation as to the time of its use cannot therefore be presumed in law to have limited such time to that before its maturity."

g. *Rights and liabilities of accommodation party.*— The liabilities of an accommodation indorser will also be hereafter considered in the chapter on Liabilities of Parties.[17] If there be no wrongful diversion, or other fraud, in the acquisition of an accommodation paper, it may be enforced by a transferee to whom it was transferred before maturity as collateral security for the payment of an antecedent debt;[18] or by a transferee to whom it was transferred in payment of such a debt.[19]

h. *Accommodation party as surety; subrogation; contribution.*— The relationship of principal and surety exists as between the

accommodation indorser, without consideration, is not liable to a transferee, after maturity, where the transfer is made from the person for whose accommodation it was indorsed, although full consideration was paid. Chester v. Dorr, 41 N. Y. 279. But see Harrington v. Dorr, 1 Rob. (N. Y.) 351; Corbitt v. Miller, 43 Barb. (N. Y.) 305; East River Bank v. Butterworth, 45 Barb. (N. Y.) 476.

Other cases holding that the maker of an accommodation note made without restriction is liable to a third person who acquires it for value after maturity are: First Nat. Bank v. Grant, 71 Me. 374, 36 Am. Rep. 334; Renwick v. Williams, 2 Md. 356; Miller v. Larned, 103 Ill. 562; Seyfert v. Edison, 45 N. J. L. 393.

13. Chester v. Dorr, 41 N. Y. 279; Battle v. Weems, 44 Ala. 105; Carroll v. Peters, 1 McGloin (La.), 88; Kellogg v. Barton, 94 Mass. 524; Hoffman v. Foster, 43 Pa. St. 137; Bower v. Hutchinson, 36 Pa. St. 285; Cottrell v. Watkins, 89 Va. 801.

14. Story on Promissory Notes, § 191; 2 Parsons on Notes and Bills, 28; Daniel on Negotiable Instruments, §§ 726, 786; Chitty on Bills, pp. 218, 219; Byles on Bills (Sharswood's ed.), 285.

15. First Nat. Bank v. Grant, 71 Me. 374, 36 Am. Rep. 334.

16. Robertson, C. J., in Harrington v. Dorr, 3 Rob. (N. Y.) 275.

17. See *post*, chap. VII.

18. De Zeng v. Fyfe, 1 Bosw. (N. Y.) 335; Inglis v. Kennedy, 6 Abb. Pr. (N. Y.) 32; Schepp v. Carpenter, 51 N. Y. 602; Todd Nat. Union Bank, 132 Pa. St. 312, 19 Atl. 218; Atkinson v. Brooks, 26 Vt. 569.

19. Grocers' Bank of New York v. Penfield, 69 N. Y. 502, 25 Am. Rep. 231; Ward v. Howard, 88 N. Y. 74; Schepp v. Carpenter, 51 N. Y. 602; Smith v. Van Loan, 16 Wend. (N. Y.) 659; Crosby v. Lane, Fed. Cas. No. 3,423.

person for whose benefit a note was made and the accommodated party, at least so far as their own interests are concerned.[20] An accommodation party, being a surety for the person benefited, is entitled to be subrogated to all the rights and securities of the holder, for the purpose of obtaining reimbursement; and it is the duty of such holder, having such securities from the principal, to retain or dispose of them for the benefit of the sureties.[21] And, if holding such securities, he surrenders them to the principal, or otherwise disposes of them to his advantage, without the assent of the sureties, he thereby discharges them to the amount of the value of the securities so surrendered.[22] But such right of subrogation does not exist until the accommodation party has paid the instrument.[23] And it may also be said as a general rule that the accommodation party is subrogated to all the defenses and equities possessed by his principal except such as are personal to such principal, and also such as are impliedly or expressly waived by his signature.[24] Where one of several joint and several makers of an accommodation paper pays the same such paper remains in his hands as evidence of his right to contribution, and he or his assignee may maintain an action against his comakers to recover their *pro rata* shares.[25]

20. *In re* Babcock, 3 Story (U. S.), 393; Knighton v. Curry, 62 Ala. 411; Cummings v. Little, 45 Me. 183; Parks v. Ingram, 22 N. H. 292, 55 Am. Dec. 153; State Bank v. Smith, 155 N. Y. 185, 49 N. E. 680, affg. 85 Hun (N. Y.), 200, 32 N. Y. Supp. 999. But the fact that the accommodation maker of a note was a surety for the payee does not affect the rights of a subsequent holder against such maker. King v. Parks (Tex. Civ. App.), 63 S. W. 900.

21. Cummings v. Little, 45 Me. 183; Farmers & Citizens' Bank v. Sherman, 33 N. Y. 69; Merchants' Nat. Bank of Syracuse v. Comstock, 55 N. Y. 24, 14 Am. Rep. 168; Nat. Exch. Bank v. Silliman, 65 N. Y. 475, where it was held that, where collaterals were deposited with a bank as security for loans and discounts, the bank cannot, as against an accommodation indorser, apply them instead to the payment of notes of such persons purchased by it after maturity; First Nat. Bank of Buffalo v. Wood, 71 N. Y. 405, 27 Am. Rep. 66.

The existence of the relationship of principal and surety between the original parties to an accommodation paper, and knowledge thereof by the plaintiff, entitles the makers, upon payment of the debt, to all the rights, remedies, and securities that the plaintiff had with reference to the notes. State Bank v. Smith, 155 N. Y. 185, 197, 49 N. E. 680. See also Stevenson v. Austin, 3 Metc. (Mass.) 347; Sublett v. McKinney, 19 Tex. 438.

22. Cummings v. Little, 45 Me. 183; Dunn v. Parsons, 40 Hun (N. Y.), 77; Nat. Exch. Bank v. Silliman, 65 N. Y. 475.

23. Higgins v. Wright, 43 Barb. (N. Y.) 461; First Nat. Bank of Buffalo v. Wood, 71 N. Y. 405, 27 Am. Rep. 66; Mosser v. Crisswell, 150 Pa. St. 409.

24. Weimer v. Shelton, 7 Mo. 237, where it was held that an indorser for accommodation might avail himself of the defense of usury to the same extent as the maker. See also Gunnis v. Weigley, 114 Pa. St. 191; Sawyer v. Chambers, 43 Barb. (N. Y.) 622.

25. Dillenbeck v. Dygert, 87 N. Y. 303.

CHAPTER V.

Negotiation.

§ 56. What Constitutes Negotiation.

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§ 63. Indorsement of Instrument Payable to Bearer.

a. Statutory provision.

§ 56. What constitutes negotiation.

a. *Statutory provision.*— By the Negotiable Instruments Law it is provided that : "An instrument is negotiated when it is trans-

"ferred from one person to another in such manner as to con-" stitute the transferee the holder thereof. If payable to bearer "it is negotiated by delivery; if payable to order it is negotia-" ted by the indorsement of the holder completed by delivery."[26] This section is directly derived from the English Bills of Exchange Act, being the same in language and meaning.[27] The term "holder" is defined by the statute[28] as including the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof; and the term "bearer" means the person in possession of a bill or note which is payable to the bearer.[29] We have already seen that an instrument is payable to bearer when it is expressed to be so payable, or when it is made payable to the order of a fictitious person, or when the payee does not purport to be the name of any person, or when the only or last indorsement is an indorsement in blank;[30] and an instrument is payable to order when it is drawn payable to the order of a specified person, or to him or his order.[31] The statutory rule, as above stated, is declaratory of the common law.[32]

b. *Negotiation by delivery.*— Independent of a statutory provision to the contrary, an instrument payable to bearer,[33] or in-

26. Neg. Inst. L. (N. Y.), § 60. For same provision in statutes of other States see Appendix.

27. English Bills of Exchange Act, 1882, § 31 (1) (2) (3).

28. Neg. Inst. L. (N. Y.), § 2.

29. Neg. Inst. L. (N. Y.), § 2.

30. Neg. Inst. L. (N. Y.), § 29. For same provision in statutes of other States see Appendix.

31. Neg. Inst. L. (N. Y.), § 28.

32. Common-law rule.—The following quotation from the opinion of Blackburn, J., in Crouch v. Credit Foncier, L. R., 8 Q. B. (Eng.) 374, states the uniform rule:

"Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."

33. *New York.*— Mechanics' Bank v. Straiton, 3 Keyes, 365, 3 Abb. Ct. App. Dec. 269; Pierce v. Crafts, 12 Johns. 90.

Alabama.— Sprowl v. Simpkins, 3 Ala. 515.

Arkansas.— Buckner v. Real Estate Bank, 5 Ark. 536, 41 Am. Dec. 105.

Georgia.— Porter v. McCollum, 15 Ga. 528.

Indiana.— Riley v. Schawacker, 50 Ind. 592; Hall v. Allen, 37 Ind. 541; Tescher v. Merea, 118 Ind. 586, 21 N. E. 316.

Iowa.— Mainer v. Reynolds, 4 G. Greene, 187.

Massachusetts.— Wilbour v. Turner, 5 Pick. 526.

Mississippi.— Cobb v. Duke, 36 Miss. 60, 72 Am. Dec. 157; Tillman v. Ailles, 13 Miss. 373, 43 Am. Dec. 520.

Nebraska.— Dusenbery v. Albright, 31 Neb. 345, 47 N. W. 1047.

New Jersey.— Hutchings v. Low, 13 N. J. L. 246.

Tennessee.— Smyth v. Carden, 1 Swan, 28.

Texas.— Hopkins v. Seymour, 10 Tex. 202.

Vermont.— Adams v. Soule, 33 Vt. 538.

dorsed in blank,[34] passes by delivery only, vests a valid, legal interest in the holder, and authorizes him to sue thereon in his own name. Where a note was payable to "the order of" the payee "or bearer," it has been held that the note was payable to the bearer, and an action could be maintained thereon in the name of any holder.[35] And a note payable to the order of the maker, and indorsed by him, becomes in effect a note payable to the bearer, and passes by delivery, and any one to whom the note is delivered becomes the legal holder thereof.[36]

c. *Negotiation by indorsement.*— That the title of a negotiable instrument passes by an ordinary indorsement, whether special or general, is, of course, elementary. The term "indorsement," under the statute, means an indorsement completed by delivery;[37] it implies a transfer, by writing, upon the instrument.[38] It differs

Under the statute in Illinois, a note payable to a person or bearer cannot be transferred or assigned by delivery only, so as to authorize the holder to sue in his own name; and a writ cannot be sustained upon the note by the holder against the person who thus assigned it to him. Hilborn v. Artus, 4 Ill. 344. And it is so held although the note may have been transferred by delivery in a State where such transfer would carry the legal right with it. Roosa v. Crist, 17 Ill. 450, 65 Am. Dec. 679. See also Turner v. Peoria & S. R. Co., 95 Ill. 134, 35 Am. Rep. 144.

34. **Where notes are indorsed in blank,** they are transferable by delivery; and if such notes are part of the assets of a decedent's estate, they may be sold and transferred by the executor without indorsement by himself, and without any order of the court. Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867.

See also the following cases:

Alabama.— Carter v. Lehman, Durr & Co., 90 Ala. 126, 7 South. 735.

California.— Curtis v. Sprague, 51 Cal. 239.

Illinois.— Morris v. Preston, 93 Ill. 215; Wilder v. De Wolf, 24 Ill. 190.

Kentucky.— Caruth v. Thompson, 16 B. Mon. 572, 63 Am. Dec. 559.

Maryland.— Lucas v. Byrne, 35 Md. 485.

Massachusetts.— Lindsay v. Chase, 104 Mass. 253.

Nebraska.— Everett v. Tidball, 34 Neb. 803, 52 N. W. 816.

New York.— Beall v. Gen. Electric Co., 16 Misc. 611, 38 N. Y. Supp. 527; Taylor v. Surget, 14 Hun, 116; Mitchell v. Hyde, 12 How. Pr. 460.

North Carolina.— French v. Barney, 1 Ired. 219.

Pennsylvania.— Gunnis v. Weigley, 114 Pa. St. 191, 6 Atl. 465.

Wisconsin.— Lyon v. Ewings, 17 Wis. 61.

35. Bitzer v. Wager, 83 Mich. 223, 47 N. W. 210.

But in an early New York case (Cock v. Fellows, 1 Johns. 23), where the instrument ran "Due the bearer hereof, 3*l* 18*s* 10*d*, which I promise to pay to Abraham Thompson, or order, on demand, as witness my hand, this 22nd, 11th month, 1803. (Signed) Jordon Cock." It was held that the word "bearer" had reference to Thompson as the payee, and that no person could maintain an action on the note without his indorsement.

36. Jones v. Shapera, 57 Fed. 457, 6 C. C. A. 423; Bank of Lassen County v. Sherer, 108 Cal. 513, 41 Pac. 415.

In New York it has been held under a statute (1 R. S. 768, § 5), which has since been repealed by the Negotiable Instruments Law, that a note payable to the order of the maker, as against an accommodation indorser having knowledge of the fact, is to be considered as if payable to the bearer, and is valid although negotiated without the indorsement of the payee. Irving Nat. Bank v. Alley, 79 N. Y. 536.

37. Neg. Inst. L. (N. Y.), § 2.

38. Clark v. Sigourney, 17 Conn. 311; Stowe v. Weir, 15 Ind. 341;

from an assignment in that by an indorsement the title to the instrument is transferred, while an assignment thereof transfers merely an interest therein.[39] Difficulty has sometimes arisen in cases where parties have written upon the back of commercial paper a contract of guaranty, where the question has been somewhat mooted as to whether the title passes so as to constitute a person an indorsee who takes from such guarantor, within the rule protecting him against prior equities. It is insisted by the courts that nothing should be done by the person negotiating an instrument to affect its negotiable character. There must always be a transfer of the legal title, and such transfer must take such form as not to indicate a purpose to destroy the negotiable quality of the instrument. The form of the indorsement is not material. It may be an indorsement, although it is in terms an assignment. This was held at an early time in England,[40] and, with the exception of two States, it appears to be the law in this country.[41] It has been held that one who is the payee or the holder of negotiable paper, and who writes above his indorsement a contract of guaranty of payment, does not thereby restrict the negotiability of the instrument, but is an indorser with enlarged liability.[42] It cannot

Williams v. Osbon, 75 Ind. 280; Kern v. Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360; Partridge v. Davis, 20 Vt. 499; Freeman Bank v. Ruckman, 16 Gratt. (Va.) 126.

The proper definition of indorsement, in the commercial sense, is the writing of one's name upon or across the back of a bill of exchange, promissory note, or check, by which the property is assigned or transferred. The term "indorsement" by the law merchant is not a proper legal term for the act of one who adds his name in any manner to a nonnegotiable note. Richards v. Warring, 39 Barb. (N. Y.) 42.

39. Franklin v. Toogood, 18 Iowa, 515.

Upon the back of a negotiable interest-bearing bond, made payable to a corporation, its managing president wrote the following, and signed the same in his official capacity: "For value received, I hereby assign the within bond, together with all our interest in and all our right under the mortgage securing the same, to Mary E. Merrill, without recourse." It was held to constitute a contract of indorsement, and not to be a mere assignment of the instrument. Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

40. Roberts v. Frankum, 9 C. & D. (Eng.) 221.

41. Hailey v. Falconer, 32 Ala. 536; Brotherton v. Street, 124 Ind. 599; Sears v. Lantz, 47 Iowa, 658; Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547; Davidson v. Powell, 114 N. C. 575; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720. But see *contra*, Aniba v. Yeomans, 39 Mich. 171; Hatch v. Barrett, 34 Kan. 223.

42. Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293, 57 Am. St. Rep. 556.

Indorsement with enlarged liability. — The written words "demand, notice, and protest waived, payment guaranteed," signed by the payee on the back of a negotiable instrument, constitute an indorsement with an enlarged liability. Buck v. Davenport Sav. Bank, 29 Neb. 407, 45 N. W. 776, 26 Am. St. Rep. 392. See also Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Myrick v. Casey, 27 Me. 9, 46 Am. Dec. 583; Vansandt v. Arnold, 31 Ga. 210; Partridge v. Davis, 20 Vt. 499.

be denied, however, that there is conflict among the authorities upon this question. There are a number of cases which hold that a contract of guaranty upon the back of a negotiable instrument is not a negotiation of the bill, as understood by the law merchant.[43] There is also a decided conflict of authority as to the question of a contract of assignment written upon the back of a negotiable instrument.[44]

§ 57. Indorsement, how made.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "The indorsement must be in writing on the instru-"ment itself or upon a paper attached thereto. The signature of "the indorser, without additional words, is a sufficient indorse-"ment." [45] This is derived from a similar provision contained in the English Bills of Exchange Act,[46] and is declaratory of the rule of the law merchant.

b. *General requirements.*— No particular form of words is required in the transfer of negotiable paper, as long as they show an intention to transfer the paper without limitation or restriction.[47] An indorsement in pencil[48] or by mark is sufficient. A person may become bound by any mark or designation he thinks proper to

43. Trust Co. v. National Bank, 101 Sup. Ct. 68; Tuttle v. Bartholemew, 12 Metc. (Mass.) 454; Mamourieux v. Hewitt, 5 Wend. (N. Y.) 307; Belcher v. Smith, 7 Cush. (Mass.) 482. And see Ridley v. Hightower, 112 Ga. 476, 37 S. E. 733, to the effect that a contract of guaranty written on the back of a note by one whose indorsement was not necessary to a due transmission of the title bound him as surety and not as indorser.

44. **Contract of assignment.**— The case of Markey v. Corey, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, expressly holds that the liability of a person as indorser on a promissory note is not prevented by the use of the words "I hereby assign the within note to" the persons named as assignees. See also cases cited in the preceding note 39, and also Dickson v. Clayville, 44 Md. 573; Maine Trust Co. v. Butler, 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370; Smith v. Brooks, 65 Ga. 356.

But in the case of Spencer v. Halpern, 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120, it was held that one is not liable as indorser on a promissory note who places over his signature thereon the words "I hereby transfer my interest in the within note."

45. Neg. Inst. L. (N. Y.), § 61. For the same section in the statutes of other States see Appendix.

46. The English Bills of Exchange Act, § 32 (1).

47. Lee v. Chillicothe Branch Bank, Fed. Cas. No. 8,186, 1 Bond (U. S.), 387; Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296, where the court said: "Literally indorsement means a writing, *in dorse* on the back of the bill or note. But it is well established that, though such is its import, it may be made on the face of the bill, and numerous indorsements may be made on a separate paper called an "*allonge.*" Drew v. Jacocks, 6 N. C. 138; Partridge v. Davis, 20 Vt. 499; Farmers' Trust Co. v. Schenuit, 83 Ill. App. 267.

48. Brown v. Butchers & Drovers' Bank, 6 Hill (N. Y.), 443, 41 Am. Dec. 755; Cooper v. Bailey, 52 Me. 230; Closson v. Stearns, 4 Vt. 11, 23 Am. Dec. 245.

adopt, provided it be used as a substitute for his name, and he intend to bind himself; it was so held in a case where the indorsement was in figures, "1, 2, 8," no name being written.[49] It has also been held that an indorsement by the initials of the indorser,[50] or by his surname,[51] is valid.

c. *Place of indorsement; allonge.*— An indorsement is usually written on the back of the instrument, but the place is by no means essential. If the payee write his name on any part of a bill or note, with the intention of indorsing it, it is a sufficient indorsement.[52] Such an indorsement may be made upon the face of a note with the same effect as if made upon the back.[53] An assignment upon a separate and distinct paper does not amount to an indorsement so as to make the assignor liable as an indorser; the indorsement must be on the instrument itself, on a piece of paper so attached as to become a part thereof, or be incorporated with it.[54] An indorsement or transfer of a promissory note may be on another paper attached to and made a part of the note, called an *allonge*,[55] and it is not essential to a transfer of a note by this

49. Brown v. Butchers & Drovers' Bank, 6 Hill (N. Y.), 443, 41 Am. Dec. 755.

50. Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443.

51. Cooper v. Bailey, 52 Me. 230.

52. Haines v. Dubois, 30 N. J. L. 259; Richard v. Waring, 39 Barb. (N. Y.) 42.

53. Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606, where the court said: "The ordinary mode of indorsing a note is by the indorser writing his name upon the back thereof, but the indorsement may be made upon the face of the note with the same effect as if made upon the back." See also Perry v. Bray, 68 Ga. 293; Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Gibson v. Powell, 6 How. (Miss.) 60.

54. Traders' Deposit Bank v. Chiles, 14 Ky. L. Rep. 617; Hays v. Plummer, 126 Cal. 107, 58 Pac. 447, 77 Am. St. Rep. 153; Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080, in which case it was held that a transfer made by joining to the note a written paper containing a qualified indorsement, when there was ample space for making the indorsement on the note, was not sufficient to invest the transferee with all the rights of a *bona fide* purchaser.

55. Crosby v. Roub, 16 Wis. 616.

Allonge.— The English Bills of Exchange Act, 1882 (§ 32 [1]), provides that "an indorsement written on an *allonge*, or on a 'copy' of a bill issued or negotiated in a country where 'copies' are recognized, is deemed to be written on the bill itself." A similar provision is contained in the German Exchange Law, Art. XI.

This is also the law in this country, although the Negotiable Instruments Law does not include such a provision. As in Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17, where it was held that if, by reason of the number of indorsements on the back of an instrument, it is so covered as to make it necessary that an extra piece of paper be attached to or pasted on the instrument, that may be done, and all subsequent indorsements may be written on the attached paper. And in Crutchfield v. Easton, 13 Ala. 337, it was held that where a torn note has been pasted upon another piece of paper, an indorsement of the note may be made on such paper.

In the case of Folger v. Chase, 18 Pick. (Mass.) 63, in speaking of such an indorsement, Wilde, J., said: "The last objection is, that the indorsement on one of the notes was not made on mode that there should have been a physical impossibility of writing the indorsement or transfer on the note itself, but it may be on another paper attached to the note, whenever necessity or the convenience of the parties requires it.[56]

d. *Indorsement on collateral instrument.*— Where a note and a mortgage given as security therefor are not fastened together so as to form one and the same instrument, a written assignment on the back of the mortgage will not be construed as an indorsement of the note.[57] And where a receipt was given by an attorney for a note left with him for collection, the indorsement of such receipt does not pass to the assignee the legal title to the note, although such attorney by another indorsement on the receipt promises to pay the proceeds of the note, when collected, to the assignee.[58]

the back of the original note, and, therefore, amounted only to an equitable transfer. The indorsement was made on a paper attached to the back of the note by a wafer, and it had been before thus attached for the purpose of entering thereon indorsements of payments, the back of the original note having been before covered with indorsements; and several payments had been indorsed on the attached paper, before the note was transferred by indorsement to the plaintiff. This paper thus attached had become a part of the note, and no good reason can be given why an indorsement made thereon should not be held a valid and legal transfer. The objection is, that such an indorsement is not sanctioned by custom; but we think it is supported by the reasons on which the custom was originally founded. Bills of exchange and promissory notes were indorsed on the back of the bills and notes, because it was a convenient mode of making the transfer, and in order that the evidence thereof might accompany the note. Such an indorsement as this will rarely happen, and no authority to support it could reasonably be expected; but there is no authority against it.

"If a person write his name on a blank paper, to be used as an indorsement of a note to be written on the other side, and it be filled up as intended, the party would be held liable as indorser of the note, although such indorsements are infrequent, and are not according to the customary form of making a transfer; but they have been held to be within the reason of the custom, and are supported by principle. Bayley on Bills, 92; Violett v. Patton, 5 Cranch (U. S.), 142.

"So in the present case, as there is no authority against the validity of the indorsement, we think we shall violate no principle in holding it to be a legal transfer of the note."

56. Crosby v. Roub, 16 Wis. 616.

57. **Assignment of notes on mortgage.**—Doll v. Hollenback, 19 Neb. 639, 28 N. W. 286, where an assignment was written on the back of a mortgage given to secure certain notes, which was in the following language: "For value received, I hereby assign the within mortgage and notes therein described to John J. French." (Signed) "Moses Turner." It was held that such assignment did not convey the legal title to the notes, and that the assignor did not thereby warrant the solvency of the maker of the notes. French v. Turner, 15 Ind. 59. But in the case of Bange v. Flint, 25 Wis. 544, where a negotiable note, and a mortgage securing it, given to a railroad company, were attached to its negotiable bond, which recited that they were transferred as security for, and should be transferable only in connection with, the bond, it was held that this was an indorsement of the note, within the law merchant.

58. Gookin v. Richardson, 11 Ala. 889, 46 Am. Dec. 232; Dickson v. Cunningham, Mart. & Y. (Tenn.) 203.

§ 58. Indorsement must be of entire instrument.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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 pur-"ports to transfer the instrument to two or more indorsees sever-"ally, 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."[59] A similar provision is contained in the English Bills of Exchange Act.[60] The rule of the statute was established in England at an early date,[61] and was based upon the principle that a bill of exchange or promissory note being a personal contract cannot be apportioned, since "a man cannot be made liable to two actions, where, by the contract, he is liable to but one." And the same rule has been declared by the courts of this country, based upon the same principle.[62] But in equity there may be an effectual assignment of a portion of an entire debt, which will enable the assignee to recover by a proceeding in equity the amount of his portion, all other persons having an interest in the debt being made parties, and all their rights being disposed of in a single proceeding.[63] It would not seem, however, that a partial indorse-

59. Neg. Inst. L. (N. Y.), § 62. For the same section in the statutes of other States see Appendix. For a construction and application of this section see King v. King, 73 App. Div. (N. Y.) 548.

60. English Bills of Exchange Act, 1882, § 32 (2). See Appendix.

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

62. In the case of Bibb v. Skinner, 2 Bibb (Ky.), 57, the court said: "It is a settled principle that an indorsement of part only of a debt is not valid to charge the drawer or acceptor; because it would render him liable on one contract to as many actions as the payee or indorser should think fit." See also Frank v. Kaigler, 36 Tex. 305; Goldman v. Blum, 58 Tex. 630, 636, where the court said: "At common law such a transfer of a part only of the note to two distinct persons, and a reservation of the balance of the instrument to the original payee, could not be recognized, and no action at law could be maintained on such a note by any of the parties to it."

63. **Assignment of part of contract.** — The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of a part of an entire claim might subject the creditor to several actions to enforce a single obligation has much less force under a system which requires all parties in interest to be joined as parties to the action. Risley v. Phenix Bank, 83 N. Y. 318, 329; James v. City of Newton, 142 Mass. 368, 8 N. E. 122, 56 Am. Rep. 692; Daniels v. Meinhard, 53 Ga. 359; Grain v. Aldrich, 38 Cal. 514; Lapping v. Duffy, 47 Ind. 51; Fordyce v. Nelson, 91 Ind. 447; Etheridge v. Vernoy, 74 N. C. 809. In Indiana it was also held that a part interest in a promissory note may be assigned in equity, and the assignee, being the real party in interest, can, under the statute of that State, join with the owner of the other interest in an action on the note. Groves v. Ruby, 24 Ind. 418.

ment of a negotiable instrument would even, in equity, constitute a negotiation of the instrument and subject the indorsees to the same rights as to the portion indorsed as if the transfer had been made by a full indorsement. The partial indorsement would, in effect, be a partial assignment vesting the assignee with an equitable title to his portion of the instrument when collected.[64]

b. *Indorsement to two or more indorsees.*— While, under the statute and the common-law rule, an instrument may not be transferred to two or more indorsees severally so as to be divisible into separate causes of action there is no doubt that an entire note may be indorsed to two or more indorsees jointly, who may maintain a joint action thereon.[65] An indorsement of a note to two indorsees entitles each to one-half the note and its proceeds, and neither can transfer any other or greater interest therein.[66]

§ 59. Kinds of indorsement.

a. *Statutory provisions.*— The Negotiable Instruments Law provides that: "An indorsement may be either special or in blank; and " it may also be either restrictive or qualified, or conditional."[67]

64. **Partial indorsement vests equitable title in portion of amount collected.**— In the case of Miller v. Bledsoe, 1 Scam. (Ill.) 530, 32 Am. Dec. 37, one of two joint payees in a negotiable note indorsed his interest to the other payee in the following words, "I assign my interest in the within to M. O. Bledsoe without recourse in any event. (Signed) B. F. Turpin."

The action was brought by Bledsoe and Turpin to collect the note. Evidence tending to show that Turpin had parted with his interest in the note to Bledsoe was rejected at the trial. The appellate court said: "It is only necessary for this court to decide whether the note was admissible in evidence. At law a moiety, or any other portion of a promissory note, cannot be so assigned as to enable the assignee to bring an action in his own name for his portion of the note. Had Turpin assigned his half of the note to a third person, that third person could not have united with Bledsoe, in bringing the action, for they would have to sue in different capacities, Bledsoe as payee, and the third person as indorsee. The same result would follow if Bledsoe had brought the action in his own name; he would have had to declare for a moiety of the note as payee, and for the remainder as indorsee. This would lead to much confusion and complexity in pleading. In order, therefore, to enable an indorsee of a note to bring an action in his own name as indorsee, the whole interest in the note must be assigned to him. The interests of an assignee of part of a note would doubtless be protected in a court of law, but the action must be brought in the name of the payee or payees, who continue to be the legal holders of the note for the purpose of collection. The indorsement on the note can only be regarded as a private memorandum between the payees, and only vested in Bledsoe an equitable title to the money when collected. The court consequently decided correctly in receiving the note in evidence, and in rejecting the parol evidence. The judgment is affirmed, with costs."

65. Flint v. Flint, 6 Allen (Mass.), 34, 83 Am. Dec. 615.

66. Herring v. Woodhull, 29 Ill. 92, 81 Am. Dec. 296.

67. Neg. Inst. L. (N. Y.), § 63. For same section in statutes of other States see Appendix.

Mr. Story says that: "Indorsements may be in blank or full, general or restrictive, qualified, conditional, or absolute."[68]

b. *Special indorsement.*— 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.[69] This kind of an indorsement is also called a full indorsement.[70] A special indorsement may be as follows: "Pay to A. B. or order." But an indorsement, "Pay to A. B." is deemed a general indorsement and payable to him or his order, and the words "or order" may be added.[71] If a note is indorsed in full, to a particular person, the indorsee cannot strike out his own name and substitute the name of another, but must himself indorse it in order to transfer it.[72] Where an instrument is indorsed in blank by either the payee or any other holder, and is afterward transferred by an indorsement in full, it is still transferable by mere delivery.[73] The special indorsement

68. Story on Promissory Notes, 135.

69. Neg. Inst. L. (N. Y.), § 64. For same provision in statutes of other States see Appendix. See also Gaylord v. Nebraska Sav. & Exch. Bank, 54 Neb. 104, 74 N. W. 415, 69 Am. St. Rep. 705.

70. Story on Promissory Notes, 139.

71. Chitty on Bills (12th Am. ed.), 258; Bayley on Bills (5th ed.), p. 128. In Leavitt v. Putnam, 3 N. Y. 494, 497, the court said: "The note in the present case was upon its face transferable, and its character in respect to negotiability could only have been changed by an indorsement containing express words of restriction. The defendants' indorsement was a full one, containing the name of the person in whose favor it was made, but omitting the words 'or order,' the legal effect of which was, nevertheless, to make the note payable to him or his order, and his indorsement therefor was effectual to transfer the note to the plaintiff." See Hodges v. Adams, 19 Vt. 74.

Instances of special indorsement.— An indorsement, "Wm. Dilworth, Jr.: Pay R. McCurdy, Cashr.," is a special indorsement. Reamer v. Bell, 79 Pa. St. 292.

Where the indorsement read, "Pay the within to the cashier of the Bank of the United States, or to W. W. Frazier, their agent or order," it was held that Frazier was the only person who could transfer the legal title to the note, and that he alone could maintain an action thereon. Frazier v. Moore, 11 Tex. 755. An indorsement, "I order the contents of this note to be paid to B. at his own risk," is a special indorsement. Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129.

72. Grimes v. Piersol, 25 Ind. 246. It was also held in this case that to strike out the name of the indorsee in a full or special indorsement of a promissory note, and substitute the name of another, without the consent of the indorser, is a material alteration of the contract, and no recovery can be had on it against the indorser.

73. Watervliet Bank v. White, 1 Den. (N. Y.) 608, 612; Hale v. Bailey, 16 La. 213; Bullock v. Nally, 12 La. 619; Habersham v. Lehman, 63 Ga. 380.

Effect of blank indorsement.— Chitty on Bills (12th Am. ed.), p. 264, contains the following: "A blank indorsement makes a bill transferable by the indorsee, and every subsequent holder by mere delivery, and when the first indorsement has been in blank, the bill or note as against the payee, the drawer, and acceptor, is afterward assignable by mere delivery notwithstanding it may have upon it subsequent indorsements in full, because a holder, by delivery, may declare and recover as the indorsee of of a negotiable instrument transfers the legal title in the instrument to the indorsee, which cannot be diverted except by canceling the indorsement or indorsing it again.[74]

c. *Indorsement in blank.*— The Negotiable Instruments Law provides that: "An indorsement in blank specifies no indorsee, " and an instrument so indorsed is payable to bearer, and may be " negotiated by delivery." [75] An indorsement in blank is that most frequently used in commercial transactions, and is made by the mere signature of the indorser, usually and properly, though not necessarily, on the back of the instrument. The statute also provides that: " 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 indorse- " ment." [76] This is clearly a legislative enactment of the common-law rule. The right of a *bona fide* holder of a bill or note to write over a blank indorsement to whom the bill shall be paid has long been settled by the English and American courts;[77] and the holder,

the payee, and strike out all the subsequent indorsements, whether special or not."

74. Burdick v. Green, 15 Johns. (N. Y.) 247; Everett v. Vendryes, 25 Barb. (N. Y.) 383; Garratt v. Jaffray, 10 Bush (Ky.), 413; Lake v. Hastings, 24 Miss. 490; Johnson v. Mitchell, 50 Tex. 212, 32 Am. Rep. 602; Pickering v. Cording, 92 Ind. 306, 47 Am. Rep. 145; Mitchell v. Fuller, 15 Pa. St. 268, 53 Am. Dec. 594.

75. Neg. Inst. L. (N. Y.), § 64. For same provision in statutes of other States see Appendix. By section 28 of such law (*ante*, p. 233), it is provided that an instrument is payable to bearer " when the only or last indorsement is an indorsement in blank."

The language of the text is also that of the English Bills of Exchange Act, 1882, § 34(1).

The universal rule, independent of the statute, is that a negotiable instrument indorsed in blank is transferable by delivery only. See *ante*, § 56, note 34.

76. Neg. Inst. L. (N. Y.), § 65. For the same section in the statutes of other States see Appendix.

77. Evans v. Gee, 11 Pet. (U. S.) 80, 9 L. Ed. 639.

Reason for rule.— It is said by Justice Matthews, in Martin v. Cole, 104 U. S. 37: " The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not in any proper sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of an indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full."

The following cases are in point:

United States.— United States v. Barker, Fed. Cas. No. 14,517.

Alabama.—Agee v. Medlock, 25 Ala. 281; Bancroft v. Paine, 15 Ala. 834.

Illinois.— Weston v. Myers, 33 Ill. 424; Moore v. Maple, 25 Ill. 341.

by writing such direction over a blank indorsement, ordering the money to be paid to particular persons, does not become an indorser.[78] Such an indorsement may be filled up by making it a special indorsement payable to the holder of the instrument himself.[79] The rule is that the filling up of a blank indorsement must be consistent with the character of such indorsement; the main difficulty is to determine whether the contract written above the signature is consistent. It has been held that a contract of guaranty or a waiver of notice written over such signature is unauthorized in the absence of an agreement between the parties.[80]

d. *Effect of indorsement in blank.*— The legal title to a bill or note may be transferred by a blank indorsement, and the holder to whom such bill or note is delivered has absolute control thereof.[81] The possession of a promissory note indorsed in blank by the payee is *prima facie* proof of ownership, and sufficient in the absence of other evidence to entitle the holder to recover on proving the indorsement.[82] Where the holder of a note with several indorsers in blank sues the maker and writes over the name of the first indorser an order to pay it to himself, the holder, but without strik-

Indiana.— Moore v. Pendleton, 16 Ind. 481.

Kentucky.— Cope v. Daniel, 9 Dana, 415; Needhams v. Page, 3 B. Mon. 465.

Maine.— Metcalf v. Yeaton, 51 Me. 198. The words, "Pay to the bank on account" of the payee, indorsed on the back of a note, is a blank indorsement, and may be filled up by any lawful holder of the note by inserting his name. Adams v. Smith, 35 Me. 324.

Maryland.— Condon v. Pearce, 43 Md. 83; Mitchell v. Mitchell, 11 Gill & J. 388.

Massachusetts.— Blakely v. Grant, 6 Mass. 386.

Missouri.— Hunter v. Hempstead, 1 Mo. 67, 13 Am. Dec. 468.

New Jersey.— Riker v. Corley, 3 N. J. L. 911.

New York.— Lovell v. Evertson, 11 Johns. 52; Norris v. Badger, 6 Cow. 449.

78. Evans v. Gee, 11 Pet. (U. S.) 80, 9 L. Ed. 639; Eilen v. East India Co., 2 Burr. (Eng.) 1216; Vincent v. Halock, 1 Campb. (Eng.) 6; Smith v. Clarke, Peake (Eng.), 225.

79. Watervliet Bank v. White, 1 Den. (N. Y.) 608; Farwell v. Mayer, 36 Ill. 510; Weston v. Meyers, 33 Ill. 424; Caruth v. Thompson, 16 B. Mon. (Ky.) 572, 63 Am. Dec. 559; Lucas v. Byrne, 35 Md. 485; Lyon v. Ewings, 17 Wis. 61; Grimes v. Piersol, 25 Ind. 246; Gregory v. Pike, 94 Me. 27, 46 Atl. 793; Illinois Conference, etc. v. Plagge, 177 Ill. 431, 53 N. E. 76.

80. Central Bank v. Davis, 19 Pick. (Mass.) 373; Scott v. Calkins, 139 Mass. 529; Belden v. Hann, 61 Iowa, 42.

81. Miller v. Henry, 54 Ala. 120; Owen v. Arrington, 17 Ark. 530; Farwell v. Meyer, 33 Ill. 510; Cope v. Daniel, 9 Dana (Ky.), 415; Whitworth v. Detroit, L. & N. R. Co., 81 Mich. 98, 45 N. W. 500; Canfield v. McIlwaine, 32 Md. 94.

Rebuttal of presumption.— An indorsement in blank by the payee of the note is presumed to have been intended as a transfer thereof, but this presumption may be rebutted by parol proof that it is intended to show a receipt of the money from the agent of the maker. Davis v. Morgan, 64 N. C. 570. See also United States Nat. Bank v. Geer, 55 Neb. 462, 75 N. W. 1088, 70 Am. St. Rep. 390.

82 Bedell v. Covell, 33 N. Y. 581.

ing out the names of the subsequent indorsers, he does not thereby discharge them; and, therefore, one of them who pays the amount of the note to the holder may sue any of the prior parties.[83]

§ 60. Restrictive indorsements.

a. *When indorsement restrictive; statutory provision.*— The Negotiable Instruments Law provides that: "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."[84]

Under this statute, restrictive indorsements fall naturally into two classes: (1) where it is evident that the indorsee did not give a valuable consideration for the instrument, and that the instrument is held by the indorsee merely for the use or benefit of the indorser, who has not parted with the title, as, for example, a note is indorsed for collection, or for deposit, or indorsed payable to the order of one person only, and is hence not negotiable; (2) where there is an evident intent by the indorser to part with the title to the property, importing a consideration paid by the indorsee, but impressing the instrument with a trust, as, for example, where an instrument is made specifically for the benefit of a third person. In such case the paper is negotiable, but a subsequent indorsee takes it impressed with the trust.

It is somewhat difficult to assert what language will amount to a restrictive indorsement, or in other words, what language is sufficient to show a clear intention to restrain the general negotiability of the instrument, or the general purpose to which the indorsement might otherwise entitle the indorsee to apply it.[85] It has been held that an indorsement " Pay A., or order, for account

83. Cole v. Cushing, 8 Pick. (Mass.) 48.

84. Neg. Inst. L. (N. Y.), § 66. For the same section in statutes of other States see Appendix.

The English Bills of Exchange Act, 1882 (§ 35[1]) provides that "an indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D. only,' or 'Pay D. for the account of X.' or 'Pay D. or order for collection.'"

85. Story on Promissory Notes, § 143.

of B.," is restrictive and does not transfer the title.[86] As an instance of indorsement prohibiting further transfer, and, therefore, restrictive, is "Pay the contents of the note to A. B. only."[87]

b. *Indorsement for collection.*— An indorsement for collection is not a transfer of the title of the instrument to the indorsee, but merely constitutes him the general agent of the indorser to present the paper, demand and receive payment, and remit the proceeds.[88] The owner may still control such paper, unless paid, and may intercept the proceeds, if in the hands of an intermediate agent.[89] An indorsement for collection made by the payee is canceled by his subsequent indorsement to another indorsee for value.[90] An indorsement for collection constitutes the indorsee an agent of the indorser and passes such title to the indorsee as will enable him to sue on the instrument in his own name.[91] Since the instrument

86. Indorsement to one person for account of another.—White v. Miners' Nat. Bank, 102 U. S. 658, 26 L. Ed. 250. Such an indorsement does not operate as an assignment of the security, but only authorizes the indorsee to receive the money and apply it as directed. Lee v. Chillicothe Bank, Fed. Cas. No. 8,187, 1 Biss. (U. S.) 325. See also People's Bank v. Jefferson County Sav. Bank, 106 Ala. 524, 17 South. 728. But see Wood v. Wellington, 30 N. Y. 218; Brooks v. Van Nest, 28 N. J. L. 162; Central R. Co. v. First Nat. Bank, 73 Ga. 383.

The words, "Credit the drawer," written on the face of a note and signed by one who indorses the note in blank before delivery, and who is liable by such indorsement only as second indorser, must be construed not as a guaranty of the note, but as a statement for the purpose of advising any party to whom it may be offered that the indorsement is for the accommodation of the prior parties, and that, as between the indorser and them, the drawer is entitled to have the proceeds of the note delivered to him, or passed to his credit. Temple v. Baker, 125 Pa. St. 634, 17 Atl. 516, 11 Am. St. Rep. 926, 3 L. R. A. 709.

87. Power v. Finney, 4 Call (Va.), 411.

88. National Butchers & Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031, 15 Am. St. Rep. 515; Iselin v. Rowlands, 30 Hun (N. Y.), 488; Sweaney v. Easter, 1 Wall. (U. S.) 166, 17 L. Ed. 681; Bank of Metropolis v. New England Bank, 1 How. (U. S.) 234, 11 L. Ed. 115; Best v. Nokomis Nat. Bank, 76 Ill. 608; Locke v. Leonard Silk Co., 37 Mich. 479; Rock County Nat. Bank v. Hollister, 21 Minn. 385. The agent for collection is not authorized to sell or transfer the note. Peoples & Drovers' Bank v. Craig, 63 Ohio St. 374, 59 N. E. 102, 81 Am. St. Rep. 639.

89. An indorsement "For collection and credit," on a check, is notice to every subsequent custodian of the check that it is the property of the indorser. Bank of Clark County v. Gilman, 81 Hun (N. Y.), 486, 30 N. Y. Supp. 1111.

In the case of Freemen's Nat. Bank v. National Tube Works Co., 151 Mass. 413, 24 N. E. 779, 21 Am. St. Rep. 461, 8 L. R. A. 42, it was held that the legal title to commercial paper indorsed "for collection" passes only so far as to enable the indorsee to demand, receive, and sue for the money to be paid; upon such indorsement the owner may control his paper until it is paid, and may intercept the proceeds thereof in the hands of an intermediate agent. See also Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921; Cussen v. Brandt, 97 Va. 1, 32 S. E. 791, 75 Am. St. Rep. 762.

90. Atkins v. Cobb, 56 Ga. 86.

91. Orr v. Lacy, Fed. Cas. No. 10,589, 4 McLean (U. S.), 243; Moore

for such a purpose passes the legal title in trust, the authority to collect is not revoked by the death of the owner.[92] If the indorsee holds the instrument merely as an agent, the agency may be annulled at the pleasure of the indorser.[93]

c. *Indorsements for deposit.*— An indorsement of a bill or draft to a bank for deposit is common in business transactions. Such an indorsement, like an indorsement for collection, constitutes a retention of title in the depositor in the absence of any practice or agreement to the contrary.[94] It is likely, however, that the title to a check so indorsed which is credited, according to the practice prevailing between the bank and the indorser, to the account of the indorser, will be held to have passed to the bank.[95] In any

v. Hall, 48 Mich. 143, 11 N. W. 844; Roberts v. Parish, 17 Ore. 583, 22 Pac. 136; Wintermute v. Torrent, 83 Mich. 555, 47 N. W. 858.

92. Moore v. Hall, 48 Mich. 143, 11 N. W. 844; Deweese v. Muff, 57 Neb. 17, 77 N. W. 361, 73 Am. St. Rep. 488.

93. Barker v. Prentice, 6 Mass. 430.

Where the payee of a note indorses it and leaves the same with a member of the firm to which she is indebted for collection, and directs him to apply the proceeds to the payment of her indebtedness, it is a mere direction of an agent, and does not impair the right of the payee to collect the note, or change the direction at pleasure. Payne v. Flournoy, 29 Ark. 500.

94. Indorsement for deposit.—Freeman v. Exchange Bank of Macon, 87 Ga. 45, 13 S. E. 160, where the court said: "An indorsement for collection, or the like, is not a contract of indorsement, but the creation of a power, the indorsee being a mere agent to receive or enforce payment for the indorser's use;" and it was held that the payee of a bill of exchange by indorsing it "For deposit to the credit of" himself retains ownership not only of the bill, but of its proceeds until they are so deposited; and that the money realized by collecting the bill is, in the hands of a disinterested bank, through whose agency the collection was made, subject to garnishment as assets belonging to such indorser. See also National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50; People's Bank v. Jefferson County Sav. Bank, 106 Ala. 524, 17 South. 728, 54 Am. St. Rep. 59.

95. See Ditch v. Western Nat. Bank of Baltimore, 79 Md. 192, 29 Atl. 72, 23 L. R. A. 164, and note.

In that case, on an indorsement for deposit, a check was received and credited as cash to the account of the indorser by a bank. Thereafter, by an indorsement in the same form, the check is transferred to another bank which, in good faith, pays the amount to the former bank, and credits it for cash. The first bank having made an assignment for creditors, it is held that the title to the check is in the bank which holds it and has paid for it, and testimony of the first indorsee that he regarded all the checks deposited by him as having been deposited for collection, is held incompetent as a conclusion.

Custom or practice to control.— In the case of National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50, a bank received a check on another bank indorsed "for deposit," and procured it to be certified by the drawee. It was held that the bank became at once liable for the amount thereof to the depositor, as for money had and received, and that such liability might be reached by garnishment. The court said: "The import and effect of such indorsement must be considered in the light of the attendant circumstances, and of the previous dealings between the parties, where a depositor has for some time previously kept a deposit account with a banker, on which he was accustomed to deposit checks payable to him, entries of which were event, a restrictive indorsement of an instrument for collection or deposit, or to the use of the indorser and for his benefit, in the absence of any other circumstances, will not divest the indorser of his title thereto, until the money is paid.

d. *Indorsements in trust.*— As is provided in the Negotiable Instruments Law an indorsement is restrictive which vests the title of an instrument in trust for or to the use of some other person.[96] This statutory rule is not different from that of the common law. As when a bill is indorsed " Pay to A. or order for the use of B.," A. cannot pass the bill off for his own debt, but he can by indorsing it transfer the title, and will hold the proceeds for the benefit of B. and be accountable to him for them.[97] And where a testator drew his draft on the treasurer of a corporation, payable to himself, and indorsed it, " Pay to the order of M. H. for the benefit of her son Charlie," it was held that an indorsement to one person for the use or benefit of another affords no evidence of lack of consideration; that such consideration is presumed, and that the

made in his pass-book, and to draw against such deposits such an indorsement, in the absence of a different understanding, is presumptive of more than a mere agency or authority to collect. The special purposes for which an indorsement for deposit is made under such circumstances may be readily inferred. It was a request and direction in the garnishees (the bank) to deposit the sum to the credit of the defendant, and conferred on them not only authority to collect, but also authority to put the check in such form and use it in such manner, as in their judgment and discretion, having reference to the conditions and necessities of their business, would make it most available to their protection. The effect of the indorsement for the consummation of this purpose is to vest the garnishees (the bank) with the title to, and control of the check." But it should be noticed that in this case the certification of the check, procured by the bank with which it was deposited, was regarded in effect as a payment, and that thereafter the bank would be assumed to have the entire control of the check.

Payment of check indorsed for deposit.— Plaintiffs were the owners of certain sight drafts drawn on the defendants. P., who was the confidential man in plaintiffs' employment, having authority to receive payments for them in the course of their business, indorsed the drafts "for deposit in the Broadway National Bank," and intrusted them to a boy, who had been directed to obey the orders of P., and who took the drafts to the office of defendants, received the payment of them in money, returned, and paid over the money to P. Held, that the payment to P. was a good payment to the plaintiffs, and that their action for the amount of the check could not be sustained, and that, although the payment to the boy was irregular in the first instance, yet, as he had turned the money over to P., P.'s receipt was a good defense as against plaintiffs. The court says: "Had the boy absconded with the money it would have been more difficult to sustain the defense." Johnson v. Donnell, 90 N. Y. 1.

96. See Neg. Inst. L. (N. Y.), § 66, subd. 3; *ante*, p. 328.

97. Evans v. Cramlington, Carth. (Eng.) 5. A distinction is to be made between indorsements to the account of a third person, and where an indorsement is made in trust for another person. See Hook v. Pratt, 78 N. Y. 371, 376.

title passed from the indorser to the indorsee, subject to the trust, but that there was nothing retained to the drawer or indorser.[98]

e. *Effect of restrictive indorsement; statutory provision.*— The Negotiable Instruments Law provides that:

" 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 instrument authorizes him to do so.

" But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement." [99] This section is substantially the same as that of the English Bills of Exchange Act;[1] and such act further provides that where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.[2] The rules applicable to the effect of a restrictive indorsement have already been considered under other heads of this section and do not need to be here discussed. It would seem that, for the most part, a restrictive indorsement constitutes the indorsee an agent for the indorser, and his powers and duties in respect to the paper indorsed are to be measured and enforced in accordance with the expressed terms and circumstances of the indorsement.[3] If the indorsement, or the circumstances under which an indorsement is made, authorizes the indorsee to transfer his rights as such indorsee, independent of the statute and under the common law, the

98. Hook v. Pratt, 78 N. Y. 371. In general it has been said that the indorsement upon drafts, notes, checks, or bills of exchange determine the relation of the parties thereto; and where the owner of the draft indorses it to a person or bank "for collection," or "for account of," or "on account of," the owner, such indorsement is a restricted as distinguished from a general indorsement, and gives notice that the draft is the property of the owner who so indorsed it, and that it is no longer negotiable paper; and no one into whose hands it comes can claim protection as an innocent purchaser. People's Bank of Lewisburg v. Jefferson County Sav. Bank, 106 Ala. 524, 17 South. 728.

99. Neg. Inst. L. (N. Y.), § 67. For the same section in the statutes of other States see Appendix.

1. English Bills of Exchange Act, 1882, § 35(2).

2. Idem, § 35(3).

3. Potts v. Reed, 6 Esp. (Eng.) 59. See also Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429; White v. National Bank, 102 U. S. 658, 26 L. Ed. 250, where it was held that, by the terms of an indorsement, "Pay to A., or order, for account of B.," A. became merely the agent of B. for the collection of the money; Armour Bros'. Banking Co. v. Riley County Bank, 30 Kan. 163, 1 Pac. 506; Leary v. Blanchard, 48 Me. 269; Lawrance v. Russell, 77 Pa. St. 460; Freeman's Nat. Bank v. National Tube Works, 151 Mass. 413, 24 N. E. 779.

subsequent indorsees or transferees can only succeed to the rights of the person to whom the indorsement has been restrictively made.[4]

§ 61. Qualified indorsement.

a. *In general.*—A qualified indorsement differs from a restrictive indorsement in that the former does not in any way affect the negotiability of the instrument.[5] The only result of such an indorsement is to restrict and limit the liabilities of the indorser as imposed by the general principles of the commercial law. An indorsement without recourse transfers the whole interest of the indorser in the note, and to this extent has exactly the same effect as a general indorsement.[6] By such an indorsement the interest of the indorser in the note is transferred but he is not subjected to the liabilities of a general indorser.[7] By such an indorsement the

4. Treuttel v. Barandon, 8 Taunt. (Eng.) 100; Lloyd v. Sigourney, 5 Bing. (Eng.) 531; Sweeney v. Easter, 1 Wall. (U. S.) 166.

Assignment by bank for benefit of creditors.— Where a bank, to which drafts or checks have been sent for collection, makes a general assignment for the benefit of its creditors, its assignee does not acquire any title to such paper; and if the collections made thereon by collecting agencies are paid to him, he is answerable for the amounts thereof to the owners of such drafts and checks, and is not relieved from liability by the fact that he paid out such moneys in good faith, and as authorized by the court having jurisdiction over him. National Butchers & Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031, 15 Am. St. Rep. 515. And it was also held in this case that an assignee for the benefit of creditors can acquire no better title to a draft or check indorsed to his assignor for collection, than the latter had; and if he disposes of or pays out paper or money, though in good faith, and not under the order of the court, to which his assignor had no title, he is answerable to the owner thereof.

5. Story on Promissory Notes, § 146; Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129.

6. **Effect of indorsement without recourse.**—In the case of Richardson v. Lincoln, 5 Metc. (Mass.) 201, 204, the court said: "It was stated in the argument for the defendant that this note was indorsed without recourse, from which it was contended that the indorsee was to be regarded as the agent of the indorser, to collect it for his use. This, if it was so indorsed, is not a just conclusion. Such an indorsement transfers the whole interest, and the clause "without recourse," merely rebuts the indorser's liability to the indorsee and subsequent holders. It has indeed been sometimes considered that this clause, with other circumstances, tends to show that the note was not indorsed for value, and in the usual course of business, giving the indorsee an absolute title, without set-off, or such other defense as the maker might have, if sued by the promisee. But in the present case, if the defendant had any such set-off, or other defense as against the promisee, it would be fully open to him, not only because the note was indorsed without recourse, but because it was indorsed after it had been long overdue." See also Seeley v. Reed, 28 Fed. 164; MacIntire v. Preston, 10 Ill. 48; Chase v. Hathorn, 61 Me. 505; Keyes v. Waters, 18 Vt. 479.

7. **Negotiability not affected by qualified indorsement.**— In the case of Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129, the court said: "Another point of some importance arises, which involves the question, whether, by this restricted indorse-

indorser is liable in the same way and to the same extent as is a transferrer of a note, the title to which will pass by delivery alone;[8] unless otherwise agreed, the indorser impliedly warrants that the paper is genuine;[9] that it is of the kind or description it purports to be;[10] that the parties to it are *sui juris* and capable of contracting;[11] that it has not been paid, and that he has done nothing and will do nothing to prevent the transferee from collecting it;[12] and he is liable for any fraud practiced by him in the transfer.[13]

b. *How made.*— The usual form of making a qualified indorsement is by the use of the words *"sans recourse,"* "without re-

ment, the property of the note passed to the indorsee so that he may sue upon it in his own name. If the restriction applied to the quality of the contract so as to render a negotiable instrument no longer negotiable, there would be some difficulty in allowing, consistently with legal principles, an indorsement of this effect to operate as a transfer of the note. But this is not the effect of the restriction; the note remains negotiable in the hands of the indorsee, although he has no remedy against the indorsee; and in whose hands so ever the note may come, the maker is still liable, according to the terms of his original contract, to pay to the promisee, or his order." See also Richardson v. Lincoln, 5 Metc. (Mass.) 201; Craft v. Fleming, 46 Pa. St. 140; Watson v. Cheshire, 18 Iowa, 202, 87 Am. Dec. 382; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859.

8. Watson v. Cheshire, 18 Iowa, 202, 87 Am. Dec. 382; Dayton v. Tillorton, 39 Iowa, 404; Dumont v. Williamson, 18 Ohio St. 515, 98 Am. Dec. 186.

9. Jones v. Ryde, 1 Marsh. (Eng.) 157, 5 Taunt. (Eng.) 489; Fuller v. Smith, Ryan & M. (Eng.) 49, 1 Car. & P. (Eng.) 197; Aldrich v. Jackson, 5 R. I. 218; Lyons v. Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129; Morrison v. Currie, 4 Duer (N. Y.), 79.

10. Allen v. Pegram, 16 Iowa, 163, in relation to illegal bank stock. And see Gompertz v. Bartlett, 2 El. & B. (Eng.) 849, 24 Eng. L. & Eq. (Eng.) 156, where the vendor of a bill was held liable though he did not put his name on it.

11. Theall v. Newell, 19 Vt. 202; Lobdell v. Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358; Jones v. Crosthwaite, 17 Iowa, 393.

12. Eaton v. Mellus, 7 Gray (Mass.), 566.

13. Watson v. Cheshire, 18 Iowa, 202, 87 Am. Dec. 382, citing Welch v. Lindo, 7 Cranch (U. S.), 159; Epler v. Funk, 8 Pa. St. 468, 469; Prettyman v. Short, 5 Harr. (Del.) 360; Waite v. Foster, 33 Me. 424.

Genuineness of signatures.— While the words "without recourse" accompanying an indorsement clearly indicate that the party making the transfer does not intend to assume the position of an unconditional indorser, or to incur any liability if the note is not paid at maturity upon due demand, or even if all the parties to the paper should prove to be wholly insolvent, we think they cannot be construed as importing more than this. At least they do not divest such indorser of his character as a vendor of the note, nor exempt him from the liabilities arising from a sale and transfer by delivery, where the note is capable of being thus transferred. In such a case, then, there is an implied warranty on the part of the vendor that the note is not forged — that it is in fact what it purports on its face to be. Dumont v. Williamson, 18 Ohio St. 515, 98 Am. Dec. 186.

Liability as vendor.—See also Bevan v. Fitzsimmons, 40 Ill. App. 108.

Individual contract.— Where the payee of a note indorses it without recourse, it is his individual contract of indorsement, and a subsequent indorser cannot take advantage of it. Doom v. Sherwin, 20 Colo. 234, 38 Pac. 56.

course," or "without recourse to me." Other words, however, showing the same intent will be sufficient; as a transfer of "all my right and title in the within note to be enjoyed in the same manner as may have been by me;" [14] or "I order the contents of this note to be paid to M. R. at his own risk," [15] or "Indorser not holden." [16] If it be the intent of the parties that an indorsement should be without recourse to the indorser, such intent should be clearly expressed in the indorsement itself, for, as against a subsequent *bona fide* holder without notice, the liability of a person who has indorsed unqualifiedly in full or blank cannot be altered by evidence that there was a parol agreement that the indorsement should be without recourse.[17] It has been held that a charge to a jury that the words "without recourse" must be written in such a manner that they could be read by a man of ordinary ability and understanding in order to exonerate the indorser, was errone-

14. Hailey v. Falconer, 32 Ala. 536.

15. Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129.

16. Ticonic Bank v. Smiley, 27 Me. 225, 46 Am. Dec. 593; Hankerson v. Emery, 37 Me. 16.

17. Dale v. Gear, 38 Conn. 15, 9 Am. Rep. 353; Lee v. Pile, 37 Ind. 107, 110; Dolittle v. Ferry, 20 Kan. 230, 27 Am. Rep. 166; Hill v. Shields, 81 N. C. 250, 31 Am. Rep. 299; Martin v. Cole, 104 U. S. 30.

Intent to limit liability should be clearly expressed.— In the case of Doolittle v. Ferry, *supra*, the court says: "If a transfer of title without assumption of liability is sought, equally apt and well-known words are at hand. 'Without recourse' relieves the indorser. Where the law furnishes such apt, brief, and well-known expressions for making the indorsement accomplish exactly what the parties may desire, wise policy demands that each form of indorsement should conclusively carry with it the liability which it implies. There are no instruments concerning which it is more important that the rules should be clear, settled, and conclusive than negotiable paper. Such paper subserves an invaluable purpose in business transactions, and should tell upon its face the whole story of its obligations. Where for convenience, and to facilitate business, certain short forms and expressions are used, to which the law has attached certain implications, those implications should be as conclusive upon all the parties as though the full contract were reduced to writing." And the court also quotes from the opinion in the case of Dale v. Gear, 38 Conn. 15, 9 Am. Rep. 353, as follows: "But this plea (that regular indorsement was without recourse) shows no agency, trust, equitable relation, or equity connected with an antecedent transaction constituting a consideration for the agreement, or which would justify a court of equity in interfering to prevent an enforcement of the contract of warranty which the law implies. It presents a naked case of an attempt to prove by parol, that a clear and unambiguous contract of warranty is not such, and to contradict it in terms — to turn an indorsement without restriction, before maturity, into a restricted indorsement. Such a plea cannot be sustained without a violation of essential principles."

As between the original parties, it has been held that an agreement, made at the time of an indorsement of a note, that the indorser shall not be liable thereon, but only indorses to transfer title of the note, operates to render the indorsement equivalent to an indorsement without recourse. Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204; Johnson v. Williard, 83 Wis. 420, 53 N. W. 776.

ous.[18] And where a firm was discontinued, and during the adjustment of its affairs, was succeeded by a new firm of the same name as the old, of which the defendant was a member, and he indorsed a note with the words "old firm in liquidation," it was held not to be an indorsement without recourse.[19]

c. *Statutory provision.*— The Negotiable Instruments Law provides that: "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." [20] The English Bills of Exchange Act provides that "the drawer of a bill, and any indorser, may insert therein an express stipulation (1) negativing or limiting his own liability to the holder." [21]

§ 62. Conditional indorsement.

a. *In general.*— Story defines a conditional indorsement as one which involves some fact or event, upon the occurrence of which the validity of the indorsement is ultimately to depend, and which is either to give effect to it, or to avoid it; and it may be either a condition precedent or a condition subsequent.[22] A conditional indorsement on the back of a note does not affect its negotiability; its only effect is to give notice of the consideration to subsequent holders.[23] As has already been stated, if the instrument has a

18. Hayden v. Strong, 23 Hun (N. Y.), 527.

19. Fassin v. Hubbard, 55 N. Y. 465.

20. Neg. Inst. L. (N. Y.), § 68. For the same section in the statutes of other States see Appendix.

21. English Bills of Exchange Act, 1882, § 16 (1).

22. Story on Promissory Notes, § 149.

Chitty on Bills and Notes (12th Am. ed.), p. 268 has the following: "It is competent also for an indorser to make only a conditional transfer of the bill; and, therefore, if the payee of a bill annexes a condition to his indorsement before acceptance, the drawee who afterward accepts it is bound by the condition; and if the terms of it be not performed, the property in the bill reverts to the payee and he may recover the sum payable in an action against the acceptor."

23. Tappen v. Ely, 15 Wend. (N. Y.) 362.

Conditional indorsement does not affect negotiability.— In the case of Upham v. Prince, 12 Mass. 14, the payee of a negotiable note indorsed it, "I guarantee the payment of this note within six months." The court held that the note did not lose its negotiability by such an indorsement, any more than it would if it had been indorsed with the words "Without recourse to the indorser," which is a common form of an indorsement where the indorser does not intend to remain liable. See also Blakey v. Grant, 6 Mass. 386.

A distinction should be made between an indorsement upon a note made by the indorser in transferring it, and a memorandum attached to a note at the same time that the note is executed. It has been held that a memorandum upon a note, made condition attached to it, which affects the original contract, it is void.[24] In this respect a conditional indorsement is essentially different. The conditional indorsement does not alter the character of the instrument, or affect in any way its negotiability.[25] The liability of the maker or drawer, as expressed in the original contract, is not affected by such indorsement; the condition only relates to the manner in which the transfer by the indorsement shall be made effectual or shall be rendered void. An instrument indorsed "Pay the within sum to C. & R., or order, upon my name appearing in the Gazette as ensign," etc., is a conditional indorsement, and if the condition is not fulfilled, the title of the indorsee and every subsequent holder becomes void, and the right to the note reverts to the original indorser.[26] The effect of the decision in this case was that the conditional indorsement did not transfer the title absolutely. This doctrine has been altered by the English Bills of Exchange Act, and by a similar provision contained in Negotiable Instruments Law.

b. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where an indorsement is conditional, a party re-"quired to pay the instrument may disregard the condition and "make payment to his indorsee or his transferee, whether the con-"dition 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." [27] The English Bills of Exchange Act contains a similar provision.[28] Judge Chalmers says: "This section alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled. This was hard on him. If he dishonored the bill, he might be liable in damages, and yet it might be impossible for him to find out if the condition had been fulfilled." [29]

contemporaneously and delivered with it, and intended as a part of the contract, is a substantive part of the note and qualifies it the same as if inserted in the body of the instrument, and that it constitutes a single contract. Benedict v. Cowden, 49 N. Y. 396.

24. See *ante*, chap. III, § 36.

25. Story on Promissory Notes, § 149.

26. Robertson v. Kensington, 4 Taunt. (Eng.) 30.

27. Neg. Inst. L. (N. Y.), § 69. For the same section in the statutes of other States see Appendix.

28. English Bills of Exchange Act, 1882, § 33.

The last sentence of the above-quoted section of the Negotiable Instruments Law was not contained in the English Bills of Exchange Act.

29. Chalmers on Bills of Exchange (5th ed.), p. 110, citing Robertson v. Kensington, 4 Taunt. (Eng.) 30.

§ 63. Indorsement of instrument payable to bearer.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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." [30] The negotiability of a note payable to bearer has always been regarded as being no further restrained by an indorsement in full than would the negotiability of a note payable to order be, by the same indorsement.[31] The rule is well settled that "if a bill be once indorsed in blank, though afterward indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to the bearer, though as against the special indorser himself, title must be made through the indorsee." [32]

§ 64. Indorsement of instrument payable to two or more persons.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where an instrument is payable to the order of two "or more payees or indorsees who are not partners, all must in- "dorse, unless the one indorsing has authority to indorse for the "others." [33] This section is declaratory of the common-law rule. It is not questioned that a partner, in general, may indorse and transfer a promissory note made payable to his firm. It is also unquestioned that if a note is payable or indorsed to several persons who are not partners, the transfer can only be made by a joint indorsement of all of them.[34]

30. Neg. Inst. L. (N. Y.), § 70. For the same section in the statutes of other States see Appendix.

31. Johnson v. Mitchell, 50 Tex. 212, 32 Am. Rep. 602.

32. Byles on Bills (5th ed.), p. 109; Story on Promissory Notes, § 139; 2 Parsons on Notes and Bills, pp. 19, 26.

Where a note is indorsed in blank by the payee, and is afterward transferred by an indorsement in full, it is still transferable by delivery, and a party to whom it is so transferred may make title by filling up the blank indorsement to himself, and striking out the subsequent ones. Watervliet Bank v. Hoyt, 1 Den. (N. Y.) 608.

33. Neg. Inst. L. (N. Y.), § 71. For the same section in the statutes of other States see Appendix.

34. Ryhiner v. Feickert, 92 Ill. 305, 34 Am. Rep. 130. In this case a note was executed and delivered payable to the order of "Charles and William Feickert;" these persons were not partners, but Charles Feickert, having possession of the note and representing that the defendants were partners, sold and assigned it to the plaintiff by a writing signed in the style of "Charles and William Feickert." It was held that possession of the note by Charles was not evidence of a partnership, and that title as against both of them could only pass by a joint indorsement. See also Wood v. Wood, 16 N. J. L. 428.

b. *Authority to indorse.*—As a general rule, the lawful possession of a negotiable instrument confers on the holder authority to transfer all right and title thereto.[35] It is not necessary that the authority of one of two or more payees to indorse should appear upon the note.[36] But where notes are payable to joint payees the actual manual possession of the notes must be in some one of the payees. It is impossible that it can be in all at the same time; therefore the possession of the notes by one of such payees is of no particular significance. The face of a note payable to two or more payees discloses the interest of the payee in possession, and rebuts any ordinary presumption that might arise therefrom.[37] It would seem, therefore, that the authority of one of two or more joint payees to indorse must appear from the express terms of a contract, or from circumstances implying such an authority. It is probable that such authority may be given by parol, as in the case of other instruments payable to a single payee.[38]

§ 65. Indorsements by or to cashiers, corporate officers, and other persons acting in a representative capacity.

a. *Indorsement to a cashier or officer of corporation; statutory provision.*— The Negotiable Instruments Law provides that: "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." [39] This section of the statute seems to be declaratory of the common law.

b. *Indorsement to bank or corporation.*— An indorsement of a note by the holder in these words, "Pay to E. O., cashier, or order," made upon the purchase of it by the bank of which E. O. was cashier, is a legal transfer of the note to the bank.[40] The general rule relating to notes payable or indorsed to a person as agent does not apply in the case of bank cashiers.[41] A negotiable instru-

35. Andrews v. Bond, 16 Barb. (N. Y.) 633.

36. Bettis v. Bristol, 56 Iowa, 41, 8 N. W. 808.

37. Ryhiner v. Feickert, 92 Ill. 305, 34 Am. Rep. 130.

38. Brown v. Bookstaver, 141 Ill. 461, 31 N. E. 17; Cooper v. Bailey, 52 Me. 230; Turnbull v. Trout, 1 Hall (N. Y.), 336.

39. Neg. Inst. L. (N. Y.), § 72. For the same section in the statutes of other States see Appendix.

40. Watervliet Bank v. Hoyt, 1 Den. (N. Y.) 608; Farmers & Mechanics' Bank v. Day, 13 Vt. 36.

41. See *ante*, chap. II, § 29 (*e*).

ment payable, or an indorsement of such an instrument to, a cashier of a bank is payable to him, not as an individual, but as a bank officer, and the contract is with the bank; and it is unnecessary in a suit upon such an instrument by the bank to show an indorsement by the cashier to the bank.[42] The rule as to negotiable instruments payable to the treasurer or other fiscal officer of a corporation is not uniform in all the States. In Massachusetts, for instance, it has been held that an instrument payable to "G. S., treasurer," is payable to him personally, though described as treasurer and not merely treasurer for the time being, and may be indorsed by him as treasurer either in person or by attorney.[43] But in some States it has been held that if the interest of the corporation can be shown, the fact that the instrument is payable to its treasurer will not affect the title of the corporation.[44] The rule seems to be now established by the above section of the Negotiable Instruments Law, and in all the States having adopted this act, an instrument payable or indorsed to the treasurer of a corporation is *prima facie* payable to the corporation.

c. *Indorsement by cashier or treasurer of corporation.*— Independent of the statute above referred to an indorsement of a negotiable instrument by the cashier on behalf of the bank is sufficient to pass title to the instrument. An indorsement of a negotiable instrument, payable to a corporation, by its treasurer in his official capacity *prima facie* passes title to the instrument.[45] The general

42. New York Bank v. Ohio Bank, 29 N. Y. 619; Bank of Genesee v. Patchen Bank, 19 N. Y. 312; First Nat. Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698; Blair v. First Nat. Bank, Fed. Cas. No. 1,485; Nave v. First Nat. Bank, 87 Ind. 204; Garton v. Union City Nat. Bank, 34 Mich. 279; Lookout Bank v. Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934.

43. Shaw v. Stone, 1 Cush. (Mass.) 288. See also Horan v. Long, 4 Dev. & B. (N. C.) 274, 34 Am. Dec. 378; Johnson v. Catlin, 62 Am. Dec. 622; Chadsey v. McCreery, 27 Ill. 252; Rutland & B. R. Co. v. Cole, 24 Vt. 33; Société des Mines, etc. v. Mackintosh, 5 Utah, 568, 18 Pac. 363; Alston v. Steartman, 2 Ala. 699; McDonald v. Laughlin, 74 Me. 480.

44. Genesee Bank v. Patchen Bank, 13 N. Y. 309; Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107.

In the case of Robb v. Ross County Bank, 41 Barb. (N. Y.) 586, it was held that the omission to write either before or after the name of the cashier of the bank on the back of the draft "for the ——— bank" will not preclude the holder from recovering against the bank as indorser. An indorsement of his name by the cashier followed by "cash'r" is sufficient. And in the case of Folger v. Chase, 18 Pick. (Mass.) 63, the note of the bank was indorsed "P. H. Folger, cashier," and it was held to pass the title to the note, Wilds, J., remarking that "the indorsement by the cashier in his official capacity sufficiently shows that the indorsement was made in behalf of the bank, and if that is not sufficiently certain, the plaintiffs have the right now to affix the name of the corporation." See also Spear v. Ladd, 11 Mass. 94.

45. Cole v. Merchants' Bank of Watertown, 60 Ind. 350.

authority conferred upon an officer of a corporation to transact its financial affairs carries with it the power to transfer negotiable paper by his indorsement in his official capacity.[46]

d. *Indorsement in representative capacity.*— The Negotiable Instruments Law provides that: "Where any person is under "obligation to indorse in a representative capacity, he may indorse "in such terms as to negative personal liability." [47] An indorsement to negative personal liability should be made in the same manner as the signature to a bill or note by the agent for his principal.[48] Such an indorsement is usually "A. B., as agent for C. D.," or "C. D. by A. B., agent," or "Per procuration, C. D., principal, A. B., agent." [49]

§ 66. Misspelled name of payee or indorsee; presumption as to time and place of indorsement.

a. *Indorsement where name is misspelled; statutory provision.* — The Negotiable Instruments Law provides: "Where the name "of a payee or indorsee is wrongly designated or misspelled, he "may indorse the instrument as therein described, adding, if he "think fit, his proper signature." [50] This is a similar provision

46. Russell v. Folsom, 72 Me. 436; Ogdon v. Andre, 4 Bosw. (N. Y.) 583; Scott v. Johnson, 5 Bosw. (N. Y.) 213; Merchants' Bank v. McCall, 6 Bosw. (N. Y.) 473; Elwell v. Dodge, 33 Barb. (N. Y.) 336; Clark v. Titcomb, 42 Barb. (N. Y.) 122.

47. Neg. Inst. L. (N. Y.), § 74. It is provided in section 39 of the Negotiable Instruments Law, *ante*, § 29, *c* (1), p. 72, that where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

48. See *ante*, chap. II, § 29, *c* (3), p. 86.

49. **Indorsement by agent.**— In the case of Farmington Sav. Bank v. Fall, 71 Me. 49, a note payable to "B., agent," was indorsed "Granite and Agricultural Works, B., agent." It was held that the indorsement was that of B., agent, and that it was not affected by the needless reference to the company for which he was agent. See also Paterson v. Henry, 4 J. J. Marsh. (Ky.) 126; Case v. Mechanics' Banking Assn., 4 N. Y. 166.

In the case of Durnall v. McElroy, 3 Dana (Ky.), 407, a note payable to C. was indorsed by L., his authorized agent, as follows: "L. per C." It was held that the presumption is that the word "per" meant "for," and that the indorsement was effectual. In the case of Hunt v. Listenberger, 14 Ind. App. 320, 42 N. E. 240, two indorsements, as follows: "H. and A., by H. J. H., agent," and "H. J. H., agent, H. and A.," were held to be the indorsements of H. and A., in the absence of proof as to the latter indorsement that it was not made by H. and A., respectively. The indorsement first mentioned was held to be a sufficient indorsement by the payee.

50. Neg. Inst. L. (N. Y.), § 73. For same section of statutes of other States see Appendix.

to that contained in the English Bills of Exchange Act,[51] and is declaratory of existing law.[52] This is a usual practice in commercial transactions. The usual and proper course is for the holder to sign first the name as described or spelt in the bill, and then to put underneath his proper signature.[53]

b. *Presumption as to time of indorsement; statutory provision.* — The Negotiable Instruments Law provides that: "Except "where an indorsement bears date after the maturity of the instru-"ment, every negotiation is deemed *prima facie* to have been "effected before the instrument was overdue." [54] This is the same as a provision contained in the English Bills of Exchange Act,[55] and is declaratory of the common-law rule. Apart from the general rule there is no presumption as to the exact time of negotiation.[56] But, as stated by Judge Chalmers, "it seems that circumstances of strong suspicion, short of direct evidence, may rebut the *prima facie* presumption, and make it a question for the jury whether the bill was negotiated before or after maturity." [57]

51. English Bills of Exchange Act, 1882, § 32(4).

52. **Indorsement where name of payee or indorsee is misspelled.**—A bill was indorsed to J. Smythe, and the man's real name was T. Smith. It was held that he could validly negotiate the bill by indorsing it as J. Smythe. Willis v. Barrett, 2 Stark. (Eng.) 29.

In the case of Bryant v. Eastman, 7 Cush. (Mass.) 111, it was held that one who, while carrying on business on his own account, in the name of a company, which has been incorporated, but not organized, receives in payment of a debt contracted with him in such business, a promissory note, payable to the order of the corporation, may transfer the note by indorsing it in his own name. See also Brown v. Parker, 7 Allen (Mass.), 337; Moore v. Anderson, 8 Ind. 18; Salmon v. Hopkins, 61 Conn. 47.

53. Chalmers on Bills of Exchange, p. 108.

54. Neg. Inst. L. (N. Y.), § 75. For same section in the statute of other States see Appendix.

55. English Bills of Exchange Act, 1882, § 36(4).

56. Anderson v. Weston, 6 Bing. N. C. (Eng.) 296.

57. Chalmers on Bills of Exchange (5th ed.), 119; Bonnsall v. Harrison, 1 Mees. & W. (Eng.) 611.

Cotemporaneous with execution.—The indorsement of a note, in presumption of law, is cotemporaneous with the making of it, or at all events that it was antecedent to its becoming due; if the defendant, in a suit by the indorsee, wishes to avail himself of payment to the original holder, it is incumbent on him to show the indorsement to have been subsequent to the payment. Pinkerton v. Bailey, 8 Wend. (N. Y.) 600. See also Hendricks v. Judah, 1 Johns. (N. Y.) 319; Barrick v. Austin, 21 Barb. (N. Y.) 241.

Before maturity.— See, generally, New Orleans Canal & Banking Co. v. Montgomery, 95 U. S. 8, 24 L. Ed. 346.

Parol testimony is admissible to show whether an indorsement was made before or after the instrument was delivered. If the indorsement was made before the payee became the holder of the note, then the party so indorsing the note may be charged as an original promisor. Good v. Martin, 95 U. S. 90, 94, 24 L. Ed. 341.

c. *Presumption as to place of indorsement; statutory provision.* — The Negotiable Instruments Law provides that: "Except "where the contrary appears, every indorsement is presumed "*prima facie* to have been made at the place where the instrument "is dated." [58] This is a statutory declaration of the common-law rule.[59] As stated by Foster, J.: "It is the settled doctrine of the States of Massachusetts and Maine that one not appearing to be a party, either as payee or indorsee, to a note payable to a payee therein named or his order, who puts his name on the back of it in blank at its inception and before negotiation, is a joint and several promisor. The legal presumption in such case is that it was done for the same consideration as the contract on the face of the note. And when there is no date as to such indorsement, the presumption is that it was made at the time when the note had its inception. This presumption will prevail in favor of an innocent indorsee for value before due, and in the regular course of business; and his rights cannot be infringed by proof of any extrinsic facts which might affect the original parties to the contract or those occupying their position and having their rights only." [60]

§ 67. Negotiable character of instrument continued.

a. *Statutory provision.*— It is provided in the Negotiable Instruments Law that: "An instrument negotiable in its origin "continues to be negotiable until it has been restrictively indorsed "or discharged by payment, or otherwise." [61] A similar provision

58. Neg. Inst. L. (N. Y.), § 76. For the same section in the statutes of other States see Appendix.

59. **Presumption when indorsement was made at inception of note.**— The general rule is that if an indorsement is made at the inception of the note it will be presumed to have been for the same consideration, and a part of the original contract, expressed by the note; if made without date it will be presumed to have been made at the inception of the note. Colburn v. Elwell, 30 Me. 310, 50 Am. Dec. 630; Childs v. Wyman, 44 Me. 433, 69 Am. Dec. 111; Parkhurst v. Vail, 73 Ill. 343; Grier v. Cable, 45 Ill. App. 405; Snyder v. Oatman, 16 Ind. 265; Bates v. Pricket, 5 Ind. 22, 61 Am. Dec. 73; Powell v. Thomas, 7 Mo. 440, 38 Am. Dec. 465; Cook v. Southwick, 9 Tex. 615, 60 Am. Dec. 181; Amsbaugh v. Gearhart, 11 Pa. St. 482.

In an action by the payee of a negotiable note against two or more persons, as joint promisors, where one of the defendants' names is on the face of the note, and the names of the others are on its back, without date and in blank, the legal presumption is that all the names were signed at the same time. Benthal v. Judkins, 13 Metc. (Mass.) 265.

60. Bradford v. Prescott, 85 Me. 482, 27 Atl. 461, citing Lowell v. Gage, 38 Me. 35; Sturtevant v. Randall, 53 Me. 149, 157; Smith v. Morrill, 54 Me. 48, 53; Union Bank v. Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; Way v. Butterworth, 108 Mass. 509.

61. Neg. Inst. L. (N. Y.), § 77.

is contained in the English Bills of Exchange Act.[62] This section states a well-established principle of law. As was said by Lord Ellenborough: "A bill of exchange is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor."[63] This rule applies in the same manner and to the same extent to an accommodation note which is negotiable after its maturity.[64] One distinction to be made between an indorsement of a note after due and one before maturity is that in the case of an indorsement before maturity the time of payment is fixed at a future day by the express agreement of the parties, while in the case of an indorsement after maturity the time of payment is declared by law to be

62. English Bills of Exchange Act, 1882, § 36(1).

63. Callow v. Lawrence, 3 M. & S. (Eng.) 97.

Continuation of negotiable character. — In the case of Levitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322, the court said: "A bill or note does not lose its negotiable character by being dishonored. If originally negotiable it may still pass from hand to hand *ad infinitum* until paid by the drawer. 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. Thus the paper preserves its mercantile existence and retains the main attributes of a proper bill or note, and circulates as such in the commercial community. Exceptions to a general rule affecting so important and numerous a class of transactions as the one under consideration must be productive of great inconvenience, and will not be indulged except for urgent reasons; and nothing has been made to appear in the argument or seems to exist in the case, which warrants the court in treating the ordinary indorsement of a dishonored bill or note as without the law merchant and not negotiable. While it was questioned whether such a note was negotiable, and whether the indorser was chargeable except upon the usual condition of demand and notice, there was, perhaps, reason enough to sustain the decision of the court below. But since both the note and its indorsement, by a long course of decisions, have been treated as within the law merchant in respect to their main attributes, the indorsement ought to be regarded as negotiable to the same extent as an indorsement before maturity. The latter follows the nature of the original bill and is equally negotiable." Citing Edie v. East India Co., 2 Burr. (Eng.) 1216; Milford v. Walcott, 1 Ld. Raym. (Eng.) 574; Allwood v. Hazelton, 2 Bailey (S. C.), 457; Bishop v. Dexter, 2 Conn. 419; Berry v. Robinson, 9 Johns. (N. Y.) 121. See also Annan v. Houck, 4 Gill (Md.), 325, 45 Am. Dec. 133; Eversole v. Maul, 50 Md. 95; Amberland Bank v. Hann, 18 N. J. L. 222; Harrington v. Dorr, 3 Robt. (N. Y.) 275; Havens v. Huntington, 1 Cow. (N. Y.) 387; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75; National Bank of Washington v. Texas, 20 Wall. (U. S.) 72; McSherry v. Brooks, 46 Md. 103, 118.

But in the case of Fowler v. Brantley, 14 Pet. (U. S.) 318, 10 L. Ed. 473, the court said: "A note overdue or a bill dishonored is a circumstance of suspicion to put those dealing with it afterward on their guard; and in whose hands it is open to the same defenses it was in the hands of the holder when it fell due. After maturity, such paper cannot be negotiable 'in the due course of trade,' although still assignable." This, however, would appear to be a mere *dictum* in this case and is not entitled to consideration as against the preponderance of authority on the other side.

64. Seyfert v. Edison, 45 N. J. L. 393.

within a reasonable time, upon demand.[65] Where a note has been protested and notice of dishonor has been given to all prior parties, it is not necessary that the holder of such a note, negotiated after its maturity, should make a new demand upon the maker for payment and give notice of nonpayment to the indorsers; the original demand and notice inures to the benefit of all subsequent holders.[66]

b. *Effect or negotiation of overdue paper.*—As will be noticed hereafter, a holder of a negotiable instrument is not a holder in due course unless he becomes such before the instrument was overdue, and without notice that it had been previously dishonored, if such was the fact.[67] The English Bills of Exchange Act provides that: "Where an overdue bill is negotiated it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire

65. Levitt v. Putnam, 3 N. Y. 494. **Demand on instrument indorsed after maturity; reasonable time.**—In the case of Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75, the court said: "The legal effect of indorsing an overdue promissory note negotiable in form is usually held to be the equivalent of an inland bill of exchange, drawn by the indorser on the maker of the note, payable to the indorsee at sight or on demand; and by this analogy in this regard, the duty of the indorsee of such note, if he would hold the indorser, is generally determined. Patterson v. Todd, 18 Pa. St. 426. As the duty of the holder of such a bill is to present it for payment in a reasonable time a like duty devolves upon the indorser of such a note. Thus it is said in Tyler v. Young, 30 Pet. (U. S.) 144, 'An indorsement of a note due or overdue always expresses a conditional as opposed to an absolute obligation. The indorsement of a note overdue has been invested by the modern decisions with a very distinct character. Leidy v. Tammany, 9 Watts (Pa.), 353. It is a bill of exchange drawn upon the party primarily liable, payable at sight. On this theory, the necessity of demand and notice is an essential element; not notice on a given day, as in the case of a maturing note, possible in that case, but impossible in the other, for the day appointed by the former maker and the new acceptor has passed; but notice after the holder has had reasonable time to make the demand on the maker and has employed that time with diligence.' Where a thing is required to be done and may be done, a reasonable time in which to do it necessarily excludes any delay, that, in the exercise of reasonable diligence, could have been avoided; so that a reasonable time in which to fix the liability of the indorser of an overdue promissory note should be such as, under the circumstances, will enable the holder in the exercise of due diligence to present it for payment; and any delay that may, by the exercise of such diligence, be avoided should be treated as negligence and deprive the holder of the right to look to the indorser." See also Brown v. Hull, 33 Gratt. (Va.) 23, 28; Poole v. Tolleson, 1 McCord (S. C.), 200; Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66. In the latter case it was held that the demand for payment of a note indorsed after maturity must be made with the same diligence that is required in demanding payment of an indorsed note due on demand; and a demand made within four days after the indorsement was deemed sufficient to fix the indorser's liability, if it had been followed by protest and due notice of nonpayment.

66. French v. Jarvis, 29 Conn 347.

67. Neg. Inst. L. (N. Y.), § 91(2). See *post*, § 73, p. 359.

or give a better title than that which the person from whom he took it had." [68]

c. *Discharge of instrument.*— The negotiable character of an instrument is terminated by the discharge thereof.[69] The discharge referred to is that by or on behalf of the principal debtor; a payment or discharge by an indorser does not extinguish its negotiability either as to such indorser or any other person liable on such instrument.[70]

§ 68. Striking out indorsement.

a. *Statutory provision.*— It is provided in the Negotiable Instruments Law that: "The holder may at any time strike out "any indorsement which is not necessary to his title. The in- "dorser whose indorsement is struck out, and all indorsers subse- "quent to him, are thereby relieved from liability on the instru- "ment." [71] This section seems to be declaratory of the common law.[72]

b. *Striking out subsequent indorsements.*— It has been held that if any person indorse a negotiable instrument either for value or for collection, and comes again in possession of it, he shall be regarded, unless the contrary appear, as a *bona fide* holder, and may recover notwithstanding there may be subsequent indorsements in full without a reindorsement.[73] And such an indorser may strike out all indorsements subsequent to his, though some of them are indorsements in full.[74]

68. English Bills of Exchange Act, 1882, § 36 (2).

69. Neg. Inst. L. (N. Y.), § 200. See *post*, chap. X.

70. McCarty v. Roots, 21 How. (U. S.) 432, 16 L. Ed. 162.

In the case of Eaton v. Cary, 10 Pick. (Mass.) 211. 214, it was said: "But it is well settled that one who takes up a note as indorser may either sue the promisor for money paid, or indorse the note in such manner as to charge the promisor at his election, and though thus negotiated when overdue, an indorsee may maintain an action against the promisor or against a prior party who may be chargeable." Citing Guild v. Eager, 17 Mass. 615. See also Mead v. Small, 2 Me. 207, 11 Am. Dec. 62; Stevens v. Hannan, 88 Mich. 13, 49 N. W. 874; Havens v. Huntington, 1 Cow. (N. Y.) 387.

71. Neg. Inst. L. (N. Y.), § 78. For the same section in statutes of other States see Appendix.

72. Judge Chalmers in his work on Bills of Exchange (5th ed.), p. 112, says: "A holder may at any time, as for instance at the trial after the plaintiff has finished his case, strike out any indorsement which is not necessary to his title. The indorser whose indorsement is intentionally struck out, and all indorsers subsequent to him, are discharged from their liabilities; otherwise, if the indorsement be struck out by mistake." Citing Williamson v. Johnson, 3 B. & C. (Eng.) 428.

73. Dugan v. United States, 3 Wheat. (U. S.) 172.

74. Neederer v. Barber, Fed. Cas. No. 10,079; Farmer v. Gardner, 77 Ill. 143; Bell v. Morehead, 3 A. K. Marsh. (Ky.) 158; Ritchie v. Moore, 5 Munf. (Va.) 388, 7 Am. Dec. 688;

c. *Striking out special indorsements.*—A negotiable instrument, the first indorsement on which is in blank, is afterward assignable by a mere delivery, as against the payee, maker, drawer, or acceptor, although it have subsequent indorsements in full; because a subsequent holder by delivery may declare and recover as the indorsee of the payee, and strike out all the subsequent indorsements, whether special or not.[75] But where an instrument is transferred by a special indorsement, the holder has no right to strike out the name of the person mentioned in such indorsement and insert his own in the place thereof;[76] nor can he strike out such name and convert such special indorsement into a blank indorsement.[67] Where an instrument is indorsed to a bank or other agent for collection, on the instrument being returned to the owner, he may strike out the special indorsement and bring an action in his own name; and it is unnecessary in such a case that there should be a reïndorsement.[78]

§ 69. Transfer without indorsement.

a. *Statutory provision.*— It is provided in the Negotiable Instruments Law that: "Where the holder of an instrument pay- " able 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,

Mitchell v. Fuller, 15 Pa. St. 268, 53 Am. Dec. 594.

In New York, in the case of Pentz v. Winterbottom, 5 Den. 51, where the note purported to be indorsed by the payee in blank and several others, the plaintiff sufficiently shows his title to the note by proving the indorsement of the payee, without giving any evidence respecting the genuineness of the indorsements subsequent to his. The plaintiff was held in such case to be at liberty to make title to the note directly from the first indorser, disregarding the others. See also United States v. Barker, Fed. Cas. No. 14,517.

75. Mitchell v. Fuller, 15 Pa. St. 268, 53 Am. Dec. 594. See also Chitty on Bills (5th ed.), pp. 175, 176.

In the case of Fawsett v. National Life Ins. Co., 96 Ill. 11, 37 Am. Rep. 95, the payee of a note indorsed it in blank, the indorsee filled up the blank making the note payable to a bank, for collection on his account. The bank failing to collect, returned the note to him indorsed by its cashier "Without recourse." It was held that the indorsee on the return of the note had the right to strike out the indorsement he had written over the payee's signature, and fill up the indorsement to himself.

76. Porter v. Cushman, 19 Ill. 572.

77. Bank of United States v. Moore, Fed. Cas. No. 930, 3 Cranch (C. C.) 330; Morris v. Foreman, 1 Dall. (Pa.) 193, 1 Am. Dec. 235.

78. Chautauqua County Bank v. Davis, 21 Wend. (N. Y.) 584; Utica Bank v. Smith, 18 Johns. (N. Y.) 230; Watervliet Bank v. White, 1 Den. (N. Y.) 608; Reading v. Beardsley, 41 Mich. 123, 1 N. W. 965; Cassel v. Dows, Fed. Cas. No. 2,502, 1 Blatchf. (U. S.) 335.

"the negotiation takes effect as of the time when the indorsement "is actually made." [79] This section, with the exception of the last sentence, is taken from the English Bills of Exchange Act.[80]

b. *Effect of transfer.*— If there is a valid consideration for the transfer of a negotiable instrument without an indorsement, the transfer passes the title of the transferrer and will enable such transferee to maintain an action upon the instrument and vests in him the rights possessed by the transferrer.[81] Where paper is transferred for collection, without indorsement, title thereto does not pass sufficient for any other purpose than to enforce the collection of the instrument.[82]

c. *Effect as equitable assignment.*— There are a number of cases to the effect that the transfer of a negotiable instrument without indorsement does not pass the legal title to the instrument, but

79. Neg. Inst. L. (N. Y.), § 79. For the same section in statutes of other States see Appendix.

80. English Bills of Exchange Act, 1882, § 31(4).

Title of transferee where instrument is transferred without indorsement.— In the case of Whistler v. Forster, 14 C. B. (N. S.) (Eng.) 258, 32 L. J. C. P. (Eng.) 161, 4 Eng. Rul. Cas. 332, it was said by Willes, J.: "The general rule of law is undoubted that no one can transfer a better title than he himself possesses. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These being part of the currency are subject to the same rule as money, and if such an instrument be transferred in good faith for value, before it is overdue, it becomes valuable in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favor transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action; and it is, therefore, clear that in order to acquire the benefit of this rule, the holder must, if it be payable to order, obtain an indorsement, and that he is affected by notice of a fraud received before he does so. Until he does so, he is merely in the position of an assignee of an ordinary chose in action, and has no better title than his assignor."

81. **Effect of certification of check transferred without indorsement.**— In the case of Freund v. Importers & Traders' Nat Bank, 76 N. Y. 352, a person drew a check and delivered it to another for his accommodation, with no restrictions as to its use. The payee delivered it without indorsement to a third person in payment of a previous indebtedness. After such check had been certified by the bank, the maker thereof notified the bank not to pay it. But the bank paid the check, notwithstanding, to the third person. It was held that the transfer from the payee to the third person, resting on a valid consideration, the certification had the legal effect of an indorsement, and bound the bank to pay the instrument to the third person. See also Nutter v. Stover, 48 Mo. 163.

A transferee of negotiable paper without indorsement can only recover upon it, by proving consideration. Farris v. Wells, 68 Ga. 604.

82. Carter v. Layman, 90 Ala. 126, 7 South. 735; Little v. O'Brien, 9 Mass. 423; Sherwood v. Roys, 13 Pick. (Mass.) 172; Mills v. Porter, 2 Hun (N. Y.), 524; Manwell v. Briggs, 17 Vt. 176.

merely constitutes the transferee an equitable assignee thereof,[83] and an action on such a note must be brought by the transferrer,[84] or by the transferee in the name of the transferrer.[85] And where a note payable to order is transferred by delivery only, without indorsement, the transferee may, by proper proceedings, compel an indorsement to be made.[86] In many of the States the common-law rule that the holder of the equitable title to a negotiable instrument transferred to him by delivery only and without indorsement could sue on such instrument only in the name of the last holder of the legal title, has been abrogated by the statutory requirement that actions shall be prosecuted in the name of the real party in interest.[87]

83. **Transfer without indorsement constitutes transferee an equitable assignee.**— See the following cases:

Connecticut.— Freeman v. Perry, 22 Conn. 617.

Georgia.— National Bank v. Leonard, 91 Ga. 805, 18 S. E. 32.

Indiana.— Foreman v. Beckwith, 73 Ind. 515.

Kansas.—McCrum v. Corby, 11 Kan. 464.

Louisiana.— Pavey v. Stauffer, 45 La. Ann. 353, 12 South. 512, 19 L. R. A. 716.

Maine.— Titcomb v. Thomas, 5 Me. 282.

Michigan.— Minor v. Bewick, 55 Mich. 491, 22 N. W. 12.

Mississippi.— Taylor v. Reese, 44 Miss. 89; Eckford v. Hogan, 44 Miss. 398.

North Carolina.— Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696.

Ohio.—Seymour v. Lehman, 18 Ohio St. 283.

In New York it has been held that where a promissory note payable to order is not indorsed by the payee, but is transferred by delivery merely to another, the holder of the note is a mere assignee, and his rights are to be settled by the same rules which govern the case of an assignee of any other chose in action. Hedges v. Sealy, 9 Barb. (N. Y.) 214.

84. Freeman v. Perry, 22 Conn. 617.

85. In the case of Jones v. Witter, 13 Mass. 304, it was held that a negotiable promissory note is assignable by delivery only, without writing, for an adequate consideration; and the assignee may recover judgment in the name of the promisee, notwithstanding payments made by the maker to the promisee after notice of the assignment.

86. Brown v. Wilson, 45 S. C. 519, 23 S. E. 630; Schoepfer v. Tommack, 97 Ill. App. 562.

87. **Right of assignee to sue.**—Davis v. Johnson, 4 Colo. App. 545, 547, 36 Pac. 887, in which the court said: "But it is not true that such a transfer of a note does not invest the purchaser with title. At common law he took the equitable title, and at law could sue only in the name of the last holder of the legal title; but this distinction has been abrogated by the requirement of the Code that actions shall be prosecuted in the name of the real parties in interest; so that, subject to defenses in favor of the maker, existing at the time of the notice of the transfer, such purchaser now takes a complete title to the note."

In Pease v. Rush, 2 Minn. 107, it was said: "A promissory note like any other personal property can be transferred by mere delivery, so as to pass the title, and the right to sue in the name of the holder; when a note is payable to order, and is found in the hands of a person not the payee, without the indorsement of the payee, the difference between such a holder and one who holds by an indorsement, is that the former is not entitled to the privileges of a *bona fide* holder, while the latter is; a note payable to order passed without indorsement is not taken in the regular course of business, but is subject to the same disabilities as if it had been taken after

d. *Notice of transfer without indorsement.*— It is well settled that the owner of negotiable paper, who obtains title without indorsement by the payee, holds it subject to all the equities and defenses which exist between the original parties.[88] But while, like other assigned choses in action, it is subject to all the equities and defenses existing in favor of the maker, including the payment of the note to the payee if the payment is made without notice of the title of the holder, still, when a debtor has notice of the assignment, he may not thereafter make a valid payment to the assignor.[89] It is the duty of an assignee of a nonnegotiable chose in action, in order to protect himself against payment by the debtor to the original creditor, to notify the former of the assignment.[90]

e. *Indorsement when made does not relate back to time of transfer.*— It has been declared as a general rule that an indorsement of a negotiable instrument by a transferrer subsequent to its transfer cannot relate back to the time of such transfer so as to destroy the intervening rights and remedies of a third party.[91] The reason for this rule is that before an indorsement the holder of a note transferred to him by delivery alone is not a holder in due course and is not within the protection of the law merchant.[92] The holder

due, but the title passes sufficiently to maintain a suit in the name of the owner."

In the case of Wangner v. Grimm, 169 N. Y. 421, 428, 62 N. E. 569, the court said: "Where such an instrument is so transferred it is treated as a chose in action, assigned to the holder, and the assignee acquires all the title of the assignor and may maintain an action thereon in his own name."

See also Lewis v. Hathman, 7 Ind. 585; White v. Callinan, 19 Ind. 43; Williams v. Norton, 3 Kan. 290; Lewis v. Bowen, 29 Mo. 202; Davis v. Lane, 8 N. H. 224. But see Beard v. Dedolph, 29 Wis. 136; Roane v. Williams, 12 Ark. 74.

88. Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 354, 23 N. E. 180; Freund v. Importers & Traders' Nat. Bank, 76 N. Y. 352, 358; First Nat. Bank v. Henry, 156 Ind. 1, 58 N. E. 1057; Sackett v. Montgomery, 57 Neb. 424, 77 N. W. 1083, 73 Am. St. Rep. 522; Hays v. Plummer, 126 Cal. 107, 58 Pac. 447, 77 Am. St. Rep. 153; Gray Tie & Lumber Co. v. Farmers' Bank, 22 Ky. L. Rep. 1333, 84 N. W. 930; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495.

89. Wangner v. Grimm, 169 N. Y. 421, 428, 62 N. E. 569.

90. Heermans v. Ellsworth, 64 N. Y. 159.

91. Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 354, 23 N. E. 180; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414.

92. **Reason for rule.**— In the case of Clark v. Whitaker, 50 N. H. 474, the court said: "Ordinarily the assignee of a chose in action has no greater rights than his assignor. The superior right claimed for the holder of negotiable paper can rest only upon the custom of merchants and the Statute of 3 & 4 Anne, chap. 9. An exception is thereby made in favor of those who take notes by indorsement, for value, before maturity, and without notice of any defense. Until the note is indorsed, the holder is not an indorsee. If it is not indorsed until after maturity, he cannot be said to have taken the note 'by indorsement' before maturity. So too

of such a note is in no better position than was the transferrer at the time of the transfer.[93] Upon indorsement by the transferrer the transferee becomes vested with the rights of an indorsee. But where the indorsement is made after maturity the maker is not thereby divested of the defense of fraud or failure of consideration.[94] The section of the Negotiable Instruments Law above quoted contains a legislative enactment of this rule,[95] and the rule now in force in all States which have adopted that act makes the indorsement of an instrument transferred by delivery effectual only from the time it is made, and, therefore, where such an indorsement is made after maturity, it has the same effect upon the rights and liabilities of the parties, as any other transfer by indorsement after maturity.[96]

if the note is not indorsed till after the purchaser had notice of a defense, he cannot be said to have taken the note by indorsement without notice of any defense. Before he had obtained the indorsement, he was not within the protection of the law merchant, and when he did obtain it, he had notice that he could not gain any title to the note on account of its original invalidity."

93. Savage v. King, 17 Me. 301; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71; Clark v. Callison, 7 Ill. 263; Gilbert v. Sharp, 2 Lans. (N. Y.) 412; Harrop v. Fisher, 30 L. J. (C. L. N. S.) (Eng.) 283; Whistler v. Forster, 14 C. B. (N. S.) (Eng.) 246.

94. **Indorsement after maturity of instrument transferred by delivery.**—In the case of Haskell v. Mitchell, 53 Me. 468, 89 Am. Dec. 711, the note in suit was sold and assigned by delivery before and indorsed after its maturity. The court said: "Before such note was indorsed, and up to the time of its indorsement, a suit to enforce its payment must have been brought in the name of the payee. If so brought, it would have been competent for the maker to show fraud or a failure of consideration by way of defense. The plaintiff, by his purchase, acquired only the rights of an assignee. The indorsement after maturity enables the plaintiff to maintain an action in his own name, but it does not divest the defendant of the defense to which he was entitled prior to such indorsement." And in the case of Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 1 Am. Rep. 71, the court said: "A note not negotiable may be assigned and transferred like any other chose in action, but can be sued only in the name of the payee, and is liable to every defense existing against him. A negotiable note, not transferred until it is overdue, may be sued in the name of the indorsee, but as to defenses must be treated precisely like one not negotiable, and a negotiable note which is transferred before maturity, but not indorsed until afterward, in our opinion can stand on no better footing. Whoever receives it takes a contract which upon its face shows that it is subject to every defense that could have been made between the original parties. There is no custom of merchants in favor of such an assignee, and no rule of law by which he is entitled to greater rights than the payee. If the contract was originally invalid for want of consideration or other cause, so will it be in any other hands into which it passed before the legal title is transferred by regular indorsement. No such indorsement having been made before the note is overdue and dishonored, any subsequent one takes effect only from its date. There is no doctrine known to the mercantile law by which it can relate back to the time of the equitable transfer, and place the assignee in the same position as if he had been, before maturity, the holder of the note for value."

95. Neg. Inst. L. (N. Y.), § 79, last sentence. See *ante*, § 69, p. 347.

96. See *post*, § 73, (*d*), (3).

§ 70. When prior party may negotiate instrument.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where an instrument is negotiated back to a prior "party, such party may, subject to the provisions of this act, "reissue and further negotiate the same. But he is not entitled "to enforce payment thereof against any intervening party to "whom he was personally liable." [97] This section seems to have been derived from the English Bills of Exchange Act,[98] and in any event is a statutory declaration of the common-law rule.[99] This section should be construed with the prior section to the effect that "an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise." [1]

§ 71. Assignment of commercial paper.

a. *Assignability in general.*— Negotiable instruments payable to bearer or indorsed in blank are, as we have seen, transferable by delivery, and without indorsement.[2] In a preceding section of this chapter we have considered the transfer or assignment of instruments payable to order without indorsement,[3] and it will not be necessary to refer again in this section to such subject. We propose here to discuss briefly the effect of the assignment or transfer of nonnegotiable instruments, and of negotiable instruments assignable by delivery. Negotiable and nonnegotiable instruments are choses in action and are assignable;[4] and are none the less so because their transfer by indorsement so vests the title thereto in the assignees as to enable them to maintain actions thereon in their own names.[5] An assignment of a note to pass title must be made by the payee;[6] and where there are two or more

97. Neg. Inst. L. (N. Y.), § 80. For same section in statutes of other States see Appendix.

98. English Bills of Exchange Act, 1882, § 37.

99. Attenborough v. McKenzie, 25 L. J. Exch. (Eng.) 244.

1. Neg. Inst. L. (N. Y.), § 77. See *ante*, § 67, p. 343.

2. See *ante*, § 56, p. 317.

3. See *ante*, § 69.

4. Griffin v. Nokes, Fed. Cas. No. 5,817*a;* Fogg v. Babcock, 41 Me. 347; Tibbets v. Gerrish, 25 N. H. 41, 57 Am. Dec. 307; Wolfe v. Tyler, 1 Heisk. (Tenn.) 313; Stiles v. Farrar, 18 Vt. 444; Freeman's Bank v. Ruckman, 16 Gratt. (Va.) 126.

The payee of negotiable paper having by indorsement made it payable to the order of another, adding also in the same indorsed contract a guaranty of payment, it was held that the contract thus indorsed was assignable, and the assignee might recover thereon; and further, that the assignment of the notes transferred also the indorsed contract of guaranty. Harboard v. Cooper, 43 Minn. 466, 45 N. W. 860.

5. Fogg v. Babcock, 41 Me. 347.

6. Martin v. Hayes, 44 N. C. 423.

payees, one has no right to assign without the express authority of the others,[7] although one payee may assign his interest in the instrument to his copayee to enable him to sue as the legal owner of the note.[8]

b. *Assignment of nonnegotiable instruments.*— The indorsement and delivery by the payee of a nonnegotiable instrument, independent of statute, operates as an assignment of the note.[9] There must be some evidence in writing of the assignment of a nonnegotiable instrument, under a statute providing for written assignments of choses in action, in order to enable the assignee to sue thereon in his own name.[10]

c. *Assignment by separate writing.*— It has been held that the assignment of a promissory note, under a transfer made in the body of a separate instrument, executed for an independent purpose, signed by the holder of the legal title, discharged all prior equities within the meaning of the law merchant.[11] But a note or bond may be assigned on a separate instrument so as to authorize an action thereon in the name of the assignee.[12] The assignment of a mortgage which was given as security for the payment of a promissory note will not operate as an assignment of the note, because under the statutes of many of the States the legal title thereto cannot be assigned by a separate instrument.[13]

d. *Effect of assignment.*—An assignment of a note not negotiable does not pass to the assignee a legal title to the note, but merely vests in him an equitable interest which the courts of law

7. De Forest v. Frary, 6 Cow. (N. Y.) 151.

8. Smith v. Oldham, 5 Mo. 483.

9. Merchants' Nat. Bank v. Gregg, 107 Mich. 146, 64 N. W. 1052. See also Rice v. Teabout, 73 Iowa, 419, 35 N. W. 499; Steere v. Trebilcock, 108 Mich. 464, 66 N. W. 342.

In the case of Mosher v. Allen, 16 Mass. 451, the court said: "If the payee of a promissory note, not negotiable, puts his name on the back thereof, intending to transfer it, he authorizes the prosecution of a suit in his name, for there is no other way of making the assignment effectual."

10. Tradesmen's Nat. Bank v. Green, 57 Md. 602; Nelson v. Marley, 2 Yerg. (Tenn.) 576.

11. Franklin v. Toogood, 18 Iowa, 515.

12. Instone v. Williamson, 2 Bibb (Ky.), 83; Able v. Shields, 7 Mo. 120.

The transfer by the payee by a separate instrument, and without indorsement, does not vest the legal title in the assignee, but is merely an assignment of a chose in action. Hull v. Farmers & Merchants' Bank, 6 Ala. 761; Planters & Merchants' Ins. Co. v. Tunstall, 72 Ala. 142; Thornton v. Crowther, 24 Mo. 164; McClain v. Weidemyer, 25 Mo. 364.

13. Barrett v. Hinckley, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; Ryan v. May, 14 Ill. 49. In the last case it was held that the legal title of a note under the statutes of Illinois cannot be transferred by a separate instrument in writing. The mode pointed out by the statute must be pursued in order to vest a right of action in the assignee. See also Fortier v. Darst, 31 Ill. 212; Boynton v. Renwick, 46 Ill. 280; Badgley v. Botrain, 68 Ill. 25, 18 Am. Rep. 541.

will protect.[14] The statutes in most of the States at the present time provide for the enforcement of beneficial interests in all species of property, including commercial paper, and under such statutes an assignee of either a negotiable or nonnegotiable instrument would be a proper party plaintiff in an action thereon.[15]

e. *Rights of parties.*—An important distinction to be noted between the transfer of a negotiable instrument by indorsement and the assignment of a nonnegotiable instrument is that in the former case the indorsee who is the holder in due course for value takes it free from all defenses not known to him; but the assignee of a nonnegotiable instrument takes the same subject to any equities between the original parties thereto, and any defenses which may be interposed by the maker.[16] An assignment of a negotiable instrument confers upon the holder only such rights as he would acquire upon the assignment of a note which is not negotiable.[17] The assignee of a nonnegotiable instrument who takes the same for value without notice of existing equities between the prior parties will hold it subject to all equities or counterclaims between the original parties existing at the time of the assignment.[18] The maker of a note may set up the same defenses against it in the hands of the assignee that he might set up if it were held by the payee.[19] But all of such defenses and equities must have existed

14. Lyon v. Summers, 17 Conn. 399; Harris v. Culver, 9 B. Mon. (Ky.) 365; Grand Gulf Bank v. Wood, 20 Miss. 482.

15. Forster v. Second Nat. Bank, 61 Ill. App. 272; Kimball v. Whitney, 15 Ind. 280.

16. Franklin v. Toogood, 18 Iowa, 515. See also Cohn v. Prater, 56 Ga. 203; Dyer v. Homer, 22 Pick. (Mass.) 252; Havens v. Potts, 86 N. C. 31; Welter v. Kiley, 95 Pa. St. 461; Zeis v. Potter, 105 Fed. 671, 44 C. C. A. 665; Neale v. Head, 133 Cal. 42, 65 Pac. 131; Pitkin v. Clayton, 41 App. Div. (N. Y.) 363, 58 N. Y. Supp. 483.

17. Story on Promissory Notes, § 120; 2 Parsons on Notes and Bills, 1.

In the case of Franklin v. Toogood, 18 Iowa, 515, in considering the rights of an assignee of a negotiable instrument the court cited this section of Story on Promissory Notes, and said: "And in such cases (and aside from any statute) the assignee acquires the same rights and equities as the payee or assignor had; that is, he may sue the maker and prior parties in the name of the payee or the assignor; or he may maintain a suit in equity in his name against them. And he stands in the place and upon the rights of the payee or assignor, and is subject to whatever defenses might be made as against such payee or assignor, provided they are such as the law considers equitable, and were subsisting at the time the debtor received notice of the assignment."

18. McGarvey v. Hale, 23 Cal. 140; Henry v. Guilland, 103 Ind. 177; Willis v. Twambly, 13 Mass. 204; Smith v. Busby, 15 Mo. 388, 57 Am. Dec. 207; Chamberlain v. Gorham, 20 Johns. (N. Y.) 144; Chase v. Kelly, 59 Hun (N. Y.), 623, 13 N. Y. Supp. 351; First Nat. Bank v. Binum, 84 N. C. 24, 37 Am. Rep. 604; White v. Heylman, 34 Pa. St. 142; Searles v. Seipp, 6 S. D. 472, 61 N. W. 804.

19. Bradley v. Trammel, Fed. Cas. No. 1,788*a*; Huber v. Egner, 22 Ky.

in favor of the maker prior to the assignment and before notice thereof.[20] But the equities and defenses which can be asserted against the assignee are only such as relate to the contract between the original parties, and, therefore, it has been held that the assignee of a nonnegotiable note is not bound to inquire whether the note was made to defraud creditors.[21] The assignor or transferrer of commercial paper either by an assignment or by delivery impliedly warrants the genuineness of the paper, and that there are, to his knowledge, no defenses which will render it void.[22] There is also an implied warranty that no legal defenses exist to such note.[23] Upon the sale of a negotiable instrument there is an implied warranty that the instrument is what it purports to be,[24] and that it is neither forged nor fictitious.[25] But in such a case

L. Rep. 1800, 61 S. W. 353; Stokeley v. Buckler, 22 Ky. L. Rep. 1740, 61 S. W. 460.

20. Carroll v. Malone, 28 Ala. 521; Steele v. Sellman, 79 Md. 1, 28 Atl. 803; Havens v. Potts, 86 N. C. 31.

21. Wright v. Levy, 12 Cal. 257; Bowman v. Halstead, 2 A. K. Marsh. (Ky.) 200, 12 Am. Dec. 380; Caldwell v. Cook, 5 Litt. (Ky.) 180; Holland v. Makepeace, 8 Mass. 418. But if the assignee of the note knew that it was given in fraud of creditors, he cannot enforce it. Bradford v. Beyer, 17 Ohio St. 388.

22. Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Wire v. McCormack, 96 Ky. 159, 28 S. W. 156; Lobdell v. Baker, 3 Metc. (Mass.) 469; Baldwin v. Vandeusen, 37 N. Y. 487.

Warranty dependent upon knowledge.— In the case of Brown v. Montgomery, 20 Wend. (N. Y.) 287, 75 Am. Dec. 404, the court said: "Where a party negotiates commercial paper, payable to bearer, or under a blank indorsement of another person, he cannot be sued on the paper because he is not a party to it; but he, nevertheless, warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the failure of the maker, or by its being already paid, or otherwise to have become void or defective; for, says Judge Story, any concealment of this, would be a manifest fraud. Story on Promissory Notes, § 118."

And in the case of Littaur v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171, the court said: "Without proof of such knowledge no warranty is made out, for there is only the naked fact that the plaintiff purchased the notes, and as we have seen, there is no reported case which holds that where such purchase is made without actual knowledge by the defendant that an implied warranty is established." And the court also said: "The examination we have made of the question shows that the law in regard to the transfer of negotiable bills of exchange and promissory notes as laid down for a century or more only excepts two cases as coming within the doctrine of implied warranty, viz., a warranty of title, and that the instrument is genuine and not forged. There is no precedent and not a single reported case in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that is an implied warranty of the validity of the note."

23. Fake v. Smith, 2 Abb. Dec. 76, 7 Abb. Pr. 106.

24. Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199; Semmes v. Wilson, Fed. Cas. No. 12,658, 5 Cranch (C. C.) 285; Sering v. Findlay, 7 Ind. 247; Thompson v. McCullough, 31 Mo. 224.

25. Swanzey v. Parker, 50 Pa. St. 441, 88 Am. Dec. 541; Aldridge v. Jackson, 5 R. I. 218.

there is no implied warranty of the solvency of the parties to the instrument.[26] The assignor or vendor of negotiable instruments with indorsements thereon, also impliedly warrants the genuineness of the indorsements.[27]

26. Milliken v. Chapman, 75 Me. 308, 46 Am. Rep. 386; Williams v. Usbon, 75 Ind. 280; Lyons v. Divelbis, 22 Pa. St. 185. Nor is there an implied warranty upon the part of an assignor of orders against a municipality for work performed under a public contract that there are funds in treasury available for the payment of such orders. First Nat. Bank v. Drew, 191 Ill. 186, 60 N. E. 856. But see Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404, where it was held that one who sells a check of a third person without communicating to the purchaser the fact known to the seller that the maker of the check had failed to pay another check presented to him for payment on the day of the sale, he cannot recover upon the note given in payment for the check.

27. Aldridge v. Jackson, 5 R. I. 218; Allen v. Clark, 49 Vt. 390; Giffert v. West, 37 Wis. 115.

CHAPTER VI.

Rights of Holders.

§ 72. Right of holder to sue; payment.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "The holder of a negotiable instrument may sue "thereon in his own name; and payment to him in due course "discharges the instrument." [28] The term "holder," as here used, means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.[29]

b. *Rule at common law.*— The person who, by a general indorsement, or where it is payable to bearer, by a delivery, becomes a holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title, notwithstanding any defect of title in the party, whether indorser or deliverer, from whom he took the instrument.[30] It is a general rule that the holder of the legal title of a negotiable instrument may sue thereon, though he is not the full owner, unless it appears that the maker will be prejudiced thereby in his defense.[31] Under the statutes in many of the States an action will lie upon a negotiable instrument by the equitable owner in his own name, and the possession of the note is itself evidence of such ownership.[32] We have already discussed the rights of assignees of negotiable and nonnegotiable instruments to maintain actions thereon.[34]

28. Neg. Inst. L. (N. Y.), § 90. For the same section in the statutes of other States see Appendix.

29. Neg. Inst. L. (N. Y.), § 2.

30. Justice Blackburn, in Crouch v. Credit Foncier, L. R., 8 Q. B. (Eng.) 374.

31. Irwin v. Bailey, Fed. Cas. No. 7,079, 8 Biss. (U. S.) 523; Freeman v. Perry, 22 Conn. 617; Richards v. Betzer, 53 Ill. 466; Peaslee v. McLoon, 16 Gray (Mass.), 488; Hargous v. Lahens, 3 Sandf. (N. Y.) 213; Freeman v. Falconer, 12 Jones & S. (N. Y.) 132.

32. Hudson v. Wier, 29 Ala. 294; Garner v. Cook, 30 Ind. 331; Harriman v. Hill, 14 Me. 127; Guest v. Rhine, 16 Tex. 549.

34. See *ante*, § 71.

§ 73. What constitutes a holder in due course.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "A holder in due course is a holder who has taken "the instrument under the following conditions:

"1. That it is complete and regular upon its face;

"2. That he became the holder of it before it was overdue, and "without notice that it had been previously dishonored, if such "was the fact;

"3. That he took it in good faith and for value;

"4. That at the time it was negotiated to him he had no notice "of any infirmity in the instrument or defect in the title of the "person negotiating it." [35] This section is in all respects declaratory of the common law, and is substantially the same as a section contained in the English Bills of Exchange Act.[36]

b. *In general.*— The expression "holder in due course" is a substitute made by the statute for the former cumbersome phrase of "*bona fide* holder for value without notice before due." [37] The statute has not in any sense affected the necessary qualifications of a *bona fide* purchaser or holder for value. The same rules applicable to the rights of a holder in due course before the enactment of this statute are still in force thereunder. An instrument payable to bearer or indorser in blank and delivered by the maker or indorser to another person will constitute a *bona fide* purchaser of such note a holder in due course.[38] An indorsement for collection does not constitute the indorsee a holder in due course.[39] But the rights of a holder in due course are not affected by an indorsement on the instrument, accompanied by a guaranty of payment.[40]

35. Neg. Inst. L. (N. Y.), § 91. For the same section in the statutes of other States see Appendix.

36. English Bills of Exchange Act, 1882, § 29 (1).

37. Byles on Bills (16th ed.), p. 144.

38. Esty v. Snyder, 41 Ill. 363; Goodfellow v. Landis, 36 Mo. 168; Gould v. Segee, 5 Duer (N. Y.), 260. As to instruments payable to bearer, see Central Bank v. Lang, 1 Bosw. (N. Y.) 202; Matthews v. Poythress, 4 Ga. 287; Lane v. Krekle, 22 Iowa, 399; Winstead v. Davis, 40 Miss. 785; Bank of Winona v. Wofford, 71 Miss. 711, 14 South. 262.

39. Bank of Metropolis v. First Nat. Bank, 19 Fed. 301; Peoples Bank v. Jefferson County Sav. Bank, 106 Ala. 524, 17 South. 728; Wilson v. Tolson, 79 Ga. 137, 3 S. E. 900; Claflin v. Wilson, 51 Iowa, 15, 50 N. W. 578; First Nat. Bank v. Strauss, 66 Miss. 479, 6 South. 232, 14 Am. St. Rep. 579; Hoffman v. Miller, 9 Bosw. (N. Y.) 334; Filbrick v. Ballett, 2 Jones & S. (N. Y.) 370.

40. Central Trust Co. v. Wyandotte Bank, 101 U. S. 68, 25 L. Ed. 876; State Nat. Bank v. Haylen, 14 Neb. 480, 16 N. W. 754; Bank of Woodstock v. Kent, 15 N. H. 579; Dunham v. Peterson, 5 N. D. 414, 67 N. W. 293.

c. *Instrument complete and regular on its face.*—A party purchasing commercial paper which remains in some essential particular incomplete and imperfect does not become a *bona fide* holder; thus where a blank was left for the signature of the president, in paper issued by a corporation, but the paper was negotiated unsigned by such president, it was held that the party taking it was not a *bona fide* holder.[41] And where, at the time the holder of a note purchased it, it was irregular on its face, the effect of the irregularity cannot be avoided by afterward having the note corrected.[42] But the transfer of a postdated note before the day of its date affords no cause of suspicion, so as to put the indorsee on inquiry, and subject him to the equities existing between the parties.[43]

d. *Holder before maturity.*— (1) *In general.*— The statute requires that the holder of a negotiable instrument to constitute himself a holder in due course should become such holder before the instrument was overdue.[44] An instrument is overdue as soon as the time of payment specified therein has passed,[45] and in those States where days of grace are still allowed, a purchaser of an instrument before the expiration of the last day of grace is a purchaser before maturity.[46] An instrument payable in installments

41. Davis Sewing Mach. Co. v. Best, 105 N. Y. 59, 11 N. E. 146.

42. Losee v. Bissell, 76 Pa. St. 459.

43. Brewster v. McCardell, 8 Wend. (N. Y.) 478. But see, as to postdated check, Mayer v. Mode, 14 Hun (N. Y.), 155; Walker v. Geisee, 4 Whart. (Pa.) 252, 33 Am. Dec. 60.

44. Neg. Inst. L. (N. Y.), § 91 (2). See *ante*, § 73 (*a*), p. 359.

45. First Nat. Bank v. Scott County Comrs., 14 Minn. 77; Wallach v. Bader, 7 N. Y. St. Rep. 375.

Where a note payable one day after date is transferred on the second day after its date, the transferee takes subject to equities. Baucom v. Smith, 66 N. C. 537.

Where a due bill payable one day after date is assigned by the payee on the day of its date as collateral security for a loan not evidenced by any note, but ten days afterward the payee in the due bill gives his note, payable with 10 per cent. interest, for the cash previously loaned him, and permits the assignee of the due bill to keep it as security for this note, such assignee is not an innocent purchaser of the due bill, before its maturity. City Bank of Dowagiac v. Dill, 84 Mich. 549, 47 N. W. 1109.

A note payable on or before three years from its date is payable in three years, and a purchaser for value within three years is a purchaser for value before maturity, and, therefore, a holder in due course. Helmer v. Krolick, 36 Mich. 371.

46. **Transfer before expiration of grace.**—Crosby v. Grant, 36 N. H. 273; Johnson v. Glover, 121 Ill. 283, 12 N. E. 257; Goodpaster v. Voris, 8 Iowa, 334.

In New York days of grace have been abolished since 1894, but prior to that time the rule was settled that the maker has the whole of the last day of grace within which to pay. Osborn v. Moncure, 3 Wend. (N. Y.) 170; Hoppin v. Quin, 12 Wend. (N. Y.) 517; Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635; Smith v. Aylesworth, 40 Barb. (N. Y.) 104; Ootthout v. Ballard, 41 Barb. (N. Y.) 33. In the case of Harmon v. Hope, 87 N. Y. 8, 10, the court said: "While a different rule prevails elsewhere to is overdue upon the failure to pay any one of the installments upon the day of payment, and thereafter one who takes it is not a holder in due course.[47]

(2) *Indorsement after maturity where transferred before maturity.*—An instrument transferred without indorsement may be subsequently indorsed by the transferrer, and upon the request of the transferee of such an instrument payable to order, it is the duty of the transferrer to indorse it.[48] If such an indorsement be made after the maturity of the note, it will not constitute the indorsee a holder in due course, but, since the negotiation only takes effect from the time the indorsement is made,[49] the indorsement will be regarded in the same manner as any other indorsement after maturity, and the instrument in the hands of a holder will be subject to all the defenses and equities existing between the original parties thereto.[50]

(3) *Equities and defenses where paper is transferred after maturity.*—When a negotiable instrument is transferred after maturity the holder takes the same subject to all the equities and defenses existing between the original parties. This is an elementary principle of commercial law, and is sustained by a large number of cases, among which are those cited in the note.[51] In an

some extent (Story on Promissory Notes, § 278, note 2; Sargent v. Southgate, 5 Pick. [Mass.] 312; Ayer v. Hutchins, 4 Mass. 370; Pine v. Smith, 11 Gray [Mass.], 38), the current of authority in this State is very manifest, and we can see no good reason for doubting it, or departing from it. Although this note was transferred on the last day of grace, it was yet transferred before actual dishonor, and so as to bar the equities sought to be interposed."

47. Vinton v. King, 4 Allen (Mass.), 562; Vette v. La Barge, 64 Mo. App. 179; McCorkle v. Miller, 64 Mo. App. 153.

48. Neg. Inst. L. (N. Y.), § 79. See *ante*, § 69.

49. Idem, § 69 (*c*).

50. Clark v. Whitaker, 50 N. H. 474; Harkell v. Mitchell, 53 Me. 468, 89 Am. Dec. 711; Lancaster Nat. Bank v. Taylor, 100 Mass. 18, 97 Am. Dec. 70.

51. **Instrument transferred after maturity subject to equities and defenses.**—Bayley, in his treatise on Bills (Phill. & Serv. Ed.), 82, says: "He who takes a bill after it is due, takes it subject to all the objections and equities to which it was liable in the hands of the persons from whom he takes it." Many authorities may be cited which fully support this broad and general principle, among which are:

United States.—Smyth v. Strader, 4 How. 404, 11 L. Ed. 1031; Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. Ed. 876.

Alabama.—Ware v. Russell, 57 Ala. 43, 29 Am. Rep. 710; Battle v. Weems, 44 Ala. 105.

California.—Templeton v. Poole, 59 Cal. 286; Fuller v. Hutchins, 10 Cal. 523, 70 Am. Dec. 746.

Connecticut.—Robins v. Lyman, 10 Conn. 30, 25 Am. Dec. 52.

Georgia.—Burton v. Wynne, 55 Ga. 615; Harrell v. Broxton, 78 Ga. 129, 3 S. E. 5.

Illinois.—Eagle v. Kohn, 84 Ill. 292; Bissell v. Kurran, 69 Ill. 20; Lock v. Fulford, 52 Ill. 166; Griffin v. Ketcham, 18 Ill. 392.

action by the indorsee upon an instrument so transferred, the maker can defend by showing a want or failure of consideration;[52] or if such note has been paid in whole or part by him he can set up such defense.[53] And it seems to have been generally held that

Iowa.— Leightman v. Kadetska, 58 Iowa, 676, 12 N. W. 736, 43 Am. Rep. 129; Hedge v. Gibson, 58 Iowa, 656, 12 N. W. 713; Clute v. Frazier, 58 Iowa, 268, 12 N. W. 327; Schuster v. Marsden, 34 Iowa, 181.

Kentucky.— Frazer v. Edwards, 5 Dana, 358.

Maine.— Cummings v. Little, 45 Me. 183; Burnham v. Tucker, 18 Me. 179; Wing v. Dunn, 24 Me. 128; Sprague v. Graham, 29 Me. 160.

Maryland.— Herrick v. Swomley, 56 Md. 439.

Massachusetts.— Sargent v. Southgate, 6 Pick. 312, 16 Am. Dec. 409; Holland v. Makepeace, 8 Mass. 418.

Michigan.— City Bank of Dowagiac v. Dill, 102 Mich. 305, 60 N. W. 767; Simmons v. Morris, 53 Mich. 155, 18 N. W. 625.

Mississippi.— Money v. Ricketts, 62 Miss. 209.

Missouri.— Kellogg v. Schaake, 56 Mo. 136; Mattoon v. McDaniel, 34 Mo. 138.

Nebraska.— First Nat. Bank v. Security Nat. Bank, 34 Neb. 71, 51 N. W. 305, 33 Am. St. Rep. 618; Davis v. Neligh, 7 Neb. 78, 84.

New Hampshire.— Odiorne v. Howard, 10 N. H. 343.

New Jersey.— Cumberland Bank v. Hann, 18 N. J. L. 222.

New York.— Cowing v. Altman, 79 N. Y. 167; Northampton Nat. Bank v. Kidder, 106 N. Y. 221; Chester v. Dorr, 41 N. Y. 279; Morss v. Gleason, 64 N. Y. 204; Cummings v. Morris, 25 N. Y. 625; Callahan v. Crow, 91 Hun, 346, 36 N. Y. Supp. 225, affd. in 157 N. Y. 695; Newell v. Gregg, 51 Barb. 263; Farrington v. Park Bank, 39 Barb. 645; Hackley v. Spague, 10 Wend. 113; De Mott v. Starkey, 3 Barb. Ch. 403; Williams v. Matthews, 3 Cow. 252; Havens v. Huntington, 1 Cow. 387; Lansing v. Lansing, 8 Johns. 454; Lansing v. Gaine, 2 Johns. 300; O'Callaghan v. Sawyer, 5 Johns. 118; Sebring v. Rathbun, 1 Johns. Cas. 331; Johnson v. Bloodgood, 1 Johns. Cas. 331.

North Carolina.— Griffin v. Hasty, 94 N. C. 438; Capell v. Long, 84 N. C. 17; Baucom v. Smith, 66 N. C. 537.

Ohio.— Baker v. Kinsey, 41 Ohio St. 403; Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41.

Pennsylvania.— Marsh v. Marshall, 53 Pa. St. 396; Clay v. Cottrell, 18 Pa. St. 408.

South Carolina.— Gibson v. Hutchins, 43 S. C. 287, 21 S. E. 250.

Texas.— Huddleston v. Kempner, 3 Tex. Civ. App. 252, 22 S. W. 871.

Vermont.— Bowen v. Thrall, 28 Vt. 382.

See also cases cited in Century Dig., Vol. 7, "Bills and Notes," § 878.

52. Defense of failure or want of consideration.— Where, in an action against the maker and payee of a note by an indorsee after maturity, it appears that the note was given in payment for a portion of a mine, and that the mine was worthless, the defense of failure of consideration, which would have been good in an action on the note by the payee, is good as against such indorsee. Risley v. Gray, 98 Cal. 40, 32 Pac. 884.

In New York the leading cases on this proposition are: Jones v. Caswell, 3 Johns. Cas. (N. Y.) 29, 2 Am. Dec. 134, where it was held in an action brought on a note against the maker by the second indorsee to whom it was transferred after maturity, and with a knowledge of the circumstances under which it was given, that the consideration of the note might be inquired into; and the consideration being unconscientious and against public policy, the note was void; Merrick v. Butler, 2 Lans. (N. Y.) 103; Chester v. Dorr, 41 N. Y. 279.

In other States the following may be cited: Stafford v. Fargo, 35 Ill. 481; Barlow v. Scott, 12 Iowa, 63; Coburn v. Ware, 30 Me. 202; Thompson v. Hale, 6 Pick. (Mass.) 259; Fish v. French, 15 Gray (Mass.), 520; Barnett v. Offerman, 7 Watts (Pa.), 130; Bell v. Wood, 1 Bay (S. C.), 249; Rhode v. Lodge, 15 Tex. 446.

53. Payment as a defense.—*In New York* it has been held in an where a negotiable instrument is transferred after maturity the transferee acquires the same subject to any right of set-off which the maker had against the payee;[54] and if the title of such an instrument is not in the person who transfers it, the transferee acquires no title against the true owner,[55] but the fact that on the

action against the survivor of two makers of a joint promissory note, that unless the plaintiff succeeds in establishing a joint indebtedness, he is not entitled to recover; and where it appeared that the note was transferred after maturity, the defendant, sued as the surviving maker of such joint note, might prove payment of the note by his joint debtor, and thus defeat a recovery, although before transfer of the note to the plaintiff, he acknowledged it to be due, and promised to pay it. Mott v. Petrie, 15 Wend. (N. Y.) 317.

In other States, see James v. Yaeger, 86 Cal. 184, 24 Pac. 1005; Cramer v. Willets, 61 Ill. 481; Reichart v. Koerner, 54 Ill. 304; McLain v. Lohr, 25 Ill. 419; Leach v. Funk, 97 Iowa, 576, 66 N. W. 768; Fidelity Loan & Trust Co. v. Hogan, 94 Iowa, 303, 62 N. W. 740; Hatch v. Dennis, 10 Me. 244; Creech v. Byron, 115 Mass. 324; Stevens v. Bruce, 21 Pick. (Mass.) 193; Baker v. Wheaton, 5 Mass. 509, 4 Am. Dec. 71; Edney v. Willis, 23 Neb. 56, 36 N. W. 300; Hardy v. Waddell, 58 N. H. 460; Cottrell v. Watkins, 89 Va. 801, 17 S. E. 328, 37 Am. St. Rep. 897, 19 L. R. A. 754.

In the last case where a person executes accommodation notes in payment of his mother's debt, and the latter pays them as they mature, but fails to cancel them, and afterward indorses them to a third person, it was held that the indorsee takes the notes subject to their infirmities.

54. Right of set-off.— *In New York* it was held, in an action upon a negotiable promissory note assigned after maturity, that a set-off to the amount of the plaintiff's debt may be made of a demand existing against the assignor, provided it be such as might have been set off against the assignor while the note belonged to him. Driggs v. Rockwell, 11 Wend. (N. Y.) 504. But under the Code, see Wiltsie v. Northam, 3 Bosw. (N. Y.) 162.

Where an overdue note is transferred, the maker cannot set off a demand against the payee, if at the time of transfer the payee has demands against the maker greater than the set-off. Collins v. Allen, 12 Wend. (N. Y.) 356, 27 Am. Dec. 130.

In other States the following cases are in favor of set-off as stated in the text: Mobile Bank v. Poelnitz, 61 Ala. 147; Bissell v. Curran, 69 Ill. 20; Wood v. Warren, 19 Me. 23; Robinson v. Perry, 73 Me. 168; Bond v. Fitzpatrick, 4 Gray (Mass.), 89; Wilbur v. Jeep, 37 Neb. 604, 56 N. W. 198. In New Hampshire it is held that the maker may set off a claim against the indorser unless it is shown by the holder that he took the note *bona fide*, and for a valuable consideration. Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704; McDuffie v. Dame, 11 N. H. 244; Odiorne v. Woodman, 39 N. H. 541; Leavitt v. Peabody, 62 N. H. 185; Davis v. Noll, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841.

Negotiable note may be set off.— A negotiable note held by the maker against the payee of a note in suit may be pleaded as a set-off in an action by an indorsee against the maker of the note sued on; provided the note sued on was indorsed after it became due. Sargent v. Southgate, 5 Pick. (Mass.) 312, 16 Am. Dec. 409.

55. When title is not acquired by transferee.— Vermilye v. Adams Express Co., 21 Wall. (U. S.) 138, 22 L. Ed. 609; Chase v. Whitmore, 68 Cal. 142, 9 Pac. 942; Woodsum v. Cole, 69 Cal. 142, 10 Pac. 331; Clark v. Sigourney, 17 Conn. 511; Thomas v. Kinsey, 8 Ga. 421; Merrill v. Springer, 123 Ind. 485, 24 N. E. 258, 8 L. R. A. 61; in the last case the plaintiff made a loan of her own money, and took a note therefor payable to her son, who took it from her possession without her consent, and sold it after maturity to an innocent third party for a valuable consideration; it was held that the assignee took the note subject to the plaintiff's equitable title, and must re-face of the instrument it is overdue is notice of a defective title sufficient to put the transferee on inquiry.[56] It has been held that where there is an equity directly attaching to the bill or note itself, in the nature of a claim of right or title to the instrument, such equity may be asserted by a third party, not a party to the instrument, against an indorsee after maturity.[57] But the infirmities, equities, or defenses which can be set up against an instrument in the hands of an indorsee after maturity must have existed and attached thereto prior to its transfer,[58] nor can the maker avail himself of equities and defenses which are not connected with, and did not arise from, the note or transaction upon which the note is based.[59] The holder of an overdue bill or note is not affected by

turn it to her. Eversole v. Maull, 50 Md. 95; Julian v. Calkins, 85 Mo. 202; Ford v. Phillips, 83 Mo. 523; Walker v. Wilson, 79 Tex. 185, 15 S. W. 402; Smith v. Lawson, 18 W. Va. 212, 41 Am. Rep. 688.

In New York it has been held that a promissory note past due and dishonored, and which has been protested for nonpayment, although it passes by delivery, and an action may be maintained upon it by the holder, subject to the equities of the parties thereto, cannot be said to pass in the usual course of trade and business; the holder takes it in the light of an assignee of the person from whom he receives it, rather than as an indorsee according to the usage of trade; and he, therefore, takes just such title and no other, as his assignee had to it at the time of the transfer. Farrington v. Park Bank, 39 Barb. (N. Y.) 645.

56. Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41; Hinckley v. Union Pac. Ry. Co., 129 Mass. 60; Fisher v. Leland, 4 Cush. (Mass.) 456; Barker v. Valentine, 10 Gray (Mass.), 341; Flint v. Flint, 6 Allen (Mass.), 34; Scott v. Kokoma Bank, 71 Ind. 445; Clarke v. Dederick, 31 Md. 148; Kellogg v. Schnaake, 56 Mo. 137; Marsh v. Marshall, 53 Pa. St. 396; Foley v. Smith, 6 Wall. (U. S.) 492, 18 L. Ed. 839.

57. Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, 12 L. R. A. 41; Wilbur v. Jeep, 37 Neb. 604, 56 N. W. 198. But an indorsee after maturity does not take subject to the equity of a third person which does not appear from an inspection of the note or the indorsement thereon. Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11.

58. **Equities arising after transfer.**—Robinson v. Lyman, 10 Conn. 30, 25 Am. Dec. 52. In this case it was held that an agreement made by the makers and payee of a note while it is in the latter's hands, that sums paid by the former on certain notes of the latter might be applied on the note in question, may be set up against an indorsee after maturity; but a similar agreement made after the matured note had been transferred is not an equity attaching to the note while in the payee's hands, and is not available against the transferee. See also Stockbridge v. Damon, 5 Pick. (Mass.) 223; Baxter v. Little, 6 Metc. (Mass.) 7, 39 Am. Dec. 707; First Nat. Bank v. Security Nat. Bank, 34 Neb. 71, 51 N. W. 305, 33 Am. St. Rep. 618; Sawyer v. Cutting, 23 Vt. 486; Davis v. Noll, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841.

59. **Defenses, etc., must be connected with note, etc.**—In Burroughs v. Moss, 10 B. & C. (Eng.) 558, the court said: "The indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters;" and in the same case Bayley, J., said: "The cases have not yet gone the length of establishing that such a set-off not arising out of the bill or note transaction, can be made available against an indorsee, even when the bill or note is overdue, at the time of the indorsement." See also Robertson v. Breedlove, 7 Port. (Ala.) 541; Fairchild v. Brown, 11

the equities and defenses existing in favor of the maker or drawer against intermediate holders.[60]

A promissory note past due and dishonored, although it passes by delivery and may be sued on by the holder, subject to the equities of the parties thereto, cannot be said to pass in due course of business.[61] Where an overdue negotiable instrument is transferred, the transferee is bound to inquire as to the existence of defenses thereto,[62] and is

Conn. 26; Shipman v. Robbins, 10 Iowa, 208; Annan v. Houck, 4 Gill (Md.), 325, 45 Am. Dec. 133; Barnes v. McMullins, 78 Mo. 260; Cutler v. Cook, 77 Mo. 388; Crawford v. Johnson, 87 Mo. App. 478; Hughes v. Large, 2 Pa. St. 103; McAlpin v. Wingard, 2 Rich. L. (S. C.) 547; Armstrong v. Noble, 55 Vt. 428.

In Indiana it is held that by the law merchant, where a note is overdue when indorsed, matter of set-off due from the payee, not arising out of the note transaction, cannot be claimed against the indorsee, though the set-off was due to the maker whilst the payee held the note. Hankins v. Shoup, 2 Ind. 342. And it has also been held that a claim arising out of an independent transaction, and for which a merely nominal consideration has been paid, is not available as a set-off against a promissory note in the hands of an indorsee in good faith and for value, or even in the hands of a mere equitable assignee. Proctor v. Cole, 115 Ind. 15, 17 N. E. 189.

In New York the question of set-off by a maker of a negotiable promissory note or bill of exchange transferred after maturity is settled by section 502, subdivision 2 of the Code of Civil Procedure, which is as follows: (2) "If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it became due, a demand existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him." Other States have similar statutes.

60. Vinton v. Crowe, 4 Cal. 309; Hayward v. Stearns, 39 Cal. 58; Favorite v. Lord, 35 Ill. 142; Perry v. Mays, 2 Bailey (S. C.), 354.

Effect of statute.— This rule seems to have been changed by statute in many of the States, as in Minnesota where it has been held under Gen. Stat. 1878, chap. 66, § 27, that an overdue bill or note is placed upon the same footing as any other chose in action, and that a purchaser of an overdue draft takes it subject to any set-off arising out of an independent transaction against an intermediate holder, if such set-off could have been asserted against such holder while the drafts belonged to him. Le Due v. First Nat. Bank, 31 Minn. 33, 16 N. W. 426. See also Downing v. Gibson, 53 Iowa, 517; Hill v. Shields, 81 N. C. 250, 31 Am. Rep. 499; Wyman v. Robbins, 51 Ohio St. 98, 37 N. E. 264.

61. Farrington v. Park Bank, 39 Barb. 645.

"**In the usual course of business**" means "according to the customs and usages of commercial transactions," and a purchaser of negotiable paper after maturity is not within the definition. Wood v. McKean, 64 Iowa, 16, 19 N. W. 817; Woodsum v. Cole, 69 Cal. 142, 10 Pac. 331.

62. **Overdue note circumstance of suspicion.**— In the case of Fowler v. Brantly, 14 Pet. (U. S.) 318, 321, 10 L. Ed. 473, the court said: "A note overdue or a bill dishonored, is a circumstance of suspicion, to put those dealing for it afterward on their guard; and in whose hands it is open for the same defenses as it was in the hands of the holder when it fell due. After maturity, such paper cannot be negotiable 'in the due course of trade,' although still assignable." See also Frazer v. Edwards, 5 Dana (Ky.), 538; Davis v. Bradley, 26 La. Ann. 555; Chappell v. Allen, 38 Mo.

chargeable with knowledge of all equities in favor of the maker.[63]

e. *Holder in good faith and for value.*—A holder of a negotiable instrument is not a holder in due course unless he took the instrument in good faith.[64] The words "good faith," as used in this connection, refer only to the acts of the indorsee.[65] If a negotiable instrument is obtained for a valuable consideration and before maturity, the holder is protected in its acquisition unless it can be shown that it was obtained in bad faith.[66] We have already considered what constitutes a valuable consideration.[67]

f. *Notice of infirmity or defect.*—A holder in due course must have taken the instrument without notice of any infirmity in the instrument or defect in the title of the person negotiating it.[68] This subject is further considered under the section of the Negotiable Instruments Law declaring what constitutes a notice of an infirmity in the instrument or a defect in the title.[69] It is an established rule, independent of statute, that one who takes com-

213; Diamond v. Harris, 33 Tex. 634; Earp v. Richardson, 81 N. C. 5.

Overdue check.— The date of a check is *prima facie* evidence of the time it was made and had its inception; and, if found in the hands of the payee or a third person for a considerable time (in this case fourteen months) after its date, it will be deemed to be discredited, and the party taking it is put upon inquiry, and, in the absence of explanation, takes subject to any defense existing as between the payee and drawee. Cowing v. Altman, 71 N. Y. 435.

And in the case of Laber v. Steppacher, 103 Pa. St. 81, it was held that the retention of a check, without presentation for payment, for a considerable time after its date, will cast discredit upon it, and one who then its date, without notice or inquiry, But the mere fact that a person receives a check two or three days after its date, without notice or inquiry, does not necessarily subject him to the objections which the maker could have made against it in the hands of the payee.

63. *In New York* the leading case is that of Chester v. Dorr, 41 N. Y. 279, where it was held that when a note has become due and dishonored, the rights and responsibilities of the parties thereto are fixed. The note then loses the chief attribute of commercial paper, and thereafter he who takes it, takes it with knowledge of its dishonor, with obvious reason to believe that there exists some reason why it was not paid to the holder, and takes it with just such rights to enforce it as such holder himself has, and no other.

Among other cases holding this principle are: James v. Yaeger, 86 Cal. 184, 24 Pac. 1005; Williams v. Nicholson, 25 Ga. 560; Comstock v. Draper, 1 Mich. 481, 53 Am. Dec. 78; Hilton v. Britton, 9 N. J. L. 120.

If an accommodation note is transferred after it is dishonored, the indorsee has implied notice of the character of the paper. Cummings v. Little, 45 Me. 183.

64. Neg. Inst. L. (N. Y.), § 91(3).

65. Hangen v. Sunwal, 60 Minn. 367, 62 N. W. 398; Helmer v. Krolick, 36 Mich. 373. In the latter case it was held that the motives and interests of the seller of negotiable paper are unimportant in determining the rights of the buyer. Only the buyer's good faith is in question.

66. Barnum v. Phœnix, 60 Mich. 388, 27 N. W. 577.

67. See *ante*, chap. IV, § 50.

68. Neg. Inst. L. (N. Y.), § 91(4).

69. Neg. Inst. L. (N. Y.), § 95. See *post*, § 75, p. 368.

mercial paper from the apparent owner for full value, without notice of any equities between the parties or of any defect in the title of the presumptive owner, is to be deemed a *bona fide* holder.[70]

§ 74. When holder of instrument payable on demand deemed holder in due course.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where an instrument payable on demand is nego"tiated an unreasonable length of time after its issue, the holder "is not deemed a holder in due course." [71] This section is declaratory of the common law.[72] To determine when instruments are payable on demand reference should be made to a section in the preceding chapter of this work.[73] Where no time of payment is specified, the instrument is deemed payable on demand, and presumably the same rule would apply to such an instrument.[74] The courts differ somewhat as to what constitutes a reasonable time after the issue of a negotiable instrument within which a transfer may be made which will constitute the holder a holder in due course.[75]

70. Belmont Branch Bank v. Hoge, 35 N. Y. 65.

71. Neg. Inst. L. (N. Y.), § 92. For same section in statutes of other States see Appendix.

72. Poorman v. Mills, 39 Cal. 345, 2 Am. Rep. 451; Field v. McKesson, 13 Mass. 131; Stockbridge v. Damon, 5 Pick. (Mass.) 223; Furman v. Harkins, 2 Cai. (N. Y.) 369.

73. See *ante*, chap. III, § 39 (*c*). Neg. Inst. L. (N. Y.), § 4, provides that in determining what is unreasonable time, "regard should 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."

74. **No time of payment specified.**— Where a promissory note dated Jan. 24, 1853, was made by P., payable to R., or bearer, with use, no time of payment being specified, and the same was within three days after its date sold by R. to M., by whom it was subsequently transferred to plaintiff; it was held that although the note was payable on demand, yet that it was evident from the fact of its bearing interest, that an immediate demand of payment was not contemplated by the parties; and that consequently it could not be considered as overdue, at the time of its transfer by R., so as to render claims against R., then owned and held by the maker, available as a set-off. Weeks v. Pryor, 27 Barb. (N. Y.) 79.

75. **Reasonable time.**— A demand note negotiated within twenty-three days after date is negotiated within a reasonable time. Mitchell v. Catchings, 23 Fed. 710. So is seven days a reasonable time. Thurston v. McKown, 6 Mass. 428. And five weeks after date. Wethey v. Andrews, 3 Hill (N. Y.), 582. And two days after date. Pindar v. Barlow, 31 Vt. 529; Dennett v. Wyman, 13 Vt. 485.

A note payable on demand, with interest, transferred nearly three months after date, the parties having their places of business in the same street of the same city, must be considered to have become due, without demand made, in such sense that the transferee takes it subject to all the equities existing in behalf of the maker against the payee previous to the transfer. Herrick v. Wolverton, 41 N. Y. 581, 1 Am. Rep. 461. The following cases are instances where the transfer was not made a reasonable time after date: Three or

§ 75. Notice of infirmity or defect.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "To constitute notice of an infirmity in the instru-"ment or defect in the title of the person negotiating the same, "the person to whom it is negotiated must have had actual knowl-"edge of the infirmity or defect, or knowledge of such facts that "his action in taking the instrument amounted to bad faith."[76] This section is, without doubt, declaratory of the existing rule.[77]

b. *Actual knowledge.*— Actual knowledge of a defect or infirmity in an instrument on the part of the indorsee, although purchased by him, for value and otherwise in good faith, will destroy the protection which the law affords to a holder in due course.[78] Where the holder had actual knowledge of the fraud with which the instrument is tainted or of the illegality or inadequacy of the consideration, he is not a holder in good faith. In any event his superior title is destroyed and he occupies no better position than his transferrer.[79] The fact that full value was given for an

four months. Paine v. Central Vt. R. Co., 14 Fed. 269. Nine months. Nevens v. Townsend, 6 Conn. 5. Four months. Parker v. Tuttle, 44 Me. 459. Eight months. Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec. 332; American Bank v. Jenness, 2 Metc. (Mass.) 288. One year. Hemmenway v. Stone, 7 Mass. 58, 5 Am. Dec. 27. Eleven months. Sylvester v. Crapo, 15 Pick. (Mass.) 192. Five months. Le Due v. First Nat. Bank, 31 Minn. 33, 16 N. W. 426. Ten months. Morey v. Wakefield, 41 Vt. 24, 98 Am. Dec. 562.

76. Neg. Inst. L. (N. Y.), § 95. For same section in statutes of other States see Appendix.

77. **Notice is defined** by Chalmers in his work on Bills of Exchange (5th ed.), p. 90, as meaning actual, though not formal notice, that is to say, either knowledge of the facts, or a suspicion of something wrong, combined with a willful disregard of the means of knowledge.

Notice published in a newspaper warning the public not to purchase a certain note described therein does not bind one who neither saw the notice nor had knowledge of its contents. English-American L. & T. Co. v. Hiers, 112 Ga. 823, 38 S. E. 103; Gehlbach v. Carlinville Nat. Bank, 83 Ill. App. 129.

78. See Zook v. Simonson, 72 Ind. 83; Bryant v. Couillard, 32 Me. 520; Hunt v. Rumsey, 83 Mich. 156, 47 N. W. 105, 9 L. R. A. 674; Myers v. Bealer, 30 Neb. 280, 46 N. W. 479; Proctor v. McCall, 2 Bailey (S. C.), 298, 23 Am. Dec. 135.

Actual knowledge (1) of failure or want of consideration, see Easton v. Blanchard, 3 Ill. 420; Mitchell v. Stinson, 80 Ind. 324; Scotten v. Randolph, 96 Ind. 581; Skinner v. Raynor, 95 Iowa, 536, 64 N. W. 601; Starr v. Torrey, 22 N. J. L. 190; (2) of illegal consideration, Perry v. Crammond, Fed. Cas. No. 11,005; Tompkins v. Compton, 93 Ga. 520, 21 S. E. 79; (3) of agreement or undertaking between maker and payee, Jones v. Swan, 6 Wend. (N. Y.) 589; Gafford v. Hall, 39 Kan. 166, 17 Pac. 851; Sanderson v. Goodrich, 46 Barb. (N. Y.) 616; Howk v. Eckert, 4 Thomp. & C. (N. Y.) 300; Garfield Nat. Bank v. Colwell, 57 Hun (N. Y.), 169, 10 N. Y. Supp. 864.

79. **Instances of knowledge of defects.**— In the case of Hanauer v. Doane, 12 Wall. (U. S.) 342, 20 L. Ed. 439, it was held that an action will not lie for the price of goods sold to aid the Rebellion, and a promissory note, the consideration of which is wholly or in part the price of such goods, is void, and an action cannot be sustained thereon by a holder who re-

instrument will not benefit the holder where it appears that he had actual knowledge of facts which impeach the title thereof or prevent a recovery thereon by him.[80] Knowledge of the agent acting within the scope of his authority is notice to the principal, and where the agent of a purchaser of a note having its origin in fraud had knowledge that "there was trouble about the trade" in which the note was given, this is sufficient to charge the purchaser with notice of the fraud.[81]

c. *Where an inquiry should be made.*— If the instrument is fair upon its face the indorsee is not bound to inquire into the consideration or circumstances under which it was given.[82] The indorsee is under no obligation to inquire of the maker before purchasing a note, although it is nearly due and it is offered to him at an unreasonably large discount.[83] To establish bad faith on the

ceived such note knowing the purpose for which it was given. And see Braly v. Henry, 71 Cal. 481, 60 Am. Rep. 544; Fisher v. Leland, 4 Cush. (Mass.) 456; Crampton v. Perkins, 65 Md. 24; McNamara v. Gargett, 68 Mich. 454; Kasson v. Smith, 8 Wend. (N. Y.) 437; Skilding v. Warren, 15 Johns. (N. Y.) 270.

Knowledge at the time of taking a note that the maker intends to set up in defense a failure of title to the land for which it was given will subject an indorsee to that defense, although he did not know the particular facts invalidating the title. Knapp v. Lee, 3 Pick. (Mass.) 452. The maker's telegram to the indorsee before he took the note, that it would be good "if the consideration for which it was given has not been misrepresented. This has not been tested yet," will be sufficient to charge the indorsee with knowledge of the defense of false representation on the part of the payee. Studebaker Mfg. Co. v. Dickson, 70 Mo. 272. As to knowledge of inadequacy of consideration see Shirk v. Neible, 156 Ind. 66, 59 N. E. 281.

80. Maitland v. Citizens' Nat. Bank, 40 Md. 542, 17 Am. Rep. 620; Crampton v. Perkins, 65 Md. 22; Heard v. Shedden, 113 Ga. 162, 38 S. E. 387.

81. **Knowledge of agent is that of principal.**— Morris v. Georgia Loan, S. & B. Co. (Ga.), 34 S. E. 378, 46 L. R. A. 506; Henry v. Sneed, 99 Mo. 407, 12 S. W. 663, 17 N. Y. St. Rep. 580. See also Goodrich v. Buzzell, 40 Me. 500; Rickle v. Dow, 39 Mich. 91; Livermore v. Blood, 40 Mo. 48; Sanders v. Wedeking, 47 Neb. 71, 66 N. W. 18; Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632. But the principal is not chargeable with notice of equities attached to a promissory note purchased by him, knowledge of which was acquired by his agent while acting outside the scope of his authority. Kauffman v. Robey, 60 Tex. 308, 48 Am. Rep. 264.

82. *In re* Great Western Tel. Co., Fed. Cas. No. 5,740, 5 Biss. (U. S.) 363; Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080.

83. Murray v. Beckwith, 81 Ill. 43. The indorsee or assignee of commercial paper who takes, before maturity, for a valuable consideration, without knowledge of any defects, and in good faith, will be protected against the defenses of the maker. Suspicion of defective title, or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or gross negligence on the part of the assignee at the time of the transfer, will not defeat his title; that result can only be produced by bad faith on his part. Comstock v. Hannah, 76 Ill. 531; Matson v. Alley, 141 Ill. 284, 31 N. E. 419. See also Tescher v. Merea, 118 Ind. 586, 21 N. E. 316.

Suspicious circumstances.— In the case of Citizens' Bank v. Leonhart, 126 Ind. 206, 25 N. E. 1099, the court said: "While it is true that a bank, or other person, natural or artificial, part of the purchaser of a negotiable instrument of one having no authority to sell, as against the rightful owner, it must appear that the purchaser knew of facts which would lead the mind to believe that the seller was disposing of the paper without lawful authority.[84] The fact that a purchaser of a note knew that the payee was engaged in the selling of spirituous liquors is not sufficient to put the purchaser upon inquiry as to whether the note was given as the price of liquors sold by the dealer contrary to law.[85] The purchase by a bank at a large discount of notes of farmers and residents in the vicinity from a stranger selling churns throughout the county is chargeable with notice of such facts as might have been ascertained upon inquiry, affecting the validity of the notes.[86]

d. *Knowledge that person negotiating instrument is acting in fiduciary capacity.*— The fact that the instrument on its face is made payable to a person in his fiduciary capacity is notice that the payee is acting in such capacity and that he can only give title or deal with such instrument for the benefit of the person whom he represents.[87] Where one was known to be an agent for the

purchasing commercial paper, tainted with fraud, is bound to show the payment of a valuable consideration, and to rebut notice of the fraud, such purchaser is not called upon to make inquiry of the maker or holder as to the circumstances under which the paper is executed, unless there is something about the paper itself, or the circumstances under which it is presented, to excite the suspicion of a person of common prudence. But persons dealing in commercial paper are expected to use reasonable diligence where such paper is offered for sale under circumstances that are calculated to excite the suspicion of a reasonably cautious person."

84. Trumblety v. O'Connor, 13 Daly (N. Y.), 177.

85. Bottomley v. Goldsmith, 36 Mich. 27.

86. Anten v. Gruner, 90 Ill. 300.

As to purchase of notes from strangers, see Smith v. Mechanics & Traders' Bank, 6 La. Ann. 610; Jennings v. Todd, 108 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373.

In New York, a leading case on the duty of a bank purchasing negotiable paper from an entire stranger is that of Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676, in which it was held that negotiable instruments bought by a bank cashier cannot, as a matter of law, be said to have been purchased in good faith, in the ordinary course of business, so as to cut off the defense of fraudulent inception, where it appears that the payee procured the notes by fraud and misrepresentation from the maker, and that plaintiff, through its cashier, purchased the notes of the payee, a perfect stranger to him, at an illegal rate of discount, payment to be made for the notes in drafts; the payee gave the cashier no information where he might receive notice of protest, or as to his pecuniary circumstances, and no such information was required of him; and also, where it appears that the cashier did not know defendant's handwriting and made no inquiries of any one in regard thereto.

87. Thurber v. Cecil Nat. Bank, 52 Fed. 513; Payne v. Flournoy, 29 Ark. 500; McMasters v. Dunbar, 2 La. Ann. 577; Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304; Turner v. Hoyle, 95 Mo. 337, 8 S. W. 157; Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268; Gale v.

negotiation of his principal's draft, and he negotiates the draft to a third person in payment of the agent's debt, such person will acquire no title to the instrument, however honest his intention may have been.[88] If a corporation authorizes its officers to execute and indorse negotiable instruments, one who, before maturity and for value, acquires such an instrument, is not put upon inquiry as to the purpose for which it was given, and as to whether or not such officers had exceeded their authority.[89] A holder for value of a note given by a firm to one of its members, is a holder in due course.[90] And where a note is made by a member of a firm to his own order and is indorsed by the firm, it is not notice that it was for the maker's accommodation, although such indorsement was made by the member benefited.[91]

e. *Suspicious circumstances and gross negligence.*— Suspicious circumstances are not, in themselves, sufficient to constitute one who takes an assignment of commercial paper before maturity, paying value therefor, a purchaser in bad faith; nor is it enough that he neglected to make the inquiry which, under the circumstances, a prudent man would, or ought to, have made. In order that the holder's title may be destroyed, it must be shown that he

Wells, 12 Barb. (N. Y.) 84; Fellows v. Longyor, 91 N. Y. 331; Alexander v. Alderson, 66 Tenn. 403.

88. Dowden v. Cryder, 55 N. J. L. 329, 26 Atl. 941; Weeks v. Fox, 3 Thomp. & C. (N. Y.) 354; Petrie v. Williams, 68 Hun (N. Y.), 589, 23 N. Y. Supp. 237.

The words "Agent, Glass Buildings," added to the signature of a check, are enough to put one who receives it in payment of a debt on inquiry as to his authority to use the fund for such payment. Gerrard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234.

89. Wilson v. Metropolitan R. Co., 120 N. Y. 145, 24 N. E. 384; Marine Bank v. Clements, 31 N. Y. 33; Scott v. Johnson, 5 Bosw. (N. Y.) 213; American Exchange Nat. Bank v. Oregon Pottery Co., 55 Fed. 265; Wormer v. Agricultural Works, 50 Iowa, 262; Merchants' Nat. Bank v. Citizens' Gas Light Co., 159 Mass. 505. 34 N. E. 183, 38 Am. St. Rep. 453; Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111, 81 N. W. 1034.

90. Thompson v. Low, 111 Ind. 272, 12 N. E. 476; Hapgood v. Watson, 65 Me. 510.

91. **Indorsement by member of firm.** — Redlon v. Churchill, 73 Me. 146, 40 Am. Rep. 345; Bueltner v. Steinbrecker, 91 Iowa, 588, 60 N. W. 177.

In an action by a bank against a firm, upon its indorsement of a note given by one of its members to pay his individual debt, which note was indorsed by him for himself and the defendant firm, without the latter's knowledge, the fact that the bank purchased the note instead of discounting it does not avail the defendants. Atlantic State Bank v. Savery, 82 N. Y. 291. But if the bank knew, or had reason to know, that the partnership name was used without authority, the bank is not a *bona fide* holder of the note discounted by it. Spalding v. Kelly, 43 Hun (N. Y.), 361; National Bank v. Underhill, 21 Hun (N. Y.), 178. And see also Austin v. Vandermark, 4 Hun (N. Y.), 259; Bank of St. Albans v. Gilliland, 23 Wend. (N. Y.) 324; Lucker v. Iba, 54 App. Div. (N. Y.) 566, 66 N. Y. Supp. 1019.

did not take the instrument in good faith.[92] Judge Porter, of the New York Court of Appeals, in a leading New York case, said: "One who purchases commercial paper for full value before maturity, without notice of any equities between the original parties, or of any defect of title, is to be deemed a *bona fide* holder. He is not bound at his peril to be upon the alert for circumstances which might possibly excite the suspicion of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence." [93] The rule requires proof direct or by circum-

92. **Lack of good faith must be shown.**—In the United States courts, the weight of authority, since the case of Swift v. Tyson, 16 Pet. (U. S.) 1, has been that one who takes an assignment of commercial paper before maturity, paying value, without notice of infirmities in the title or consideration, is deemed a good faith purchaser, and that to deprive him of that character, it is not enough that he neglected to make inquiry, which under the circumstances a prudent man would or ought to have made. See also Swift v. Smith, 102 U. S. 442; Hotchkiss v. National Banks, 21 Wall. (U. S.) 354, 22 L. Ed. 645; Atlas Nat. Bank v. Holm, 71 Fed. 489, 19 C. C. A. 94; Clark v. Evans, 66 Fed. 263, 13 C. C. A. 433.

In the several States the leading cases favoring the principle in the text are:

Colorado.— Merchants' Bank v. McClellan, 9 Colo. 608, 13 Pac. 723.

Georgia.— Montgomery v. Hunt, 93 Ga. 438, 21 S. E. 59.

Iowa.— Lane v. Evans, 49 Iowa, 156; Lake v. Reed, 29 Iowa. 258, 4 Am. Rep. 209.

Kentucky. — Montgomery v. Citizens' Nat. Bank, 16 Ky. L. Rep. 445.

Maine.— Farrell v. Lovett, 68 Me. 326, 28 Am. Rep. 59.

Maryland. — Williams v. Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; Citizens' Nat. Bank v. Hooper, 47 Md. 88.

Massachusetts.— Smith v. Livingston, 111 Mass. 342.

Michigan.— Helms v. Douglas, 81 Mich. 442, 45 N. W. 1009; Davis v. Seeley, 71 Mich. 209, 38 N. W. 901.

Minnesota. — Gale v. Birmingham, 64 Minn. 555, 67 N. W. 659; Tourtelot v. Reed, 62 Minn. 384, 64 N. W. 928.

Missouri. — Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373.

New Jersey.— Hamilton v. Vought, 34 N. J. L. 187; National Bank of the Republic v. Young, 41 N. J. Eq. 531, 7 Atl. 488.

Ohio.— Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 979.

Oregon. — Bowman v. Metzger, 27 Ore. 23, 39 Pac. 3.

Pennsylvania. — Second Nat. Bank v. Morgan, 165 Pa. St. 199, 30 Atl. 957, 44 Am. St. Rep. 652.

93. Megee v. Badger, 34 N. Y. 247. See also Cheever v. Pittsburg, etc., R. Co., 150 N. Y. 60, 66, 44 N. E. 701.

Actual notice, or circumstances showing bad faith.— In the case of American Exchange Nat. Bank v. New York Belting, etc., Co., 148 N. Y. 698, 43 N. E. 168, it was held that, where it is sought to defeat the right of the holder of negotiable paper, before maturity, to recover against the maker, it is essential that actual notice be proved of the defect in title, or that circumstances be shown evidencing bad faith in the holder, and creating reasonable grounds for suspecting his conduct in the transaction. The mere fact that the holder for value of a promissory note made by a third party receives it from a person engaged in the note brokerage business as collatstances that the holder had notice of the defects or equities; and the plaintiff in an action cannot be charged with such notice by reason of any want of diligence on his part in ascertaining the fact of fraud or want of consideration, even when he is in a situation where such facts could be ascertained by inquiry.[94] While gross negligence on the part of the holder of a negotiable instrument in inquiring as to suspicious facts and circumstances may be evidence of *mala fides,* it is not equivalent thereto, nor without further evidence will it defeat his title.[95] It has been said that: "Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will protect him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith." [96]

f. *Notice before full amount paid; statutory provision.*— The Negotiable Instruments Law provides that: "Where the trans- "feree receives notice of any infirmity in the instrument or defect "in the title of the person negotiating the same before he has paid "the full amount agreed to be paid therefor, he will be deemed a

eral security for a loan to such broker is not sufficient to raise a doubt as to the authority of the broker to so deal with the note. See also Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801; Canajoharie Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080.

94. Lake v. Reed, 29 Iowa, 258, 4 Am. Rep. 209; Richardson v. Monroe, 85 Iowa, 359, 52 N. W. 339; Cok v. Werman, 51 Iowa, 564, 2 N. W. 386.

95. Goodman v. Harvey, 4 Ad. & El. (Eng.) 870.

Gross negligence not sufficient.— In the case of Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. Ed. 857, the court said: "The party who takes a note before due for a valuable consideration, without knowledge of any defect of title and in good faith, holds it by a title valid against all the world. Suspicion of defect of title or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part." See also Swift v. Tyson, 102 U. S. 442, 26 L. Ed. 193; Comstock v. Hannah, 76 Ill. 530; Shreeves v. Allen, 79 Ill. 553; Merritt v. Boyden, 191 Ill. 136, 60 N. E. 907; Morehead v. Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077.

Suspicion of defect of title; knowledge of circumstances which would excite such suspicion in the mind of a prudent man; disregard of means of information, an examination of which would disclose such defect; in fine, gross negligence at the time of the purchase will not alone defeat the purchaser's title. It is evidence, but not conclusive, of bad faith, and that must be established by one seeking to impeach such title. Seybel v. National Currency Bank, 54 N. Y. 288.

96. Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. Ed. 934; Spero v. Holoschutz, 36 Misc. (N. Y.) 764, 74 N. Y. Supp. 852.

"holder in due course only to the extent of the amount thereto-"fore paid by him."[97] This provision seems to be declaratory of the general rule.[98]

§ 76. When title defective.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "The title of a person who negotiates an instrument "is defective within the meaning of this act, when he obtained "the instrument, or any signature thereto, by fraud, duress, or "force and fear, or other unlawful means, or for an illegal con-"sideration, or when he negotiates it in breach of faith, or under "such circumstances as amounts to a fraud."[99] This section is identical with a provision of the English Bills of Exchange Act.[1] As Judge Chalmers observes, the list of defects in title contained in such section may not be exhaustive.[2]

b. *Fraud and duress.*— Fraud vitiates every contract, and as between the immediate parties to a negotiable instrument, and as against every other person who has notice thereof, fraud is a valid defense in an action thereon.[3] It is not our purpose to discuss at

97. Neg. Inst. L. (N. Y.), § 93. For same section in statutes of other States see Appendix.

98. **Notice before full amount paid.** — In the case of Dressen v. Missouri, etc., R. Const. Co., 93 U. S. 92, it was held that a *bona fide* holder of negotiable paper, purchased before its maturity, upon an unexecuted contract, on which part payment only had been made, when he received notice of fraud and a prohibition to make further payments, is protected only to the amount paid, before the receipt of such notice.

In the case of Crandell v. Vickery, 45 Barb. (N. Y.) 156, H. obtained the indorsement of Vickery of the former's notes by false and fraudulent representations. These notes were transferred to plaintiff, without notice or knowledge of the fraud, he giving to H. several checks for the amount, upon the understanding that they were not to be presented for payment, but when the money was wanted he was to give new checks as needed. Before giving the new checks plaintiff was informed of the fraud, and requested not to make payment or to give his checks. He did, however, give his new checks according to the original agreement, and brought suit upon the notes against Vickery, the indorser. It was held that he was not a *bona fide* holder for the reason that the transaction was executory, when he received notice of the fraud; that he had then parted with no value; that the real obligations were given afterward, and under circumstances that afforded no protection.

99. Neg. Inst. L. (N. Y.), § 94. For same section in statutes of other States see Appendix.

1. English Bills of Exchange Act, 1882, § 29(2).

2. Chalmers on Bills of Exchange (5th ed.), p. 92.

3. **Fraud avoids a negotiable instrument and defeats recovery thereon.** See:

Alabama.— Wyatt v. Ayres, 2 Port. 157.

California.— Domingo v. Getman, 9 Cal. 97.

Colorado.— Buno v. Gabriel, 2 Colo. App. 295, 30 Pac. 260.

Connecticut.— Shepard v. Hall, 1 Conn. 329.

Georgia.— Janes v. Mercer University, 17 Ga. 515.

Illinois.— Hodson v. Eugene Glass Co., 156 Ill. 397, 40 N. E. 971; Edlelength the general principles involved in the issue of fraud as a defense in an action on a negotiable instrument; it would be beyond the scope of our work to characterize the fraud which will vitiate and avoid such an instrument. Reference is made to works on Contracts, or Fraud and Mistake for a more detailed discussion of such principles. A holder in due course is protected against the defense of fraud; being a purchaser for value, before maturity, and without notice of the fraud, he takes the instrument freed of all defenses and equities between the original parties.[4] There is

man v. Byers, 75 Ill. 367; Wilson v. Miller, 72 Ill. 616; Homes v. Hale, 71 Ill. 552.

Indiana.— Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; New v. Walker, 108 Ind. 365; Eichelberger v. Old Nat. Bank, 103 Ind. 401; Scotten v. Randolph, 96 Ind. 581; Overshiner v. Wisehart, 59 Ind. 135; Schofield v. Holland, 37 Ind. 220.

Iowa.—Sullivan v. Collins, 18 Iowa, 228.

Kentucky.— Coleman v. McKinney, 3 J. J. Marsh. 246; Wood v. Waters, 1 Litt. 176, 13 Am. Dec. 228.

Minnesota.— Second Nat. Bank v. Howe, 40 Minn. 390, 42 N. W. 200, 12 Am. St. Rep. 744.

Missouri.—Carter v. McClintock, 29 Mo. 464; Stephens v. Spiers, 25 Mo. 386; City Bank of Columbus v. Phillips, 22 Mo. 85, 64 Am. Dec. 254.

New Hampshire.—Goodwin v. Horne, 60 N. H. 485.

New York.— Briggs v. Merrill, 58 Barb. 389; Barber v. Kerr, 3 Barb. 149; Whitney v. Snyder, 2 Lans. 477; Matson v. Blossom, 31 N. Y. St. Rep. 228, 9 N. Y. Supp. 225.

Pennsylvania.— Moore v. Hershey, 90 Pa. St. 196.

Fraud which does not injure the promisor is not sufficient to invalidate a promissory note. Anstell v. Rice, 5 Ga. 472. And fraudulent representations which do not appear to have been acted upon by the defendant constitute no ground of defense. Janes v. Mercer University, 17 Ga. 515.

4. **Effect of fraud on holders in due course.**— In the case of Goodman v. Simonds, 20 How. (U. S.) 343, 364, Justice Clifford said: "A well-defined and correct exposition of the rights of a *bona fide* holder of a negotiable instrument was given by this court in Swift v. Tyson, 16 Pet. (U. S.) 1, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now repeat, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same became due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. * * * Such being the well-settled law of this court, it would seem to follow as a necessary consequence, from the proposition as stated, that if a bill of exchange indorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterward negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and he would be entitled to recover the amount. The law was thus framed and has been so administered, in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes which pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation the

an apparent exception to this general principle where the signature of a party is secured to an instrument under fraudulent representations as to its character; in many States, by virtue of a statutory provision [5] or the decisions of the courts, instruments

law presumes that a party in possession holds the instrument for value, until the contrary is made to appear, and the burden of proof is upon the party attempting to impeach the title."

Other cases holding that fraud in the inception of a note is not available as a defense against a holder in due course are:

Alabama.— Alabama Nat. Bank v. Halsey, 10ⁿ Ala. 196, 19 South. 522.

California.— McMahon v. Thomas, 39 Pac. 783.

Connecticut.— Humphrey v. Clark, 27 Conn. 381; Von Windlisch v. Klaus, 46 Conn. 433.

Georgia.— Walters v. Palmers, 110 Ga. 776, 36 S. E. 79; Highsmith v. Martin, 99 Ga. 92, 24 S. E. 865.

Illinois. — Exchange Nat. Bank v. Plate, 69 Ill. App. 489; Gehlbach v. Carlinville Nat. Bank, 83 Ill. App. 129; Woodworth v. Huntoon, 40 Ill. 131, 89 Am. Dec. 340.

Indiana.— Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Woolen v. Uhlrich, 64 Ind. 120; Noll v. Smith, 64 Ind. 511, 31 Am. Rep. 131.

Iowa.—Hawkins v. Wilson, 71 Iowa, 761, 32 N. W. 416; Fayette County Sav. Bank v. Steffes, 54 Iowa, 214, 6 N. W. 267.

Kentucky.— David v. Merchants' Nat. Bank, 45 S. W. 878; Bement v. McClaren, 1 B. Mon. 296.

Maine.— Farrell v. Lovett, 68 Me. 326, 28 Am. Rep. 59; Wait v. Chandler, 63 Me. 257.

Maryland. — Davis v. Building Union, 32 Md. 285.

Massachusetts.— Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; Smith v. Livingston, 111 Mass. 342; Prouty v. Roberts, 6 Cush. 19, 52 Am. Dec. 761.

Michigan. — First Nat. Bank v. Houseknecht, 121 Mich. 313, 80 N. W. 13; Cristy v. Campau, 107 Mich. 172, 65 N. W. 12; First Nat. Bank v. Deal, 55 Mich. 592, 22 N. W. 53.

Minnesota.— Rosemond v. Graham, 54 Minn. 323, 56 N. W. 38, 40 Am. St. Rep. 336.

New Jersey.— Second Nat. Bank v. Hewitt, 59 N. J. L. 57, 34 Atl. 988; Holcomb v. Wyckoff, 35 N. J. L. 35, 10 Am. Rep. 219.

New York.— Chapman v. Rose, 56 N. Y. 137, 15 Am. Rep. 401; First Nat. Bank v. American Exchange Bank, 170 N. Y. 88, 62 N. E. 1089; Ketchum v. Govin, 35 Misc. Rep. 375, 71 N. Y. Supp. 991; Sanford v. Moss, 45 N. Y. St. Rep. 710, 18 N. Y. Supp. 673; Watson v. Blossom, 18 N. Y. St. Rep. 726, 4 N. Y. Supp. 489; McDonald v. Johnson, 46 N. Y. St. Rep. 838, 19 N. Y. Supp. 443; Shaw v. Outwater, 77 Hun, 87, 28 N. Y. Supp. 312; Callahan v. Bancroft, 28 Hun, 584, affd. in 95 N. Y. 653; Springer v. Dwyer, 58 Barb. 189; Stewart v. Small, 2 Barb. 559; Hart v. Palmer, 12 Wend. 523.

Ohio.— Gano v. Samuel, 14 Ohio, 592.

Pennsylvania.— Gillespie v. Rogers, 184 Pa. St. 488, 39 Atl. 290; Second Nat. Bank v. Morgan, 165 Pa. St. 199, 30 Atl. 957, 44 Am. St. Rep. 652; Hoats v. Aschbach, 160 Pa. St. 6, 28 Atl. 437.

Wisconsin. — Andrews v. Hart, 17 Wis. 297.

5. **Statute rendering void instrument where signature was procured by fraud.**— In Illinois it is provided by statute that an instrument, the execution of which was procured by fraud or circumvention, is void even in the hands of an innocent assignee for value before maturity. See Austen v. Gruner, 90 Ill. 300; Hubbard v. Rankin, 71 Ill. 129. But in Homes v. Hale, 71 Ill. 552, it was held that the exercise of due diligence and attention on the part of the signer of negotiable paper is a necessary element in a defense that its execution was obtained by fraud and circumvention, when such defense is set up against an innocent assignee before maturity.

And in Wisconsin, in the section corresponding to the one under consideration (Neg. Inst. L. [N. Y.], § 94), the following sentence was inserted: "And the title of such person is absolutely void when such instruso executed have been held to be void even in the hands of a *bona fide* holder.[6] But the weight of authority in most of the States is clearly opposed to this doctrine in its fullest extent; the general rule is that false representations as to the character or contents of an instrument, which is afterward transferred in due course as a negotiable instrument, will afford no defense to the maker as against a holder in due course unless it appear that such maker was unable to read, or blind, or otherwise so physically incapacitated that he could not read and the instrument was falsely read to him.[7] This rule is based upon the negligence of the person

ment or signature was so procured from a person who did not know the nature of the instrument and could not have attained such knowledge by the use of ordinary care." See Acts of 1899, chap. 356. This seems to be declaratory of the law as it existed in that State, and was probably inserted so that no change in this respect should be made in existing rules. See Butler v. Carns, 37 Wis. 61; Kellogg v. Steiner, 29 Wis. 626; Walker v. Ebert, 29 Wis. 194. As to use of ordinary care, see Keller v. Schmidt, 104 Wis. 596, 80 N. W. 935.

6. **Fraud in procuring instrument to be executed.**— In the case of Cline v. Guthrie, 42 Ind. 227, it was held that, where the maker of a promissory note payable at a bank was induced by fraud and circumvention of the payee to sign his name thereto, when he honestly supposed and believed he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and such payee, before its maturity and for value, assigned it to a *bona fide* purchaser, such facts, pleaded in an answer, constitute a complete defense to an action upon the note of the assignee; and the court said: "It is well settled by authority and on principle that the party whose signature is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included." See also Lindley v. Hofman, 22 Ind. App. 237, 53 N. E. 471; Detwiler v. Bish, 44 Ind. 70; Soper v. Peck, 51 Mich. 563, 17 N. W. 57; Gibbs v. Linabury, 22 Mich. 479; Butler v. Carns, 37 Wis. 61; Bowers v. Thomas, 62 Wis. 480, 22 N. W. 710. But in some of these cases the absence of negligence was deemed a controlling factor. As in the case of Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, it was held that a party who is ignorant of the contents of a written instrument from inability to read, who signs it without intent to do so, and is chargeable with no negligence in not ascertaining its character, is not bound by it in the hands of a *bona fide* purchaser.

7. **When misrepresentation as to character of instrument not effectual as defense.**— In the case of Chapman v. Rose, 56 N. Y. 137, it appeared that the signature of the defendant to a promissory note was procured by the false representation that the instrument was for the delivery of a hay fork and two grappling pulleys. It also appeared that there was no physical obstacle to the defendant's reading the paper before he signed it. It was held that where one having the opportunity and the power to ascertain with certainty the exact obligation he is assuming, yet chooses to rely upon the statements of the person with whom he is dealing, and executes a negotiable instrument without reading or examination, as against a *bona fide* holder for value, he is bound by his act, and is estopped from claiming that he intended to sign an entirely different obligation, and that the statements upon which he relied were false; to avoid liability he must show that he was guilty of no laches or negligence in signing.

imposed upon. If a person can read or has means at his command whereby he can ascertain the contents and the character of the instrument to which he attaches his signature, he is guilty of negligence if he fails to satisfy himself as to the obligation which he thus assumes, and will not, however great the fraud practiced upon him, be permitted to impeach the title of an innocent holder for value.[8]

Ordinarily duress is a good defense in an action on a negotiable instrument but not as against a *bona fide* holder for value;[9] there are cases, however, which maintain that a note executed under duress practiced upon the maker avoids the note even as against a *bona fide* holder for value.[10]

See also Page v. Kreky, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 404; Carey v. Miller, 25 Hun (N. Y.), 28; Shirts v. Overjohn, 60 Mo. 305; Citizens' Nat. Bank v. Smith, 55 N. H. 593; Baldwin v. Barrows, 86 Ind. 351; Boynton v. McDaniel, 97 Ga. 400, 23 S. E. 824.

Inability to read.— In the case of National Exchange Bank v. Veneman, 43 Hun (N. Y.), 241, it appeared that neither the defendant nor his wife could read English, and that there was no other person within half a mile of the place where the instrument was executed whom the defendant could call upon to read the instrument. His signature was affixed to the instrument under the belief that he was executing a valid contract of agency for the sale of certain agricultural machinery in his locality. It was held that defendant was not guilty of negligence in omitting to ascertain the true nature and import of the instrument, and that there could be no recovery although the holder was an innocent purchaser for value and before maturity. See also Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046.

8. **Negligence** of party signing note is controlling upon the question of his liability to a *bona fide* holder for value. As in the case of Kellogg v. Curtis, 65 Me. 59, it was held that a person who voluntarily signs as maker a negotiable promissory note, supposing he is binding himself to some other contract, and relying on the representations of the payee as to the contents of the paper, without examining it sufficiently to ascertain the fact for himself, is estopped by his own negligence from setting up the invalidity of the note against a *bona fide* holder thereof. See also Ward v. Johnson, 51 Minn. 480, 53 N. W. 766, 38 Am. St. Rep. 515; Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486; Boynton v. McDaniel, 97 Ga. 400, 23 S. E. 824; Nichols v. Baker, 75 Me. 334; First Nat. Bank v. Stanley, 46 Mo. App. 440; Keller v. Schmidt, 104 Wis. 596, 80 N. W. 935. But there are cases holding that a *bona fide* holder may recover against the maker, although the maker was induced to sign on a false representation as to the character of the instrument, without regard to his negligence or care. First Nat. Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 506; Leonard v. Dougherty, 22 W. Va. 536; Rowland v. Fowler, 47 Conn. 347.

9. Veach v. Thompson, 15 Iowa, 380; Farmers & Mechanics' Bank of Grand Rapids v. Butler, 48 Mich. 192, 12 N. W. 36; Mundy v. Whitmore, 15 Neb. 647, 19 N. W. 694.

10. **Note void for duress.**— In New York a case arose where the signature of a married woman was obtained to a promissory note by duress. It purported in terms to charge the separate estate, stating that the consideration therefor was for the benefit of her separate estate. This statement was not true, nor was the note given in the course of any separate business carried on by her. It was held that the note could not be enforced against her even in the hands of a *bona fide* holder. Loomis v. Ruck, 56 N. Y. 462. See also Hall v. Wil-

c. *Illegal consideration; usury.*— An illegal consideration is sufficient to avoid a contract, and a court of law or of equity will not entertain any suit brought in relation to such contract, but will leave the parties thereto as it finds them. We have already considered the illegality of consideration as affecting the validity of negotiable instruments in a previous chapter to which reference is made.[11] Illegality of consideration is a good defense as against the payee of the note and in favor of the maker, but it will not avoid it as against a holder in due course,[12] unless the statute which declares the consideration to be illegal expressly provides that the contract is void.[13] Where statutes are enacted which provide that a negotiable instrument given for a gambling debt is void, it follows that such instrument is void in the hands of a *bona fide* holder for value.[14] If the consideration of an instrument is tainted

son, 16 Barb. (N. Y.) 548; Duncan v. Scott, 1 Campb. (Eng.) 100.

11. See *ante*, chap. IV, § 51.

12. Johnston v. Dickson, 1 Blackf. (Ind.) 256; Payne v. Raubinek, 82 Iowa, 587, 48 N. W. 995; Draper v. Cowles, 27 Kan. 484; Vallett v. Parker, 6 Wend. (N. Y.) 615; Glenn v. Farmers' Bank, etc., 70 N. C. 191. In the case of Devlin v. Brady, 36 N. Y. 531, it was held that a note given to induce an officer to violate his duty as such is void in the hands of either the payee, or of any subsequent holder, with knowledge of its character.

13. **Instruments made void by statute.**—Aurora v. West, 22 Ind. 88, 85 Am. Dec. 413, where it is held that mercantile paper, made void *ab initio* by statute, is void in the hands of a *bona fide* holder. See also, to the same effect, Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57.

See, generally, the following cases:

United States. — Hatch v. Burroughs, Fed. Cas. No. 6,203, 1 Woods, 439.

Alabama.— Bozeman v. Allen, 48 Ala. 512.

Georgia.— Poe v. The Justices, Dudley, 249.

Illinois. — Eagle v. Kohn, 84 Ill. 292.

Maryland.— Gwyn v. Lee, 1 Md. Ch. 445.

Massachusetts.— Smith v. Livingston, 111 Mass. 342.

Nebraska.— Kittle v. De Lameter, 3 Neb. 325.

New York.— Grimes v. Hillenbrand, 6 Thomp. & C. 620, 4 Hun, 354.

14. **Statutes making gambling contracts void.**— Under a statute making notes, etc., given for money won or lost upon any game absolutely void and of no effect (Ohio R. S., § 4269), it was held that the indorsee of a check given for money lost at a game of cards cannot recover on it against the drawer, though a *bona fide* holder for value without notice of the defect in the consideration. Lagonda Nat. Bank v. Portner, 46 Ohio St. 381, 21 N. E. 634. To the same effect are: Ivey v. Nicks, 14 Ala. 564; Hawley v. Bibb, 69 Ala. 52; Haight v. Joyce, 2 Cal. 64, 56 Am. Dec. 311; Williams v. Judy, 8 Ill. 282, 44 Am. Dec. 699; Traders' Bank v. Alsop, 64 Iowa, 98, 19 N. W. 863; Early v. McCart, 2 Dana (Ky.), 414; Maine Mile Track Assn. v. Hammond (Mich.), 87 N. W. 135; Harper v. Young, 112 Pa. St. 419, 3 Atl. 670; Mordecai v. Dawkins, 9 Rich. L. (S. C.) 262. In the case of Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432, it was said: "The principle may be considered as well established that when a statute in express terms pronounces contracts, notes, bills, securities, and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute as absolutely void, no recovery can be had thereon; and the doctrine that transactions

with usury and, therefore, illegal, it has been held in many jurisdictions that the defense is available in favor of the maker, even as against a *bona fide* holder;[15] there are, however, a number of decisions holding contrary to this.[16] But the rule which seems supported by the weight of authority is that where a note is void in its inception for usury it continues void forever, whatever its subsequent history may be; it is as void in the hands of an innocent holder for value as it was in the hands of those who made the usurious contract. No vitality can be given to it by sale or exchange, because that which the statute has declared to be void cannot be made valid by passing through the channels of trade.[17] This would seem to be well established in New York and in all

which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authority."

15. **Usury as defense.**— See Union Bank v. Gilbert, 83 Hun (N. Y.), 417, 31 N. Y. Supp. 945, where it was held that if a promissory note is void for usury it cannot be rendered valid by a sale thereof to another; and in Rodecker v. Littauer, 59 Fed. 857, 8 C. C. A. 320, it was held that no one could become the *bona fide* holder of a note or bill which, by statute, is void for usury. See also Faris v. King, 1 Stew. (Ala.) 255; Pearson v. Bailey, 23 Ala. 537; Early v. McCart, 2 Dana (Ky.), 414; True v. Triplett, 4 Metc. (Ky.) 57; Bridge v. Hubbard, 15 Mass. 96, 8 Am. Dec. 86; Torrey v. Grant, 18 Miss. 89; Clark v. Sisson, 22 N. Y. 312; Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360; Ward v. Sugg, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280; Faison v. Grandy, 128 N. C. 438, 38 S. E. 897; Kendall v. Robertson, 12 Cush. (Mass.) 156; Payne v. Trezevant, 2 Bay (S. C.), 23; First Nat. Bank v. Ledbetter (Tex. Civ. App.), 34 S. W. 1042.

16. **Statutes declaring usurious instruments illegal and voidable.**— In the case of Palmer v. Call, 7 Fed. 737 (Cir. Ct., Iowa), it was held that where an usurious obligation is passed for value to an innocent purchaser without notice of the usury, who afterward takes a new and substitute security for the debt, there being no taint of usury in the second transaction, the plea of usury to the substituted obligation cannot be sustained. But this case, and nearly every case holding that a usurious bill or note is not affected with the taint in the hands of an innocent holder for value, is under a statute which does not expressly declare the contract void. In this case the court said: "It has long been the settled law that where a statute by its terms makes a note or bill absolutely void, the instrument is invalid in the hands of a *bona fide* holder for value. But where a statute declares a contract not illegal, but only voidable, a negotiable note or bill founded upon such voidable contract is good in the hands of a *bona fide* holder." See also Hamilton v. Fowler, 99 Fed. 18, 40 C. C. A. 47; Sherman v. Blackman, 24 Ill. 347; Conkling v. Underhill, 4 Ill. 388; Gross v. Funk, 20 Kan. 655; First Nat. Bank v. Bentley, 27 Minn. 87, 6 N. W. 422, which was under a statute protecting a *bona fide* purchaser from the defense of usury; Long v. Long, 141 Mo. 352, 44 S. W. 341; Cheney v. Jansent, 20 Neb. 128, 29 N. W. 289; Darst v. Backus, 18 Neb. 231, 24 N. W. 681; Young v. Berkely, 2 N. H. 410; Bradshaw v. Van Valkenburgh, 97 Tenn. 316, 37 S. W. 88.

17. Claflin v. Boorum, 122 N. Y. 385, 25 N. E. 360, citing Miller v. Zeimer, 111 N. Y. 441, 444; Miller v. Hull, 4 Den. (N. Y.) 104, 107; Bennet v. Smith, 15 Johns. (N. Y.) 355, 357; Wilkie v. Roosevelt, 3 Johns. Cas. (N. Y.) 206; Powell v. Waters, 8 Cow. (N. Y.) 669.

other States where a usurious contract is declared void by statute. Where a note which was usurious in its inception is, upon its maturity, taken up and a new note or other negotiable instrument is given therefor, which of itself is not usurious, the new instrument is valid in the hands of a *bona fide* holder for value.[18]

§ 77. Rights of holder in due course.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "A holder in due course holds the instrument free "from any defect of title of prior parties and free from defenses "available to prior parties among themselves, and may enforce "payment of the instrument for the full amount thereof against "all parties liable thereon." [19] A similar provision is contained in the English Bills of Exchange Act.[20]

b. *Effect of statute.*— The statute provides in effect that the title of the holder of a negotiable instrument transferred before maturity in good faith and for value, and without notice of any defect, is absolute and unimpeachable by any of the prior parties thereto. There is apparently no exception to the rule as thus declared. It would seem to follow, therefore, that in all cases the holder in due course takes the instrument free from any defect of title, or other defenses. It has been suggested that this section

18. **New note given for one usurious in its inception.**—*In New York* the case most frequently cited on this question is that of Powell v. Waters, 8 Cow. (N. Y.) 669, 691. In this case it was contended that a new security, taken in renewal of a prior usurious contract by a *bona fide* holder, is not avoided by the usury of the original transaction. Jones, Ch., said: "That principle applies to the case of an innocent holder of a usurious contract for which he has given a valuable consideration, without notice of the usury. Thus in Cuthbert v. Haley, 8 T. R. (Eng.) 390, A. made a usurious note to B., who transferred it to C. for a valuable consideration, without notice of the usury, and A. gave a bond to C. for the amount, and the bond was held not to be affected by the usury. A new security taken by such a meritorious holder of the usurious note has a just claim to protection. He is not implicated in the usury which vitiated the original contract, and if he can obviate the necessity of using the contaminated security by procuring a new one to be substituted for it which is free from the taint, he should not be visited with the penalty of an offense which he never committed. See also Palmer v. Call, 7 Fed. 737; Mitchell v. McCullough, 59 Ala. 179; Masterson v. Grubbs, 70 Ala. 406; Smalley v. Doughty, 6 Bosw. (N. Y.) 66; Smith v. White (Tex. Civ. App.), 25 S. W. 809; Faison v. Grandy, 128 N. C. 438, 38 S. E. 897; Ward v. Sugg, 113 N. C. 489, 18 S. E. 717, 24 L. R. A. 280.

19. Neg. Inst. L. (N. Y.), § 96. For same section in statutes of other States see Appendix.

20. English Bills of Exchange Act, 1882, § 38(2), which provides that "where a holder is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defenses available to prior parties among themselves, and may enforce payment against all parties liable on the bill."

abrogates the rule permitting the defense of usury, gambling, or other consideration prohibited by statute, affecting the validity of the instrument.[21] This seems doubtful at least in the States where these defenses are made such by express statutory provision, and where such statutes declare the contract or negotiable instrument affected thereby to be absolutely void. To hold that this section was intended to repeal such statutes, as far as they relate to negotiable instruments, would seem to be a forced construction and an undue recognition of a presumable legislative intent. This section does not clearly conflict with such statutes, and it is possible that they may be so construed as to both be given their full force. Without a clearer expression of a legislative intent, it seems unreasonable to hold that the declaration of the general principle in its broad terms as contained in this section works a repeal of other prior statutes in the States which have adopted the act, making absolutely void, for certain prohibited acts, contracts including negotiable instruments.

c. *Declaratory of the general rule.*— This section is declaratory of the general rule established by a long line of authorities in all the States. It has also been the rule that a *bona fide* holder of a negotiable instrument, for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement before the same becomes due, holds title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity.[22]

d. *Incapacity of parties and want of authority.*— The want of capacity upon the part of a maker of a negotiable instrument, as in the case of infants, lunatics, and habitual drunkards, avoids

21. See opinion of Chief Justice Alvey in the case of Wirt v. Stubblefield, 17 App. Cas. (D. C.) 283, 285. This possible effect of a change in the rule was recognized by the Legislature of Wisconsin in enacting the Negotiable Instruments Law, since they added to this section the following exception: "Except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provisions of section 1676(25) of this act." For the effect of usury, gambling, and other illegal acts upon the legality of negotiable instruments see *ante*, § 51, p. 294.

22. Swift v. Tyson, 16 Pet. (U. S.) 1; Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. Ed. 934; Brown v. Spoffard, 95 U. S. 474; Pettee v. Prout, 3 Gray (Mass.), 502, 63 Am. Dec. 778; Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; Bostwick v. Dodge, 1 Doug. (Mich.) 413, 41 Am. Dec. 584; Price v. Keen, 40 N. J. L. 332; Reddick v. Jones, 28 N. C. 107, 44 Am. Dec. 68.

the instrument in the hands of a *bona fide* holder, and defeats an action thereon by whomsoever brought, unless it can be shown that the instrument was given for necessaries, or that the maker received an adequate consideration for it, in a transaction that was fair and reasonable on the part of the payee, and, in the case of a lunatic, that it was without knowledge by the payee of the maker's mental condition.[23] But it has been held in a case where the in-

23. A purchaser of negotiable paper takes it with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind. McClain v. Davis, 77 Ind. 419.

Infants.— Judge Sharswood, in his notes to Byles on Bills (60), says: "A note may be valid as such, though it may be so circumstanced as to let in all inquiries as to its consideration in the hands even of a *bona fide* holder. So here, on proof that the maker is an infant, the negotiability of the instrument is at an end; but it does not cease to be a note. It may be sued on by the holder in his own name. He stands in the shoes of the original payee, and can recover whatever he would have been entitled to recover. If the note is voidable, then without ratification it cannot be sued on at all. The holder, at most, must be subrogated to the rights of the original payee, in an action against the infant in the name of the payee, or a declaration founded on the original consideration." See cases cited under chap. II, § 22.

Lunacy.—In 1 Parsons on Notes and Bills, 150, it is said: "To defeat a promissory note it is only necessary to prove a condition of mind which makes self-protection impossible." In the case of McClain v. Davis, 77 Ind. 419, the court said: "Commercial paper is not an exception to the rule which permits a disaffirmance by any one who was of unsound mind at the time of becoming a party thereto. The purchaser of such paper takes with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind." And in Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 1045, the court said: "The paper of an insane person, however perfect in form it may be, not having the quality of negotiability within the rule of the law merchant, by reason of the incapacity of the maker, and the holder occupying no better position with respect to it than the original payee, the plea of insanity at the time of execution is as available, and has the same effect in a suit by the holder, as if the suit were by the payee." See also Wirebach's Exr. v. Bank, 97 Pa. St. 543, where it is held that the holder of an insane person's note is in no better position than the payee.

In the case of Anglo-Californian Bank v. Ames, 27 Fed. 727, the court said: "He who is legally disabled to act cannot be estopp d from denying that he has acted. An estoppel creates no power; and, while in favor of a *bona fide* purchaser, inquiry is denied as to equities between prior parties, yet such protection does not cut off inquiry into the contractual capacity of those parties."

Intoxication.— Where the maker of a negotiable note defends against a *bona fide* holder on the ground that he was intoxicated when he made the note, he must make out a case of complete intoxication. Where he was able to sign the note, and the next morning to remember that he had done so and for what the note was given, it was held that he had not shown a case of complete intoxication. Caulkins v. Fry, 35 Conn. 170. The court in this case draws a distinction between actions brought by the payee and actions brought by an indorsee, and says: "As against the payee the maker may avail himself of any defense which shows that the paper was either void or voidable, while as against a *bona fide* holder for value he can only defend by showing that the paper was void. In the latter case he is limited to those defenses which go to the essence of the contract, and, either by common law or capacity of the maker of a note was not clearly apparent, and where the indorsee acted in good faith and the transaction was such as not likely to call his attention to such incapacity, that such indorsee could recover on the note.[24] If a negotiable instrument is executed by an agent within the scope of his authority, his fraudulent act will not be available as a defense in an action brought thereon against the principal by a *bona fide* holder for value;[25] and where the officer of a corporation executes or nego-

by statute, annul and avoid the contract, or which interfere with and prevent the indorsee from acquiring a legal title to the paper. Upon the same principle complete incapacity of the maker, which shows that the paper is void, is a good defense as against a *bona fide* holder; while partial incapacity, which, in connection with other circumstances, may show that the paper is voidable, but does not render it absolutely void, is only available as against the payee." See also Borden v. Clark, 26 Mich. 410. In Smith v. Williamson, 8 Utah, 219, 30 Pac. 753, it was held that a negotiable note, signed by the maker while in a state of intoxication, cannot be avoided in the hands of a *bona fide* purchaser before maturity. See also McSparran v. Neeley, 91 Pa. St. 17; State Bank v. McCoy, 69 Pa. St. 204, 8 Am. Rep. 246; Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440; Page v. Krekey, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 404.

Coverture.— In those States where the common-law incapacity of a married woman to contract has not been abrogated, it is held that the holder of a negotiable note of a married woman, who has taken it for value and before maturity, is liable to have pleaded against him every defense arising out of the wife's incapacity. Conrad v. Le Blanc, 29 La. Ann. 123; Voreis v. Nusbaum, 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45; Comings v. Leedy, 114 Mo. 454, 21 S. W. 804; National Bank v. Brewster, 49 N. J. L. 231, 12 Atl. 769; Loweree v. Babcock, 8 Abb. Pr. 255.

24. Shoulters v. Allen, 51 Mich. 529, 16 N. W. 888.

25. Agency.— If the principal authorize his agent to fill up a blank note or bill over his signature, he will be liable to a *bona fide* holder for any misuse of such authority. And this is so though it be shown that the person to whom a blank instrument had been intrusted had no authority at all to fill up the blank (Fullerton v. Sturges, 4 Ohio St. 529; Decatur Bank v. Spence, 9 Ala. 800), or that the agent's authority was limited to a certain sum, which he had exceeded; or that he was only authorized to use the paper for a particular purpose, and had fraudulently converted it to a different purpose. Putnam v. Sullivan, 4 Mass. 45. See 2 Parsons on Notes and Bills, 110. See also Holden v. Durant, 29 Vt. 184.

If an agent be authorized generally to execute notes in the name and for the benefit of his principal, and he executes notes in his principal's name for the fraudulent purpose of raising money for his own use, such notes will, nevertheless, be binding upon the principal, in the hands of a *bona fide* holder. 2 Parsons on Notes and Bills, 108, citing North River Bank v. Aymar, 3 Hill (N. Y.), 262; Stinback v. Bank of Virginia, 11 Gratt. (Va.) 269; Newland v. Oakley, 6 Yerg. (Tenn.) 489.

In the case of Mechanics' Bank v. N. Y. & N. H. R. R. Co., 13 N. Y. 599, 631, the court said (per Comstock, J.); "It is obvious, upon a moment's reflection, that negotiability can impart no vitality to an instrument executed under a power where the agent has exceeded his actual or presumptive authority. Whoever proposes to deal with a security of any kind appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry he deals at his peril."

As to authority of agents see *ante*, chap. II, § 29.

tiates commercial paper for the benefit of the corporation and in the regular course of its business, the want of authority upon the part of such officer will not be an available defense as against a *bona fide* holder who had no knowledge of such defect.[26] Nor will a corporation be permitted to set up as a defense in an action upon a note by a *bona fide* holder that it had no power to execute a note for the purpose for which it was given,[27] provided it has power to execute a note for any purpose, or the nature of its business is such as to warrant the presumption that it had such power.[28]

e. *Conditions and agreements between original parties.*— A collateral contemporaneous agreement, providing that the note should not be paid in the event that an executory contract which was the consideration of the notes should not be performed, does not defeat the negotiability of the note in the hands of an indorsee,

26. Want of authority of corporate officer not a defense.— Irwin v. Bailey, Fed. Cas. No. 7,079, 8 Biss. (U. S.) 523; Bird v. Daggett, 97 Mass. 494; Merchants' Bank v. McColl, 6 Bosw. (N. Y.) 473; Exchange Bank v. Monteath, 26 N. Y. 505; National Park Bank v. German-Am. Mut. Warehousing Co., 21 Jones & S. (N. Y.) 367.

In National Spraker Bank v. Treadwell Co., 80 Hun (N. Y.), 363, 30 N. Y. Supp. 77, it was held that the fact that a promissory note was not signed by the defendant's treasurer, in accordance with the by-laws, constitutes no defense to an action on a note in the hands of a *bona fide* holder, the corporation having received the benefit of the proceeds. See also Grant v. Treadwell Co., 82 Hun (N. Y.), 591, 31 N. Y. Supp. 702.

But in Davis v. Rockingham Investment Co., 89 Va. 290, 15 S. E. 547, it was held that one who takes a note by indorsement from an officer of a corporation does so at his peril, and though he pays value for the note in good faith, without notice of want of authority in the officer, he acquires no title to the note as against the corporation.

Corporate paper payable to officer.— It is a general rule that when an officer of a corporation makes a corporate obligation payable to himself, and it is presented by him for negotiation, it bears upon its face sufficient notice of the incapacity of the officer to issue. Hanover Bank v. American Dock Co., 148 N. Y. 612, 43 N. E. 72; Bank of New York v. American Dock Co., 143 N. Y. 559, 30 N. E. 713; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115. But this rule does not apply to corporate notes regularly issued by an officer, so far as appeared from their face, to a stranger and by him transferred to a firm of which the officer was a member and for which he acted as agent in procuring the loan for which the notes were pledged as security. Cheever v. Pittsburgh, etc., R. Co., 150 N. Y. 59, 44 N. E. 701.

27. As to accommodation paper in hands of *bona fide* holder see Mechanics' Banking Assn. v. N. Y. & S. White-Lead Co., 35 N. Y. 505; Florence R. & Imp. Co. v. Chase Nat. Bank, 106 Ala. 364, 17 South. 720; Tod v. Kentucky Union Land Co., 57 Fed. 47.

And, generally, see Willmarth v. Crawford, 10 Wend. (N. Y.) 341; Commercial Bank v. St. Croix Mfg. Co., 23 Me. 280; Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 438, 18 N. W. 206; Auerbach v. Le Seuer Mill Co., 28 Minn. 291, 9 N. W. 199, 41 Am. Rep. 285; Lehigh Valley Coal Co. v. West Defere Agricultural Works, 63 Wis. 45, 22 N. W. 831.

28. Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709; Wright v. Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701.

though he had notice of such agreement.[29] If, however, a breach of the collateral agreement had occurred to the knowledge of the indorsee when he took the note he would not be protected in his right to recover.[30] As has been said by Judge Parsons: "Knowledge on the part of the holder, at the time he took the note, that it was not to be paid on a specified contingency, is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of that fact." [31] It has been held

29. **Breach of collateral agreement.**—*In New York* it was held in the case of Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461, that the breach of an executory contract which formed the consideration for the acceptance of a bill of exchange, is not a defense in whole or in part, against indorsees who took the bill for value, with notice of the contract but without notice of the breach. See also Tradesmen's Nat. Bank v. Curtis, 167 N. Y. 194, 60 N. E. 429, where it was held that the right of a bank to enforce the liability of the acceptor of drafts discounted by it is not affected by its knowledge that the consideration therefor was a promise to deliver coal in the future instead of an actual delivery, where the drafts were discounted for value before maturity, and before a breach of the agreement for the delivery of the coal. Maas v. Chatfield, 90 N. Y. 303; Cameron v. Chappell, 24 Wend. (N. Y.) 94; Dowe v. Schutt, 2 Den. (N. Y.) 621; Harbeck v. Craft, 4 Duer (N. Y.), 122; Adams v. Blancan, 6 Rob. (N. Y.) 334; Metropolitan Bank v. Engel, 66 App. Div. (N. Y.) 273, 72 N. Y. Supp. 691.

In other States the following cases are in point: Calm v. Dooley, 105 Fed. 836; Goodrich v. Stanley, 23 Conn. 79; Kinkel v. Harper, 7 Colo. App. 45, 42 Pac. 173; Wooten v. Inman, 33 Ga. 41; Hodges v. Nash, 141 Ill. 391, 31 N. E. 151; Strough v. Gear, 48 Ind. 100; Goldthwait v. Bradford, 36 Ind. 149: Graff v. Logue, 61 Iowa, 704, 17 N. W. 171; Skinner v. Church, 36 Iowa, 91; Frank v. Quast, 86 Ky. 649, 6 S. W. 909; Gano v. Finnell, 13 B. Mon. (Ky.) 390; Wait v. Chandler, 63 Me. 257; Carrier v. Sears, 4 Allen (Mass.), 336, 81 Am. Dec. 707; Patten v. Gleason, 106 Mass. 439; Miller v. Ottoway, 81 Mich. 196, 45 N. W. 665, 21 Am. St. Rep. 513; First Nat. Bank v. Compo-Board Co., 61 Minn. 274, 63 N. W. 731; Donovan v. Fox, 121 Mo. 236, 25 S. W. 915; Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373; Haines v. Dubois, 30 N. J. L. 259; Mishler v. Reed, 76 Pa. St. 76; Rice v. Ragland, 10 Humph. (Tenn.) 545, 53 Am. Dec. 737; Heffron v. Cunningham, 76 Tex. 312, 13 S. W. 259; Dixon v. Dixon, 31 Vt. 450, 76 Am. Dec. 129.

Reason for rule.—As has been stated by Macfarlane, J., in the case of Jennings v. Todd, 118 Mo. 373, 24 S. W. 148, 40 Am. St. Rep. 373: "A great part of the improvement of the county, and of business generally, is carried on with money raised by the discount of notes given upon executory contracts, and if the maker could be allowed to defend against such notes, in case of a breach of contract, on the ground that the indorsee, though in other respects *bona fide*, had knowledge of the transaction out of which the note grew, all confidence in such notes as negotiable paper would be destroyed and such business would be paralyzed. By making and delivering a negotiable note the maker is held to intend that it may be put in circulation and that no defenses against it exist. In purchasing such note no inquiry as to the consideration is required. If a failure of consideration occur, the maker must look to the payee for indemnity."

30. Miller v. Ottoway, 81 Mich. 196, 45 N. W. 665, 21 Am. St. Rep. 513; Wagner v. Diedrich, 50 Mo. 484; Coffman v. Wilson, 2 Metc. (Ky.) 542; Sutton v. Beckwith, 68 Mich. 303, 13 Am. St. Rep. 344; Bowman v. Van Kuren, 29 Wis. 218, 9 Am. Rep. 554.

31. 1 Parsons on Notes and Bills, 261. And see First Nat. Bank v. Anderson, 55 App. Div. (N. Y.) 570, 67 N. Y. Supp. 434.

that a note valid on its face is not invalid because prior parties thereto had agreed that the note should not be negotiated until signed by a certain person as surety.[32] Evidence of a parol contemporaneous agreement between the original parties to the instrument is not admissible in an action brought thereon by a *bona fide* holder.[33] Such evidence would be clearly in contravention of the well-established rule of law that parol evidence of matters which take place before or at the time of making a written contract cannot be received to nullify or vary the terms of a written contract made by the parties.[34]

§ 78. Defenses where instrument is in hands of person who is not holder in due course; rights of persons deriving title through holder in due course.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "In the hands of any holder other than a holder in "due course, a negotiable instrument is subject to the same de-"fenses as if it were nonnegotiable. 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."[35]

b. *Defenses where instrument is in hands of person other than holder in due course.*— The rule laid down in the statute as to the rights of holders of negotiable instruments who have taken them as holders in due course is that which obtains at the common law.[36] We have already noticed, in a preceding section, that a negotiable instrument which is transferred after maturity is subjected to all the equities and defenses existing between the original parties.[37] The same result would follow where the transferee of such an instrument had notice of a defect in the title or other infirmity of the instrument transferred to him.[38] The assignment of a non-

32. Whitcomb v. Miller, 90 Ind. 384; Jordan v. Jordan, 10 Lea (Tenn.), 124, 43 Am. Rep. 294.

33. Davy v. Kelley, 66 Wis. 452, 29 N. W. 232; Rice v. Ragland, 10 Humph. (Tenn.) 545, 53 Am. Dec. 737; Smith v. Moberly, 10 B. Mon. (Ky.) 543, 52 Am. Dec. 543; McIntosh-Huntington Co. v. Rice, 13 Colo. App. 393, 58 Pac. 358.

34. Davy v. Kelley, 66 Wis. 452, 29 N. W. 232; Charles v. Denis, 42 Wis. 56; Eaton v. McMahon, 42 Wis. 484; Hunt v. Adams, 7 Mass. 518, 522; Erwin v. Saunders, 1 Cow. (N. Y.) 249; Payne v. Ladue, 1 Hill (N. Y.), 116; Brown v. Hull, 1 Den. (N. Y.) 400.

35. Neg. Inst. L. (N. Y.), § 97.

36. *In re* Overend-Gurney & Co., L. R., 6 Eq. (Eng.) 344; Amory v. Meryweather, 2 B. & C. (Eng.) 573.

37. See *ante*, § 79 (*d*), (3).

38. **Notice of defect.**—The person to whom the note is indorsed having knowledge that it was tainted with

negotiable instrument, and the rights of parties thereto have already been considered in a previous chapter of this work.[39] It is, however, a general proposition that the assignee for value of a nonnegotiable instrument holds it subject to all the equities or counterclaims between the original parties, existing at the time of the assignment, notwithstanding that it was taken before maturity, and without notice of any of such equities.[40]

c. *Person deriving title through holder in due course.*— As declared in the statute, a purchaser of a promissory note or other negotiable instrument from a holder in due course is entitled to the same protection as his vendor.[41] And where the first indorsee of a negotiable instrument purchased it before maturity and paid value therefor, without notice of any prior equities, the second indorsee, holding under the first, takes a good title, even though he had notice of such equities, if he purchased the instrument in the regular course of business, before it became due, for the reason that he took a new and independent title under another indorser.[42]

fraud, or of other facts impeaching its consideration or legality, takes the note subject to all equities and defenses existing between the original parties thereto. Zook v. Simonson, 72 Ind. 83; Bryant v. Couillard, 32 Me. 520; Hunt v. Rumsey, 83 Mich. 156, 47 N. W. 105, 9 L. R. A. 674; Meyers v. Bealers, 30 Neb. 280, 46 N. W. 479.

In New York it has been held that the fact that the indorsee of a promissory note, at the time that he took the note, knew that the promisors were incompetent to contract, does not deprive him of the character of a *bona fide* purchaser. Erwin v. Downs, 15 N. Y. 575. But where a partner makes a note in his own name, indorses it in the name of the firm, and delivers it in payment of his own debt to a person who knows the facts, the indorsee is not a *bona fide* holder. Elliott v. Dudley, 19 Barb. 326. See also the following New York cases: Bacon v. Burnham, 37 N. Y. 614; Benjamin v. Rogers, 57 Hun (N. Y.), 588, 10 N. Y. Supp. 777; Garfield Nat. Bank v. Colwell, 57 Hun (N. Y.), 169, 10 N. Y. Supp. 864; Produce Bank v. Bache, 30 Hun (N. Y.), 351; Sanderson v. Goodrich, 46 Barb. (N. Y.) 616.

39. See *ante*, chap. V, § 71.

40. McGarvey v. Hall, 23 Cal. 140; Hamilton v. Grangers, L. & H. Ins. Co., 65 Ga. 750; Mettard v. Allen, 139 Ind. 644, 39 N. E. 239; First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604.

41. Pearson v. Howe, 11 Ala. 370; Poorman v. Mills, 39 Cal. 345, 2 Am. Rep. 451; O'Connor v. Clark (Cal.), 44 Pac. 482; Wood v. Starling, 48 Mich. 592, 12 N. W. 866; Miller v. Talcott, 54 N. Y. 114; Merchants' Nat. Bank v. Comstock, 55 N. Y. 24, 14 Am. Rep. 168.

A plaintiff in an action on a promissory note is not chargeable with knowledge of any facts constituting a defense in favor of an accommodation indorser, unless his assignor, who took the note before maturity, for value, had knowledge of such facts. Kruelwitch v. Meltser, 13 Misc. (N. Y.) 242, 34 N. Y. Supp. 451.

42. Bailey v. Bidwell, 13 Mees. & W. (Eng.) 15; Marion County Comrs. v. Clark, 94 U. S. 278, 24 L. Ed. 59; Stamper v. Hayes, 25 Ga. 546; Thomas v. Ruddell, 66 Ind. 326; Hardy v. First Nat. Bank, 56 Kan. 493, 43 Pac. 1125; Roberts v. Lane, 64 Me. 108, 18 Am. Rep. 242; Thompson v. Shepard, 12 Metc. (Mass.) 311, 46 Am. Dec. 676; Wood v. Starling, 48 Mich. 592, 12 N. W. 866; Knight v. Kenney, 59 Neb. 274, 80 N. W. 912; Hermann v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632.

Notice of such prior equities cannot affect the title of the second holder if he acquired title from a prior holder, who had no such knowledge.[43] A holder with knowledge that the instrument is tainted with fraud and that it is a valid defense thereto can recover on such instrument provided the person from whom he received it had no knowledge of such fraud,[44] and the same is true where the defense is want, failure, or illegality of consideration.[45]

The principle is that the promise being good to the prior indorsee or holder, free from objection on the ground of fraudulent or illegal consideration, he has the power of transferring it to others with the same immunity, as an incident to the legal right which he had acquired in the instrument. It is no defense, therefore, that a plaintiff, being a transferee of a bill or note, had notice of a fraudulent or illegal consideration, if he can deduce title from a prior party not shown to have had any such notice.[46] Where it appears that a person bought a negotiable instrument by the direction of, and with funds furnished by, the plaintiff, the latter cannot be deemed a holder in due course, although he derived his title to the instrument from such person, who had no notice of equities existing between the original parties.[47]

d. *Transfer after maturity.*— It is the settled law in this country that where a negotiable instrument is transferred after maturity by a holder in due course before maturity, the transferee takes the title of, and is entitled to the same protection as his indorser.[48] Where the instrument has been indorsed for value and

43. Byles on Bills (5th ed.), p. 118; Story on Promissory Notes, § 196; Story on Bills of Exchange, § 220.

44. Reilly v. Schawacker, 50 Ind. 592; Mornyer v. Cooper, 35 Iowa, 257; Simon v. Merritt, 33 Iowa, 537; First Nat. Bank v. Stanley, 46 Mo. App. 440; Watson v. Flanigan, 14 Tex. 354.

45. Mornyer v. Cooper, 35 Iowa, 257; Hascall v. Whitmore, 19 Me. 102, 36 Am. Dec. 738; Kinney v. Kruse, 28 Wis. 183; Burch v. Pope, 114 Ga. 334, 40 S. E. 227.

46. Kinney v. Kruse, 28 Wis. 183, 190; Smith v. Hiscock, 14 Me. 449.

47. Vosburgh v. Diefendorf, 119 N. Y. 357, 367, 23 N. E. 801, 16 Am. St. Rep. 836. The court said in this case: "And it is contended that Richmond, from whom the plaintiff took the paper, was shown to be innocent of any imperfection in it. But the testimony tended to show that Richmond bought the note from Henderson, as the agent, and by direction of, and with funds subsequently furnished by the plaintiff. It is quite clear, we think, that the testimony on this point was of such a character that it could not be held that, absolutely, as a matter of law, Richmond ever had any title to the note, and, unless he had, his connection with its purchase, as a mere agent or instrument of the plaintiff, could not confer the character of a *bona fide* holder, or shield the plaintiff from the legal consequences of any notice that he might have had of the fraudulent origin of the paper as between the maker and the payee."

48. **Transferee after maturity takes title of transferrer.**—Koehler v. Dodge, 31 Neb. 328, 47 N. W. 913; Barker v. Lichtenberger, 41 Neb. 751,

in good faith before it is due, the want of consideration or any other defense existing between the original parties is not available against a subsequent holder to whom it may have been passed after it was due.[49]

e. *Application to purchase made by payee from bona fide holder.* — The general rule, that a purchaser from a *bona fide* holder of negotiable paper takes it with all the rights of such holder, whether he had notice of any infirmity as between the original parties or not, is subject to the exception that, when the payee becomes such purchaser, he takes it subject to all the equities and defenses originally existing against it.[50]

§ 79. Presumption as to holder in due course; burden of proof.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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

60 N. W. 79; Matson v. Alley, 141 Ill. 284, 31 N. E. 419; Howell v. Crane, 12 La. Ann. 126, 68 Am. Dec. 765; Lewis v. Long, 102 N. C. 206, 9 S. E. 637, 11 Am. St. Rep. 725; Woodman v. Churchill, 52 Me. 58. If a person once becomes a *bona fide* holder of commercial paper, he can transfer his rights thereto and title therein both before and after maturity. Hogan v. Moore, 48 Ga. 156; Peabody v. Rees, 18 Iowa, 571; Bassett v. Avery, 15 Ohio St. 299.

In New York it has been held that when the payee of a note, made for his accommodation, indorses and delivers it before maturity to a third party, receiving from the latter the surrender of an old note of his own for a smaller amount and the balance in cash, such third party is thereby constituted a *bona fide* holder of the note, and his right to recover on the note as against the maker will pass to his assignee thereof after maturity. Weems v. Shaughnessy, 70 Hun (N. Y.), 175, 24 N. Y. Supp. 271. See also Britton v. Hall, 1 Hilt. (N. Y.) 528; Benedict v. De Groat, 45 How. Pr. (N. Y.) 384; Beal v. Gen. Elect. Co., 16 Misc. (N. Y.) 611, 38 N. Y. Supp. 527.

49. Hascall v. Whitmore, 19 Me. 102, 36 Am. Dec. 738; Smith v. Hiscock, 14 Me. 449; Wilson v. Mechanics' Sav. Bank, 45 Pa. St. 488. But if a note void on account of failure of consideration is transferred to one having notice of that fact, a purchaser from such transferee after maturity of the note will not be entitled to recover thereon. Woodman v. Churchill, 52 Me. 58.

50. **Rule where purchase is made by payee.**—Kost v. Bender, 25 Mich. 515. Judge Cooley said in this case: "But I am not aware that this rule has ever been applied to a purchase by the original payee, nor can I perceive that it is essential to the protection of the innocent indorsee, that it should be. It cannot be very important to him, that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell to all the rest of the community the market value of his security is not likely to be affected by the circumstance, that a single individual cannot compete for its purchase, especially when we consider that the nature of negotiable securities is such that their market value is very little influenced by competition. Nor do I perceive that any rule or principle of law would

"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." [51] A similar provision is contained in the English Bills of Exchange Act.[52] The statute also, as we have already seen, presumes that every negotiable instrument was issued for a valuable consideration, and that every person whose signature appears thereon became a party thereto for value.[53]

b. *Presumption that person is holder in due course.*— A holder is defined in the Negotiable Instruments Law as the "payee or "indorsee of a bill or note who is in possession of it, or the bearer "thereof." [54] Applying this definition to the above section, we find that the statute is declaratory of the common-law rule that the possession of a negotiable instrument by the payee, indorsee, or bearer is *prima facie* evidence that he is the lawful owner thereof,[55]

be violated by permitting the maker to set up this defense against the payee, when he becomes indorsee, with the same effect as he might have done before it had been sold at all, or that there is any valid reason against it." See also Andrews v. Robertson, 111 Wis. 334, 87 N. W. 190, 54 L. R. A. 673; Camp v. Sturdevant, 16 Neb. 693, 21 N. W. 190; Battersby v. Calkins (Mich.), 87 N. W. 860.

51. Neg. Inst. L. (N. Y.), § 98. For same section in statutes of other States see Appendix.

52. English Bills of Exchange Act, 1882, § 30(2), which provides that every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, of force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has been given in good faith for the bill.

53. Neg. Inst. L. (N. Y.), § 50. See *ante*, § 53, p. 30.

54. Neg. Inst. L. (N. Y.), § 2.

55. **Possession is prima facie evidence of ownership.** See

Alabama.— Anniston Pipe Works v. Furnace Co., 94 Ala. 606, 10 South. 259; Garrell v. Lillie, 40 Ala. 271.

California.— McCann v. Lewis, 9 Cal. 246.

Colorado.—Wyman v. Colorado Nat. Bank, 5 Colo. 30, 40 Am. Rep. 133.

Illinois.— Jewett v. Cook, 81 Ill. 260; Curtiss v. Martin, 20 Ill. 557.

Iowa.— Bigelow v. Burnham, 90 Iowa, 300, 57 N. W. 865, 48 Am. St. Rep. 442.

Kansas.— State Sav. Assn. v. Barber, 35 Kan. 488, 11 Pac. 330.

Kentucky.— Crosthwait v. Meisner, 13 Bush, 543.

Maine.— Lord v. Appleton, 15 Me. 270.

Maryland.— Long v. Crawford, 18 Md. 220.

Michigan.— Barnes v. Peet, 77 Mich. 391, 43 N. W. 1025.

Minnesota.— Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117; Dessaint v. Elling, 31 Minn. 287, 17 N. W. 480.

Mississippi.— Smith v. Prestidge, 14 Miss. 78.

Missouri.— Priest v. Way, 87 Mo. 16; Fitzgerald v. Barker, 85 Mo. 13.

Montana.— Meadowcroft v. Walsh, 15 Mont. 544, 39 Pac. 914.

New York.— Freeman v. Falconer, 12 Jones & S. 132; Dean v. Hewit, 5 Wend. 257; Bell v. Spotts, 50 How. Pr. 162.

North Carolina.— Triplett v. Foster, 115 N. C. 335, 20 S. E. 475.

Texas.— Daugherty v. Eastburn, 74 Tex. 68, 11 S. W. 1053; Ball v. Hill, 38 Tex. 237.

Wisconsin.— Woodruff v. King, 47 Wis. 261, 2 N. W. 452.

and that he took such instrument before maturity, in good faith, for value, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it.[56] The presumption, however, does not arise in favor of a holder, where the instrument was payable to order, or was not indorsed.[57] The possession of a nonnegotiable instrument is not *prima facie* evidence of the title of the holder, nor that it was transferred to him

56. **Presumption as to good faith.**— The holder of a negotiable instrument is presumed to have taken it in good faith, before maturity and for value. See the following cases:

United States.— Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170; Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Atlas Nat. Bank v. Holm, 71 Fed. 489, 19 C. C. A. 94.

Alabama.— First Nat. Bank v. Sproul, 105 Ala. 275, 16 South. 879; Lehman v. Tallassee Mfg. Co., 64 Ala. 567.

California.— Sperry v. Spaulding, 45 Cal. 544.

Colorado.— Champion Empire Mining Co. v. Bird, 7 Colo. App. 523, 44 Pac. 764.

Georgia.— Dickerson v. Burke, 25 Ga. 225.

Illinois.— Hall v. First Nat. Bank, 133 Ill. 234, 24 N. E. 546; Cisne v. Chidester, 85 Ill. 523; Jewett v. Cook, 81 Ill. 260.

Iowa.— Rea v. Owens, 37 Iowa, 262; Bigelow v. Burnham, 90 Iowa, 300, 57 N. W. 865, 48 Am. St. Rep. 442.

Kansas.— Cobleskill First Nat. Bank v. Emmett, 52 Kan. 603, 35 Pac. 213; First Nat. Bank v. Elliott, 46 Kan. 32, 26 Pac. 487.

Kentucky.— Hargis v. Trust Co., 30 S. W. 877; Alexander v. Springfield Bank, 2 Metc. 534.

Maine.— Webster v. Calden, 56 Me. 204.

Massachusetts.—Esterbrook v. Boyle, 1 Allen, 412; Balch v. Onion, 4 Cush. 559; McGee v. Prouty, 9 Metc. 547, 43 Am. Dec. 409.

Michigan.— Little v. Mills, 98 Mich. 423, 57 N. W. 266; Wright v. Irwin, 33 Mich. 32; Hovey v. Sebring, 24 Mich. 232, 9 Am. Rep. 1022.

Missouri.— Harrison v. Pike, 48 Miss. 46; Emanuel v. White, 34 Miss. 56, 49 Am. Dec. 385.

Missouri.— Famous Shoe & Clothing Co. v. Crosswhite, 124 Mo. 34, 27 S. W. 397, 26 L. R. A. 568; Fitzgerald v. Barker, 85 Mo. 13; Bastine v. Wilding, 45 Mo. 92, 100 Am. Dec. 347.

Montana.— Rossiter v. Loeber, 18 Mont. 372, 45 Pac. 560.

Nebraska.— Kelman v. Calhoun, 43 Neb. 157, 61 N. W. 615.

New York.— Langley v. Wadsworth, 99 N. Y. 161, 1 N. E. 106; Harger v. Worrall, 69 N. Y. 370; Nickerson v. Renger, 76 N. Y. 279; Hayes v. Hathorn, 74 N. Y. 486; Kidder v. Horrobin, 72 N. Y. 159; Seybell v. National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583; Morton v. Rogers, 14 Wend. 575; Nelson v. Cowing, 6 Hill, 336; James v. Chalmers, 6 N. Y. 209; Strickland v. Henry, 66 App. Div. 23, 73 N. Y. Supp. 12; Flour City Nat. Bank v. Grover, 88 Hun, 4 34 N. Y. Supp. 496; Torne v. Gerlach, 64 Hun, 635, 18 N. Y. Supp. 932; National State Bank v. Richardson, 50 Hun, 604, 2 N. Y. Supp. 804.

North Carolina.— Tredwell v. Blount, 86 N. C. 53.

Pennsylvania.— Battles v. Laudenslager, 84 Pa. St. 446; Knight v. Pugh, 4 Watts & S. 445, 39 Am. Dec. 99.

Wisconsin.— Wayland University v. Boorman, 56 Wis. 657, 14 N. W. 819.

57. Ross v. Smith, 19 Tex. 171, 70 Am. Dec. 327; Thompson v. Olney, 96 N. C. 9; Quigley v. Mexico So. Bank, 80 Mo. 289, 50 Am. Rep. 503.

But in New York it has been held that where a promissory note is payable to order and not indorsed, the legal presumption is that it was delivered to the payee named, or some one authorized by him to receive it, and its possession by a third person will be deemed to be in trust; as between him and the payee the note furnishes at least *prima facie* evidence that the former has the legal title. Price v. Brown, 98 N. Y. 388.

before maturity.[58] And where a note was executed by the president of a corporation in the name of the corporation, and made payable to him as executor of a decedent, there is no presumption that the holder is a *bona fide* holder for value, before maturity.[59] Where a prior indorsee is in possession of a note, the burden of proof is on him to show his title.[60] The presumption being in favor of the validity of the title of the holder of a note, one seeking to impeach such title assumes the burden of proof.[61]

c. *When burden of proof shifts.*— The provision of the statute imposing upon the holder the burden of proving that he or some person under whom he claims acquired the title is a holder in due course, when it is shown that the title of any person who has negotiated the instrument is defective, is a legislative enactment of the general rule. This provision should be construed with the former section of the statute declaring when the title to an instrument is defective.[62] It is an elementary rule that when the maker of a negotiable instrument shows that it has been obtained from him by fraud or duress, a subsequent transferee must, before he is entitled to recover on it, show that he is a *bona fide* holder.[63] It

58. Barrick v. Austin, 21 Barb. (N. Y.) 241; Bircleback v. Wilkins, 22 Pa. St. 26.

59. Erie Boot & Shoe Co. v. Eichenlaub, 127 Pa. St. 164, 17 Atl. 889.

60. Mauldin v. Branch Bank, 2 Ala. 502; Palmer v. Whitney, 21 Ind. 61.

61. See cases cited under note 56, immediately *ante*.

62. See Neg. Inst. L. (N. Y.), § 94, See *ante*, § 76, p. 374.

63. **Burden of proof when maker shows fraud, duress, etc.**— *In New York* the following are controlling cases upon this proposition: Citizens' Nat. Bank v. Weston, 162 N. Y. 113, 56 N. E. 494, where it was held that proof that a promissory note was fraudulent as between the holder and makers, shifts to the transferee, suing thereon, the burden of proof, and it becomes necessary for him to show not only the payment of value by him, but the circumstances under which he became the holder of the note. See also Donai v. Lutjens, 165 N. Y. 622, 59 N. E. 1121; Smith v. Weston, 159 N. Y. 194, 54 N. E. 38; Joy v. Diefendorf, 130 N. Y. 6, 28 N. E. 602; Franc v. Dickinson, 125 N. Y. 710, 26 N. E. 250; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676; Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; First Nat. Bank v. Green, 43 N. Y. 298; Cahen v. Everitt, 67 App. Div. (N. Y.) 86, 73 N. Y. Supp. 549; Pelly v. Onderdonk, 61 Hun (N. Y.) 314, 15 N. Y. Supp. 915; Benson v. Gurlach, 58 Hun (N. Y.), 610, 12 N. Y. Supp. 595.

In other States the following cases are cited:

Alabama.— Holland v. Barnes, 53 Ala. 83, 25 Am. Rep. 595; Ross v. Drinkard, 35 Ala. 434.

Arkansas.— Bertrand v. Barkman, 13 Ark. 150; Taber v. Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805.

California.— Eames v. Crosier, 101 Cal. 260, 35 Pac. 873; Jordan v. Grover, 99 Cal. 194, 33 Pac. 889.

Illinois.— Hodson v. Eugene Glass Co., 156 Ill. 397, 40 N. E. 971.

Indiana.— First Nat. Bank v. Ruhl, 122 Ind. 279, 23 N. E. 766; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984; Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306.

Iowa.— Galbraith v. McLaughlin, 91 Iowa, 399, 59 N. W. 338; United States Nat. Bank v. Crosley, 86 Iowa, 633, 53 N. W. 352.

is not essential that the plaintiff sustain the burden so cast upon him by showing that he himself purchased the instrument for value, but he may avail himself of the position of any previous holder who was a holder for value.[64] Where it is shown by the defendant that an instrument was given for a particular purpose, and was afterward unlawfully diverted therefrom, the burden of proving that he is a *bona fide* holder is imposed upon the plaintiff.[65] The fraudulent diversion operating to change the burden

Kentucky.— Early v. McCart, 2 Dana, 414.

Maine.—Wing v. Martel, 95 Me. 535, 50 Atl. 705; Market & Fulton Nat. Bank v. Sargent, 85 Me. 349, 27 Atl. 192; Kellogg v. Curtis, 69 Me. 212, 31 Am. Rep. 273.

Maryland.— Cover v. Myers, 75 Md. 406, 23 Atl. 850; Williams v. Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477.

Massachusetts.— Conant v. Johnston, 165 Mass. 450, 43 N. E. 192; Sullivan v. Langley, 120 Mass. 437; Tucker v. Morrill, 1 Allen, 528.

Michigan.— Drovers' Nat. Bank v. Blue, 110 Mich. 31, 67 N. W. 1105; French v. Talbot Pav. Co., 100 Mich. 443, 59 N. W. 163.

Minnesota.— First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; Bank of Montreal v. Richter, 55 Minn. 362, 57 N. W. 61.

Missouri.— Campbell v. Hoff, 129 Mo. 317, 31 S. W. 603.

Nebraska.— Crosby v. Ritchey, 47 Neb. 924, 66 N. W. 1005; Fawcett v. Powell, 43 Neb. 437, 61 N. W. 586.

New Hampshire.— Perkins v. Prouty, 47 N. H. 387, 93 Am. Dec. 449.

New Jersey.— Haines v. Merrill Trust Co., 56 N. J. L. 312, 28 Atl. 796.

North Carolina.— Commercial Bank v. Burgowyn, 108 N. C. 62, 12 S. E. 952, 23 Am. St. Rep. 49.

North Dakota.— Ravicz v. Nickells, 9 N. Dak. 536, 84 N. W. 353.

Oregon.— Owens v. Snell, etc., Co., 29 Ore. 483, 44 Pac. 827.

Pennsylvania.— Real Estate Co. v. Russell, 148 Pa. St. 496, 24 Atl. 59; Gere v. Unger, 125 Pa. St. 644, 17 Atl. 511; Reamer v. Bell, 79 Pa. St. 292.

Rhode Island.— Hazard v. Spenser, 17 R. I. 561, 23 Atl. 729.

Texas.— Riche v. Planters' Nat. Bank, 84 Tex. 413, 19 S. W. 610; People's Nat. Bank v. Mulkey (Tex. Civ. App.), 61 S. W. 528.

64. Montclaire v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391, 37 L. Ed. 431. See also preceding section as to rights of holders deriving title through holder in due course.

65. **Unlawful diversion.**— In the case of Smith v. Weston, 159 N. Y. 194, 198, 54 N. E. 38, the court said: "While upon the production of the note by the plaintiff, and proof of the signatures of the parties thereto, and of presentment and notice of dishonor, a *prima facie* case was established in his favor, as soon as it appeared that the note was indorsed outside of the firm business, and without authority of all the members, the burden of proof shifted, and in order to recover it was necessary for the plaintiff to show that he was a *bona fide* purchaser, or that the indorsement was authorized. It was not enough for him to prove simply that he had paid value for the note before maturity, but it was necessary for him to go further and show either that he had no nowledge, or notice equivalent to knowledge, that the indorsement was for the accommodation of the makers, or else that it was made with the authority of, or was ratified by, the other members of the firm." See also Farmers & Citizens' Nat. Bank v. Moxen, 45 N. Y. 762; Nickerson v. Ruger, 76 N. Y. 279; Grocers' Bank v. Penfield, 69 N. Y. 502, 25 Am. Rep. 231; Western Nat. Bank v. Wood, 64 Hun (N. Y.), 635, 19 N. Y. Supp. 81; Hale v. Shannon, 57 Hun (N. Y.), 466, 11 N. Y. Supp. 129.

In the case of American Exchange Nat. Bank v. New York Belting, etc., Co., 74 Hun (N. Y.), 446, affd. in 148 of proof must be a fraud as against the defendant or maker, and not as against the payee or some intermediate holder.[66] Where it is proved that negotiable paper was lost or stolen, the burden of proof is upon the purchaser to show that he is himself a *bona fide* purchaser, or that he has succeeded to the rights of a *bona fide* holder, before maturity.[67] In the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a *bona fide* holder for value, and this presumption is not repelled merely by proof that the bill or note, as between the immediate parties, was without consideration, and was made, indorsed, or accepted by one for the sole accommodation of the other; when no other proof is given, the holder is not bound to prove a valuable consideration.[68] We have already considered, in the chapter on Consideration, the presumption of a valuable consideration, and the effect thereof on the rights of holders.[69] The rule has been well stated by Paterson, J., as follows: "Upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder. This the latter may do by showing that he purchased the note before maturity, or from an innocent indorsee, for value, in the usual course of business. When this is done, unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, if he would defeat the plaintiff in his action, that the latter took the instrument with notice of the defendant's equities."[70] The payment of value for negotiable paper is a circum-

N. Y. 698, 43 N. E. 168, it was held that where it appears that the plaintiff paid full value for a note, in the usual course of business, and there are no circumstances to show that he had notice that the note had been diverted, it will be presumed that he acquired it in good faith, and without notice of the diversion.

See also in support of the proposition in the text: Sperry v. Spaulding, 45 Cal. 544; Union Nat. Bank v. Harber, 56 Iowa, 559, 9 N. W. 890; Aldrich v. Warren, 16 Me. 465; Perrin v. Noyes, 39 Minn. 384, 63 Am. Dec. 633; Williams v. Huntington, 68 Md. 590, 13 Atl. 336, 6 Am. St. Rep. 477; Davis v. Bartlett, 12 Ohio St. 534, 80 Am. Dec. 375; Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. 1025.

66. Kinney v. Kruse, 28 Wis. 83.

67. Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443; Nickolson v. Patton, 13 Iowa, 213; Devlin v. Clark, 31 Mo. 22.

68. Harger v. Worrall, 69 N. Y. 370; Merchants & Traders' Bank v. Crow, 60 N. Y. 85; Ross v. Bedell, 5 Duer (N. Y.), 462.

69. See chap. IV, § 53, *ante*.

70. Eames v. Crosier, 101 Cal. 260, 35 Pac. 873. See also Dalrymple v. Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438. The effect of the decision in the latter case is that where in an action on a promissory note the defense

stance to be taken into account with other facts in determining the question of the *bona fides* of the transaction, and when full value is paid, it is entitled to great weight.[71]

It will be noticed that the statute provides that proof of a defective title shifts the burden of proof upon the holder; a title is defective where the instrument is obtained for an illegal consideration. It follows, therefore, that if the consideration be shown to be illegal; as for a gambling debt, an unlawful sale of commodities, or as being tainted with usury, the burden of proof will then rest upon the plaintiff to show that he was a holder in due course;[72]

of fraud in its inception is interposed and the plaintiff shows that he was a purchaser for full value, before maturity, the burden of proving that he had notice of the alleged fraud is upon the defendant. The following cases are also applicable: Montgomery First Nat. Bank v. Dawson, 78 Ala. 71; Merchants' Nat. Bank v. Masonic Hall, 62 Ga. 271; American Nat. Bank v. Sargent, 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192; Henry v. Sneed, 99 Mo. 422, 12 S. W. 663, 17 Am. St. Rep. 580; Todd v. Wick, 36 Ohio St. 370; Wright v. Hardy, 88 Tex. 853, 32 S. W. 885.

71. **Presumption when full value is paid.**— Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 25 N. E. 402, 10 L. R. A. 676. The court in this case said: "But that fact (of full value paid, etc.), is never conclusive, except in the absence of evidence tending to show notice or bad faith. Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills or negotiable paper must bring themselves within the conditions which the law prescribes to establish the character of a *bona fide* holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith, in the usual course of business, before maturity for full value, and without notice of any facts affecting the validity of the paper. This has been the law in this State since the case of Hay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 20 Johns. (N. Y.) 636. The fact that they took the paper before maturity, and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction. But where it further appears that such property has been fraudulently and illegally obtained from its owner or maker, and under such circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder, in order to succeed, to go farther and show the circumstances under which it came into his possession, and that he has acted in good faith in the transaction. What constitutes good faith in such transactions has been the subject of frequent discussion in the books, and while differences of opinion may exist on some points, there is perfect uniformity among them upon the point that a want of good faith in the transaction is fatal to the title of the holder, and that gross carelessness, although not of itself sufficient as a question of law to defeat title, constitutes evidence of bad faith."

72. **Illegal consideration.**—Where the consideration of a note is illegal, the burden is on the holder to show that he is a *bona fide* holder (State Nat. Bank v. Bennett, 8 Ind. App. 679, 36 N. E. 551); as also where the transaction in which the note was given was in violation of a statute (New v. Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40); for gambling debt (Shain v. Goodwin, 46 Fed. 564); for sale of spirituous liquors contrary to statute (Sweet v. Hooper, 62 Me. 54; Hapgood v. Needham, 59 Me. 442; Rock Island Nat. Bank v. Nelson, 41 Iowa, 563; Paton v. Coit, 5 Mich. 505, 72 Am. Dec. 58; Bottomley v. Goldsmith, 36 Mich. 27; Garland v. Lane, 46 N. H. 245). And see, generally, Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746; Graham v. Larimer, 83

but proof of a want or failure of consideration does not, in most jurisdictions, operate to shift the burden of proof to the plaintiff.[73]

d. *Application as to party prior to defective title.*— Where a person became bound on an instrument prior to some act or circumstance which affected its title and produced a defect therein, he cannot, by proving such subsequent defect, shift the burden of proof and require the holder to show affirmatively that he is a *bona fide* holder for value.[74] Dixon, Ch. J., said: "The fraudulent putting in circulation of a negotiable instrument which operates to change the burden of proof and to call upon the plaintiff to prove his title as a *bona fide* holder, is where this is done fraudulently as to the defendant or maker, and not where it is so done as to the payee, or some intermediate holder or party to the paper."[75]

Cal. 173, 23 Pac. 286; Terry v. Taylor, 64 Iowa, 35, 19 N. W. 841; Holden v. Cosgrove, 12 Gray (Mass.), 216; Smith v. Edgeworth, 3 Allen (Mass.), 233; Emerson v. Burns, 114 Mass. 348; Porter v. Knapp, 6 Lans. (N. Y.) 125.

Usury.— Where usury in the original transaction is proved the burden is upon the plaintiff to show that he is a *bona fide* holder for value, and without notice. McDonald v. Aufdengarten, 41 Neb. 40, 59 N. W. 762; Colby v. Parker, 34 Neb. 510, 52 N. W. 693; Smith v. Mohr, 64 Mo. App. 39; Seymour v. Strong, 1 Hill (N. Y.), 563.

73. Want or failure of consideration.— Proof of want or failure of consideration between a maker and payee of a promissory note does not change the presumption that one to whom the latter has indorsed and delivered the note is a *bona fide* holder for value, but the burden of proof is upon the maker. Mechanics & Traders' Nat. Bank v. Crow, 60 N. Y. 85. See also Commissioners v. Clark, 94 U. S. 285; Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170; *In re* Tallassee Mfg. Co., 64 Ala. 593; McCann v. Lewis, 9 Cal. 246; Bank of Pittsburgh v. Neal, 22 Ind. 96; Kellogg v. Curtis, 69 Me. 212; Baxter v. Ellis, 57 Me. 180; Magee v. Badger, 34 N. Y. 247; Belmont Branch Bank v. Hoge, 35 N. Y. 65; Harger v. Worrall, 69 N. Y. 370; Sloan v. Union Banking Co., 67 Pa. St. 479; Cook v. Helms, 5 Wis. 107.

The indorsee in an action by him against the maker cannot be called on to prove consideration until the defendant has shown that the note was obtained or put in circulation by fraud or undue means. Kelly v. Ford, 4 Iowa, 140; Knight v. Pugh, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99; Gray v. Bank of Kentucky, 29 Pa. St. 365; Third Nat. Bank v. Angell, 18 R. I. 1, 29 Atl. 500.

74. Neg. Inst. L. (N. Y.), § 98.

75. Kinney v. Kruse, 28 Wis. 183.

CHAPTER VII.

Liabilities of Parties.

§ 80. Liability of maker.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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." [76] This is an elementary rule of commercial law.

b. *In general.*— It will be noticed by an examination of a following section of the Negotiable Instruments Law [77] that the liability of a maker of a promissory note and an acceptor of a bill of exchange are substantially the same. The maker of a promissory note is the principal debtor to be called upon before any of the other parties can be made liable.[78] The maker "undertakes to pay the money stated in the note at the time when it becomes due, or, as the common phrase is, at its maturity, to the payee or other person entitled to receive the same, according to the tenor thereof. He is not bound to pay the note until its maturity; and if he pays it before, and it is not surrendered up, he will be liable to any subsequent *bona fide* holder for value without notice before it become due." [79] The maker is bound by the express terms of the

76. Neg. Inst. L. (N. Y.), § 110. For same section in statutes of other States see Appendix.

77. Neg. Inst. L. (N. Y.), § 112.

78. 1 Parsons on Notes and Bills, 229.

79. Story on Promissory Notes, § 113.

instrument; it must be paid by him in the manner and at the time and place specified therein.[80] It is no defense in an action against the maker by an indorsee that the indorser had secured the payment of the note to the indorsee; by his execution of the note he has bound himself as principal debtor, and he is primarily liable;[81] nor is a maker relieved from liability to a holder because of the error of a bank officer, in omitting to apply funds in the bank, to the payment of the note, when presented by the holder.[82] If a note is payable to bearer or is indorsed in blank, the maker will be released from his liability by payment to a person in possession with an apparent lawful right of ownership;[83] but if there are circumstances clearly showing that the holder is in unlawful possession of the note he would be justified in withholding payment.[84]

80. Brown v. Noyes, Fed. Cas. No. 2,023.

Place of payment.—Negotiable paper is personal property, the location of which is that of the owner, and hence, where no place of demand is stipulated, the maker must seek the holder to pay it. Ballard v. Webster, 9 Abb. Pr. (N. Y.) 404.

In the case of Adams v. Rutherford, 13 Ore. 78, 8 Pac. 896, it was held that where a note is payable at a particular place, the payor must be at that place when the note matures, ready and willing to pay the same; and if the payee is not there to receive it, he must deposit the amount due in a bank or other place, to be paid or kept intact.

81. Hoyt v. Mead, 13 Hun (N. Y.), 327; Dickerson v. Burke, 25 Ga. 225; Dows v. McMichael, 6 Paige (N. Y.), 139. See also Jones v. Bristow, 51 App. Div. (N. Y.) 302, 64 N. Y. Supp. 892.

82. Hecksher v. Shoemaker, 47 Pa. St. 249. Nor can the maker refuse to pay because the holder has taken the note from the payee for a debt which the payee was not required to pay. Gould v. Leavitt, 92 Me. 416, 43 Atl. 17.

83. Grant v. Vaugh, 3 Burr. (Eng.) 1516; Miller v. Rose, 1 Burr. (Eng.) 452; Story on Promissory Notes, § 113.

The possession of an instrument affords *prima facie* proof of the right to receive payment for the owner. Streeter v. Poor, 4 Kan. 412; Cothran v. Collins, 29 How. Pr. (N. Y.) 113; Paulman v. Claycomb, 75 Ind. 64. And it has been held that the maker of a negotiable promissory note may rightfully pay it to any person holding the note if he acts in good faith, and has no reason to suspect that the holder is not the rightful owner. Vinson v. Vives, 24 La. Ann. 336; Ellsworth v. Fogg, 35 Vt. 355; Greve v. Schweitzer, 36 Wis. 554; Edwards v. Parks, 60 N. C. 598. This is especially true in case of notes payable to bearer or indorsed in blank. Paris v. Moe, 60 Ga. 90; Merritt v. Cole, 14 Hun (N. Y.), 324; Lamb v. Matthews, 41 Vt. 42; Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167; Stoddard v. Burton, 41 Iowa, 582. But there are cases holding that mere possession is not sufficient to authorize payment, where the circumstances within the knowledge of the maker were sufficient to arouse a suspicion as to the authority of the holder to receive payment. Tarpley v. McWhorter, 56 Ga. 410; Nelson v. Tumlin, 74 Ga. 171; Netterville v. Stevens, 3 Miss. 642.

84. Lee v. Ware, 1 Hill (S. C.), 313.

Payment to fraudulent holder releases the maker if he had no notice of the fraud. Alexander v. Rollins, 14 Mo. App. 109; Brennan v. Merchants & Mfrs.' Bank, 62 Mich. 343, 28 N. W. 881. And payment to thief or finder of note payable to order, even where the maker makes no inquiry as to rights of holder, will relieve the maker. Cothran v. Collins, 29 How. Pr. (N. Y.) 113.

Payment by maker of note to the

The possession by an assumed agent of a promissory note payable to the order of the payee, and not indorsed by him, is not alone sufficient evidence of his authority to authorize a payment thereof to him.[85]

c. *Where maker signs as surety.*— Where two or more persons execute a note, and one of them adds to his signature the word "surety," all are to be regarded as makers of the note, and suit may be brought against them all.[86] The only value of the word "surety" is to show his right to reimbursement from the principal, and not to limit his liability to the payee.[87] While the affixing of this word to the signature of one or more of the makers does not affect the terms or legal effect of the contract, it indicates the relation in which the parties stand to each other, and the payee and other subsequent parties to the note must deal with it with the knowledge that the makers occupy such position.[88] The au-

payee in possession, with knowledge that he had been adjudged *non compos mentis*, and that a guardian had been appointed for him, is invalid and will not discharge the maker from liability to the guardian. Leonard v. Leonard, 14 Pick. (Mass.) 280.

85. Doubleday v. Kress, 50 N. Y. 410; Wangner v. Grimm, 169 N. Y. 421, 62 N. E. 569.

86. *In New York* the following cases are in point: Robinson v. Lyle, 10 Barb. (N. Y.) 512; Hoyt v. Mead, 13 Hun (N. Y.), 327; Beaman v. Lyon, 27 Weekly Dig. 168.

In other States the following cases may be cited: Aud v. Magruder, 10 Cal. 282; Southern Cal. Nat. Bank v. Wyatt, 87 Cal. 616, 25 Pac. 918; Bond v. Storrs, 13 Conn. 412; Rose v. Madden, 1 Kan. 445; Little v. Weston, 1 Mass. 156; Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68; Inkster v. First Nat. Bank, 30 Mich. 143; Leonard v. Sweetzer, 16 Ohio, 1; Kleckner v. Klapp, 2 Watts & S. (Pa.) 44; Ballard v. Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664; Dart v. Sherwood, 7 Wis. 523, 76 Am. Dec. 228.

Rebuttal of presumption.— In the case of Ballard v. Burton, 64 Vt. 387, 24 Atl. 769, 16 L. R. A. 664, it was insisted that the affixing of the word "surety" to the name of the defendant on the back of a certificate of deposit was notice to the plaintiff that the defendant intended to limit and restrict his liability, and that this fact should overcome the presumption that the defendant was a maker. The court said: "The word 'surety,' affixed to the defendant's name, only indicated to the plaintiff the fact that the defendant was surety for the bank, and this was already known to him. He knew that the bank had the money, that the defendants did not have it, and that in fact they were sureties for the bank; but this fact did not change the undertaking of the defendant from that of maker to that of indorser entitled to demand and notice. A surety is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any person lawfully holding the paper. Bank of Newbury v. Richards, 35 Vt. 284. But this presumption was susceptible of being controlled by evidence of the real obligation intended to be assumed by the defendant and known to the plaintiff."

87. Aud v. Magruder, 10 Cal. 282.

88. **Use of word "surety."**— Harris v. Brooks, 21 Pick. (Mass.) 195. In the case of Hubbard v. Gurney, 64 N. Y. 457, 463, the court said: "It would have been precisely the same contract if the defendant had added the word 'surety' to his name. The addition of that word would not have varied it in the slightest degree. The only service it would have performed would have been to give notice

thorities are conflicting as to whether or not parol evidence is admissible to establish such relationship where it is not shown on the face of the note; the weight of authority is apparently in favor of the admissibility of such evidence, where it appears that the holder had notice of the relationship.[89] In the absence of anything to the contrary on the face of the note, the presumption is that the signers of a note are joint makers and not principal and surety.[90]

d. *Existence and rights of payee.*— The provision of the statute that the maker of a negotiable instrument admits the existence of the payee and his then capacity to indorse is declaratory of the common-law rule. Cases frequently arise involving the question of the right of a corporation to take or discount commercial paper. In general, whoever contracts with a corporation, in the use of corporate powers and franchises and within the scope of such powers, is estopped from denying the corporate existence, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or a right arising under it is sought.[91] And where a note is discounted by a corporation the maker cannot defend an action brought thereon, on the ground that the corporation had, by its charter, no power to discount notes.[92] And where

of the fact to the other party. If this is shown *aliunde*, it is equally effective. There is nothing inconsistent in the instrument with the fact that the defendant signed as surety, as in 10 Pet. (U. S.) 263, where the sureties bound themselves in terms as principals. The fact is collateral to the contract proving simply the relation of the parties. It is an extrinsic circumstance, not affecting the contract made, but which operates, when knowledge of it is brought home to the creditor, to prevent him from changing the contract, or making a different one with the principal debtor, without the consent of the surety, or from releasing any security held for the payment of the debt and imposes the duty of enforcing the contract when due, upon request of the party."

89. 1 Parsons on Notes and Bills, 234; Hubbard v. Gurney, 64 N. Y. 456; Harris v. Brooks, 21 Pick. (Mass.) 195; McGee v. Prouty, 9 Metc. (Mass.) 547; Davis v. Barrington, 30 N. H. 517. See also Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681, where it was held that, as between the original parties, the apparent rights of the indorser on the face of the note and the contract of indorsement may be qualified and changed by parol testimony, and the intention of the parties established by showing facts and circumstances of the transaction.

90. Johnson v. King, 20 Ala. 270; Lord v. Moody, 41 Me. 127; Derry Bank v. Baldwin, 41 N. H. 434.

91. Cahall v. Citizens' Mut. Bldg. Assn., 61 Ala. 232; Marion Sav. Bank v. Dunkin, 54 Ala. 471; Vater v. Lewis, 36 Ind. 288, 10 Am. Rep. 29; Ray v. Indianapolis Ins. Co., 39 Ind. 290; Jones v. Home Furnishing Co., 9 App. Div. (N. Y.) 103.

92. Gorrell v. Home Life Ins. Co., 63 Fed. 371, 11 C. C. A. 240; Mutual Life Ins. Co. v. Wilcox, Fed. Cas. No. 9,980, 8 Biss. (U. S.) 203; First Nat. Bank v. Gillilan, 72 Mo. 77; Exchange Nat. Bank v. Capps, 32 Neb. 242, 49 N. W. 223; Congregational Soc. v. Perry, 6 N. H. 164, 25 Am. Dec. 455; Holmes & Griggs Mfg. Co. v. Holmes & Wessel Metal Co., 53 Hun (N. Y.), 52, 5 N. Y. Supp. 937, affd. in 127 N. Y. 252, 27 N. E. 831.

a promissory note is made payable to a payee generally, the maker admits the right of the payee to receive the money, and he is estopped from insisting that the beneficial interest is in others.[93] If the note is payable to a firm the maker cannot set up as a defense that no such firm existed.[94] The maker of a negotiable promissory note warrants the capacity of the payee to transfer it by indorsement in the usual course of business.[95] As said by Mr. Edwards: "By making the note, or accepting the bill and issuing it, the maker or acceptor asserts to the world the competency of the payee to negotiate and assign the paper; and they are not afterward permitted to gainsay the assertion so made."[96]

§ 81. Liability of drawer.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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 accepted "and paid, or both, according to its tenor, and that if it be dis-"honored, 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."[97] This section is similar to a provision contained in the English Bills of Exchange Act, except that the English act states that the drawer engages to pay the bill on due presentment, and is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.[98] The last sentence of the section is not contained in the English act. This provision is inserted, presumably for the purpose of permitting the drawer to limit his

93. Grigsby's Exr. v. Nance, 3 Ala. 347; Wheeler v. Barr, 7 Ind. App. 381, 34 N. E. 591; Johnson v. Conklin, 119 Ind. 109, 21 N. E. 462; Blacker v. Dunbar, 108 Ind. 217, 9 N. E. 104.

94. Rice v. Goodenow, Tapp. (Ohio) 126; Griener v. Ulery, 20 Iowa, 266.

In an action by an indorsee against a maker of a note payable to the order of a firm, the defendant cannot set up as a defense that the name of the firm was indorsed by an infant partner. Dulty v. Brownfield, 1 Pa. St. 497.

95. Walke v. Kuhne, 109 Ind. 313, 10 N. E. 116; Mayer v. Old, 57 Mo. 639; Bigelow on Estoppel, 212, where it is said: "The execution of a negotiable note is a warranty of the existing capacity to indorse the paper."

96. Edwards on Bills and Notes, § 363.

97. Neg. Inst. L. (N. Y.), § 111. For same section in statutes of other States see Appendix.

98. English Bills of Exchange Act 1882, § 55(1).

liability to the holder to the same extent and in the same manner as an indorser, without recourse.

b. *Liability in general.*— The liability of a drawer is, in most respects, equivalent to the liability of a general indorser. The statute declares the character and extent of this liability as formerly expressed by the common-law rule. A drawer is a conditional debtor up to the time that the instrument is presented, dishonored, and the necessary proceedings taken to notify him of such dishonor; from that time he becomes an absolute debtor, and the holder of the instrument may compel him to pay it.[99] When one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as a means of paying or securing the payment of his debt. In other words, it implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order, and a willingness on the part of the debtor to pay the debt.[1] Where a bill of exchange is drawn on a third person in favor of a donee, and is delivered to him as a gift *causa mortis*, the drawee's failure to accept and pay the instrument creates no cause of action against the executors of the donor.[2] The liability of the drawer of a bill of exchange, where he has funds of the drawee in his hands, is fixed when the bill was duly presented to the drawee and payment refused and the drawer duly notified of the refusal. But where the drawer has no funds in the hands of the drawee, nor expectation of any, he is not entitled to notice of the refusal of payment by the drawee.[3] The decided weight of

99. Randolph v. Parish, 9 Port. (Ala.) 76; Kupfer v. Galena Bank, 34 Ill. 328, 85 Am. Dec. 309; Pitcher v. Banks, 7 B. Mon. (Ky.) 584; Cummings v. Kent, 44 Ohio St. 92, 4 N. E. 710, 53 Am. Rep. 796. In the last case the court said: "The liability assumed by the drawing of a bill of exchange is clearly recognized by law. The mere act of drawing a bill imports the most certain and precise contract that the bill shall be accepted and paid, and that if it is not, the drawer will pay it."

1. Manchester v. Braender, 107 N. Y. 346, 14 N. E. 405.

2. Harris v. Clark, 2 Barb. (N. Y.) 94, affd. in 3 N. Y. 93, 51 Am. Dec. 352. A gift causa mortis requires for validity that either the thing itself be given, or some sufficient means of reducing it to possession should be delivered to the donee. A bill of exchange does not operate as an assignment until accepted, although drawn for a specified sum and against funds of the drawer in the hands of the drawee. The delivery of such a draft, unaccepted, is, therefore, inoperative as a gift in view of death; and the draft cannot be enforced against the personal representatives of the drawer. From opinion of Ruggles, J., in 3 N. Y. 93.

3. Kupfer v. Bank of Galena, 34 Ill. 328, 85 Am. Dec. 309, in which the court says: "The testimony to

authority is in favor of the principle that evidence is not admissible to prove a contemporaneous parol agreement that the liability of the drawer of a bill of exchange is not to be enforced.[4] In most of the States it is provided by statute that in case of a nonacceptance of a bill of exchange, the drawer thereof shall be liable to damages. Under the law merchant, the drawer of a foreign bill of exchange was liable in case of protest for costs and othei incidental charges, and also for re-exchange, whether direct or circuitous.[5] The statutes of the several States, as a rule, fix a certain rate per cent. as damages, generally for the purpose of obviating the difficulty of proving the price of re-exchange.[6]

c. *Words limiting liability.*— Independent of the statute, the drawer may, like an indorser, add to his signature restrictive or qualifying words to exempt himself from personal liability.[7] In

the point that the payee would take the drafts only on the responsibility of the appellant, and his alleged promise to guarantee them, amount to nothing; for by the very act of drawing, he guaranteed their payment, and could be called upon for payment on certain conditions that, having funds in the hands of the drawee, the drafts were presented to the drawee for payment, and payment refused, and he duly notified of the refusal. His liability is then complete. But if he had no funds in the hands of the drawee, nor the expectation of any, he would not be entitled to notice of the refusal of the drawee. And the reason is, having no funds, notice could do him no good; there was nothing in jeopardy which he might save by timely notice." See also Neg. Inst. L. (N. Y.), § 185, *post*, chap. IX, § 117 (*d*). And as to necessity of presentment where drawer had no funds in hands of drawee, see chap. VIII, § 99, *post*.

4. **Evidence inadmissible to prove contemporaneous agreement.**— Cummings v. Kent, 44 Ohio St. 92, 4 N. E. 710, 58 Am. Rep. 796, in which case evidence to prove that at the time of the drawing and delivery of the bill of exchange, it was agreed between the payee and the drawer that the latter should not be liable as such drawer, was held inadmissible. This principle is based upon the rule that the agreement cannot exist partly in writing and partly in parol, and that verbal terms and conditions cannot control the rights or liabilities of parties to commercial paper. See also Wood v. Surrells, 89 Ill. 107; Martin v. Cole, 104 U. S. 30; Day v. Thompson, 65 Ala. 269; Bartlett v. Lee, 33 Ga. 491; Stubbs v. Goodall, 4 Ga. 106; Stack v. Beach, 74 Ind. 571, 39 Am. Rep. 113; Holton v. McCormick, 45 Ind. 411; Crocker v. Getchell, 23 Me. 392; Davis v. Randall, 115 Mass. 547, 15 Am. Rep. 146; Bigelow v. Colton, 13 Gray (Mass.), 309, 74 Am. Dec. 633; Barnard v. Gaslin, 23 Minn. 192; Barry v. Morse, 3 N. H. 132; Woodward v. Foster, 13 Gratt. (Va.) 200; Heath v. Van Cott, 9 Wis. 516.

5. Union Bank v. United States, 2 How. (U. S.) 711, 11 L. Ed. 439.

6. Brown v. Van Braan, 3 Dall. (U. S.) 344, 1 L. Ed. 629; Murphy v. Andrew, 13 Ala. 708; State Bank v. Bowers, 8 Blackf. (Ind.) 72; Campbell v. Swasey, 12 Ind. 70; First Nat. Bank v. Owen, 23 Iowa, 185; Wood v. Farmers & Mechanics' Bank, 7 T. B. Mon. (Ky.) 281; Warren v. Coombs, 20 Me. 139; Weldon v. Buck, 4 Johns. (N. Y.) 144; Pesant v. Pickergill, 56 N. Y. 650; West v. Valley Bank, 6 Ohio St. 168; Watt v. Riddle, 8 Watts (Pa.), 545; Cox v. Tennessee Bank, 3 Sneed (Tenn.), 140.

7. Chitty on Bills, 32, 33, 34, 234. When it is laid down that an indorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter. Lord El-

any event the liability of a drawer to the payee can only be controlled by an express and distinct agreement that the payee takes the bill at his own risk as to the solvency of the drawee or his acceptance thereof.[8]

§ 82. Liability of acceptor.

a. *Statutory provision.*— It is provided in the Negotiable Instruments Law that: "The acceptor by accepting the instrument "engages that he will pay it according to the tenor of his accept-"ance; and admits:

"1. The existence of the drawer, the genuineness of his signa-"ture, and his capacity and authority to draw the instrument.

"2. The existence of the payee and his then capacity to in-"dorse."[9] The English Bills of Exchange Act contains provisions somewhat similar to the above section; but also provides that an acceptor is precluded from denying to a holder in due course, in the case of a bill payable to the drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; and also, in case of a bill payable to the order of a third person, the existence of the payee, and his then capacity to indorse, but not the genuineness or validity of his indorsement.[10]

lenborough in Ballingall v. Gloster, 3 East (Eng.), 482.

Signature as agent.— In the case of Hicks v. Hinde, 9 Barb. (N. Y.) 528, 530, the court says: "If the drawer of an accepted bill is, like an indorser, considered as a surety, and stands in all respects in the same situation as an indorser, and may, like an indorser, add to his signature restrictive or qualifying words to exempt himself from personal liability, it would seem necessarily to follow that whatever restrictive or qualifying words exempt an indorser from personal liability will have a like effect upon a drawer, when added to his signature. If this proposition cannot be disputed, then the case of Mott v. Hicks, 1 Cow. (N. Y.) 514, disposes of this case. There an addition by the indorser, to his indorsement, of the word 'agent' was held to be equivalent to a declaration that he would not be personally liable. Why should not, upon principle, the same effect flow from the addition of the same word to the drawer of a draft?"

8. Jones v. Heiliger, 36 Wis. 149.

9. Neg. Inst. L. (N. Y.), § 111. For same section in statutes of other States see Appendix.

10. English Bills of Exchange Act, § 54, which is as follows: "The acceptor of a bill by accepting it

"(1) Engages that he will pay it according to the tenor of his acceptance.

"(2) Is precluded from denying to a holder in due course:

"(*a*) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill.

"(*b*) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness, or validity of his indorsement.

"(*c*) In the case of a bill payable to the order of a third person, the existence of the payee, and his then capacity to indorse, but not the genuineness or validity of his indorsement."

Capacity and authority.—Judge Chalmers, in his work on Bills of Exchange (5th ed.), p. 60, distinguishes

b. *Liability to pay.*— Upon the acceptance of a bill of exchange, the acceptor becomes absolutely bound to pay the bill; he becomes primarily liable for its payment not only to each of the subsequent indorsees, but also to the drawer himself.[11] An acceptance creates a contractual relationship between the acceptor and the payee which is binding upon the acceptor, whether he have funds of the drawer in his hands or not;[12] and such relationship cannot be affected by any subsequent arrangement between the acceptor and the drawer.[13] The acceptor of a bill of exchange is the principal debtor and the drawer and indorsers are but sureties.[14] An acceptor becoming, as he does, a principal debtor, his obligation is similar to that of the maker of a promissory note.[15]

between capacity and authority in the following language: "Capacity must be distinguished from authority. Capacity means power to contract so as to bind one's self. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of the law. Authority is derived from the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact."

11. Heurtematt v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657. See also Matter of Babcock, 3 Story (U. S.), 399; Davis v. Baker, 71 Ga. 33; Marsh v. Low, 55 Ind. 271.

12. **Acceptance creates absolute engagement to pay.**— It is stated by Story, J., in the case of Raborg v. Peyton, 2 Wheat. (U. S.) 385, 4 L. Ed. 268: "An acceptance is not a collateral engagement to pay the debt of another; it is an absolute engagement to pay the money to the payee of the bill; and the engagements of all the other parties are merely collateral. *Prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor; and is, of itself, an express appropriation of these funds for the use of the holder. The case may indeed be otherwise, and then the acceptor, in fact, pays the debt of the drawer; but as between himself and the payee, it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he cannot resort to the drawer, but upon a failure of due payment of the bill." See also Davis v. Baker, 71 Ga. 33; Ray v. Morgan, 112 Ga. 923, 38 S. E. 335; Smith v. Muncie Nat. Bank, 29 Ind. 158; Sylvester v. Staples, 44 Me. 496; Swoper v. Ross, 40 Pa. St. 186, 80 Am. Dec. 567; Green v. Duncan, 7 S. C. 239, 15 S. E. 956.

13. **Effect of acceptance cannot be modified by acceptor and drawer.**— In the case of Flournoy v. First Nat. Bank, 79 Ga. 810, 816, 2 S. E. 547, the court said: "The effect of accepting a bill is to acknowledge that the drawer has funds in the hands of the acceptor applicable to its payment, and the payee is entitled to repose with absolute trust and confidence upon that admission, and is under no duty to inquire further. If the admission proves an injury he who made it must take the consequences. If the payee gives value to the drawer and acquires the bill in due course of trade, before maturity, he is entitled to all the protection which commercial law can afford to the most favored class of creditors." See also Fisher v. Meckwith, 19 Vt. 31, 46 Am. Dec. 174.

14. Swoper v. Ross, 40 Pa. St. 186, 80 Am. Dec. 567; McCandless v. Hadden, 9 B. Mon. (Ky.) 186.

15. Capital City Ins. Co. v. Quinn, 73 Ala. 558; Parmelee v. Williams, 72 Ga. 42.

The acceptors of a draft are in the same position as the makers of a note, and their liability must be governed by the same rules. Mechanics' Bank v. Livingston, 33 Barb. (N. Y.) 458, 462.

c. *Admission of existence of drawer.*— The provision of the statute to the effect that the acceptance of a bill admits the existence of the drawer is declaratory of the common-law rule.[16] Once having admitted his liability by an acceptance of the bill he is estopped from denying the drawer's capacity; his obligation then becomes the same as that of the maker of a note, and he is thereupon liable to the payee of the bill, or to the person deriving title through him.

d. *Admission of genuineness of signature.*— The acceptance of a bill of exchange admits the genuineness of the signature of the drawer.[17] When the drawee of a bill accepts and pays it, he only vouches for the genuineness of the signature of the drawer and is not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other name appearing thereon, or of the title of the holder.[18] The drawee has the right to rely upon the presumptive ownership of the apparent holder, and if he pays the bill to a person wrongfully in possession thereof, without notice, he will not be liable to the rightful party.[19] The defense of

16. Ashpitel v. Bryan, 3 B. & S. (Eng.) 474; Cooper v. Meyer, 10 B. & C. (Eng.) 468.

17. **Genuineness of signature of drawer.**—United States Bank v. Georgia Bank, 10 Wheat. (U. S.) 333; First Nat. Bank v. Ricker, 71 Ill. 439; Howard v. Mississippi Bank, 28 La. Ann. 727, 26 Am. Rep. 105; Bernheimer v. Marshall, 2 Minn. 78, 72 Am. Dec. 79; Star Fire Ins. Co. v. New Hampshire Bank, 60 N. H. 412; Susquehanna County Bank v. Loomis, 85 N. Y. 207, 39 Am. Rep. 652; White v. National Bank, 64 N. Y. 316, 21 Am. Rep. 612; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Bank of Commerce v. Union Bank, 3 N. Y. 30; Coggill v. American Express Bank, 1 N. Y. 113, 49 Am. Dec. 310.

In the case of Salt Springs v. Syracuse, etc., Inst., 62 Barb. (N. Y.) 101, Mullin, J., said: "Lord Mansfield, in Price v. Neal, 3 Burr. (Eng.) 1354, as long ago as 1762, decided that the drawee of bills of exchange, one of which he had paid, without acceptance, the other after acceptance, could not recover back money thus paid; and the decision is, that it is incumbent upon the plaintiff to be satisfied that the bill drawn on him was in the drawer's hand before he accepted or paid it, but it was not incumbent on the defendant to inquire into it. This case has been followed both in England and in this country without any doubt having been expressed by any of the judges, so far as I have been able to discover, as to its soundness. It is, therefore, laid down by elementary writers on the law of bills of exchange that the acceptance, whether general or for honor or *supra* protest, after sight of the bill, admits the genuineness of the signature of the drawer, and consequently in favor of a *bona fide* holder for value without notice, if the signature of the drawer turns out to be a forgery the acceptance will nevertheless be binding and entitle the holder to recover thereon according to its tenor."

18. Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604; Esby v. Bank, 18 Wall. (U. S.) 604; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77; Goddard v. Merchants' Bank, 4 N. Y. 147; Williams v. Drexel, 14 Md. 566; Lamson v. Plaff, 1 Handy (Ohio), 450; Depau v. Brown, Harp. (S. C.) 251.

19. White v. Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612.

forgery of the name of the drawer will not be available in an action brought by the payee against the acceptor.[20]

e. *Admission of capacity and authority of drawer.*— An acceptance, as stated by Story, "Admits the ability of the party to draw, and if drawn by an agent in the name of his principal, it also admits that he has full authority to draw the bill. But it does not admit the authority of the agent to indorse the same bill, even though it is made payable to the order of his principal, and is indorsed by the same agent in the name of the principal."[21] The capacity of the drawer of a bill is also admitted by the acceptance.[22] It, therefore, follows that the acceptor is estopped from setting up as a defense the want of authority of a corporation to draw its bills of exchange for a particular purpose,[23] nor can he defend upon the ground that the drawer is an infant,[24] a married woman,[25] or a bankrupt.[26] The acceptance of a bill raises the presumption that the drawee has funds of the drawer in his hands.[27] This presumption may be rebutted by evidence of the relation of the parties and the general scope of their dealings;[28] and when

The court in this case said: "The defendant, as holder of the bill and claiming to be entitled to receive the amount thereof from the drawees, was held to a knowledge of its own title and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument. The presentation of the bill, and the demand and receipt of the money thereon, was equivalent to an indorsement. The drawees had a right to act on the presumptive ownership of the defendant as the apparent holder."

20. Bank of United States v. Bank of Georgia, 10 Wheat. (U. S.) 333.

Payment by acceptor on forged signature of drawer.— In Story on Bills, § 411, after repeating the proposition that if the acceptor has accepted a forged bill, he must nevertheless pay, he proceeds to say: "And if he has paid it he cannot recover back the money, although the forgery is established by the most conclusive evidence, for by accepting the bill he, by implication in favor of a *bona fide* holder, admits its genuineness, and is not permitted to dispute it afterward, although he can have no recourse against the drawer for any reimbursement for his payment." See also Salt Springs Bank v. Syracuse, etc., Inst., 62 Barb. (N. Y.) 101.

21. Story on Bills of Exchange, § 262. And see Robinson v. Yarrow, 7 Taunt. (Eng.) 445; Taylor v. Croker, 4 Esp. (Eng.) 187.

22. Story on Bills, § 113.

23. Halajox v. Tyle, 3 Exch. (Eng.) 446.

24. Taylor v. Croker, 4 Esp. (Eng.) 187.

25. Cowton v. Wickersham, 54 Pa. St. 302.

26. Braithwaite v. Gardner, 8 Q. B. (Eng.) 473.

27. Raborg v. Peyton, 2 Wheat. (U. S.) 385, 4 L. Ed. 268; Benjamin v. Tillman, Fed. Cas. No. 1,704, 2 McLean S.), 213; Gilliland v. Myers, 31 Ill. 525; Byrne v. Schwing, 6 B. Mon. (Ky.) 199; Kendall v. Galvin, 15 Me. 131, 32 Am. Dec. 141; Healy v. Gilman, 1 Bosw. (N. Y.) 235; Alvord v. Baker, 9 Wend. (N. Y.) 323; State Bank v. Clark, 8 N. C. 36.

28. Parks v. Nichols, 20 Ill. App. 143.

such presumption is rebutted by proving that the acceptance was made without funds, the presumption shifts to the other side and raises a presumption of a promise on the part of the drawer to put his drawee in funds.[29]

f. *Admission of existence of payee.*— The provision of the statute to the effect that the acceptance of an instrument is an admission of the existence of the payee and his then capacity to indorse, is in recognition of the rule which evidently has existed in this country and in England for a considerable time. By the English Bills of Exchange Act, it is provided that the acceptor is precluded from denying to the holder in due course in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or the validity of his indorsement.[30] It has been held that the acceptor would not be permitted to show that the payee, at the time of the acceptance of the bill, was a lunatic.[31]

g. *Liability of holder acquiring before acceptance.*— The drawees who accept a bill after it is received by the holders for a full and valuable consideration are liable as acceptors; they cannot avoid their liability on the ground that the bill or draft was not actually accepted by them at the time it was transferred to the holders.[32] The acceptance of a draft or bill negotiated for a valuable consideration cannot be rescinded on the ground of fraudulent representations made to the acceptor by the drawer, if the holder had no knowledge of the fraud and the drawer was not his agent.[33]

29. Thurman v. Van Brunt, 19 Barb. (N. Y.) 409.

30. English Bills of Exchange Act, 1882, § 54(2)(a). And see Daniel on Negotiable Instruments, § 536; Draton v. Dale, 2 B. & C. (Eng.) 293. It was held in this case that it was a general principle 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 name.

31. Smith v. Marsack, 6 C. B. (Eng.) 486. And see Peaslee v. Robbins, 3 Metc. (Mass.) 164.

32. Bank of Louisville v. Ellery, 34 Barb. (N. Y.) 630; Mechanics' Bank v. Livingston, 33 Barb. (N. Y.) 458; First Nat. Bank v. Schuyler, 7 Jones & S. (N. Y.) 440; Iselin v. Chemical Nat. Bank, 16 Misc. (N. Y.) 437, 40 N. Y. Supp. 388; Credit Co. v. Howe Machine Co., 54 Conn. 357, 8 Atl. 472; Arpin v. Owens, 140 Mass. 144, 3 N. E. 25.

If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. Heurtematt v. Morris, 101 N. Y. 63, 4 N. E. 1.

33. **Acceptance cannot be rescinded for fraud of drawer.**— Fort Dearborn Nat. Bank v. Carter, 152 Mass. 34, 25 N. E. 27, in which case the court says: "The general rule is, that a contract made between two persons on a valuable consideration cannot be rescinded by

§ 83. Contract of indorsement; who deemed indorser.

a. *Contract of indorsement.*—A person who becomes an indorser of commercial paper assumes a contractual obligation.[34] The indorsement of a bill or note implies an undertaking from the indorser to the person in whose favor it is made, and to every other person to whom the bill or note may afterward be transferred, exactly similar to that which is implied by drawing a bill, except that in the case of a bill the stipulation with respect to the drawer's responsibility and undertaking do not apply.[35]

one of the parties on the ground that a third person, at whose request the party entered into the contract, made fraudulent representations to him, on which he relied, if this third person was not an agent of the other party, and the other party had no knowledge of the fraud. * * * There are practical reasons of great weight why the rule we have stated should be applied to negotiable paper. Acceptors of bills of exchange should not be permitted to vary their liability from that which is apparent on the face of the bills, by setting up against *bona fide* holders for value, who take the bills before maturity, statements made by the drawers to the drawees whereby they were induced to accept the bills; and we have been unable to find that any distinction has been taken in this respect between holders of bills who take them before acceptance and those who take them afterward."

34. In Story on Promissory Notes, § 135, it is said: "The indorsement of a note, in contemplation of law, amounts to a contract on the part of the indorser with and in favor of the indorsee and every subsequent holder to whom the note is transferred; (1) that the instrument itself and the antecedent signatures thereon are genuine; (2) that he, the indorser, has a good title to the instrument; (3) that he is competent to bind himself by the indorsement as indorser; (4) that the maker is competent to bind himself to the payment, and will, upon due presentment of the note, pay it at maturity, or when it is due; (5) that if, when duly presented, it is not paid by the maker, he, the indorser, will, upon due and reasonable notice given him of the dishonor, pay the same to the indorsee or other holder."

35. Bayley on Bills (5th ed.), p. 169. As said by Sir John Byles: "The effect of indorsement is a conditional contract on the part of the indorser to pay the immediate or succeeding indorsee or bearer, in case of the acceptor's or maker's default." Byles on Bills (6th ed.), p. 4. See also Bank of British North America v. Ellis, Fed. Cas. No. 859, 6 Sawy. (U. S.) 96; Johnson v. Crane, 60 N. H. 68.

Indorsement as a contract.—In the case of Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 41 L. R. A. 581, the court said: "It is a rule of universal application in commercial law that every indorsement of a promissory note, whether for accommodation or otherwise, is essentially a new contract, independent of any contract obligation of the maker." And in Furgerson v. Staples, 82 Me. 159, it is said: "The indorsement of a note is a new contract. The indorser engages that the note shall be paid according to its tenor; that is upon proper presentment, demand, and notice. He engages that it is genuine, and the legal obligation that it purports to be, and that he has title to it, and a right to indorse it. Story on Promissory Notes, § 135; Daniel on Negotiable Instruments, § 669; State Bank v. Fearing, 16 Pick. (Mass.) 533, 28 Am. Dec. 265; Prescott Bank v. Caverly, 7 Gray (Mass.), 217, 66 Am. Dec. 473. All engagements of the indorser, except payment, conditioned upon demand and notice, and possibly the validity of the note, when it is voidable only, are absolute warranties, and not dependent upon any condition whatever. If the note transferred by indorsement be a forgery, or absolutely void for any other reason, the indorser may be sued for the original consid-

b. *Who deemed indorser; statutory provision.*— The Negotiable Instruments Law provides that: "A person placing his signature "upon an instrument otherwise than as maker, drawer, or acceptor "is deemed to be an indorser, unless he clearly indicates by appro- "priate words his intention to be bound in some other capacity."[36] This section should be construed in connection with subdivision 6 of section 36 of the statute, which provides that where a signature is so placed upon an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.[37]

§ 84. Liability of irregular indorser.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where a person, not otherwise a party to an instru- "ment, 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 subse- "quent 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."[38]

b. *General rule.*— It has been held that an indorsement in blank of a note, whether negotiable or not, made by a stranger, for the benefit of the payee, implies, in the absence of countervailing proof, that the maker will be able to pay it at maturity, and that it is collectible by due diligence. Such an indorsement does not make the indorser a joint maker nor an absolute guarantor, liable at all events on the dishonor of the note.[39] The rule as to the

eration paid him, or may be held as a party without notice."

36. Neg. Inst. L. (N. Y.), § 113. For same section in statutes of other States see Appendix.

37. See *ante*, § 47 (*g*).

38. Neg. Inst. L. (N. Y.), § 114. For same section in statutes of other States see Appendix.

39. Indorsement before delivery imposes same obligations as ordinary indorsement, see Perkins v. Catlin, 11 Conn. 213, 29 Am. Dec. 282; Welton v. Scott, 4 Conn. 527. In the case of Price v. Lavender, 38 Ala. 389, the indorsement in question was an irregular one, made by a person not a party to the instrument. The court said: "Whatever may be the decisions in other countries, the law is settled in this State, with respect to such indorsements, that unexplained they impose a liability in favor of a person to whom the indorsement is made against the indorser, which is strictly analogous to the liability upon a regular indorsement." Citing Tiller v. Shearer, 20 Ala. 596; Hullum v. State Bank, 18 Ala. 805; Hall v. Chilton, 3 Ala. 633;

liability of an irregular indorser, that is, a person who places his name on an instrument in blank before delivery, has varied in the several States. The rule as above stated is that which has controlled in the State of Connecticut. In New York the rule has been, prior to the statute, that the liability of a stranger who signs his name on the back of a negotiable instrument before delivery is that of an indorser. If the note is payable to order, the payee must be the first indorser; and when indorsed in blank by the third person, before it is indorsed by the payee, the law implies that such third person intended to assume the liability of a subsequent indorser. He was held under no liability to the payee, nor to any one to whom the note was transferred, with notice of the facts, and if he paid the note, he could have recourse to the payee as the first indorser.[40] But as the paper itself furnishes only *prima facie* evidence of the intention of the indorser to become liable as second indorser, and not to the payee, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee.[41] The New York rule has prevailed in several other States, among which are Pennsylvania,[42] Oregon,[43] Tennessee,[44] and Wisconsin.[45] In Massachu-

Jordon v. Garnett, 3 Ala. 610. See also Carrington v. Odom, 124 Ala. 529, 27 South. 510.

40. Coulter v. Richmond, 59 N. Y. 478; Phelps v. Vischer, 50 N. Y. 69; Bacon v. Burnham, 37 N. Y. 614; Tilman v. Wheeler, 17 Johns. (N. Y.) 325; Herrick v. Carman, 10 Johns. (N. Y.) 224; Howard v. Van Gieson, 46 App. Div. (N. Y.) 77, 61 N. Y. Supp. 349.

Indorsement in blank before delivery.—In the case of Coulter v. Richmond, *supra*, Church, Ch. J., said: "There is considerable diversity of sentiment among the courts as to the nature of the contract implied by a blank indorsement of a negotiable instrument before delivery to the payee. In some of the States such an indorser is *prima facie* regarded as a guarantor, in others an indorser, and in others a joint promisor. In this State it has been repeatedly held, and is too strongly settled by authority to be disturbed, that a person making such an indorsement is presumed to have intended to become liable as second indorser, and that on the face of the paper, without explanation, he is to be regarded as second indorser, and of course not liable upon the note to the payee, who is supposed to be the first indorsee."

41. Coulter v. Richmond, 59 N. Y. 478; Davis v. Bly, 164 N. Y. 527, 58 N. E. 648. In the latter case it was held that where a note is indorsed before it is delivered to the payee, at the request of the maker, the indorser knowing, before such indorsement, that his name is required by the payee as a condition precedent to making the loan to or procuring it for the maker, and as security for its payment, the indorser is placed in the same relation to the payee as if he had indorsed by express agreement with him, and is liable as first, and not as second indorser. See also Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681; Clothier v. Adriance, 51 N. Y. 322; Moore v. Cross, 19 N. Y. 227.

42. Slack v. Kirk, 67 Pa. St. 380; Taylor v. McCune, 11 Pa. St. 460; Temple v. Baker, 125 Pa. St. 634.

43. Kamm v. Holland, 2 Ore. 59; Delsman v. Friedlander (Ore.), 66 Pac. 297.

44. Comparree v. Brockway, 11 Humph. (Tenn.) 355.

45. Cady v. Shepard, 12 Wis. 639.

setts, the rule is that where a person places his signature on the back of a negotiable instrument at the time of the execution of the note, and before its delivery, or subsequently thereto, and in pursuance of a previous arrangement, he becomes liable thereon as an original promisor or maker of the note.[46]

Where the indorsement is made after the instrument has taken effect and under a subsequent arrangement, the contract is considered as a guaranty.[47] The presumption is that the signature of a third person on the back of a note was placed there at the time the instrument was made,[48] although this presumption may be rebutted by parol testimony.[49] And where a note is indorsed by a person not a party to the instrument and a stranger to the title, after the payee has indorsed it, his liability is that of an indorser, and it cannot be shown by parol testimony that a different liability

46. **Indorser before delivery liable as promisor or maker.**— Noyes v. Bird, 11 Mass. 436, 6 Am. Dec. 179; Union Bank v. Willis, 8 Metc. (Mass.) 504; Reilly v. Gerrish, 9 Cush. (Mass.) 104; Hawkes v. Philips, 7 Gray (Mass.), 284; National Pemberton Bank v. Longee, 108 Mass. 371, in which case the court said: "It is to be presumed that one who puts his name upon a note intends to add security and credit to it by his promise and to become liable upon it in some form, either as maker or indorser or guarantor, either absolutely or conditionally. The time when, with reference to its negotiation, the note is signed by the parties sought to be charged will often determine the nature of the liability. But in the absence of anything to the contrary, it is presumed in favor of the honest holder for value, that all the names on the note, whether on the back or on the face, were placed there at the same time and before delivery. Benthall v. Judkins, 13 Metc. (Mass.) 265. If a person, not the payee, writes on the note at its inception, that he is to be holden as surety, he is liable as an original promisor. And this is true if the signature is simply indorsed on the back of the instrument before delivery."

47. **Liability as guarantor.**— Where one places his name on the back of a promissory note, while in the hands of an indorsee for value, at the request of such indorsee, for a consideration moving solely from him, and without any request, express or implied, of the first indorsee, he becomes a guarantor and not a second indorsee. Nelson v. Harrington, 16 Gray (Mass.), 139. The court said: "What then was the legal effect of this contract with the bank? Certainly not to make him an indorsee upon the note in relation to the bank, or to give him the character of an indorsee toward the promisor or prior indorsers. The note had never been in his hands; no title to it was conveyed by his indorsement; there was no privity of contract subsisting between him and the first indorser. He did not, strictly speaking, become a party to the note. His contract was one of guaranty only, and he was liable solely by virtue of the separate and independent agreement which he had entered into with the bank. He had no title to the note itself, had incurred no liability upon it, and had acquired no right as against the first indorser at the time of the commencement of the insolvent proceedings." See also Green v. Shepherd, 5 Allen (Mass.), 589; Mecomey v. Stanley, 8 Cush. (Mass.) 85: Tenny v. Prince, 4 Pick. (Mass.) 385; Edgerly v. Lawson, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432.

48. Union Bank v. Willis, 8 Metc. (Mass.) 504; Benthall v. Judkins, 13 Metc. (Mass.) 265; Way v. Butterworth, 108 Mass. 509.

49. Brown v. Butler, 99 Mass. 179; Way v. Butterworth, 108 Mass. 509.

was intended.[50] The rule as it existed in Massachusetts is also that which obtains in Maine,[51] Maryland,[52] Michigan,[53] Minnesota,[54] Missouri,[55] Rhode Island,[56] and South Carolina,[57] and in a

50. Howe v. Merrill, 99 Mass. 179; 80; Prescott Bank v. Caverly, 7 Gray (Mass.), 217; Essex Company v. Edmands, 12 Gray (Mass.), 274; Bigelow v. Colton, 13 Gray (Mass.), 309; Reed v. Bacon, 175 Mass. 407, 56 N. E. 716.

Statute in Massachusetts.— By Pub. Stat. 1874, chap. 404, it was provided that "Every person becoming a party to a promissory note payable on time, by a signature in blank on the back thereof, shall be entitled to notice of nonpayment the same as an indorser." It has been held that under this statute the liability of a person who puts his name on the back of a promissory note above the name of the payee is conditional on the failure of the maker to pay, and not absolute. National Bank of Commonwealth v. Law, 127 Mass. 72.

51. *Maine.*— Where a person, not a party to an instrument, indorses his name in blank upon the back thereof, at the time of making or before it had been indorsed by the payee, the presumption of law is that he designed to become an original promisor. Irish v. Cutter, 31 Me. 536; First Nat. Bank v. Marshall, 73 Me. 79; Rice v. Cook, 71 Me. 559; Woodman v. Boothby, 66 Me. 389; Childs v. Wyman, 44 Me. 433, 69 Am. Dec. 111, where it was held that if the stranger signed his name on the back of the note on the day after its date and execution by other parties, but in pursuance of an agreement to do so at the time it was made, he is liable as an original indorser; Bradford v. Prescott, 85 Me. 482, 27 Atl. 461; Merchants' Trust & Banking Co. v. Jones, 95 Me. 335, 50 Atl. 48.

52. *Maryland.*— Schroeder v. Turner, 68 Md. 506, 13 Atl. 331; Ives v. Bosley, 35 Md. 262; Walz v. Albach, 37 Md. 404. Where before the delivery of a note executed by a partnership, the partners indorse it individually, they become joint makers. Thompson v. Young, 90 Md. 72, 44 Atl. 1037.

53. *Michigan.*— Gumz v. Giegling, 108 Mich. 295, 66 N. W. 48; Fay & Co. v. Jenks & Co., 78 Mich. 312, 44 N. W. 380; Rothschild v. Grix, 31 Mich. 150.

54. *Minnesota.*— In the case of Shultz v. Howard, 63 Minn. 196, 202, 65 N. W. 363, the court said: "We suppose that, as a matter of fact, in no case do those who sign their names on the back of a note intend to assume the obligation of 'joint obligors,' strictly so called, with those who sign at the foot. Their actual intention is, doubtless, to assume the obligation of either sureties or indorsers. In order to establish a fixed rule governing negotiable paper, we have held that as between themselves and the other makers, they may be mere sureties, yet as to the payee, they must be conclusively presumed to have assumed the obligation of makers." The court then held that the obligation of such indorsers is joint and several, and not joint, with the obligation of the makers who sign their names at the foot of the note, although the instrument is in form in other respects joint. See also Wolford v. Bowen, 57 Minn. 267, 59 N. W. 195; Stein v. Passmore, 25 Minn. 256; Robinson v. Bartlett, 11 Minn. 410.

A contract of guaranty written on the back of a negotiable instrument and signed by a stranger to the note at the time of its execution, under the law of Massachusetts, constitutes a contract of guaranty and not of indorsement. Edgerly v. Lawson, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432.

55. *Missouri.*— Faulkner v. Faulkner, 73 Mo. 327; Semple v. Turner, 65 Mo. 696; Cahn v. Dutton, 60 Mo. 297; Lewis v. Harvey, 18 Mo. 74, 59 Am. Dec. 286; Powell v. Thomas, 7 Mo. 440. And see Corbyn v. Brockmyer, 84 Mo. App. 649.

56. *Rhode Island.*— Carpenter v. McLaughlin, 12 R. I. 270, 34 Am. Rep. 638; Jackson Bank v. Irons, 18 R. I. 718, 30 Atl. 420; Atwood v. Lester, 20 R. I. 660, 40 Atl. 866.

57. *South Carolina.*— Carpenter v. Oaks, 10 Rich. L. 17, to render an indorser of a note liable as maker he must have indorsed it before or at the time of delivery to the payee. Johnston v. McDonald, 41 S. C. 81, 19 S. E. 65.

number of other States.[58] In Illinois the contract implied, where the indorsement of a stranger is prior to that of the payee, is of guaranty, and if after the indorsement of the payee, the contract is that of indorsement;[59] and this rule also prevails in Kansas[60] and Ohio.[61] Justice Clifford of the United States Supreme Court has considered the diversity of decision on this subject and declared that the weight of authority supports the following proposition: "Where the indorsement is in blank, if made before the payee, the liability must be either as an original promisor or guarantor; and parol proof is admissible to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same; and if before, then the party so indorsing the note may be charged as an original promisor, but if after the payee became the holder, then such a party can only be held as guarantor, unless the terms of the indorsement show that he intended to be liable only as second indorser, in which event he is entitled to the privileges accorded to such an indorser by the commercial law. Whether regarded as a second indorser or an original promisor, it is not necessary to allege or prove any other than the original consideration; but if it be attempted to charge the party as a guarantor, a distinct consideration must appear."[62]

58. *In other States* the following cases are in point: Tabor v. Miles, 5 Colo. App. 127, 38 Pac. 64; Byers v. Tritch (Colo.), 55 Pac. 622; Gilpin v. Marley, 4 Houst. (Del.) 284; Drexel v. Pusey, 57 Neb. 30, 77 N. W. 351; Currier v. Fellows, 27 N. H. 377; Strong v. Riker, 16 Vt. 554; Nash v. Skinner, 12 Vt. 219, 36 Am. Dec. 338.

59. *Illinois.*— Klein v. Currier, 14 Ill. 237; Webster v. Cobb, 17 Ill. 459; White v. Weaver, 41 Ill. 409. In the case of Dewitt County Nat. Bank v. Nixon, 125 Ill. 615, 18 N. E. 203, it was held that the placing of the name of a third party on the back of a note is *prima facie* evidence only that the liability intended to be assumed is that of guarantor. It may be shown what the real contract is; that the liability intended to be assumed is that of a simple indorser. See also Holmes v. Williams, 69 Ill. App. 114.

60. *Kansas.*—Firman v. Blood, 2 Kan. 496; Fuller v. Scott, 8 Kan. 25. Where a note, after execution and delivery, is indorsed by the payee and by a third person, and is then sold by the payee to another person before the maturity of the note, both the indorsers are ordinary indorsers, and not guarantors. Cornett v. Hafer, 43 Kan. 60, 22 Pac. 1015. See also Fullerton v. Hill, 48 Kan. 558, 29 Pac. 583, 18 L. R. A. 33.

61. *Ohio.*—Castle v. Rickly, 44 Ohio St. 490, 9 N. E. 136, 58 Am. Rep. 839: Bright v. Carpenter, 9 Ohio, 139, 34 Am. Dec. 432.

62. Good v. Martin, 94 U. S. 90, 97, 24 L. Ed. 341. In this case it was also held, in substance, that the question whether one who, not being a party to a note, writes his name upon the back thereof, in reliance on which the holder has brought it, should be treated as a maker, indorser, guarantor, or surety, should be determined by the actual intent, if the attendant circumstances in evidence enable them to be ascertained.

c. *Effect of statute.*— The effect of the above section of the statute is to make a uniform rule in all States which have adopted the Negotiable Instruments Law. The liability imposed upon an indorser, not otherwise a party to an instrument, is the same as that of a general indorser, at least in respect to those persons who become indorsers subsequent to his indorsement. It seems to be in recognition of the rule which has existed in California by virtue of a provision of the Civil Code,[63] to the effect that "one who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser." The statute makes absolute his liability to the payee, which is a complete change in the New York rule that a person indorsing in blank before delivery to the payee was presumptively a second indorser and, therefore, only liable to the payee who was deemed the first indorser.[64] The change seems reasonable in view of the fact that in nearly every case where a third party places his name on the back of an instrument before its delivery to the payee he intends thereby to aid the credit of the payee and render himself directly responsible to him.[65] Prior to the enactment of the above section of the statute a complaint was fatally defective which did not allege that an indorsement before delivery by a third party was made in order to give the maker credit with the payee or as surety for the maker;[66] it would seem that the statute has rendered such an allegation immaterial.[67] The section in question only applies to an indorsement by a third party before delivery; and where it is alleged in a complaint that such an indorsement was made after delivery, it is essential that the plaintiff should allege and affirmatively substantiate that such indorsement was made for the purpose of lending credit to the maker and with the intent to charge the indorser thereon to the payee.[68]

63. California Civil Code, § 3117; Fessenden v. Summers, 62 Cal. 484; Fisk v. Miller, 63 Cal. 367.

64. See *ante*, note 40.

65. In the case of Davis v. Baron, 13 Wis. 227, 229, the court says: "Obviously, a person indorsing a note before delivery thereof to the payee, intends rendering himself liable to the payee in some character and upon some ground. He must intend and design to secure its payment and give credit to the paper by placing his name upon it, even in the hands of the payee. He cannot complain if the courts hold him to his contract."

66. Edison Gen. Elect. Co. v. Zebley, 72 Hun (N. Y.), 166; McPhillips v. Jones, 73 Hun (N. Y.), 516; Draper v. Chase Mfg. Co., 2 Abb. N. C. (N. Y.) 79; Phelps v. Vischer, 50 N. Y. 69; Bacon v. Burnham, 37 N. Y. 614, 616.

67. People ex rel. Cotton Oil Co. v. Roberts, 25 App. Div. (N. Y.) 11, 48 N. Y. Supp. 100.

68. **Application of section of statute.**— In the case of Kohn v. Consolidated Butter & Egg Co., 30 Misc. (N. Y.) 725, 63 N. Y. Supp. 265, Judge McAdam of the Supreme Court, in speaking of the allegation and proof that

§ 85. Warranties where instrument is negotiated by delivery or qualified indorsement.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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 prior 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 trans-"feree. The provisions of subdivision three of this section do not "apply to persons negotiating public or corporate securities, other "than bills and notes." [69] It is provided in the English Bills of Exchange Act that: "A transferrer by delivery who negotiates a bill, thereby warrants to his immediate transferee, being a holder for full value, that the bill is what it purports to be, and that he has a right to transfer it, and that at the time of the transfer he

an indorsement of a third party before delivery was made "for the purpose of lending their credit," etc., said: "Prior to the statute of 1897 (Neg. Inst. Law), the allegation referred to was a necessary one in such cases, and, if denied, the *onus* of proving the allegation was on the plaintiff, for the payee was presumably the first indorser. Since the statute the legal presumption is changed where the complaint alleges that the irregular indorsers indorsed the paper 'before delivery' to the payee. And when this fact is established the *onus* is cast upon such indorsers to allege and prove that, notwithstanding such delivery, the payee was to become first indorser according to the customary form of the contract, and that they did not indorse for the purpose of lending their credit to the maker or with the intention of becoming liable to the payee. That this is the proper interpretation of the act is obvious. The true intention of the indorsers, as between themselves, can always be shown by oral evidence. To go further and decide that the statute intended to create an incontestible liability against irregular indorsers would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interest of law reform."

But see Spencer v. Allerton, 60 Conn. 410, 22 Atl. 778, where, under Gen. Stat., § 1860, which provided that "the blank indorsement of a negotiable or nonnegotiable note, by a person who is neither the maker or payee, before or after its indorsement by the payee, shall import the contract of an ordinary indorsement of negotiable paper, as between such indorser and the payee or subsequent holders;" it was held that the statute intended to give to the contract of such an indorser the same certainty as to its import that the law gives to an ordinary indorsement of commercial paper; and that the legal contract implied by such an indorsement *cannot, therefore, be varied by parol evidence of a different agreement.*

69. Neg. Inst. L. (N. Y.), § 115. For same section in statutes of other States see Appendix.

is not aware of any fact which renders it valueless." [70] It should be remembered in construing the above provision of the statute that an instrument payable to bearer is negotiable by delivery;[71] and that it is provided that a qualified indorsement constitutes the indorser a mere assignee of the title of the instrument.[72]

b. *Warranty of genuineness.*— The principle is well settled that where personal property of any kind is sold, there is, on the part of the seller, an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time.[73] This principle is universally applied to a sale of negotiable instruments transferable by delivery.[74] The vendor of a bill or note without indorsement is responsible for the genuineness of the paper. He is considered as representing the note to be signed and indorsed by the persons whose names appear upon it in that character, and if these signatures are forgeries, the consideration fails.[75] It has been held in New York that where the holder of a promissory note which is tainted with usury transfers the same for a valuable consideration, without indorsement, and without representation as to legality, in the absence of knowledge on his part, at the time of the transfer, of the defect, no warranty against it will be implied, and an action cannot be sustained against him for loss occasioned by reason of the defect, since scienter is essential to establish an implied warranty as to the validity of a promissory note.[76] The rule as laid down by the Court of Appeals in New York has not escaped criticism. The United States Supreme Court has expressly dissented therefrom, and has held that the implied warranty of

70. English Bills of Exchange Act, 1882, § 58 (3).

71. Neg. Inst. L. (N. Y.), § 60. See *ante*, § 56, p. 316.

72. Neg. Inst. L. (N. Y.), § 68. See *ante*. § 61 (*c*), p. 336.

73. Hannum v. Richardson, 48 Vt. 508, 21 Am. Rep. 152.

74. Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199; Semmes v. Wilson, Fed. Cas. No. 12,658; Foster v. Swasey, Fed. Cas. No. 4,984; Sering v. Findley, 7 Ind. 247.

75. Thompson v. McCullough, 31 Mo. 224; Swanzey v. Parker, 50 Pa. St. 441, 88 Am. Dec. 549; Aldrich v. Jackson, 5 R. I. 218.

76. **Implied warranty in absence of knowledge.**— Littauer v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171. In the case of Ross v. Terry, 63 N. Y. 613, the rule of implied warranty on the part of the vendor was applied to the sale of a bond and mortgage which were usurious and void, but the defendant in that case knew of the defect at the time of the sale; and in Delaware Bank v. Jarvis, 20 N. Y. 226, the defendant had transferred to the plaintiff without indorsement a promissory note which had been taken at a usurious premium. The court held that whether the defendant had knowledge of the usury was not a material circumstance and that "the vendor of the chose in action in the absence of express stipulations, impliedly warrants its legal soundness and validity." Ten years later this case was followed and made the basis of judgment in Fake v. Smith, 2 Abb. Dec. (N. Y.) 76.

identity of the thing sold which arises at common law on the sale of goods and chattels, applies on the sale of commercial paper, without indorsement, or without express assumption of liability on the paper itself.[77] It would seem that the New York rule as above referred to has not been unequivocally adopted by the courts in that State. There have been recent decisions where the effect of the rule has been limited and its application restricted.[78] The true rule seems to be, as now declared by the statute, that upon the sale of commercial paper without indorsement, there is an implied warranty that the thing sold is what it purports to be.[79] In the sale of commercial paper, without indorsement, the obligation of the vendor is not restricted to the mere question of forgery *vel non,* but depends upon whether he has delivered that which he has contracted to sell, this rule being designated in England as a condition of the principal contract as to the essentials and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold.[80]

77. **Implied warranty of identity of thing sold as applied to commercial paper.**— Meyer v. Richards, 163 U. S. 385, 411, 16 Sup. Ct. 1148, 41 L. Ed. 199, where the court says: "There is an exceptional case (Littauer v. Goldman, 72 N. Y. 506), which holds that the common-law obligation as to the implied warranty of identity in the thing sold, in the case of commercial paper extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper differing from all others; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion in this case illustrates the same contradictory position presented by the argument of the defendant in error, to which we have just called attention, that is, that it admits the common-law rule and then denies its essential result by eliminating conditions of nonexistence which are necessarily imposed by it. It follows that this New York decision leads logically to the view expressed in the Maine and Maryland cases just referred to; for either the principle of warranty of identity must be accepted or rejected: it cannot be accepted and its legitimate and inevitable results be denied. The rule there announced was in conflict with previous decisions in New York, and the decision is strongly criticised in the Court of Errors and Appeals of New Jersey, in Wood v. Sheldon, 42 N. J. L. 421, 425."

78. Flandrow v. Hammond, 148 N. Y. 129, 42 N. E. 511; McClure v. Central Trust Co., 165 N. Y. 108, 126, 58 N. E. 777.

79. Terry v. Bissell, 26 Conn. 23; Smith v. McNair, 19 Kan. 330; Bell v. Cafferty, 21 Ind. 411, 413; Snyder v. Reno, 38 Iowa, 329, 333; Ware v. McCormack, 96 Ky. 139, 28 S. W. 157; Hurst v. Chambers, 12 Bush (Ky.), 155, 158; Hussey v. Sibley, 66 Me. 192; Worthington v. Cowles, 112 Mass. 30; Merriman v. Walcott, 85 Mass. 258; Lobdell v. Baker, 3 Metc. (Mass.) 472; Brown v. Ames, 59 Minn. 476, 61 N. W. 448; Rogers v. Walsh, 12 Neb. 28; Palmer v. Courtenay, 32 Neb. 773, 49 N. W. 754; Milliken v. Chapman, 75 Me. 306; Wood v. Sheldon, 42 N. J. L. 421; Flinn v. Allen, 57 Pa. St. 482; Daskam v. Ullman, 74 Wis. 474.

80. Meyer v. Richards, 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199.

The words "without recourse," as used in the indorsement of commercial paper, constitute a qualified indorsement, and, under the above section of the statute, and also under the common law, the indorser in using such words nevertheless warrants that the note is genuine, and that it is of the kind or description that it purports to be.[81]

c. *Warranty of title.*— He who negotiates an instrument by delivery or by a qualified indorsement warrants by implication, unless otherwise agreed, that he is the lawful holder thereof, and has a valid title thereto and a right to so negotiate it.[82] He warrants the genuineness and validity of the indorsements, and that he is the lawful holder of the instrument by virtue thereof.[83] If the indorsement of any of the previous parties is a forgery, which defeats the title of the instrument in the hands of the vendee, the vendor is liable to the vendee for what he has received thereon, with interest from the time of the receipt.[84]

Warranty of validity.— Benjamin, in his work on Sales (7th ed.), § 607, states the English rule, when he says: "Under this head may also properly be included a class of cases in which it has been held that the vendor who sells bills of exchange, notes, shares, certificates, and other securities, is bound, not by the collateral contract of warranty, but by the principal contract itself to deliver, as a condition precedent, that which is genuine, not that which is false, counterfeit, or not marketable, by the name or denomination used in describing it."

Story, in his work on Promissory Notes, § 118 *et seq.*, says in effect that the seller of a note warrants by implication, unless otherwise agreed, that he is the lawful holder, and has a just and valid title to the instrument, or a right to transfer it by delivery; that the instrument is genuine, and not forged or fictitious; that it is of the kind and description it purports on its face to be, and that he has no knowledge of any facts which prove the instrument, if originally valid, to be worthless, either by failure of the maker or by its being paid, or otherwise to have become void or defunct. He further says, however, that the authorities are in conflict when a fact exists which makes a note of no value, but both parties are clearly ignorant and clearly innocent; under these circumstances, he states that the weight of reasoning and the weight of authority seem to be in favor of holding that the seller in such cases must bear the loss.

81. Dayton v. Tillotson, 39 Iowa, 404; Watson v. Chesire, 18 Iowa, 202, 87 Am. Dec. 382; Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181; Ware v. McCormack, 96 Ky. 139, 28 S. W. 157; Palmer v. Courtenay, 32 Neb. 773, 49 N. W. 754; Dumont v. Williamson, 18 Ohio St. 515, 98 Am. Dec. 186.

82. Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298, 24 N. E. 994; Littauer v. Goldman, 72 N. Y. 506, 8 Am. Rep. 171; Delaware Bank v. Jarvis, 20 N. Y. 226.

83. Strange v. Ellison, 2 Bailey (S. C.), 385; Allen v. Clark, 49 Vt. 390. In the case of Giffert v. West, 37 Wis. 115, it was held that the sale and transfer, for a full and fair price, of a note past due, indorser in blank by the person to whose order it is payable, implies a warranty by the vendor that such indorsement is valid; but an express warranty in such a sale may be so framed as to exclude all other warranty which would otherwise be implied by law.

84. Aldrich v. Jackson, 5 R. I. 218.

d. *Warranty of capacity to contract.*— The vendor of commercial paper impliedly warrants that the parties to the paper are under no incapacity to contract, as from infancy, coverture, or other disability.[85] It is also probable that the authority of the parties to the instrument to bind those whom they represent is also impliedly warranted,[86] although this warranty would not seem to be within the express terms of the above section of the statute, except that where there is an absence of authority on the part of any of the parties within the knowledge of the transferrer it would doubtless come within the provision thereof which makes him warrant that there is nothing within his knowledge which would impair the validity of the instrument or render it valueless.[87] We have, in a former chapter, discussed at length the capacity of certain persons and corporations as parties to commercial paper;[88] it seems unnecessary for us to consider the question in this connection. The warranty applies to the capacity of all parties prior to the transferrer, including every person who has assumed any obligations or liability as a party to the instrument transferred.

e. *Knowledge of fact that would impair validity or render it valueless.*— Under the statute the transferrer of commercial paper

85. 2 Parsons on Notes and Bills, 39. In the case of Lobdell v. Baker, 1 Metc. (Mass.) 193, the holder of a note who fraudulently procures it to be indorsed by a minor, and afterward sells it to a person who relies on the validity of such indorsement, was held liable to an action by such person, though, at the time of sale, he had no fraudulent intent. Selling the note without erasing such indorsement, or disclosing the minority of the indorser, is tantamount to a direct affirmation by the seller, that the indorsement constitutes a valid contract. See Thrall v. Newell, 19 Vt. 203, 47 Am. Dec. 682.

An express warranty on the sale of a promissory note made by O., that "the note is the genuine note of O." is not broken by proof that O. was an infant when the note was made and became payable; and a finding of a referee that the defendant "agreed that the note was a genuine note and not otherwise," forbids the implication of any other warranty, and such a warranty affirms nothing respecting the validity of the note as a binding obligation. Baldwin v. Van Dusen, 37 N. Y. 487.

86. **Warranty of authority of party to contract.**— Hussey v. Sibley, 66 Me. 192. In this case a town order which had passed from one person to another in payment of a debt being utterly worthless for the reason that the drawer or acceptor had no authority to draw or accept it, was held not to operate as a payment of the debt. The court said: "Thus from the weight of authority it would appear * * * in short, that he (the defendant) as seller, warrants the order to be what it purports, a genuine order; and whether that want of genuineness results from forgery or want of authority on the part of the drawers or acceptor, or, as in this case, both, must be immaterial. It was a town order the parties talked about; it was that which the defendant undertook to transfer, and that which the plaintiff agreed to receive. It turned out to be another thing — a mere form without the substance. It is not the responsibility of the parties which the seller guarantees, but their liability." See also Terry v. Allis, 16 Wis. 478.

87. Neg. Inst. L. (N. Y.), § 114 (4).

88. See chap. II, *ante*.

by delivery or qualified indorsement warrants that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.[89] This is a broad statement of a general rule which may modify to some extent the law as it existed prior to the enactment of the statute, although it seems amply supported by the weight of authority in nearly every State. A person who transfers an instrument by delivery knowing it to be tainted with usury is liable to his transferee for the repayment of the consideration received,[90] although it has been held otherwise where the transferrer had no knowledge of the defect.[91] So also the transferrer warrants that there is no legal defense to the collection of the instrument, arising out of his own connection with its origin.[92] And it has been held that it is a fraudulent suppression, avoiding the sale of commercial paper, for the vendor to withhold information that the maker's check, upon the bank in which they kept their accounts, had been protested, though the vendor's informant accompanied his statement with the expression of his opinion that the makers were perfectly solvent.[93] This decision rests upon the principle that one who sells commercial paper payable to bearer, and which he does not indorse, while not liable on the paper as a party, nevertheless warrants that he has no knowledge of any facts which prove the paper to be worthless on account of the insolvency of the parties, or because it has been already paid.[94] It seems, however, that as a general rule there is no implied warranty of the solvency of the maker or any other

89. Neg. Inst. L. (N. Y.), § 115(3).

90. Persons v. Jones, 12 Ga. 371.

91. Littauer v. Goldman, 72 N. Y. 506.

92. Delaware Bank v. Jarvis, 20 N. Y. 226.

93. Brown v. Montgomery, 20 N. Y. 287. In this case the court said: "Where a party negotiates commercial paper, payable to bearer, or under the blank indorsement of another person, he cannot be sued on the paper because he is not a party to it; but he nevertheless warrants that he has no knowledge of any facts which prove the paper to be worthless, on account of the failure of the makers, or by its being already paid, or otherwise to have become void or defunct; for, says Judge Story, any concealment of this nature would be a manifest fraud. Story on Promissory Notes, § 118."

94. **Knowledge of insolvency of maker of note.**— Rothmiller v. Stein, 143 N. Y. 581, 592, 38 N. E. 718, *per* Peckham, J., who also says: "A promissory note or the ordinary bond is given for one purpose only, payment at its maturity, and it is plain that in ordinary circumstances one would not take a note or bond if in possession of the fact of the insolvency of its maker. It would appear that the one purpose for which such instruments are issued would fail of accomplishment because of the inability of the maker to pay. The mere fact that the vendor offers to sell the written obligation of another to pay money is evidence enough of a warranty such as is above stated, because the vendor knows that if the maker were known to be insolvent his written obligation to pay money would not be taken."

party to an instrument upon its sale and delivery, in the absence of misrepresentation, and where it appears that the vendor had no knowledge of the insolvency of the maker or other party;[95] both before the statute and under its provision it is well settled that knowledge of facts indicating the insolvency or inability to pay of the maker, on the part of the vendor of the instrument, will render him liable to his vendee in an action to recover the purchase price paid therefor.[96]

§ 86. Liability of general indorser.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: " 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." [97] This section is clearly declaratory of the general rule as it existed at the common law. The last paragraph is the same in substance as a provision contained in the English Bills of Exchange Act of 1882, and the first three subdivisions are also contained in such act, but in a modified form.[98]

95. Williams v. Osbon, 75 Ind. 280; Milliken v. Chapman, 75 Me. 306, 46 Am. Rep. 386; Lyons v. Divelbis, 22 Pa. St. 185; Bicknall v. Waterman, 5 R. I. 43; Burgess v. Chapin, 5 R. I. 225.

In the case of Hecht v. Batcheller, 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708, the court said: "The defendant sold the note in good faith. So far as the evidence shows, neither party, at the time of the sale, spoke of, or inquired about or knew anything about, the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the makers. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note, and we are of the opinion that from the circumstances no warrant could fairly be inferred of the solvency of the makers, or that they continued to do business."

96. Hewitt v. Waterman, 3 La. Ann. 716; Taylor v. Burke, 4 La. Ann. 16. But the knowledge of the vendor must be actual, and not implied or constructive. Burgess v. Chapin, 5 R. I. 225.

97. Neg. Inst. L. (N. Y.), § 116. For the same section in statutes of other States see Appendix.

98. The English Bills of Exchange Act, § 55(2). See Appendix. Judge Chalmers says (Bills of Exchange [5th ed.], p. 187): "*The indorser of a bill* is in the nature of a new drawer (citing Penny v. Innes, 1 C., M. & R.

b. *Warranty of genuineness, title, and capacity of parties.*— It will be noticed that the section applies to every person who indorses without qualification; it would seem, therefore, on its face, that it applies to a restrictive indorsement, as where an instrument is indorsed for collection or deposit. But in view of the fact that an indorsee for collection or deposit does not acquire the title of the instrument, but only constitutes the indorsee an agent of the indorser for the purposes specified in the indorsement,[99] and the further fact that the statute itself provides that the "subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement,"[1] it is doubtful whether the section applies with full force and effect to an instrument which has been restrictively indorsed. As the law exists independent of the statute an indorsement by a bank or other agency to which an instrument has been indorsed for collection does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal as stated upon the face of the draft.[2] If it is admitted that a restrictive indorsement, as for collection, does not confer title upon the indorsee, he, of course, has no title to transfer by indorsement, and it would, therefore, be a misconstruction to hold that, pursuant to the above section, such a restrictive indorser warrants what he never had. In our opinion this section has not modified the prior rule as applied to restrictive indorsements.

An indorser of commercial paper warrants the genuineness of the signature of the maker and that the instrument is what it pur-

(Eng.) 441; Steele v. McKinlay, 5 App. Cas. (Eng.) 767, 768), that is to say, his relations with the holder resemble those of a drawer. It is conceived that the words 'according to its tenor' mean the tenor of the bill at the time of its indorsement, and not its tenor at the time it was drawn, if its effect has been varied, *e. g.*, by a qualified indorsement, or by an alteration of the sum payable."

99. See § 60 (*b*), *ante*, p. 329, and cases cited.

1. Neg. Inst. L. (N. Y.), § 67. See § 60 (*e*), *ante*, p. 332.

2. United States v. American Exchange Nat. Bank, 70 Fed. 232, in which case the defendant as collecting agent of the Bellaire Bank of Ohio collected at the Sub-Treasury, New York, a pension draft on which the payee's name was forged after her death. The defendant in making the collection indorsed the draft as collecting agent of the Bellaire Bank, as appeared by the terms of its indorsement, and on collection at once paid over the money to the principal, without notice of the forgery, before the action was commenced; it was held that the defendant was not liable.

Where the collecting agent pays over the funds before any notice of irregularity or fraud, the remedy is against the principal alone. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533; White v. Bank, 102 U. S. 658; Sweeny v. Easter, 1 Wall. (U. S.) 166; Wells, Fargo & Co. v. United States, 45 Fed. 337; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632. And see Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 59 N. E. 62.

ports to be;[3] he also warrants the genuineness of all preceding indorsements,[4] and that the maker and each prior indorser was of legal capacity to contract.[5] The payee of a forged check who indorses it and receives full value therefor, warrants the genuineness of the check, and the indorsee may, upon discovery of the forgery, recover the amount paid thereon;[6] and any person who indorses a forged negotiable instrument warrants the genuineness of the signatures of both the maker and prior indorsees.[7] An

3. Herrick v. Whitney, 15 Johns. (N. Y.) 240; Ogden v. Blydenburgh, 1 Hilt. (N. Y.) 182; Dalrymple v. Hillenbrand, 2 Hun (N. Y.), 488; Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11; Bell v. Cafferty, 21 Ind. 411; Hurst v. Chambers, 12 Bush (Ky.), 155; Condon v. Pearce, 43 Md. 83; Brown v. Ames, 59 Minn. 476, 61 N. W. 448; Lyons v. Miller, 6 Gratt. (Va.) 427, 52 Am. Dec. 129; Donohoe v. Meeker, 35 App. Div. (N. Y.) 43, 54 N. Y. Supp. 286; Gabay v. Doane, 66 App. Div. (N. Y.) 507, 73 N. Y. Supp. 381; Wilhelm v. Loop, 8 Ohio Com. Pl. 444, 6 Ohio N. P. 270.

Diligence required.— The transfer of a note implies a guaranty of its genuineness, as to all apparent parties to it; but the holder is under an implied obligation to try, by due diligence, the liability, as well as the solvency of the ostensible obligors, before he can hold the assignor liable either as guarantor or vendor. Wynn v. Poynter, 3 Bush (Ky.), 54.

Decline to warrant.— Where the vendor of a promissory note expressly declines to warrant the genuineness thereof, no such warranty can be implied. Bell v. Dagg, 60 N. Y. 528.

4. **Warranty of indorsements.**— See Woodward v. Harbin, 1 Ala. 104; Mills v. Barney, 22 Cal. 240; Bunker v. Osborn, 132 Cal. 480, 64 Pac. 853; Chicago First Nat. Bank v. Northwestern Nat. Bank, 40 Ill. App. 640; McCall v. Corning, 3 La. Ann. 409, 48 Am. Dec. 454; Cochran v. Atchison, 27 Kan. 728; Third Nat. Bank v. Lange, 51 Md. 138, 34 Am. Rep. 304; Condon v. Pearce, 43 Md. 83; Fall River Nat. Bank v. Buffington, 97 Mass. 498; Prescott Bank v. Caverly, 7 Gray (Mass.), 217, 66 Am. Dec. 473; Brown v. Ames, 59 Minn. 476, 61 N. W. 448; First Nat. Bank v. Farmers & Merchants' Bank, 56 Neb. 149, 76 N. W. 430; Ogden v. Blydenburgh, 1 Hilt. (N. Y.) 182; Foster v. Collner, 107 Pa. St. 305; Chambers v. Union Nat. Bank, 78 Pa. St. 205.

5. **Warranty of capacity of maker and indorser.**— Erwin v. Downs, 15 N. Y. 575, where it was held that the indorsement of a promissory note imports a guaranty by the indorser, that the makers were competent to contract in the character in which, by the terms of the paper, they purported to contract. And knowledge by one who became the holder of such a note before maturity, and for a valuable consideration, that the makers were married women, does not deprive him of the right to rely upon the implied guaranty of the indorser, that the makers were competent to contract as partners, nor of the character of a *bona fide* holder. See also Dalrymple v. Hillenbrand, 62 N. Y. 5, 20 Am. Rep. 438, affg. 2 Hun (N. Y.), 488; Archer v. Shea, 14 Hun (N. Y.), 493; Ogden v. Blydenburgh, 1 Hilt. (N. Y.) 182; Prescott Bank v. Caverly, 7 Gray (Mass.), 217, 66 Am. Dec. 473; Kilgore v. Bulkely, 14 Conn. 362; Beal v. Alexander, 6 Tex. 531.

6. Case v. Bradburn, 1 Daly (N. Y.), 256; Wheeler v. Miller, 2 Handy (Ohio), 149; Roth v. Crissey, 30 Pa. St. 145; Semmes v. Wilson, Fed. Cas. No. 12,658; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 South. 440; National Bank of North America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349.

7. Onondaga County Sav. Bank v. United States, 64 Fed. 703, 12 C. C. A. 407; Rhodes v. Jenkins, 18 Colo. 49, 31 Pac. 491, 36 Am. St. Rep. 263.

The indorsement of a promissory note implies a contract by the in-

indorsement of a negotiable instrument is a warranty by him who makes it to every subsequent holder in good faith that the instrument itself and all the signatures antecedent to such indorsement are genuine; and when these signatures are forgeries, the indorser is at once liable upon his warranty to such subsequent holder, without any presentment for payment, or notice of nonpayment.[8]

c. *Warranty of validity of instrument.*— An indorser of a negotiable instrument warrants the existence and legality of the contract which he undertakes to assign.[9] And where a promissory note was alleged to have been made on Sunday, it was held that this was immaterial in an action against the indorser, because by his indorsement he is estopped to deny that the note is a valid contract, and as against him it must be presumed it was made and delivered at a time when such business could lawfully be done.[10] By such an indorsement the validity of the note is warranted, and also the ability of the maker to pay it.[11] Where a note is invalid, suit may be brought immediately against the indorser, without having sued the maker.[12] Although the general rule is that an indorsement of a negotiable instrument amounts to a contract that the instrument itself and the antecedent signatures thereon are genuine, yet the obligation of such a contract cannot be enforced

dorser with the subsequent *bona fide* holder that the instrument itself and all the signatures prior to the particular indorsement are genuine; and the fact that the name of the maker was forged will not discharge the indorser. Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11.

8. Turnbull v. Bowyer, 40 N. Y. 456, 100 Am. Dec. 523; Warren-Scharf Asphalt Pav. Co. v. Commercial Nat. Bank, 97 Fed. 181, 38 C. C. A. 108.

9. **Indorser warrants validity of instrument.**— Burrill v. Smith, 7 Pick. (Mass.) 291, 294, where the court says: "The indorsee takes it on the credit of the indorser. Thus, if a note void between the promisor and the payee on account of usury or other illegal consideration is indorsed *bona fide* for valuable consideration, the indorser must make it good; so if the indorsement is of a note made by a minor, or of a *feme covert*, and even if the name of the promisor is forged, the indorser is held upon his contract to pay the indorsee." See also Veasie v. Willis, 6 Gray (Mass.), 90; Prescott Bank v. Caverly, 7 Gray (Mass.), 217; Kenworthy v. Sawyer, 125 Mass. 28; Hannum v. Richardson, 48 Vt. 508; Henderson v. Lemly, 79 N. C. 169.

In the case of Binney v. Globe Nat. Bank, 150 Mass. 574, 23 N. E. 380, the court said: "Nor is the liability of the petitioner affected by the fact that she is the wife of the assignor of the note who filled the blanks therein and caused the same to be discounted, receiving the proceeds thereof. While a promissory note between a husband and wife is void between the original parties, an indorser, when sued upon a contract, between him and his indorsee, is not at liberty to deny the validity of the original note, or the capacity of the maker, for the purpose of defeating his or her own liability."

10. Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

11. McNeil v. Knott, 11 Ga. 142; Howell v. Wilson, 2 Blackf. (Ind.) 418; Tam v. Shaw, 10 Ind. 469; Furgerson v. Staples, 82 Me. 159, 19 Atl. 158; Bruce v. Burr, 67 N. Y. 237.

12. Tam v. Shaw, 10 Ind. 469; Johnson v. Blake, 3 Ind. 542.

by a holder who procured an indorsement upon the forged note, with knowledge of the forgery, and upon a representation to the indorser that it was genuine.[13]

d. *Engagement to pay.*— Under the common law, as well as under the statute, an indorser guarantees the payment of an instrument according to its tenor, and engages that if it be dishonored, and the necessary proceedings on dishonor be taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. The liability imposed upon an indorser depends upon the fulfillment of the terms of the contract of indorsement, which is conditioned upon a sufficient demand being made upon the maker, and other necessary proceedings taken upon its dishonor.[14] Upon a compliance with the terms of the contract, the indorser is absolutely bound, although the instrument itself is void.[15] An indorsement, although in blank, being a contract in writing, its legal effect cannot be varied by parol proof, in the absence of fraud or mistake.[16] This rule must

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

14. Lockett v. Howze, 18 Ala. 613; Cassidy v. Kreamer (Pa.), 13 Atl. 744.

The obligation of an indorser is widely different from that of a surety, whatever may be the analogy between them in some respects. The latter is bound absolutely to pay in case the debtor does not, while the obligation of the former is one dependent upon certain suspensive conditions. Breedlove v. Fletcher, 7 Mart. (La.) 524; Rushworth v. Moore, 36 N. H. 188.

15. **Indorser is absolutely bound** upon a compliance by the holder with the terms of the contract, see:—

Connecticut.— Miller v. Riley, 2 Root, 522.

Illinois.— Bowes v. Industrial Bank, 58 Ill. App. 498.

Indiana.— Holton v. McCormick, 45 Ind. 411; Grimes v. Piersol, 25 Ind. 246.

Iowa.— National Bank v. Green, 33 Iowa, 140.

Kentucky.— Owings v. Grimes, 5 Litt. 331.

Louisiana.— Crane v. Trudeau, 19 La. Ann. 307; Dupre v. Richard, 11 Rob. 497, 43 Am. Dec. 214.

Maine.— Furgerson v. Staples, 82 Me. 159, 19 Atl. 158; Cushman v. Marshall, 21 Me. 122.

Maryland.— Mudd v. Harper, 1 Md. 110, 54 Am. Dec. 644.

Massachusetts.— Van Staphorst v. Pearce, 4 Mass. 258.

New Hampshire.— Dow v. Rowell, 12 N. H. 49.

New York.— Fassin v. Hubbard, 55 N. Y. 465; Hodges v. Schuler, 22 N. Y. 114; Morford v. Davis, 28 N. Y. 481; Bank of Albion v. Smith, 27 Barb. 489.

Ohio.— Farr v. Ricker, 46 Ohio St. 265, 21 N. E. 354; Parker v. Riddle, 11 Ohio, 102.

South Carolina.— Eccles v. Ballard, 2 McCord, 388.

Texas.— Davidson v. Peticoals, 34 Tex. 27.

Wisconsin.— Cowles v. McVickar, 3 Wis. 725.

16. **Legal effect of contract of indorsement cannot be varied by parol testimony**, Farr v. Rickar, 46 Ohio St. 265, 21 N. E. 354. In the case of Martin v. Cole, 104 U. S. 37, Matthews, J., said: "The contract created by the indorsement and delivery of a negotiable note even between the immediate parties to it is a commercial contract, and is not in any proper sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of

be deemed subject to the exception that as between the indorser and the indorsee parol testimony is admissible to show their true relation to each other, according to their own intention and agreement.[17] But this exception is not universally admitted, and in some States it is held that even as between the immediate parties a collateral agreement, modifying the obligation which the law presumes in the case of a blank indorsement, is not admissible.[18] An apparent conflict in the authorities as to the admissibility of evidence to vary the terms of a blank indorsement is presumably eradicated by the provisions of the above section of the statute, which makes an indorser absolutely liable to all subsequent holders in due course, unless the indorsement is expressly qualified.

e. *Liability of indorser on instrument negotiable by delivery; statutory provision.*— The Negotiable Instruments Law provides that: "Where a person places his indorsement on an instrument "negotiable by delivery, he incurs all the liabilities of an in- "dorser." [19] This provision is declaratory of the common law. A note payable to bearer is transferable without indorsement; and if the payee choose to put his name on the back he is as much bound as an indorser as if the note had been made payable to him or to

the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less, on that account, perfectly understood. All its terms are certain, fixed, and definite, and when necessary, supplied by the common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation, that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he has written out the customary obligation of his contract in full." And it was held in that case that parol evidence is not competent to contradict or vary the legal effect of such an instrument; and it is also stated that the cases in support of the rule "are too numerous for citation." See also Holt v. Moore, 5 Ala. 521; Stephens v. State, 56 Ga. 604; Johnson v. Glover, 121 Ill. 283, 12 N. E. 257; Smythe v. Scott, 106 Ind. 245, 6 N. E. 145; Holton v. McCormick, 45 Ind. 411; Bowler v. Braun, 63 Minn. 32, 65 N. W. 124; Allen v. Chambers, 13 Wash. 327, 43 Pac. 57; Charles v. Denis, 43 Wis. 56, 24 Am. Rep. 383.

17. **Admissibility of parol testimony** to show terms of agreement between indorser and indorsee, see Lewis v. Long, 102 N. C. 206, 11 Am. Rep. 725; Cole v. Smith, 29 La. Ann. 551, 29 Am. Rep. 343.

In the case of Smith v. Morrill, 54 Me. 48, it was held that a blank indorsement of a negotiable promissory note is, as between the immediate parties thereto, only *prima facie* evidence of the contract implied by law; and it is competent to prove by parol evidence, the agreement which was in fact made at the time of the indorsements. As to third persons without notice of any other contract, the one implied by law is conclusive. See also James v. Smith, 30 Iowa, 55; Sturtevant v. Randall, 53 Me. 149; Holmes v. First Nat. Bank, 38 Neb. 326, 56 N. W. 1011, 41 Am. St. Rep. 733.

18. Dale v. Gear, 38 Conn. 15; Beattie v. Brown, 64 Ill. 360; Hately v. Pike, 162 Ill. 241, 44 N. E. 441.

19. Neg. Inst. L. (N. Y.), § 117. For the same section in the statutes of other States see Appendix.

his order.[20] The indorser of a note drawn payable to bearer incurs the same liabilities and obligations as the indorser of a negotiable note payable to order.[21]

§ 87. Order in which indorsers are liable.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "As respects one another, indorsers are liable *prima* "*facie* in the order in which they indorse; but evidence is admis-"sible 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." [22]

b. *Presumption as to order.*— Indorsements upon bills of exchange or promissory notes rest upon the theory that the liability of the indorsers to each other is regulated by the position of their names and that the paper is transferred from one to another by indorsement.[23] The date of the indorsement does not necessarily control the obligation of the parties to each other; although there may be, as stated in the statute, a *prima facie* liability dependent upon the order in which the indorsements are made.[24] Where the indorsers are accommodation parties, the same rule is applicable; the indorsers are liable in the order of their indorsement arising from the contract of indorsement itself, and not from any separate agreement which they may have for the joint payment of the instrument.[25] Where an instrument is indorsed for transfer by

20. Brush v. Reeves, 3 Johns. (N. Y.) 439; Tam v. Shaw, 10 Ind. 469; Tillman v. Ailles, 13 Miss. 373, 43 Am. Dec. 52.

In the case of Leggett v. Raymond, 6 Hill (N. Y.), 639, L. indorsed the words "I guaranty the payment of this note," on the note payable to himself or bearer. It was held in an action brought by R. that L. was liable as indorser on proof of demand and notice, though it did not appear that the guaranty was made to R.

Where an instrument which can pass by delivery is indorsed such indorsement must be deemed to have been made for the purpose of guaranteeing the genuineness of the note and its payment, and the presumption is that the indorsement was made for these purposes. Hence the indorser is *prima facie* liable upon the instrument. Doom v. Sherwin, 20 Colo. 234, 38 Pac. 256.

21. Cover v. Meyers, 75 Md. 406, 23 Atl. 850.

22. Neg. Inst. L. (N. Y.), § 118. For the same section in the statutes of other States see Appendix.

23. Easterly v. Barber, 66 N. Y. 433, 437.

24. See Slack v. Kirk, 67 Pa. St. 380.

25. McCarthy v. Roots, 21 How. (U. S.) 432. In this case it was held that the fact that the indorsers were accommodation parties does not make them cosureties, bound to contribute equally to the payment of the bills, without a special agreement to that effect. See also Easterly v. Barber, 66 N. Y. 433.

In the case of Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109. it was held that where a second indorser of a promissory note has paid and taken it up, he becomes a holder for value, and may maintain an action to re-several indorsers, each indorsee is entitled to recover of his immediate indorser the amount of the consideration for the indorsement.[26] The amount to be recovered of an immediate indorser may include the costs in the unsuccessful suit instituted for the collection of a note defective because of usury,[27] and such other damages as may be sustained by him for the failure of the maker to pay the note.[28] Where several persons in succession indorse a negotiable note, the act of each, respectively, imports a several and successive, and not a joint obligation, whether done for accommodation or for value, unless there be an agreement *aliunde* different than that evidenced by the indorsements.[29]

c. *Agreement between indorsers.*— The statute expressly provides, and the rule has existed at common law, that an agreement may be made between the indorsers of an instrument varying their liabilities as such indorsers, which will be binding among themselves; and in an action brought by an indorser of a promissory note who has paid such note, against a prior indorser, it is competent for the defendant to prove by parol that all the indorsers were accommodation indorsers, and that by agreement they were,

cover the amount thereof, of the first indorser, although both are accommodation indorsers.

26. *In New York* it is the settled rule that an indorsee who buys a note at less than its face value can recover against the indorser no more than the sum for which he purchased the note, with interest; though he may recover the full amount of the note against the maker. This rule applies only as between the parties to the transfer of the note, and does not affect the liability of third persons who indorse for the accommodation of the payee, and who are not parties to the transfer. Ingalls v. Lee, 9 Barb. (N. Y.) 647; Judd v. Seaver, 8 Paige (N. Y.), 548; Cram v. Hendricks, 7 Wend. 569; Munn v. Commission Co., 15 Johns. (N. Y.) 44; Brannan v. Hess, 13 Johns. (N. Y.) 52; Brown v. Mott, 7 Johns. (N. Y.) 361.

In other States. See Cook v. Cockrell, 1 Stew. (Ala.) 475, 18 Am. Dec. 67; Coye v. Palmer, 16 Cal. 158; Shaeffer v. Hodges, 54 Ill. 337; Short v. Coffeen, 76 Ill. 245; Hurst v. Chambers, 12 Bush (Ky.), 155; Short v. Trabue, 4 Metc. (Ky.) 299; French v. Grindle, 15 Me. 163; Hulbert v. Douglas, 94 N. C. 128.

27. **Recovery of costs.**— In the case of Delaware Bank v. Jarvis, 20 N. Y. 226, it appeared that the holder of a note, which had a usurious inception in his hands, transferred it without indorsement and without notice of the facts to the plaintiff. The latter brought an action upon the note to which the defense of usury was successfully interposed. The defendant had notice of the plea and was called upon to assume the conduct of the action, but declined to do so. It was held that the party accepting the transfer of negotiable paper may act upon the implied warranty of the validity thereof, and bring an action for its collection; and when defeated he is entitled to recover the costs incurred by him, from his assignor. See also Gilman v. Lewis, 15 Me. 452; Whitney v. National Bank, 45 N. Y. 303.

28. Orono Bank v. Wood, 49 Me. 26.

29. Wolf v. Hostetter, 182 Pa. St. 292, 37 Atl. 988, citing Daniel on Negotiable Instruments, § 703; Russ v. Sadler, 197 Pa. St. 51, 46 Atl. 903.

as between themselves, cosureties.[30] Under this rule, evidence is admissible to show that by the agreement of the parties their liability is joint,[31] and also that there was an agreement that one was to be bound as a prior indorser.[32]

d. *Indorsement by joint payees and indorsees.*— The rule of the statute that joint payees or joint indorsees who indorse are deemed to indorse jointly and severally, and are, therefore, jointly and severally liable to subsequent holders in due course is apparently new, and has doubtless been included to dispose of a number of questions more or less disputed. Before the statute the rule, as stated by Mr. Daniel, was: "The parties will not be regarded as successive indorsers where they are joint payees of a note, and themselves indorse it. In such a case it matters not which signs first, the note being payable only to their joint order, and transferable only by their joint act, they will be considered joint indorsers." [33] The statute evidently changes this rule; and it would seem that there is some doubt of the advisability of such change.[34]

§ 88. Liability of agent or broker.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where a broker or other agent negotiates an instru-

30. **Apparent liability of successive indorsers modified by agreement.**— Easterly v. Barber, 66 N. Y. 433. As between the original parties, the apparent right of the indorser on the face of the note and the contract of indorsement may be qualified and changed by parol evidence, and the intention of the parties established by showing the facts and circumstances of the transaction. Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681. See also Philips v. Preston, 51 How. (U. S.) 278; Reinhart v. Schall, 69 Md. 352; Patch v. Washburn, 16 Gray (Mass.), 82; Brennan v. Furniss, 90 Pa. St. 186; Morrison Lumber Co. v. Hotel Co., 92 Tenn. 6; Bank of Jamaica v. Jefferson, 92 Tenn. 537; Hale v. Danforth, 46 Wis. 554.

31. Easterly v. Barber, 66 N. Y. 433. In the case of Woodward v. Severance, 7 Allen (Mass.), 340, it was held that if successive indorsers of an accommodation note have made no agreement that as among themselves their liability shall be joint, and a second indorser who has taken up the note, before its maturity, may, upon due demand and notice, recover the amount from the first indorser. See also Clapp v. Rice, 13 Gray (Mass.), 403; Weston v. Chamberlain, 7 Cush. (Mass.) 404; Sweet v. McAllister, 4 Allen (Mass.), 354; Edelen v. White, 6 Bush (Ky.), 408.

32. Reinhart v. Schall, 69 Md. 352; Slagel v. Rust, 4 Gratt. (Va.) 274.

33. Daniel on Negotiable Instruments, § 704. This rule seems to have been derived in the form stated by Mr. Daniel from the case of Lane v. Stacy, 8 Allen (Mass.), 41, 42, where the court said: "The note was made payable to their joint order, and could only be transferred by their joint act. Which name is first put upon the paper is, therefore, immaterial, as by the indorsement they incurred a joint responsibility for the debt of the promisor."

See also Cummings v. Herrick, 43 Me. 203; Culver v. Leovy, 19 La. Ann. 202; West Branch Bank v. Armstrong, 40 Pa. St. 278.

34. See article by Prof. James Barr Ames, in Harvard Law Review, for December, 1900.

"ment without indorsement, he incurs all the liabilities prescribed "by section 115 of this act,[35] unless he discloses the name of his "principal, and the fact that he is acting only as agent." [36]

b. *General rule.*— The provision of the statute is in recognition of the general rule that where a party acts as agent without disclosing his agency he will be personally liable to the person with whom he deals, provided such person chooses to treat him as principal.[37] It has been held that one who procures notes to be discounted at a bank is not the less responsible for the genuineness of the signatures because he does it as agent of another, unless the bank knew or had reasonable cause to know his agency.[38] We have discussed in a previous chapter the authority of agents to bind their principals by their signatures to commercial paper; and also their liability while acting as such agents.[39]

§ 89. Liability of accommodation indorsers.

a. *Liability as imposed by statute.*— An accommodation indorser is liable on an instrument indorsed by him, to a holder for value, although such holder, at the time of taking the instrument, knew him to be only an accommodation party.[40] And the statute, in imposing upon general indorsers an absolute engagement that the instrument will be paid according to its tenor, makes no exception in the case of an accommodation indorser, and the presumption, therefore, is that such an indorser is subject to the same liabilities as are imposed by the statute upon general indorsers.[41]

b. *Contract of indorsement; liability in general.*— An indorsement for accommodation, like every other indorsement, is an original contract binding the indorser in favor of the holder.[42]

35. See § 85, *ante*, p. 418.

36. Neg. Inst. L. (N. Y.), § 119. For same section in statute of other States see Appendix.

37. Fuller v. Smith, 1 Car. & P. (Eng.) 197; Gurney v. Womenley, 4 El. & Bl. (Eng.) 133; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287.

38. Cabot Bank v. Morton, 4 Gray (Mass.), 156.

In the case of Worthington v. Cowles, 112 Mass. 30, it was held that to relieve an agent from liability upon an implied warranty of the genuineness of a promissory note sold by him, which afterward proves to be forged, the transaction must have been such that the purchaser understood, or ought, as a reasonable man, to have understood, that he was dealing with the principal.

39. See Neg. Inst. L. (N. Y.), § 39, *ante*, p. 82.

40. Neg. Inst. L. (N. Y.), § 55. See chap. IV, § 55, *ante*, p. 309.

41. See § 86, *ante*, p. 424.

42. Crane v. Trudeau, 19 La. Ann. 307.

Not a surety.— An accommodation indorser is not a surety in the sense that he may discharge himself from liability on the note by requesting the

The relative rights and duties of such indorsers are the same as in the case of any other instrument;[43] and they are subject to the same obligations.[44] Where the indorsement is made for the accommodation of the payee, the indorser assumes the same liability as every other indorser, and the holder is entitled to recover against him, although at the time of the transfer he knew it to be for accommodation only.[45] And where a signature of an accommodation indorser is placed immediately after that of the payee, merely for the purpose of identifying the payee, the indorser nevertheless assumes all the obligations and liabilities of an indorser.[46] And

holder to enforce payment from the maker, and by showing the neglect of the holder to do so, the solvency of the maker at that time, and his insolvency afterward. Converse v. Cook, 25 Hun (N. Y.), 44.

The contract is single and entire, where the indorsement is in blank for the accommodation of the maker, and the holder of the note cannot fill up the indorsement, so as to make the note payable, part to one person and part to another, without consent. Erwin v. Lynn, 16 Ohio St. 539.

43. Kirschner v. Conklin, 40 Conn. 77; Church v. Barlow, 9 Pick. (Mass.) 547; Brown v. Mott, 7 Johns. (N. Y.) 361; Zellweger v. Caffe, 5 Duer (N. Y.), 87.

44. **Obligations of accommodation indorser.**—A person who indorses for another as surety is liable to the same extent as one who indorses to secure the discount of a note. Ætna Nat. Bank v. Charter Oak Life Ins. Co., 50 Conn. 167.

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. Laubach v. Pursell, 35 N. J. L. 434. And the liability of accommodation indorsers is not altered by the fact that they were intended as collateral security for the performance by the makers of certain conditions in favor of the holders. Zellweger v. Caffe, 5 Duer (N. Y.), 87.

And see the following cases:

United States.—Molson v. Hawley, Fed. Cas. No. 9,702. 1 Blatchf. 409; Bank of British North America v. Ellis, 2 Fed. 44.

Connecticut.— Greathead v. Walton, 40 Conn. 226.

Georgia.— Moncas v. Stacks, 2 Ga. 35.

Iowa.— Brenner v. Gundersheimer, 14 Iowa, 82.

Louisiana.— Butler v. Slocumb, 33 La. Ann. 170, 39 Am. Rep. 265; Oliver v. Audry, 7 La. 496.

Maryland.—Hamburger v. Miller, 48 Md. 317.

Massachusetts.— Shaw v. Knox, 98 Mass. 214; State Bank v. Fearing, 16 Pick. 533, 28 Am. Dec. 265.

New Hampshire.— Merriam v. Rockwood, 47 N. H. 81.

New Jersey.— Edmunds v. Rose, 51 N. J. L. 547, 18 Atl. 748, 14 Am. St. Rep. 704.

New York.— Irving Nat. Bank v. Alley, 79 N. Y. 536; Bookstaver v. Jayne, 60 N. Y. 146; Easterly v. Barber, 66 N. Y. 433; Bacon v. Burnham, 37 N. Y. 614; Bickford v. Biddlecum, 52 Barb. 245; Beall v. General Electric Co., 16 Misc. 611, 38 N. Y. Supp. 527.

Ohio.— Second Nat. Bank v. Morrison, 3 Ohio Dec. 534.

Oregon.— Benn v. Kutschan, 24 Ore. 28, 32 Pac. 763.

Pennsylvania.— Steckel v. Steckel, 28 Pa. St. 233; Bonsall v. Bauer, 2 Wkly. Notes Cas. 298; Peale v. Addicks, 190 Pa. St. 585, 43 Atl. 527.

Tennessee.— Harris v. Bradley, 7 Yerg. 310.

45. Lincoln Nat. Bank v. Butler, 16 Misc. (N. Y.) 566, 38 N. Y. Supp. 776; Beall v. General Electric Co., 16 Misc. (N. Y.) 611, 38 N. Y. Supp. 527; Second Nat. Bank v. Morrison, 3 Ohio Dec. 534.

46. **Indorsement for identification.** —In the case of Stack v. Beach, 74

where the payee of a note who discounts it with his own indorsement and subsequently takes it up, he has a right of action against an indorser for the accommodation of the maker, though in form his indorsement is subsequent to that of the payee.[47] But the right of a holder to recover is to be determined by his right to recover against the maker.[48] And where a note is transferred subsequent to the accommodation indorsement, the holder can only recover from the indorser the consideration actually paid for the note.[49]

c. *Liability of several accommodation indorsers.*— *Prima facie,* accommodation indorsers are liable in the order in which they indorse.[50] This is the general rule as declared in the Negotiable

Ind. 571, 39 Am. Rep. 113, the material statements contained in the answer were: "That appellant went with one Wilson to the Prairie City Bank, of Terre Haute, for the purpose of identifying the said Wilson as the payee and holder of the bill of exchange sued on; that the agent of the bank requested the appellant to write his name on the back thereof, for the purpose of identifying Wilson; that he, the appellant, never owned or had possession of said bill; that he did not negotiate it; that he did not sign it as maker, surety, or indorser; that the sole purpose for which he wrote his name on the back thereof was to identify the said Wilson as the payee of said bill; that Wilson was the identical person he represented himself to be; that appellant was not requested to write his name as indorser by Wilson or anybody else; that he was not informed, nor did he understand, that he was signing as indorser." The court held the answer to be insufficient, and that the contract of indorsement in writing and regular upon its face is not to be modified by evidence that it was not intended thereby to bind the indorser. See also Prescott Bank v. Caverly, 7 Gray (Mass.), 217, 66 Am. Dec. 473; Cochran v. Atchison, 27 Kan. 728.

In the case of Susquehanna Valley Bank v. Loomis, 85 N. Y. 207, 39 Am. Rep. 652, a stranger presented to a bank a draft drawn by a New Jersey bank upon a New York bank, which had been fraudulently altered by raising the amount and changing the date and the name of the payee. The defendant's testator came to the bank with the stranger and put his name to the draft as an accommodation indorser, with the knowledge of the plaintiff bank. The plaintiff thereupon purchased the draft from the stranger. The draft was paid by drawee, but the money was refunded on discovery of the forgery. In an action on the indorsement, it was held that the indorser could not be presumed to have known of the forgery; and that he was not liable on his indorsement without demand, refusal, and notice of nonpayment.

In the case of Simonowitch v. Schwartz, 67 App. Div. (N. Y.) 535, 74 N. Y. Supp. 221, where the drawer of a check indorses the same at the request of the payee, in order to enable the latter to obtain money thereon from the bank without being identified, and such check, after being lost by the payee, but before notice of its loss had been given either to the bank or the drawer, is presented to the bank bearing the forged indorsement of the payee, and is paid by the bank, it was held that the drawer was not liable to the payee for the amount of the check.

47. Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326.

48. Cake v. Northumberland County Nat. Bank, 6 Wkly. Notes Cas. (Pa.) 88.

49. Grabbe v. Bosse, 10 Mo. App. 492; Brown v. Mott, 7 Johns. (N. Y.) 361; Cook v. Clark, 4 E. D. Smith (N. Y.), 213.

50. **Accommodation indorsers liable in order named.**— See the following cases:

Alabama.—Moody v. Findley, 43 Ala. 167; Abercrombie v. Connor, 10 Ala. 293; Spence v. Barclay, 8 Ala. 581.

Instruments Law, and doubtless applies to accommodation as well as general indorsers. There is some conflict among the earlier authorities, particularly in Ohio [51] and North Carolina; [52] but it is now well settled, even without regard to the statute, that successive accommodation parties are liable to each other in succession, according to the order in which their names appear upon the instrument. The reason for this rule may be found in the presumption that each accommodation indorser placed his name upon the instrument trusting in the strength of the prior accommodation indorsers.[53] Facts may be shown, as in the case of other indorsers, to show that the liability is joint because of an agreement between

Georgia.— Stiles v. Eastman, 1 Ga. 205.

Indiana.— Dunn v. Sparks, 7 Ind. 490; Gore v. Wilson, 40 Ind. 204.

Kentucky.—Denton v. Lytle, 4 Bush, 597; Smith v. Bacon, 3 J. J. Marsh. 312; Hixon v. Reed, 2 Litt. 174.

Maine.— Hagerthy v. Phillips, 83 Me. 336, 22 Atl. 223; Westcott v. Stevens, 85 Me. 325, 27 Atl. 146; Coolidge v. Wiggin, 62 Me. 568.

Massachusetts.— Moore v. Cushing, 162 Mass. 594, 39 N. E. 177; Shaw v. Knox, 98 Mass. 214; Clapp v. Rice, 13 Gray, 403, 74 Am. Dec. 639; Barker v. Parker, 10 Gray, 339.

Michigan.— McGurk v. Huggett, 56 Mich. 187, 22 N. W. 308; Farwell v. Ensign, 66 Mich. 600, 33 N. W. 736.

Missouri.— McCune v. Belt, 45 Mo. 174; McNeilly v. Patchin, 23 Mo. 40, 66 Am. Dec. 651.

New Hampshire.—Johnson v. Crane, 16 N. H. 68.

New Jersey.—Johnson v. Ramsey, 43 N. J. L. 279, 39 Am. Rep. 119; Laubach v. Pursell, 35 N. J. L. 434.

New York.—Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109, in which case it was held that where a second indorser of a promissory note has paid and taken it up, he becomes a holder for value and may maintain an action to recover the amount thereof of the first indorser, although both are accommodation indorsers. Palmer v. Field, 76 Hun, 229, 27 N. Y. Supp. 736; Watson v. Shuttleworth, 53 Barb. 357; Brown v. Mott, 7 Johns. 361.

Pennsylvania.— Youngs v. Ball, 9 Watts, 139.

South Carolina.— Aiken v. Barkley, 2 Spears, 747, 42 Am. Dec. 397.

Vermont.— Pitkin v. Flanagan, 23 Vt. 160, 56 Am. Dec. 61.

Virginia.— Hogue v. Davis, 8 Gratt. 4; Bank of United States v. Beirne, 1 Gratt. 539, 42 Am. Dec. 551.

51. Douglas v. Waddle, 1 Ohio, 413, 13 Am. Dec. 630.

52. Richards v. Simms, 18 N. C. 48; Daniel v. McRae, 9 N. C. 530, 11 Am. Dec. 787.

53. **Reason for rule.**— McDonald v. Magruder, 3 Pet. (U. S.) 470, 478, where the court says: "But in the case at bar the parties do not stand in the same relation to each other. The second indorser gives his name on the faith of the first indorser as well as of the maker. The first indorser gives his name on the faith of the maker only. Unquestionably these liabilities may be changed by contract; but no contract existing between these parties, it is not a case to which the principle of contribution applies." And in the case of Gillespie v. Campbell, 39 Fed. 724, it is said: "The principle upon which the rule is founded is this: 'The indorser has incurred a contingent liability upon the faith of the antecedent names to the paper, and by payment becomes entitled to all the rights of an indorser for value, with remedy over for the whole amount paid against the prior parties.' The obligation of the one is primary; of the other secondary. It is of no moment that the accommodation indorser knew that the acceptance was without consideration. He has incurred and met his obligation upon the faith of the acceptance, and stands in the light of a holder for value."

them to be bound jointly and not severally.[54] If no such agreement is shown such indorsers are not cosureties and there can be no right of contribution among them.[55]

54. **Rebuttal of legal effect of successive accommodation indorsements.** — In the case of Farwell v. Ensign, 66 Mich. 600, 33 N. W. 736, it was held that where there are several indorsers of a bill or note, the legal effect of their successive indorsements is to make them liable to each other in the order of time in which they sign their names; but this legal effect may be rebutted by parol proof that all the indorsers were accommodation indorsers, and, by agreement among themselves, cosureties. And see Hawley v. McCredy, 54 Cal. 388; Talcott v. Cogswell, 3 Day (Conn.), 522.

But the fact that the indorsements on a renewal note are not in the same order as the indorsements on the original notes does not raise the presumption that the obligation of the indorsers on the renewal notes is joint, and not several, as the holder could insist on such change as a condition of the renewal. Palmer v. Field, 76 Hun (N. Y.), 229, 27 N. Y. Supp. 736.

Proof of agreement by parol is permitted. Rhodes v. Sherrod, 9 Ala. 63; Weston v. Chamberlain, 7 Cush. (Mass.) 404; Clapp v. Rice, 13 Gray (Mass.), 403, 74 Am. Dec. 639; Paul v. Rider, 58 N. H. 119; Ross v. Espy, 66 Pa. St. 481, 5 Am. Rep. 394.

55. Moody v. Findley, 43 Ala. 167; Dunn v. Sparks, 7 Ind. 490; Clapp v. Rice, 13 Gray (Mass.), 403, 74 Am. Dec. 639; Farwell v. Ensign, 66 Mich. 600, 33 N. W. 736; Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109; Aiken v. Barkley, 2 Spears (S. C.), 748, 42 Am. Dec. 397.

CHAPTER VIII.

Presentment for Payment.

§ 90. Necessity for Presentment for Payment.
- a. Statutory provision.
- b. Presentment unnecessary to charge principal debtor.
- c. Demand necessary to charge drawer and indorsers.

§ 91. When Presentment Must be Made.
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§ 92. What Constitutes a Sufficient Presentment.
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§ 94. Instrument Must be Exhibited.

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- a. Statutory provision.
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§ 96. Presentment where Principal Debtor is Dead.

§ 97. Presentment to Persons Liable as Partners.
- a. Statutory provision.
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§ 98. Presentment to Joint Debtors.
- a. Statutory provision.

§ 90. Necessity for presentment for payment.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Presentment for payment is not necessary in order "to charge the person primarily 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 and willing- "ness are equivalent to a tender of payment upon his part. "But except as herein otherwise provided, presentment for pay- "ment is necessary in order to charge the drawer and in-

"dorsers." [56] The words "and has funds there available for that purpose," as contained in the above section, were inserted therein by an amendment made to the New York act in 1898.[57] The statutes in the other States which have adopted the law is the same as this section, except for the insertion of these words.[58] It is suggested by Mr. Crawford, who is credited with having drafted the Negotiable Instruments Law, that the words inserted in the New York act are clearly superfluous. He says they impose a condition not deemed necessary by the courts. "If, for example, the 'special place' where the paper is payable is the office of the maker or acceptor, this provision requires that he have the funds there, and it would be enough if he have them in bank. The interpolation is not only at variance with the decisions on the subject, but is contrary to the good sense and to the practice of the business world." In our opinion, the criticism made by Mr. Crawford is unwarranted. It seems to us that the insertion of the words makes clear the probable intent of the framer of the act. It may be admitted that if a maker or acceptor is compelled to pay at a "special place," as specified in the instrument, that it is to be presumed that funds are at that place available for the purpose. But this is by no means conclusive. To constitute a tender of payment, it would seem that something more than ability and willingness is required. There must be the available funds at the "special place" to meet the demand. It seems that while the words might not have been absolutely essential, that they have a purpose in making clear what, upon its face, is an ambiguous statement.

b. *Presentment unnecessary to charge principal debtor.*— The rule of the statute that presentment for payment is not necessary in order to charge the person primarily liable on the instrument is declaratory of the common law.[59] And the rule has been held applicable, although the maker has made the note for the accommodation of the payee, and this is known to the holder.[60] No presentment at the place named is necessary to give a right

56. Neg. Inst. L. (N. Y.), § 130. For same section in statutes of other States see Appendix.

57. See L. 1898, chap. 336.

58. In the Wisconsin act all of the first sentence after the first clause is omitted.

59. Bush v. Gilmore, 45 App. Div. (N. Y.) 89, 61 N. Y. Supp. 682; Howard v. Boorman, 17 Wis. 459; Oxman v. Garwood, 80 Ill. App. 658.

60. Hansborough v. Gray, 3 Gratt. (Va.) 340; Torry v. Foss, 40 Me. 74; Marion Nat. Bank v. Phillips (Ky.), 35 S. W. 910; American Nat. Bank v. Junk Bros., etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492.

of recovery against the maker of a promissory note. The only effect of an omission to make such a presentment is to relieve the maker from damages in case he was ready at the time and place appointed to pay it, if there was no one there to receive the money. Such readiness is considered equivalent to a tender of the sum payable, and an answer pleading that fact and a payment of the money due into court would be a bar to a recovery of interest and costs, but not to the cause of action.[61] In an action on a promissory note against the maker or on a bill of exchange against the acceptor, where the note or bill is made payable at a specified time and place, it is not necessary to allege or to prove that a demand of payment was made in order to maintain the action.[62]

61. Hill v. Place, 48 N. Y. 520, 8 Am. Rep. 568, citing Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; Caldwell v. Cassidy, 8 Cow. (N. Y.) 271.

This rule has been modified in some of the States by statute, as in Maine, where it is provided that a demand for payment shall be made as a prerequisite to the maintenance of a suit for a note payable at a place certain. Greenlief v. Watson, 83 Me. 266, 22 Atl. 165; Veazie Bank v. Winn, 40 Me. 62. But the general rule is that stated in the first New York case above cited. See Roberts v. Mason, 1 Ala. 373; Pritchard v. Smith, 77 Ga. 463; Bradford v. Cooper, 1 La. Ann. 325; Folger v. Chase, 18 Pick. (Mass.) 63; Middleton v. Boston, etc., Works, 26 Pa. St. 257.

62. **Necessity of presentment and demand.**— The following cases may be cited as relating to this subject:

United States.— Brabston v. Gibson, 9 How. 263; Wallace v. McConnell, 13 Pet. 136; Sulver v. Hunterson, Fed. Cas. No. 12,854, 3 McLean, 165; Thompson v. Cook, Fed. Cas. No. 13,952, 2 McLean, 122.

Alabama.— Clark v. Moses, 50 Ala. 326; Montgomery v. Elliott, 6 Ala. 701.

Connecticut.— Bond v. Storrs, 13 Conn. 412.

Florida.— Greeley v. Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286.

Georgia.— Dougherty v. Western Bank, 13 Ga. 287.

Illinois.— Hannibal & St. J. R. R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581.

Indiana.— McCullough v. Cook, 34 Ind. 290; Eaton R. R. Co. v. Hunt, 20 Ind. 457.

Iowa.— Jurgensen v. Carisen, 97 Iowa, 627, 66 N. W. 877; Callanan v. Williams, 71 Iowa, 363, 32 N. W. 383.

Kentucky.— Baker v. Phelps, 12 Ky. L. Rep. 387.

Maine.— Peterson v. Vose, 43 Me. 552; Dockray v. Dunn, 37 Me. 442.

Massachusetts.— Carter v. Smith, 9 Cush. 321; Berkshire Bank v. Jones, 6 Mass. 524, 4 Am. Dec. 175.

Michigan.— McIntyre v. Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781; Reeve v. Pack, 6 Mich. 240.

Minnesota.— Balme v. Wambaugh, 16 Minn. 116.

Nebraska.— Morlong v. Bronson, 37 Neb. 608, 56 N. W. 205.

New Hampshire.—Bingham v. Smith, 16 N. H. 274; Eastman v. Fifield, 3 N. H. 333, 14 Am. Dec. 371.

New Jersey.— Weed v. Van Houten, 9 N. J. L. 189, 17 Am. Dec. 468.

New York.— Hills v. Place, 48 N. Y. 520, 8 Am. Rep. 568; Genesee College v. Dodge, 26 N. Y. 213; Haxtun v. Bishop, 3 Wend. 13; Caldwell v. Cassidy, 8 Cow. 271: Herring v. Sanger, 3 Johns. Cas. 71; Finch v. Skilton, 79 Hun, 531, 29 N. Y. Supp. 925.

North Carolina.— Nichols v. Pool, 47 N. C. 25.

Ohio.— Conn v. Gans, 1 Ohio, 483, 13 Am. Dec. 639.

Pennsylvania.— West Branch Bank v. Fulmer, 3 Pa. St. 399, 45 Am. Dec. 651; Nosser v. Criswell, 150 Pa. St. 409, 24 Atl. 618.

Texas.— Deel v. Berry, 21 Tex. 463, 73 Am. Dec. 236.

Vermont.— Hart v. Green, 8 Vt. 191.

But a certificate of deposit payable to the order of the depositor on a return of the certificate must be presented for payment before an action can be maintained thereon.[63]

c. *Demand necessary to charge drawer and indorsers.*— It is a well-established rule that an indorser cannot be charged for the nonpayment of a negotiable instrument unless presentment for payment be made to the maker of the note or the acceptor of the bill.[64] The demand of payment is necessary although the in-

Washington.— Hardin v. Sweeney, 14 Wash. 129, 44 Pac. 138.

63. Presentment of certificate of deposit.— Riddle v. First Nat. Bank, 27 Fed. 503; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176. In the latter case the distinguishing feature between a promissory note and a certificate of deposit was that in the case of a note the maker might be sued without a demand, but in the case of a certificate of deposit a demand for payment must necessarily be made. But in a recent case, decided in the State of Michigan, holding that a certificate of deposit payable to the order of the depositor on its return properly indorsed is a promissory note, payable on demand, it was held that the institution of a suit upon such a certificate of deposit is a sufficient demand of payment. Beardsley v. Webber, 104 Mich. 88, 66 N. W. 173.

64. The consequence of not duly presenting a bill or note is that all the antecedent parties are discharged from their liability, whether on the instrument or on the consideration for which it is given. The acceptor or maker, however, still continues liable, in most cases presentment not being necessary for the purpose of charging him. The action itself is a sufficient demand, and that though the instrument be made payable on demand. But though the absence of demand be in general no defense, yet if the acceptor or maker, on action brought, pay without any previous demand, the court will take the question of costs into consideration. Byles on Bills (6th ed.), p. 293.

Necessity of demand to charge indorsers.— See the following cases:

United States.— Magruder v. Union Bank, 3 Pet. 90, 7 L. Ed. 612; January v. Duncan, Fed. Cas. No. 7,217, 3 McLean, 19.

Arkansas.— Winston v. Richardson, 27 Ark. 34; Jones v. Robinson, 11 Ark. 504, 54 Am. Dec. 212.

California.— Eastman v. Turman, 24 Cal. 379.

Illinois.— Balford v. Bangs, 15 Ill. App. 76.

Indiana.— Pryor v. Bowman, 38 Iowa, 92.

Kansas.— Selover v. Snively, 24 Kan. 672.

Kentucky.— McGowan v. Bank of Kentucky, 5 Litt. 272.

Maine.— Rea v. Dorrance, 19 Me. 137.

Maryland.—Howard Bank v. Carson, 50 Md. 18; Staylor v. Ball, 24 Md. 183.

Massachusetts.—Copp v. McDougall, 9 Mass. 1; Shaw v. Griffith, 7 Mass. 494.

Missouri.— Napper v. Blank, 54 Mo. 131.

New Hampshire.— Piscataqua Exchange Bank v. Carter, 20 N. H. 246, 51 Am. Dec. 217.

New York.— Pahquioque Bank v. Martin, 11 Abb. Pr. 291; Ranson v. Mack, 2 Hill, 587; Jones v. Haight, 13 Johns. 470; Griffin v. Goff, 12 Johns. 423; Berry v. Robinson, 9 Johns. 121, 6 Am. Rep. 267; Kelly v. Theiss, 65 App. Div. 146, 72 N. Y. Supp. 467.

Ohio.— House v. Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813; Blackwell v. Montgomery, 1 Handy, 40.

Pennsylvania.— Cassidy v. Kreamer, 22 Wkly. Notes Cas. 109, 13 Atl. 744.

South Carolina.— Bank of State v. Craft, 3 McCord, 522, 15 Am. Dec. 640; Scarborough v. Harris, 1 Bay, 177, 1 Am. Dec. 609.

Texas.— Green v. Elson, 31 Tex. 159.

Virginia.— Davis v. Poland, 92 Va. 225, 23 S. E. 292.

West Virginia.— Peabody Ins. Co. v. Wilson, 29 W. Va. 28, 2 S. E. 888.

dorser has become the personal representative of the maker.[65] As will be seen hereafter, presentment at the place specified in the instrument will be sufficient to bind the indorser although no formal demand of payment has been made of the maker.[66] Since an irregular indorser who places his signature on the instrument in blank before delivery is an indorser,[67] a demand of payment must be made upon the maker to bind him as such indorser.[68] A person indorsing an instrument for the accommodation of the maker of a note cannot be charged without a demand.[69] And this is true although the indorsement was made with full knowledge of the insolvency of the maker, and for the sole purpose of giving the note credit and currency.[70] But where accommodation indorsers have under their control and management all the assets and business of the person for whose benefit they have indorsed, and whose duty it is to see that funds are provided for the payment of the debt, they are not entitled to notice of dishonor and will not be discharged by a failure to demand payment of the maker.[71] Where an instrument is indorsed in payment of or as collateral security for a debt, it has been held that a demand must be made of the maker, and unless due demand can be shown, the indorser will be discharged of his liability.[72] The obligations

65. Magruder v. Union Bank, 3 Pet. (U. S.) 90, 7 L. Ed. 612.

66. See Neg. Inst. L. (N. Y.), §§ 133 and 135, *post*. See also Roberts v. Mason, 1 Ala. 373; Gillett v. Averill, 5 Den. (N. Y.) 85. But to charge the indorser of a note payable at a bank, it must be shown that the note was at the bank, or that payment of it was demanded there on the day when it fell due. Magoun v. Walker, 49 Me. 419.

67. Neg. Inst. L. (N. Y.), § 114; *ante*, § 84.

68. Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203; Hooks v. Anderson, 58 Ala. 238, 29 Am. Rep. 745; Jones v. Goodwin, 39 Cal. 493, 2 Am. Rep. 473; Depauw v. Bank of Salem, 126 Ind. 553, 25 N. E. 705, 10 L. R. A. 46; Webber v. Matthews, 101 Mass. 481; Waterbury v. Sinclair, 26 Barb. (N. Y.) 456.

69. **Necessity of presentment to bind accommodation indorser.**—French v. Bank of Columbia, 4 Cranch (U. S.), 141, 2 L. Ed. 576; Braley v. Buchanan, 21 Kan. 274; Thielman v. Gueble, 32 La. Ann. 260, 36 Am. Rep. 267; Rea v. Dorrance, 18 Me. 137; Perry v. Green, 19 N. J. L. 61, 38 Am. Dec. 536. In the case of Perry v. Friend, 57 Ark. 437, 21 S. W. 1065, it was held that one not connected with the original consideration of a note, who indorses his name on the back, under that of the payee, after it has been delivered by the maker, not pursuant to an agreement entered into before the note was executed, or to give the maker credit with the payee, but at the latter's request, to enable him to discount the note, is simply an accommodation indorser, and not a maker or guarantor, and is discharged by failure to demand payment and give notice of dishonor to him.

70. Buck v. Cotton, 2 Conn. 126, 7 Am. Dec. 251.

71. Hull v. Myers, 90 Ga. 674, 16 S. E. 653.

72. **Where instrument is indorsed in payment or as collateral security.**—Bates v. Ryland, 6 Ala. 668; Blanchard v. Boom, 40 Mich. 566;

of a drawer of a bill of exchange are similar to those of an indorser of a promissory note, and it is well established that demand must be made of the acceptor before he can be bound upon the bill, as in the case of an indorser of a bill or note.[73] An order upon a particular fund, as by one municipal officer upon another, or by an officer of a corporation upon its treasurer, are not subject to the same rule as to presentment for payment as in the case of other commercial paper; and it has usually been held that the drawer of such an order will be liable in an action thereon, notwithstanding the failure of presentment for payment.[74] But this proposition is not universally accepted, for it has been held that such orders are analogous to bills of exchange or checks, and that the drawer cannot be bound thereon unless a demand of payment has been duly made.[75] Where the drawer is an accommodation party he cannot be charged without a demand of payment;[76] but this rule does not apply, as will be seen hereafter, to a drawer where the bill was accepted for his accommodation.[77] If a person signs or indorses a negotiable instrument, as a surety

Whitten v. Wright, 34 Mich. 92: Shipman v. Cook, 16 N. J. Eq. 251. In the case of Dayton v. Trull, 23 Wend. (N. Y.) 345, it was held that a draft or bill of exchange upon a third person, given by a debtor to a creditor who stipulates that it shall be in full satisfaction of the debt when paid, is *prima facie* evidence of payment of the original debt; and to rebut such evidence a creditor is bound to show, in an action for the recovery of the original debt, diligence in obtaining payment of the bill, and if not paid notice of nonpayment; or he must excuse the nonpayment and produce the bill to be canceled. In the case of Jones v. Savage, 6 Wend. (N. Y.) 658, a bill was given for goods purchased, and the holder having neglected to present and give notice, it was held that he could neither recover on the bill nor on the count for goods sold and delivered. See also Toby v. Barber, 5 Johns. (N. Y.) 69; Huston v. Weber, 1 Hun (N. Y.), 120.

73. French v. Bank of Columbia, 4 Cranch (U. S.), 141, 2 L. Ed. 576; Bank of Mobile v. Brown, 42 Ala. 108; Hoyt v. Seeley, 18 Conn. 353; Fair v. Peck, 81 Ill. 74; Griffin v. Kemp, 46 Ind. 172; Mize v. Godsey, 16 Ky. L. Rep. 399; Green v. Darling, 15 Me. 139; Bradford v. Fox, 39 Barb. (N. Y.) 203, 16 Abb. Pr. (N. Y.) 51; Gough v. Staats, 13 Wend. (N. Y.) 549; Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130.

When a draft on a third person is given in settlement of an antecedent debt, it is the duty of the holder to present it and to give notice of its dishonor if not paid. Manney v. Coit, 80 N. C. 300, 30 Am. Rep. 80.

74. Lyell v. La Peer County, Fed. Cas. No. 8,618; Dennis v. Table Mountain Water Co., 70 Cal. 369; Steele v. Davis County, 2 G. Greene (Iowa), 469; Crawford v. Eilly, Wright (Ohio), 453; Porter v. Dillahunty, 8 Humph. (Tenn.) 570; Gay v. Hazeltine, 18 N. H. 530; Pitman v. Breckenridge, 3 Gratt. (Va.) 127.

75. Goings v. Chapman, 18 Ind. 194; Sinclaire v. Johnson, 85 Ind. 527; Brown v. Teague, 52 N. C. 573; National Shoe & Leather Bank v. Gooding, 87 Me. 337, 32 Atl. 967; Sweet v. Swift, 65 Mich. 90, 31 N. W. 767.

76. Shirley v. Fellows, 9 Port. (Ala.) 300; Sherrod v. Rhodes, 5 Ala. 683; Merchants' Bank v. Easley, 44 Mo. 286, 100 Am. Dec. 287.

77. Neg. Inst. L. (N. Y.), § 140. See *post*, § 99 (*b*).

or guarantor, it has generally been held that a demand of the maker or acceptor is not necessary to bind the guarantor or surety.[78]

§ 91. When presentment must be made.

a. *Statutory provision.*— The Negotiable Instruments Law provides: "Where the instrument is not payable on demand, pre- "sentment must be made on the day it falls due. Where it is "payable on demand, presentment must be made within a reason- "able time after its issue, except that in the case of a bill of "exchange, presentment for payment will be sufficient if made "within a reasonable time after the last negotiation thereof."[79] The English Bills of Exchange Act requires a note payable on demand, which has been indorsed, to be presented for payment within a reasonable time after its indorsement;[80] and in the case of a bill of exchange the presentment must be made within a reasonable time after its issue, in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.[81] The Negotiable Instruments Law also provides that in determining what is a "reasonable time," or an "unreasonable time," a regard is to be had to

78. **Demand not necessary to bind guarantor.**— In the case of Donley v. Camp, 22 Ala. 695, 58 Am. Dec. 274, an indorsement on the note made before maturity was in the following form: "I assign and guaranty the within note, to J. C. for value received." It was held to be an absolute and unconditional guaranty of the note at maturity and that no demand of payment or notice of nonpayment was required to bind the guarantor. See also First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94, in which case it was held, under section 2787, of the Civil Code of California, which provided that a person who indorsed his name on the back of a nonnegotiable note, to give it credit is a guarantor, that he is liable without any previous demand or notice. Tyler v. Waddingham, 58 Conn. 375, 20 Atl. 335, 8 L. R. A. 657; Gage v. Mechanics' Nat. Bank, 79 Ill. 62; Claflin v. Reese, 54 Iowa, 544, 6 N. W. 729; Bowman v. Curd, 2 Bush (Ky.), 565; Read v. Cutts, 7 Me. 186; Parkman v. Brewster, 15 Gray (Mass.), 271; Hungerford v. O'Brien, 37 Minn. 306. 34 N. W. 161; Wright v. Dyer, 48 Mo. 525; Bloom v. Warder, 3 Neb. 476, 14 N. W. 395; Castle v. Rickley, 44 Ohio St. 490; 9 N. E. 136, 58 Am. Rep. 839.

In New York, in the case of Allen v. Rightmere, 20 Johns. (N. Y.) 365, 20 Am. Dec. 288, it was held that where the payee of a negotiable note indorsed "For value received, I sell, assign, and guaranty the payment of the within note to A. or bearer," such indorsement is an absolute engagement that the maker will pay the note when due, or that the indorser will pay it himself, and the holder is not bound to show demand of payment of the maker, as in the case of an ordinary indorsement. See also Winchel v. Newcomb, 7 Hill (N. Y.), 416, 42 Am. Dec. 82; Hough v. Gray, 19 Wend. (N. Y.) 202.

79. Neg. Inst. L. (N. Y.), § 131. For same section in statutes of other States see Appendix. Section construed in Merritt v. Jackson (Mass.), 62 N. E. 987; Creteau v. Foote & Thorne Glass Co., 40 App. Div. (N. Y.) 215, 57 N. Y. Supp. 1103.

80. English Bills of Exchange Act, § 86(1).

81. English Bills of Exchange Act, § 45(2).

the nature of the instrument, the usage or trade or business (if any) with respect to such instruments, and the facts of the particular case.

b. *Presentment where instrument is not payable on demand.*— Where a note is made payable on a certain day it is a general rule, independent of the statute, that a demand must have been made on that day, or due diligence must be shown to make such a demand, in order to bind the parties secondarily liable.[82] The Negotiable Instruments Law specifies the time of maturity of a negotiable instrument, and the rule as therein declared is the same in effect as that which exists in many other States which have not yet adopted the law.[83] Where the day, or the last day, for doing any act required or permitted to be done by the statute falls on Sunday or on a holiday, it is provided therein that the act may be done on the next succeeding secular or business day.[84] This would seem to modify the general rule as applied to the time of maturity of commercial paper.[85]

c. *Presentment of instrument payable on demand.*— Under the rule as it existed in New York prior to the enactment of the statute, a promissory note payable on demand, with interest, was regarded as a continuing security, and the indorser remained liable until the actual demand for payment, and the holder was not chargeable with neglect for omitting to make such demand within any particular time.[86] It would seem, however, that

82. Hoffman v. Hollingsworth, 10 Ind. App. 353, 57 N. E. 960; Groatman v. Delheim, 6 Me. 476; Woodbridge v. Brigham, 12 Mass. 403, 7 Am. Dec. 85; Barnes v. Vaughn, 6 R. I. 259; Garland v. West, 68 Tenn. 315.

83. Neg. Inst. L. (N. Y.), § 145.

84. Neg. Inst. L. (N. Y.), § 5.

85. See case cited under section 145 of the Negotiable Instruments Law, *post*, § 103.

86. Merritt v. Todd, 23 N. Y. 28; Pardee v. Fish, 60 N. Y. 265; Parker v. Stroud, 98 N. Y. 379.

Demand note with interest as continuing security.— In the case of Wheeler v. Warner, 47 N. Y. 519, the court distinguished the case of Merritt v. Todd, and said: "That case simply decided that an indorser on such a note bearing interest was not discharged, though no demand was made upon the maker until some three and one-half years after the making of the note. That, as between holder and indorser, such a note was not due until demand made. This rule, by the decision itself, was confined to that particular case, nor was it claimed to apply to the rights of holders of such paper as against the maker. We are not disposed to extend the rule there laid down." It was held in this case that a note payable on demand was due forthwith and that the Statute of Limitations began to run against such a note from the time it was issued. See also Howland v. Edmonds, 24 N. Y. 307; Parker v. Stroud, 89 N. Y. 379. In the case of Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, while upholding the rule that the Statute of Limitations commenced to run upon a note payable on demand in favor of the maker at its date, it was held that no cause of action arises against the indorser of a promissory note payable upon de-where the instrument was payable on demand, without interest, that it must be presented for payment by the holder within a reasonable time, in order to charge the indorser.[87] The Negotiable Instruments Law by the above section makes no distinction in the case of a note payable on demand, with interest, and it is probable that the rule as laid down in the case of Merritt v. Todd has been changed.[88] The rule as declared in the statute seems

mand, with interest, until after actual demand, and until such time the statute does not begin to run as against the indorser. But if the holder omits to make a demand of payment until the liability of the maker, or one of several makers, has been discharged by the running of the statute, the indorser is thereby discharged. It would seem, therefore, that the Court of Appeals of New York was forced to limit the effect of the decision in the case of Merritt v. Todd by holding that notwithstanding a note payable on demand, with interest, is a continuing security, that a demand for its payment must be made upon the maker within six years from its date, in order to charge the indorser.

87. Demand note without interest. — In the case of Merritt v. Todd, 23 N. Y. 28, the court said: "If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will allow, on a check or sight draft. Such a note, payable at the bank where the maker keeps his funds, would perform essentially the office of a check, imposing the duty of early presentment, in order to hold the collateral parties." See also Wethey v. Andrews, 3 Hill (N. Y.), 582.

In the case of Crim v. Starkweather, 88 N. Y. 339, a promissory note was by its terms made payable on demand after date at a bank, with interest after maturity. The note was indorsed and transferred by the payee on the day of its date. The note was presented for payment on the first and fourth days of February, 1878, nearly four years after its date, and payment was demanded and refused, and on the fourth it was protested and the indorser notified. The court held that the intent of the parties to the note was that it should be presented for payment if not immediately, at least within a very short time after its date, and that the delay in this case was sufficient to dishonor the note, and the indorser was discharged. See Home Sav. Bank v. Hosie, 119 Mich. 116, 77 N. W. 625.

88. Demand note with interest payable semi-annually.— It may be that the statute can be considered as waived in a case where a promissory note payable on demand is made payable, "with interest semi-annually." In the case of Hayes v. Werner, 45 Conn. 246, it was held that while a negotiable note payable on demand is by statute dishonored at the end of four months, if not paid, yet where such a note is on annual or semi-annual interest, it will be presumed, in the absence of evidence to the contrary, that the indorser made his indorsement with no expectation that demand of payment would be made at the end of four months, and, therefore, that he waived such demand. The court used the following language: "The note in terms was made payable, 'with interest semi-annually;' that is an unmistakable indication that all parties contemplated and intended to loan for at least the period of six months and that the note should continue for that length of time as security therefor. The defendant, therefore, could not have expected or intended that the note should be paid at the end of four months; and if not to be paid, then a demand of payment must have been an idle ceremony, which the law does not require. Indeed, if a demand had been made and payment enforced it would have defeated the manifest intention of the parties. By indorsing the note and delivering it to the plaintiff, the defendant virtually agreed that demand need not be made at the time fixed by statute. Such an agreement is presumptively a waiver; and in the ab-to be that which has existed in most of the States.[89] Where an instrument is indorsed after its maturity it is payable on demand, and within the rule of the statute, as well as the common law, a demand of payment must be made within a reasonable time after the indorsement.[90] The statute provides that where a bill of exchange is payable on demand presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. It will be noticed that under the English Bills of Exchange Act the presentment must be made within a reasonable time after the issue of the bill, in order to charge the drawer, and within a reasonable time after its indorsement, in order to render the indorser liable. The rule of the English law seems to have been departed from in our Negotiable Instruments Law. We have already considered the effect of the negotiation of an instrument payable on demand an unreasonable length of time after its issue,[91] and therein reference was made to a number of cases determining what constituted a reasonable time within which a payment of a negotiable instrument payable on demand should be made.[92]

§ 92. What constitutes a sufficient presentment.

a. *Statutory provision.*— The Negotiable Instruments Law provides: "Presentment for payment, to be sufficient, must be "made:

sence of any evidence to the contrary may reasonably be regarded as such. Not only is there no evidence to the contrary, but the facts appearing in the case strongly fortify this presumption."

89. *In re* Crawford, Fed. Cas. No. 3,364; Martin v. Winslow, Fed. Cas. No. 9,172; Lockwood v. Crawford, 18 Conn. 361; Field v. Nickerson, 13 Mass. 131; Perry v. Green, 19 N. J. L. 61, 38 Am. Dec. 536; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75. In the case of Verder v. Verder, 63 Vt. 38, 21 Atl. 611, it was held that the indorsee on an overdue promissory note payable on demand must prove demand and notice within sixty days from the time of the indorsement to him, in order to charge his indorser. The addition of the words "with interest annually" does not vary the time of payment of a note payable on demand.

90. Jones v. Robinson, 11 Ark. 504, 54 Am. Dec. 212; Sachs v. Fuller Bros. Lumber & Box Co., 69 Ark. 270, 62 S. W. 902; Kimmel v. Weil, 95 Ill. App. 15; Jones v. Middleton, 29 Iowa, 188; Goodwin v. Davenport, 47 Me. 112, 74 Am. Dec. 478; Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; Union Bank v. Ezell, 10 Humph. (Tenn.) 385. The Negotiable Instruments Law provides that 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. See Neg. Inst. L. (N. Y.), § 26; *ante*, chap. III.

91. Neg. Inst. L. (N. Y.), § 92. See *ante*, § 74, p. 367.

92. See cases cited in note number 75, on page 367.

"1. By the holder, or by some person authorized to receive "payment on his behalf;

"2. At a reasonable hour on a business day;

"3. At a proper place as herein defined;

"4. To the person primarily liable on the instrument, or if he "is absent or inaccessible, to any person found at the place where "the presentment is made."[93] This section is in substance the same as a similar provision contained in the English Bills of Exchange Act.[94]

b. *By whom made.*— The rule as stated in the statute is in every respect the same as that declared at common law. Possession of a note by a person is sufficient evidence of his authority to demand payment thereon and of giving the proper notice;[95] but the mere possession of the instrument is not sufficient to authorize an assumed agent to receive payment where the instrument is not indorsed by the payee.[96] Any person or bank receiving a note for the purpose of collection is impliedly authorized to demand payment and is for that purpose the agent of the payee.[97] If the holder of a negotiable instrument is dead, the executor or administrator of his estate should make the demand; if no such officers have been appointed the parties liable upon the instrument will not be discharged for a failure to present at maturity, provided that when they are appointed they make the demand within a reasonable time.[98] It is not necessary that the

93. Neg. Inst. L. (N. Y.), § 132.

94. English Bills of Exchange Act, 1882, § 45(3). This subsection provides that "presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as thereafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found."

95. Doubleday v. Kress, 50 N. Y. 410; Wangner v. Gremm, 169 N. Y. 421–429, 62 N. E. 569.

96. Bank of Utica v. Smith, 18 Johns. (N. Y.) 230; Cole v. Jessup, 10 N. Y. 96, 100; Burbank v. Beach, 15 Barb. (N. Y.) 326; Barr v. Leppert, 12 Hun (N. Y.), 516; Shed v. Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Morris v. Foreman, 1 Dall. (Pa.) 193, 1 Am. Dec. 235.

97. Blakeslee v. Hewett, 76 Wis. 341, 343, 44 N. W. 1105. See also Freeman's Bank v. Perkins, 18 Mo. 292. In the case of Hartford Bank v. Barry, 17 Mass. 94, a cashier without any special authority indorsed a note to another cashier, who employed a person to demand payment; it was held that a demand by such person is duly authorized. See also Church v. Barlow, 9 Pick. (Mass.) 547.

98. Blake v. McMillen, 33 Iowa, 150; White v. Stoddard, 11 Gray (Mass.), 258. In the last case upon the death of the holder of a negotiable promissory note, the executor named in his will found and filed such note three days before it became due and asked the indorsers to waive demand which was declined. The will was proved within a month, but the exec-

demand of payment of a promissory note or domestic bill of exchange should be made by a notary.[99] It is generally held, however, that a foreign bill must be protested by a notary before recovery can be had against an indorser,[1] but unless authorized by statute, or the custom or usage of the place where the presentment is made, a presentment or protest cannot be made by the clerk or deputy of a notary.[2]

c. *Presentment at reasonable hour.*— The rule of the statute that a presentment must be made at a reasonable hour on a business day is in conformity with the rule of the common law. If a bill or note is payable at a bank, presentment must be made during banking hours.[3] But if the person who is to pay the instrument is not a banker, presentment for payment may be made at any time of the day, when he may reasonably be expected to be found at his place of residence or business, though it be six, seven, or eight o'clock in the evening.[4] If the note is

utor never qualified, and an administrator was thereafter appointed, who found the note among the papers of the deceased a week after he received them, presented it the next day, and notified the indorsers of nonpayment upon the day after. It was held that the demand was seasonably made. See also Story on Promissory Notes, § 250; 1 Parsons on Notes and Bills, p. 360. In case of an insolvent holder, the presentment should be made by his agent if one be appointed, if not, the holder himself may present the instrument. Story on Promissory Notes, § 249; 1 Parsons on Notes and Bills, p. 360.

99. Smith v. Ralston, 1 Morris (Iowa), 87; Shed v. Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209.

1. Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269; Halliday v. McDougal, 20 Wend. (N. Y.) 81; Denniston v. Stewart, 17 How. (U. S.) 606; Phœnix Bank v. Hussey, 12 Pick. (Mass.) 483.

2. Presentment by clerk of notary. — In the case of Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269, it was stated: "The rule of law requiring the protest of a foreign bill of exchange is wholly founded upon the custom of merchants; but in an action against a notary for neglect to make presentment and demand, evidence that it is the common and universal usage at the place where the bill was payable for notary's clerks to make such presentment and demand, and that the bill in question was presented and demand of payment made by the clerk of the defendant, is proper and admissible. A knowledge, on the part of the plaintiff, of this usage is not necessary to its validity. See also Onondaga Bank v. Bates, 2 Hill (N. Y.), 53; Donegan v. Wood, 49 Ala. 242, 20 Am. Rep. 275; Bank of Kentucky v. Garey, 6 B. Mon. (Ky.) 626; Cribbs v. Adams, 13 Gray (Mass.), 597; Commercial Bank v. Barksdale, 36 Mo. 563.

3. Neg. Inst. L. (N. Y.), § 135. For same section in statutes of other States see Appendix.

4. Byles on Bills (16th ed.), 287; Barclay v. Bailey, 2 Campb. (Eng.) 527; Morgan v. Davison, 1 Stark. (Eng.) 114.

Reasonable hour.— In the case of Wilkins v. Jadis, 2 B. & Ad. (Eng.) 188, 1 M. & Ry. (Eng.) 41, 36 R. R. (Eng.) 540, Lord Tenterden said: "As to bankers it is established with reference to a well-known rule of trade, that a presentment out of hours of business is not sufficient; but in other cases the rule of law is that the bill must be presented at a reasonable hour. A presentment at twelve o'clock at night, when a person had retired to rest, would be unreasonable; but I cannot say that a presentment be-not in terms payable at a bank or a particular place of business, the demand may be made at the maker's dwelling-house at any hour at which, having regard to the habits and usages of the community in which he lives, he may reasonably be expected to be in a condition to attend to ordinary business, even as late as eight or nine o'clock in the evening.[5]

d. *Place of presentment.*— The proper place of presentment for payment of a bill or note is made the subject of a section of the Negotiable Instruments Law, and is considered in the next sec-

tween seven and eight in the evening is not a presentment at a reasonable time."

Except where the paper is due at a bank, the proper hours for presenting a note or bill for payment range through the whole day down to bedtime in the evening. Skelton v. Dustin, 92 Ill. 49; Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635.

In the case of Dana v. Sawyer, 22 Me. 244, 39 Am. Dec. 574, the court said: "When a bill or note is made payable at a bank, banking-house, or other place, where it is well known that business is transacted only during certain hours of the day, the law presumes that the parties intended to conform to such established course of business and requires that a demand should be made during those business hours. Parker v. Gordon, 7 East (Eng.), 385. When the bill or note is not payable at a place where there are established hours of business, a presentment for payment may be made at any reasonable hour of the day." And it was held that a demand for payment between eleven and twelve o'clock at night, by calling the maker from his bed, is insufficient and unavailing. See also McFarland v. Pico, 8 Cal. 633; Nelson v. Fotterall, 7 Leigh (Va.), 194.

It is only when presentment is at the residence that the time is extended into the hours of rest. If it is at the place of business, it must be during such hours when such places are customarily open, or, at least, while some one is there competent to give an answer. Waring v. Betts, 90 Va. 46, 53, 17 S. E. 739.

5. Estes v. Tower, 102 Mass. 65, 3 Am. Rep. 439.

Circumstances to control.— In the case of Farnsworth v. Allen, 4 Gray (Mass.), 453, Bigelow, J., said: "The note declared on not being payable at a bank, or at any place where business was transacted during certain stated hours, was properly presented to the maker at his place of residence. It was also the duty of the holder to present it within reasonable hours on the day of its maturity. No fixed rule can be established, by which to determine the hour beyond which a presentment, in such case, will be unreasonable and insufficient to charge an indorser. Generally, however, it should be made at such hour that, having regard for the habits and usages of the community where the maker resides, he may be reasonably expected to be in a condition to attend to ordinary business. In the present case, taking into consideration the distance of the place of residence of the maker from Boston, where the note was dated, and where it was held when it became due; the means that were taken to ascertain the residence of the maker, and the season of the year at which the note fell due, we are of opinion that a presentment at nine o'clock in the evening was reasonable and sufficient. It is quite immaterial that the maker and his family had retired for the night. The question whether a presentment is within a reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it reasonable or otherwise," citing Barclay v. Bailey, 2 Campb. (Eng.) 527; Triggs v. Newnham, 10 Moore (Eng.), 249; Wilkins v. Jadis, 2 B. & Ad. (Eng.) 188; Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635.

tion of this work. Under the statute a presentment is not sufficient unless it be made at a proper place as prescribed in such section of the statute.

e. *To whom made.*— The statute declares that presentment for payment must be made to the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. This proposition is, without doubt, supported by the authority of the courts and is general in its application. Presentment for payment to partners is regulated by a subsequent section of the statute and will be considered hereafter;[6] and such is also the case in respect to presentment to several persons not partners primarily liable on an instrument.[7] And if the principal debtor is dead, and no place of payment is specified, presentment must be made to his personal representative.[8] If the acceptor of a bill is absent from his place of business, demand of his clerk or bookkeeper is sufficient.[9] And it has been held that where a note was signed by "A., Agent" and bore on its face nothing to indicate who the principal was, that a demand of payment of the agent was sufficient to bind the principal, although at the time the note fell due the agency of A. had terminated.[10] Where an instrument is made payable at a bank or at any other particular place no presentment or demand is necessary, as it is sufficient if the note or bill is at that place ready to be delivered up to the party calling for and prepared to pay it.[11] A presentment to the clerk of an acceptor

6. Neg. Inst. L. (N. Y.), § 137. See *post*, p. 462.

7. Neg. Inst. L. (N. Y.), § 138. See *post*, p. 463.

8. Neg. Inst. L. (N. Y.), § 136. See *post*, p. 461.

9. Gardner v. Bank of Tennessee, 1 Swan (Tenn.), 420; Decatur Branch Bank v. Hodges, 17 Ala. 42. In the case of Luning v. Wise, 64 Cal. 410, 1 Pac. 495, where A., who held a power of attorney from B., a resident of another State, signed a note in his own behalf, and also in B.'s behalf, it was held that an indorser was liable, though the note was not presented to B. for payment.

10. Hall v. Bradbury, 40 Conn. 32. In the case of Stinson v. Lee, 68 Miss. 113, 8 South. 272, 24 Am. St. Rep. 257, 9 L. R. A. 830, it was held that in order to render an indorser liable on a note signed by one who affixes the word "agent" to his name, without disclosing his principal, payment must be demanded of, and refused by, the agent; and that demand on the principal is not sufficient. See, generally, on this subject, Brown v. Turner, 15 Ala. 832; Commercial Bank v. St. Croix Mfg. Co., 23 Me. 280.

11. 1 Parsons on Notes and Bills, p. 365. In the case of Magoun v. Walker, 49 Me. 419, it was held that to charge the indorser of a note payable at a bank it must be shown that the note was at the bank, or payment of it was demanded there on the day when it fell due; it is not sufficient to show that payment was demanded of the cashier of the bank. See also Hunt v. Maybee, 7 N. Y. 266, where it was held that when the instrument designates the maker's place of business as the

or promisor, at his counting-house, or place of business, has been held sufficient without showing any special authority given him under such circumstances.[12]

§ 93. Proper place of presentment.

a. *Statutory provision.*— The Negotiable Instruments Law contains the following provision: "Presentment for payment is "made at the proper place:

"1. Where a place of payment is specified in the instrument "and it is there presented;

"2. Where no place of payment is specified, but the address "of the person to make payment is given in the instrument and "it is there presented;

"3. Where no place of payment is specified and no address is "given and the instrument is presented at the usual place of "business or residence of the person to make payment;

"4. In any other case if presented to the person to make pay- "ment wherever he can be found, or if presented at his last known "place of business or residence."[13] This is the same as a provision contained in the English Bills of Exchange Act, with some difference in language, but none in effect.[14]

b. *Where place of payment is specified.*— The rule declared in the statute is that which exists at common law; it is well established that a presentment for payment at the place specified in the instrument is a proper presentment, and if no person is found at such place with authority to pay the instrument the presentment will be sufficient, in case of nonpayment, to bind the indorsers.[15] Cases arise where the drawer of a bill of exchange

place of payment, a demand made there of a person who states himself to be the maker is sufficient.

12. Stewart v. Elden, 2 Caines (N. Y.), 121, 2 Am. Dec. 222; Draper v. Clemens, 4 Mo. 52; Stainback v. Bank of Virginia, 11 Gratt. (Va.) 260.

13. Neg. Inst. L. (N. Y.), § 133. For the same provision in the statutes of other States see Appendix.

14. English Bills of Exchange Act, 1882, § 45 (4).

15. **Presentment at place specified in instrument.**— In the case of Buxton v. Jones, 1 Man. & Gr. (Eng.) 83, a bill of exchange was presented for payment at the door of the house where the drawee was described as living, to a lodger who was coming from the passage of the house into the street. The drawee had removed to another residence, known to the occupier of the house, but not to the lodger; and it was not shown that he had left funds for payment. It was held that the presentment was sufficient to maintain the affirmative of an issue raised on the due presentment of the bill in an action against an indorser. See also Boydell v. Harkness, 3 C. B. (Eng.) 168; Selby v. Eden, 3 Bing. (Eng.) 611; Fayle v. Bird, 6 B. & C. (Eng.) 531.

In New York it has been held that no cause of action arises against an indorser of a promissory note, payable on demand at a place specified, until demand is made in compliance with designates in the instrument the place of payment, and the decisions are that in such a case both the drawer and the indorser will be discharged unless the bill be there presented for payment at maturity; but the same decisions hold otherwise as to the maker of a note and the acceptor of a bill, the rule being that, unless the restrictive words "only and not elsewhere," or words of similar import, are added, no presentment there at maturity or afterward is necessary to charge such a party.[16] Where an in-

the terms of the contract, and due notice of nonpayment; a demand by letter is insufficient. Parker v. Stroud, 98 N. Y. 379, 50 Am. Rep. 685. The court said: "A demand of payment at the place named is an essential part of the contract so far as the indorser is concerned, and no right of action accrues to the holder until 'after demand has been made in strict compliance with the terms of the contract and due notice given of the default.' This is said to be otherwise as to the maker, for he is under a general obligation to pay the debt, and even a tender of payment by him does not discharge his obligation, although he has contracted to pay the money at a certain time and place. This has been held, so far as the maker is concerned, to have reference only to the mode of performing the contract, and the neglect of the holder to demand payment at the time and place does not discharge the debt as to the maker, but simply subjects the holder to the hazard of being defeated as to costs, upon proof by the maker of readiness to pay at the time and place mentioned." See also Wolcott v. Van Santvoord, 17 Johns. (N. Y.) 248; Woodworth v. Bank of America, 19 Johns. (N. Y.) 392; Ferner v. Williams, 37 Barb. (N. Y.) 10. If a note be payable at a particular place it is sufficient presentment if the note is there. Meyer v. Hibscher, 47 N. Y. 265; Nichols v. Goldsmith, 7 Wend. (N. Y.) 160; Woodin v. Foster, 16 Barb. (N. Y.) 146. And where a bill is payable elsewhere than at the residence of the drawee, a presentment there will not charge the drawer. Niagara Dist. Bank v. Tool Mfg. Co., 31 Barb. (N. Y.) 403.

See also the following cases:

United States.—Bank of U. S. v. Carneal, 2 Pet. (U. S.) 543, 7 L. Ed. 513; U. S. Bank v. Smith, 11 Wheat. (U. S.) 171; Sebree v. Dorr, 9 Wheat. (U. S.) 558.

Alabama.— Eason v. Isbell, 42 Ala. 456; Evans v. St. John, 9 Port. 186; Roberts v. Mason, 1 Ala. 373.

Connecticut.— Hartford Bank v. Stedman, 3 Conn. 489.

California.— Wild v. Van Valkenburgh, 7 Cal. 166.

Delaware.— Wilmington, etc., Bank v. Cooper, 1 Harr. 10.

Florida.— Spann v. Baltzell, 1 Branch, 301, 46 Am. Dec. 346.

Indiana.—Hartwell v. Candler, 5 Blackf. 215.

Louisiana.— Sanderson v. Oakey, 14 La. 373; Moore v. Britton, 22 La. Ann. 64.

Maryland.—People's Bank v. Brooke, 31 Md. 7, 1 Am. Rep. 11.

Massachusetts.— Shaw v. Reed, 12 Pick. 132.

Missouri.— Townsend v. Heer Dry-Goods Co., 85 Mo. 526; McKee v. Boswell, 33 Mo. 567; Lawrence v. Dobyns, 30 Mo. 196.

New Hampshire.— Smith v. Little, 10 N. H. 526.

New Jersey.— Freeze v. Brownell, 35 N. J. L. 285, 10 Am. Rep. 239.

North Carolina.— Bank of the State v. Bank of Cape Fear, 35 N. C. 75; Smith v. McLean, 4 N. C. 509, 7 Am. Dec. 693.

Ohio.— Mt. Vernon Bridge Co. v. Knox Sav. Bank, 46 Ohio St. 224.

Rhode Island.— Barnes v. Vaughn, 6 R. I. 259.

Tennessee.— Bynum v. Apperson, 9 Heisk. 632; Gardner v. Bank of Tennessee, 1 Swan, 420; Ocoee Bank v. Hughes, 2 Coldw. 52; Apperson v. Bynum, 5 Coldw. 341.

Virginia.— Watkins v. Crouch, 5 Leigh, 522.

16. Cox v. National Bank, 100 U. S. 704, 712; Foden v. Sharp, 4 Johns. (N. Y.) 183; Struthers v. Kendall, 41 Pa. St. 214, 80 Am. Dec. 610.

strument is made payable generally in a city or town without specifying any particular place therein where payment is to be made, it will be sufficient to present the instrument to the maker or acceptor at his place of business or residence, if he have any therein; if he have neither place of business nor of residence, then if the holder of the instrument is at the place where it is in general made payable, on the day of payment, with the instrument, ready to receive payment, it is sufficient to constitute a presentment and demand.[17] The parties to a note may agree orally, in such a case, that the note shall be payable at a particular place so far as to make a demand of payment at that place sufficient to bind the indorser.[18]

c. *Where place of payment is not specified, but address of person is given.*— Where the address of the drawee of a bill is given in a bill, or that of the maker is added as a memorandum under his name, in the absence of a specified place of payment, the bill or note should be presented at such address. This is the rule of the statute, and is also that generally established in commercial law.[19] And where a holder of a note before transferring it adds to the name of the maker a memorandum of his address without the maker's knowledge, he will be bound upon his indorsement by a demand made by a subsequent holder at the address so given.[20]

17. Meyer v. Hibsher, 47 N. Y. 265. See also Woodworth v. Bank of America, 19 Johns. (N. Y.) 391; King v. Holmes, 11 Pa. St. 456; Malden Bank v. Baldwin, 13 Gray (Mass.), 154. And see Wood v. Rosendale, 18 Ohio Cir. Ct. 247, where a note due four years from date at "Fostoria, Ohio," and the maker prior to the maturity of the note had moved from such place, it was held that the payee, who afterward became an indorser, must have contemplated a possible change of residence by the maker and to have assumed to be governed, in making presentment, by the exercise of such diligence as change of residence and circumstances might require.

Where a bill of exchange is directed to the drawee in a city generally, it can be made payable by the drawee by his acceptance at a particular place in such city. Troy City Bank v. Lauman, 19 N. Y. 477, 481.

18. Meyer v. Hibsher, 47 N. Y. 265.

19. **Presentment at address of drawee or maker.**— In the case of Hine v. Alley, 1 N. & M. (Eng.) 433, a holder of a bill carried it, when due, to the residence of the acceptor as stated in the bill, found the house closed, and inquired for the acceptor in the neighborhood, but could not hear of him; held that the bill was dishonored. But in an early English case of Saunderson v. Judge, 2 H. Bl. 509, where the place of payment was mentioned in a memorandum beneath the maker's name, it was held that the memorandum was directory only, and that presentment at the place named was not necessary, although it is assumed that a presentment at such place would bind an indorser.

20. Farnsworth v. Mullen, 164 Mass. 112, 41 N. E. 131.

d. *Where place of payment or address is not specified.*— By the terms of the statute and also under the general rule, where no place of payment is specified, and no address is given, presentment may be properly made at the usual place of business or residence of the person primarily liable on the instrument.[21] Where the maker of a note has no place of business, presentment should be made at his residence;[22] and in such case a demand at such residence is sufficient, although the maker is not at home.[23] If the principal debtor has a place of business, and presentment is made at his residence and he is not at home, the instrument should also be presented at such place of business if known to the holder,[24] although, under the statute, this would seem unnecessary to bind the indorser. The character of the office is immaterial if it appears that the principal debtor customarily transacts his business there, and that it is his principal place of business.[25] It has been held that where the maker of a note has changed his residence, the holder, after making diligent inquiry to ascertain his new residence, and being unable to ascertain it, may present the note at his former residence.[26] But the abandonment of his place of business by a maker of a note prior to its maturity will not permit of a proper presentment and demand at the place abandoned, where it appears that he has a residence in the place which is known, or which could, with reasonable diligence, have been ascertained.[27] It has been held that the maker's removal from the State before maturity, and his continued residence without

21. Levy v. Drew, 14 Ark. 334; Bank of Red Oak v. Orvis, 42 Iowa, 691; Jarvis v. Garnett, 39 Mo. 268; West v. Brown, 6 Ohio St. 542; Kirkpatrick v. McCullough, 3 Humph. (Tenn.) 171, 39 Am. Dec. 158; Apperson v. Bynum, 5 Coldw. (Tenn.) 341; Wallace v. Crilley, 46 Wis. 577, 1 N. W. 301.

22. Bank of Red Oak v. Orvis, 42 Iowa, 691; Jarvis v. Garnett, 39 Mo. 268; Apperson v. Bynum, 5 Coldw. (Tenn.) 341.

23. Bank of Red Oak v. Orvis, 42 Iowa, 691.

24. Kirkpatrick v. McCullough, 3 Humph. (Tenn.) 171, 39 Am. Dec. 158. But see Fields v. Mallett, 10 N. C. 465.

25. In the case of West v. Brown, 6 Ohio St. 542, it was held that demand of payment of a promissory note, made at an office where the maker received business calls, and directed them to be made (he having no other place of business in the city), is sufficient, although the same office was the place of business of other persons. See also Bateson v. Clark, 37 Mo. 31; Sussex Bank v. Baldwin, 17 N. J. L. 487; Winans v. Davis, 18 N. J. L. 276.

26. Central Bank v. Allen, 16 Me. 41. If the maker before maturity changes his residence to another place within the State, demand must be made either at his new domicile, or personally, to charge the indorser. Bigelow v. Kellar, 6 La. Ann. 59, 54 Am. Dec. 555.

27. Reinke v. Wright, 93 Wis. 368, 67 N. W. 737; Talbot v. National Bank, 129 Mass. 67, 37 Am. Rep. 302; Trease v. Haggin, 107 Iowa, 458, 78 N. W. 58.

the State until after the maturity oι the note, dispenses with the necessity of presentment in order to charge the indorser.[28] The rule in other States is to the effect that where a maker removes permanently from the State prior to the maturity of the note, the holder is bound to demand payment at the maker's last place of residence or business within the State, if he can find it by the use of due diligence.[29] The statute provides that in any other case, that is, where no place is specified, no address of the principal debtor is given, and such debtor has no present place of business or residence, the presentment may be made upon him wherever he can be found, or at his last known place of business or residence.[30] This evidently disposes of any question which may arise as to the sufficiency of presentment to bind the indorser, where made at the last known place of business or residence of a maker or acceptor who has departed from the State, but does not apparently affect the question of whether presentment and demand are entirely excused.

§ 94. Instrument must be exhibited.

The Negotiable Instruments Law contains the following provision: "The instrument must be exhibited to the person from "whom payment is demanded, and when it is paid must be de-"livered up to the party paying it." [31] This section of the statute is evidently declaratory of the common-law rule. A presentment and demand of payment must be made of the acceptor personally, and no such presentment can be made unless the person presenting it has the bill or note in his possession at the time.[32] The reason for the rule that a personal presentment of the in-

28. Foster v. Julien, 24 N. Y. 28, 80 Am. Dec. 320; Taylor v. Snyder, 3 Den. (N. Y.) 145; Magruder v. Bank of Washington, 9 Wheat. (U. S.) 598, 6 L. Ed. 170; Gist v. Lybrand, 3 Ohio, 307, 17 Am. Dec. 595.

29. Wheeler v. Field, 6 Metc. (Mass.) 290. In the case of Herrick v. Baldwin, 17 Minn. 209, 10 Am. Rep. 161, the court said: "The rule appears to be, that when a note is made by a resident of a State, who before its maturity removes from such State and takes up a permanent residence elsewhere, it is *sufficient* to present the note for payment at the maker's last place of residence in the State from which he has so removed. Though whether, under such circumstances, presentment and demand are not entirely excused, seems not altogether free from doubt."

30. Neg. Inst. L. (N. Y.), § 133 (4).

31. Neg. Inst. L. (N. Y.), § 134. For the same section in statutes of other States see Appendix.

32. Musson v. Lake, 4 How. (U. S.) 262; Nailor v. Bowie, 3 Md. 251; Arnold v. Dresser, 8 Allen (Mass.), 435; Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216; Shaw v. Reed, 12 Pick. (Mass.) 132; Etheridge v. Ladd, 44 Barb. (N. Y.) 69; Vergennes Bank v. Cameron, 7 Barb. (N. Y.) 143.

strument should be made to the party liable to pay it, is that he may judge of the genuineness of the instrument and of the right of the holder to receive the contents, and that upon paying the amount he may obtain immediate possession of the instrument.[33] While the maker of a note is entitled, upon demand for payment, to have the note exhibited to him, yet if he does not ask to see the note and refuses to pay it on other grounds, this is a sufficient presentment to bind the indorser.[34] It is assumed that the statute has not affected the application of this rule. It is probable that the exhibition of the instrument may be waived, and if the maker of a note or the acceptor of a bill refuses to pay it upon other grounds, then the failure to duly present it will, even under the statute, constitute a sufficient waiver, and the indorser will be bound thereby. None of the cases, however, go to the extent of holding that a presentment would be deemed sufficient, although the person making it did not have the instrument in his possession. If the instrument has been lost or destroyed, a presentment of a copy with an offer of indemnity for the protection of the maker or acceptor will be sufficient.[35]

33. Musson v. Lake, 4 How. (U. S.) 262, 274. The court in this case also said: "And the acceptor has a right to see that the person demanding payment has a right to receive it before he is bound to answer whether he will pay it or not, for notwithstanding his acceptance it may have passed into other hands before its maturity. And he, as well as the drawee, has a right to the possession of the bill upon paying it, to be used as a voucher in the settlement of accounts with the drawer." See also Vergennes Bank v. Cameron, 7 Barb. (N. Y.) 143.

34. **Instrument not exhibited but payment refused on other grounds.** Legg v. Vinal, 165 Mass. 555, 43 N. E. 518. See also King v. Crowell, 61 Me. 244; Lockwood v. Crawford, 18 Conn. 361; Porter v. Thom, 167 N. Y. 584, 60 N. E. 1119. In the case of Etheridge v. Ladd, 44 Barb. (N. Y.) 69, 72, the court said: "The holder may demand at the proper place — the place of payment named in the notice — of the person who then had charge of the store, being the only person in charge. He had the note with him, and although he did not exhibit it, yet he so described it as to leave no doubt but that the maker, if present, would have well understood of what note payment was demanded. He was there to demand payment of the note in suit, and plainly manifested his purpose, and the person of whom payment was asked understood what he desired. This was sufficient. Such demand, refusal, or omission to pay, with immediate personal notice thereof to the indorser, fixed and determined his liability, and he was thus bound to its absolute payment without a repetition of those formalities." In the case of Waring v. Betts, 90 Va. 46, 17 S. E. 739, 44 Am. St. Rep. 890, it was held that if, on demand for payment of a note, an exhibition of the instrument is not asked for, and the party on whom the demand is made declines to pay on other grounds, a formal, actual presentment of the instrument is waived. And in the case of Gilbert v. Dennis, 3 Metc. (Mass.) 495, 38 Am. Dec. 329, it was held sufficient to constitute a demand and refusal to pay a note, that the maker, on the day it becomes due, calls on the holder at his store, where the note is, and informs him that he cannot pay it and desires him to give notice to the indorser, though the note itself is not produced.

35. Hinsdale v. Miles, 5 Conn. 331.

§ 95. Presentment where instrument is payable at a bank.

a. *Statutory provision.*— The Negotiable Instruments Law provides: "Where the instrument is payable at a bank, present-"ment must be made during banking hours, unless the person "to make payment has no funds there to meet it at any time "during the day, in which case presentment at any hour before "the bank is closed on that day is sufficient."[36]

b. *Presentment at bank generally.*— As has already been said, where an instrument specifies the place of payment such place is a proper place for presentment.[37] Where, therefore, an instrument is made payable at a specified bank, presentment must be there made to charge the indorser, unless an excuse exists for not doing so.[38] If a note is payable at a certain bank it is sufficient to charge the indorser if the note is there at maturity, to be delivered if paid, and a special demand of payment is unnecessary.[39] If an instrument is made payable at any bank in a certain city it is sufficient demand on the maker to charge the indorser if the instrument is presented for payment at any bank within such city, and it is unnecessary to notify the maker at which bank presentment is to be made.[40] A presentment for

In the case of Arnold v. Dresser, 8 Allen (Mass.), 435, the court said: "But no valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence." In the case of Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326, a check was paid by the drawee on a forged indorsement, and it was held that a subsequent verbal demand of payment by the payee was good without a physical presentation of the check; the possession of the check by the drawee being sufficient.

36. Neg. Inst. L. (N. Y.), § 135. For the same section in statutes of other States see Appendix.

37. See § 93 (*b*), *ante*, p. 453.

38. People's Bank v. Keech, 26 Md. 521, 90 Am. Dec. 118; Shaw v. Reed, 12 Pick. (Mass.) 132; Arnold v. Dresser, 8 Allen (Mass.), 435; Apperson v. Bynum, 5 Coldw. (Tenn.) 341.

39. **When note is at bank where payable.**— Hildeburn v. Turner, 5 How. (U. S.) 69, 12 L. Ed. 54; Bank of the Metropolis v. Brent, Fed. Cas. No. 900, affd. in 1 Pet. (U. S.) 84, 7 L. Ed. 65; North Bank v. Abbott, 13 Pick. (Mass.) 465, 25 Am. Dec. 334; Woodbridge v. Brigham, 13 Mass. 556; Berkshire Bank v. Jones, 6 Mass. 524, 4 Am. Dec. 175; Ogden v. Dobbin, 2 Hall (U. S. Sup.), 112; Remington v. Harrington, 8 Ohio, 507. In the case of Chicopee Bank v. Phil. Bank, 8 Wall. (U. S.) 641, 19 L. Ed. 422, a bill payable at a bank was sent to the bank in a letter, and the postman laid it upon the cashier's desk, but it slipped through a crack and was not discovered until after the date of its maturity. It was held that the fact that the bill was thus really in the bank is not sufficient to constitute a valid presentment.

40. Boit v. Corr, 54 Ala. 112; Allen v. Avery, 47 Me. 287; Langley v. Palmer, 30 Me. 467, 50 Am. Dec. 634; Way v. Butterworth, 108 Mass. 509; Hampden Fire Ins. Co. v. Davis, 13 Gray (Mass.), 156; Walden Bank v. Baldwin, 13 Gray (Mass.), 154, 74 Am. Dec. 627; North Bank v. Abbott, 13 Pick. (Mass.) 465, 25 Am. Dec. 334.

payment to the cashier of a bank outside of the office or the place of business of the bank is insufficient to bind the indorser, where by the terms of the instrument it is made payable at the bank.[41] If prior to the maturity of the instrument the bank where it is made payable has ceased to transact business, and another bank is doing business at the same place, a presentment at such place will be sufficient.[42]

c. *Presentment during business hours.*— The above section of the statute requires a presentment to be made of an instrument payable at a bank during the regularly established banking hours of such bank. This applies generally where it is shown that the person liable upon the instrument has funds at the bank sufficient to meet the payment of the note. The maker of a note or the acceptor of a bill has until the close of the banking hours of the day of the maturity of the instrument to deposit the money for the payment thereof;[43] the instrument must, therefore, remain at the bank until the close of banking hours.[44] It has been held that the rule that when a note or bill is payable at a bank or at a banker's, it must be presented within business hours, is subject to the qualification that if presented after that time, while any of the officers are present to give an answer at the time of the demand, it will be sufficient;[45] but under the statute and in ac-

Presentment at trust company.— Nash v. Brown, 165 Mass. 384, 43 N. E. 180, was where an action was brought upon a promissory note made "payable at any bank in Boston." The note was presented for payment at the office of the Massachusetts Loan and Trust Company in Boston, and was duly protested by a notary public for nonpayment. The question was whether such a trust company was a bank, as that word was used in the note. The court said: "We assume that the trust company has the power to discount commercial paper, and to perform many other acts which banks of issue and deposit usually perform. But our statutes make a distinction between trust companies organized under our laws, and banks, and we are not aware that such trust companies are commonly called banks, or that there is any well-established custom to present promissory notes and bills of exchange payable at a bank to such trust companies for payment. The present act discloses no evidence of any such custom. We are of the opinion that the presentment at the office of the trust company is not sufficient to charge an indorser on the note."

41. Peabody Ins. Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888.

42. Roberts v. Mason, 1 Ala. 373; Central Bank v. Allen, 16 Me. 41. In the case of Waring v. Betts, 90 Va. 46, 17 S. E. 739; 44 Am. St. Rep. 890, it is held that although a note is made payable at a bank, presentment and demand for payment at the bank within banking hours is excuse if the bank had ceased to exist, and in such case presentment to and demand on the indorser of such note and manager of the defunct bank, made at his residence at 5:30 in the afternoon is sufficient to charge him.

43. Church v. Clark, 21 Pick. (Mass.) 310; Harrison v. Crowder, 14 Miss. 464, 14 Am. Dec. 290.

44. Planters' Bank v. Markham, 6 Miss. 397, 37 Am. Dec. 162. But see Thorpe v. Peck, 28 Vt. 127.

45. 1 Parsons on Notes and Bills, pp. 418, 419; Reed v. Wilson, 1 N. J. L. 29.

cordance with the weight of authority, presentment must be made during banking hours, unless the person required to pay the instrument has no funds at the bank to meet it, at any time during the day. Where such person is without funds at the bank, the presentment will be sufficient to bind the indorser, if it be made at any time before the bank is actually closed and while some person having authority is at the bank upon whom the presentment can be made.[46]

§ 96. Presentment where principal debtor is dead.

The Negotiable Instruments Law provides: "Where the per-"son primarily liable on the instrument is dead, and no place of "payment is specified, presentment for payment must be made "to his personal representative, if such there be, and if, with "the exercise of reasonable diligence, he can be found." [47] The rule of the statute is supported by the authorities. It has been declared that when the maker of a note dies, before it becomes payable, the holder should make inquiry of his personal representative, if there be one, to present the note on its maturity to him for payment.[48] The presentment to the personal representative of the deceased must be made notwithstanding the fact that the indorser and the personal representative are one and the same person.[49] If there be no personal representative, demand for payment should be made at the former dwelling-house or place of business of the deceased.[50]

§ 97. Presentment to persons liable as partners.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where the persons primarily liable on the instru-"ment are liable as partners, and no place of payment is speci-

46. Allen v. Avery, 47 Me. 287; Shepherd v. Chamberlain, 8 Gray (Mass.), 225; Cohea v. Hunt, 10 Miss. 227, 41 Am. Dec. 589; Oothout v. Ballard, 41 Barb. (N. Y.) 33. A note was made payable at a bank and was presented fifteen minutes after banking hours in the usual course of business; it was held a sufficient presentment. Bank of Utica v. Smith, 18 Johns. (N. Y.) 230.

47. Neg. Inst. L. (N. Y.), § 136. For the same section in statutes of other States see Appendix.

48. Gower v. Moore, 25 Me. 16. In this case it is also held that the knowledge of the indorser that the note would not be paid on presentment, that the maker had died, and his estate was insolvent, would not relieve the holder from his obligation to make the presentment and give due notice of its dishonor.

49. Magruder v. Union Bank, 3 Pet. (U. S.) 87.

50. Washington Bank v. Reynolds, Fed. Cas. No. 954, 2 Cranch (U. S.), 289; Hoff v. Hatch, 2 Disney (Ohio), 63.

"fied, presentment for payment may be made to any one of them, "even though there has been a dissolution of the firm."[51] The rule as declared in the statute is that which obtains at common law and is in conformity with the further rule that presentment for payment, to be sufficient, must be made to the person liable on the instrument.[52]

b. *General rule.*— Where a partnership is the maker of a note or the acceptor of a bill of exchange, a presentment of payment to one member of the partnership is sufficient to charge the indorser.[53] The rule as to negotiable instruments executed by partners is different from that in a case where several persons who are not partners are primarily liable on such instruments, as will appear in the next section. The general rule is that where the acceptance of a bill of exchange is by partners, then the presentment for payment should be made at their place of business, or at the dwelling-house of either of them.[54] The rule applies where the partnership is dissolved. The reason for this exists in the fact that after the dissolution of a partnership there continues that common interest in past transactions, so that a joint power and authority in relation thereto continues, and while, after dissolution, no member of the late firm can by his act create a new liability against his former copartners or bind them to an alleged liability, or revive an extinguished one, yet he may do some acts which shall affect and be binding upon them, when such acts are confined to matters in which they all still have a common interest and are under a common liability.[55]

51. Neg. Inst. L. (N. Y.), § 137. For the same section in statutes of other States see Appendix.

52. Neg. Inst. L. (N. Y.), § 132 (4).

53. **Presentment to member of firm.** — In the case of Gates v. Beecher, 60 N. Y. 518, 19 Am. Rep. 207, the court said: "No place of payment was named in the note. In such case, demand of payment at the usual place of business of the maker, though he be absent, is sufficient; or at his residence; or to him in person. And where such a note is made by a partnership, a demand of one of the members in person, or a demand at the usual place of business of the partnership, is sufficient." And in the case of Erwin v. Downs, 15 N. Y. 375, it was held that presentment to one of two persons, who by the signature to a promissory note purport to constitute a partnership firm, is sufficient to charge the indorser, although such person and her presumptive partner are married women. See also Fourth Nat. Bank v. Heuschen, 52 Mo. 207; Hunter v. Hempstead, 1 Mo. 67, 13 Am. Dec. 468; Shed v. Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; Crowley v. Barry, 4 Gill (Md.), 194; Mount Pleasant Branch of State Bank v. McLeran, 26 Iowa, 306.

54. Otsego County Bank v. Warren, 18 Barb. (N. Y.) 290.

55. Gates v. Beecher, 60 N. Y. 518, 19 Am. Rep. 207. See also Brown v. Turner, 15 Ala. 832; Barry v. Crowley, 4 Gill (Md.), 194; Greatrake v. Brown, Fed. Cas. No. 5,743, 2 Cranch (U. S.), 541.

In the case of Fourth Nat. Bank v.

Where one member of a partnership dies prior to the time of payment of a bill or note, presentment for payment to the surviving partner is sufficient.[56]

§ 98. Presentment to joint debtors.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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."[57] This is the general rule, although there have been cases to the effect that to charge an indorser of the note of joint makers, who are not partners, demand made on one of them would be sufficient.[58] There is, however, no doubt but that the weight of authority supports the rule as declared in the statute.[59]

Heuschen, 52 Mo. 207, it was held that a partnership, though dissolved, is still in existence so far as the question of demand and protest of their negotiable paper and notice thereof is concerned; and a demand made on one of the partners, or made at a place which one of the partners said was their place of business, is good.

56. Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635.

57. Neg. Inst. L. (N. Y.), § 138. For the same section in statutes of other States see Appendix.

58. Harris v. Clark, 10 Ohio, 5. This case was limited to a certain extent by the case of Greenough v. Smead, 3 Ohio St. 415, 422. In the case of Shed v. Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209, it appeared that a demand was made upon one of the several makers of a negotiable promissory note. This was held sufficient, but the question as to the sufficiency of the presentment upon one of the makers was not considered. The question arose as to the authority of the person making the demand. It would seem, therefore, that the statement of the court as to the presentment upon one of the several makers was outside of the case.

59. Tayloe v. Davidson, Fed. Cas. No. 13,769, 2 Cranch (U. S.), 434; Bank of Red Oak v. Orvis, 40 Iowa, 332; Blake v. McMillen, 22 Iowa, 358; Union Bank v. Willis, 8 Metc. (Mass.) 504, 41 Am. Dec. 541; Arnold v. Dresser, 8 Allen (Mass.), 435; Britt v. Lewson, 15 Hun (N. Y.), 123; Shutts v. Fingar, 100 N. Y. 539; Benedict v. Shomieg, 13 Wash. 476, 43 Pac. 374.

In the case of McClellan v. Bishop, 42 Ohio St. 113, it appeared that a husband and wife had executed their joint note, but before maturity the husband had deserted the wife and his whereabouts could not be ascertained. It was held that a demand on the wife was sufficient to charge an indorser.

Distinction between partnership and joint makers.— In the case of Gates v. Beecher, 60 N. Y. 518, 19 Am. Rep. 207, Judge Folger said: "It is seen, therefore, that there is a distinction between the case of a note of joint makers who are not partners, and a note of persons who are still partners at the maturity of the note. That distinction rests upon the fact that partners are but one person in legal contemplation; that each partner, acting in such capacity, is not only capable of performing what all can do, and of receiving and paying out that which belongs to all, but by such acts necessarily binds them all; that, as incident to such joint relations, all of the partners are affected by the knowledge of one. These things do not pertain to the relation of joint makers who are not partners. Hence, while a demand of one partner is equivalent to a demand of all, a demand of one of joint makers not partners is not. And so a demand upon one partner is sufficient, because he represents the firm, and a

§ 99. When presentment not required to charge drawer or indorser.

a. *When not required to charge drawer; statutory provision.*— The Negotiable Instruments Law provides that: "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." [60] Under the English Bills of Exchange Act, presentment for payment is dispensed with as regards the drawer, where the drawee or acceptor is not bound as between himself and the drawer to accept and pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.[61] It is a well-established rule that where the drawer of a bill has no funds in the hands of the drawee, or any reasonable expectation of having any, presentment for payment to the drawee is not necessary to charge the drawer.[62]

There are some exceptions to the general rule that demand is not necessary where it is shown that the drawer did not have sufficient funds in the hands of the drawee with which to meet the bill. If the drawer has any funds or property in the hands of the drawee, or there is a fluctuating balance between them in the

dishonor by one is a dishonor by all, and each is presumed to have authority to act for the others; while in the case of a note of joint makers not partners, the indorser has a right to rely upon the responsibility of all and each, and may insist upon a dishonor by each."

60. Neg. Inst. L. (N. Y.), § 139. For the same section in statutes of other States see Appendix.

61. English Bills of Exchange Act, 1882, § 46 (2) (c).

62. **Presentment where drawer has no funds in hands of drawee.**— See the following cases:

United States.— Dickins v. Beal, 10 Pet. 572, 9 L. Ed. 538.

Alabama.— Stewart v. Desha, 11 Ala. 844.

Arkansas.— Sullivan v. Readman, 23 Ark. 14.

Illinois.— Walker v. Rogers, 40 Ill. 278, 89 Am. Dec. 348; Lawrence v. Schmidt, 35 Ill. 440, 85 Am. Dec. 371; Kupfer v. Galena Bank, 34 Ill. 328, 85 Am. Dec. 309.

Indiana.— Culver v. Marks, 122 Ind. 554, 23 N. W. 1086, 17 Am. St. Rep. 377, 7 L. R. A. 489; Fletcher v. Pierson, 69 Ind. 281.

Iowa.— Kimball v. Bryan, 56 Iowa, 632, 10 N. W. 18.

Maine.— Burnham v. Spring, 22 Me. 495.

Maryland.— Orear v. McDonald, 9 Gill, 350, 52 Am. Dec. 703.

Massachusetts.— Beauregard v. Knowlton, 156 Mass. 395, 31 N. E. 389; Savage v. Merle, 5 Pick. 83.

Missouri.— Merchants' Bank v. Easley, 44 Mo. 286, 100 Am. Dec. 287.

New York.— Dollfus v. Frosch, 1 Den. 367; Nobley v. Clark, 28 Barb. 390; Healey v. Gilman, 1 Bosw. 235; Fitch v. Redding, 4 Sandf. 130; Mohawk Bank v. Broderick, 10 Wend. 304.

Ohio.— Miser v. Trovinger, 7 Ohio St. 281.

Pennsylvania.— Callen v. Fawcett, 58 Pa. St. 113; Case v. Morris, 31 Pa. St. 100.

Rhode Island.—Arborn v. Bosworth, 1 R. I. 401.

South Carolina.—Hubble v. Fogartie, 3 Rice, 413, 45 Am. Dec. 775.

Tennessee.—Golladay v. Bank of the Union, 2 Head, 57; Oliver v. Bank of Tennessee, 11 Humph. 74.

Texas.— Lewis v. Parker, 33 Tex. 121; Kottwitz v. Alexander, 34 Tex. 689.

Wisconsin.— Mehlberg v. Tisher, 24 Wis. 607.

course of their transactions, or a reasonable expectation that the bill would be paid; or if the drawee has been in the habit of accepting the bills of the drawer without regard to the state of their accounts; or if there was a running account between them, then there must be a presentment of the bill, and the drawer is entitled to notice of dishonor.[63] The fact that the drawer of a bill had no funds in the hands of an acceptor does not excuse a presentment of the bill at maturity, where it appears that the acceptor is indebted to the drawer;[64] such an indebtedness constitutes a fund against which the drawer had a right to draw.[65]

63. **Reasonable ground to believe that bill will be accepted.**— In Dickens v. Beal, 10 Pet. (U. S.) 572, 577, 9 L. Ed. 538, the court says: "In all such cases the drawer is considered as justified in drawing; as so far having a right to draw that 'the transaction cannot be denominated a fraud; for in such a case it is a fair commercial transaction, in which the drawer has a reasonable expectation that his bill will be honored; and he is entitled to the same notice as a drawer with funds, or authority to draw without funds.' But unless he draws under some such circumstances, his drawing without funds, property, or authority, puts the transaction out of the pale of commercial usage and law; and as he can in no wise suffer by the want of notice of the dishonor of his drafts, that is deemed an useless form. * * * In a case where he has no fair pretense for drawing there is no person on whom he can have a legal or equitable demand, in consequence of the nonpayment or nonacceptance of the bill." See also, as to reasonable expectation that the bill will be paid. Orear v. McDonald, 9 Gill (Md.), 350, 52 Am. Dec. 703. Demand must be made if any funds had been in hands of drawer from the time of making the bill until it becomes due. Richie v. McCoy, 21 Miss. 541. Fluctuating balance in the hands of drawee makes necessary a demand. Commercial Bank v. Barksdale, 36 Mo. 563. A charge to a jury that if there was an agreement between a drawer and the drawees that they would accept his drafts, or a course of dealing between them in which the drawees were accustomed to accept his drafts without reference to the state of their mutual accounts, he was entitled to a demand and notice, was held no error. Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866.

And as to what constitutes reasonable ground to believe that a bill will be accepted, see the following additional cases:

United States.— French v. Bank of Columbia, 4 Cranch, 141, 2 L. Ed. 576; Olshausen v. Lewis, Fed. Cas. No. 10,507, 1 Biss. 419; *In re* Brown, Fed. Cas. No. 1,985, 2 Story, 502.

Alabama.— Hill v. Norris, 2 Stew. & P. 114.

Florida.— Joseph v. Salomon, 19 Fla. 623.

Illinois.— Welch v. Taylor, 82 Ill. 579; Walker v. Rogers, 40 Ill. 278, 89 Am. Dec. 348; Krupfer v. Galena Bank, 34 Ill. 328, 85 Am. Dec. 309.

Iowa.— Kimball v. Bryan, 56 Iowa, 632, 10 N. W. 218.

Kentucky.— Clark v. Castleman, 1 J. J. Marsh. 69.

Maryland.— Orear v. McDonald, 9 Gill, 350, 52 Am. Dec. 703.

Massachusetts.—Grosvenor v. Stone, 8 Pick. 79; Stanton v. Blossom, 14 Mass. 116, 7 Am. Dec. 198.

New York.— Robinson v. Ames, 20 Johns. 146, 11 Am. Dec. 259; Cruger v. Armstrong, 3 Johns. Cas. 5.

North Carolina.— Austin v. Rodman, 8 N. C. 195, 9 Am. Dec. 630.

Texas.— Cole v. Wintercost, 12 Tex. 118; Durrum v. Hendrick, 4 Tex. 495.

64. Walker v. Rogers, 40 Ill. 278, 89 Am. Dec. 348.

65. Thackray v. Blackett, 3 Campb. (Eng.) 164.

The rule does not apply in an action by a holder against the indorser of a bill; in such case a demand of payment from the drawee must be proved, although the drawer had no funds in the hands of the drawee and no expectation that the bill would be paid.[66]

b. *When not required to charge indorser.*— The Negotiable Instruments Law provides that: "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 pre- "sented."[67] A similar provision is contained in the English Bills of Exchange Act.[68] This is declaratory of the common law. It is a well-established rule, independent of the provision of the statute, that an indorser for whose benefit an accommodation note was made, being bound to provide funds to meet it at maturity, is not released by lack of presentment, protest, or notice.[69] Where the indorser was the payee for whose benefit the note was made, demand on the accommodation maker is unnecessary to charge such indorser.[70] Accommodation makers of a note signed jointly with the principal maker are not discharged for a failure to demand payment of the principal maker.[71]

66. Slack v. Longshaw, 8 Ky. L. Rep. 166; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; Denny v. Palmer, 27 N. C. 610; Harwood v. Jarvis, 5 Sneed (Tenn.), 375.

67. Neg. Inst. L. (N. Y.), § 140. For the same section in statutes of other States see Appendix.

68. English Bills of Exchange Act, 1882, § 46(2) (*d*), which provides that "Presentment for payment is dispensed with (*d*) as regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he had no reason to expect that the bill would be paid if presented."

69. **Presentment not required where indorser is party accommodated.**— American Nat. Bank v. Junk Bros. Lumber, etc., Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492. And in the case of Risk v. Bridgeford, 15 Ky. L. Rep. 206, it was held that, although due notice of dishonor is ordinarily a condition precedent to the liability of an indorser, if the indorser is himself the accommodated instead of the accommodating party, he is not entitled to notice because he is under obligation to take up the bill, and has no remedy on so doing against any other party. See also Sale v. Branch Bank of Decatur, 1 Ala. 425; Holman v. Whiting, 19 Ala. 703; First Nat. Bank v. Ryerson, 23 Iowa, 508; Black v. Fizer, 10 Heisk. (Tenn.) 48; Furth v. Baxter, 24 Wash. 608, 64 Pac. 798.

70. Torrey v. Foss, 40 Me. 74; Blenderman v. Price, 50 N. J. L. 296, 12 Atl. 775. Nor is an accommodation maker discharged for want of demand for payment of the payee, for whose benefit the note was made, when it appears that it was indorsed without any disclosure of the fact. Bank of Montgomery v. Walker, 9 Serg. & R. (Pa.) 229, 11 Am. Dec. 709. But if the holder had notice that it was an accommodation note of the maker for the benefit of the payee, the maker is entitled to notice of nonpayment. Connerly v. Planters & Merchants' Bank, 66 Ala. 432. This latter case is in conflict with the earlier Virginia case of Hansborough v. Gray, 3 Gratt. (Va.) 356.

71. Marion Nat. Bank v. Phillips (Ky. 1896), 35 S. W. 910.

§ 100. When delay in making presentment is excused.

a. *Statutory provision.*— The Negotiable Instruments Law provides as follows: "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 fault, mis-"conduct, or negligence. When the cause of delay ceases to "operate, presentment must be made with reasonable diligence." [72] This is also the rule as contained in the English Bills of Exchange Act.[73] No change is made in the general rule by the statute. It has been recognized by all the leading text-writers [74] and is supported by the authority of the courts.[75]

b. *Circumstances causing delay.*— The existence of a malignant and contagious disease in the place where the instrument is payable would be a valid excuse for a failure to present at that place.[76] The sickness of the holder of an instrument will excuse a delay in the presentment thereof, if it is of so severe a nature as to preclude him from making such presentment or directing others to make it;[77] but the absence of the holder from his home at the time of the maturity of the instrument will not excuse the delay.[78] Where a bill payable at a certain place was deposited in a post-office by the holder in ample time to reach such place before the day of its payment, the delay in the delivery of such bill caused by the mistake of the post-office officials will be excused.[79]

72. Neg. Inst. L. (N. Y.), § 141. For same section in statutes of other States see Appendix.

73. English Bills of Exchange Act, 1882, § 46(1).

74. On this subject Chitty (chap. 9 [8th ed.], 422), says: "Provided the party entitled to a bill or note produce it, as soon as the impediment has been removed, and, in the meantime, takes every step in his power to obtain payment at the appointed time, a delay in presenting the instrument itself at maturity may be excused, on account of any accident or circumstance not attributable to the party's own fault. Thus, it has been considered, that the detention of the bill by contrary winds, or the holder's having been robbed of the bill, or the like, would afford an adequate excuse, provided he present it as soon afterward as he is able. So the occupation of the country by an enemy will constitute an adequate excuse for delay." See also Story on Bills of Exchange, § 327.

75. Windham Bank v. Norton, 22 Conn. 213, 56 Am. Dec. 397; Barker v. Parker, 6 Pick. (Mass.) 80; Benton v. Martin, 31 N. Y. 382.

76. Hanauer v. Anderson, 16 Lea (Tenn.), 340; Tunno v. Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 14.

77. Wilson v. Senier, 14 Wis. 380.

78. McCrummen v. McCrummen, 5 Mart. (N. S.) (La.) 159.

79. Windham Bank v. Norton, 22 Conn. 213, 56 Am. Dec. 397. In this case the court said: "The general rule is that it must be presented for payment, on the very day on which, by law, it becomes due, and that, unless the presentment be so made, it is a fatal objection to any right of recovery against the indorser. But, although this is the general rule, it is not an universal one, and prevails only under the qualification, which is a part of the rule itself, that there is

§ 101. When presentment may be dispensed with.

a. *Statutory provision.*— The Negotiable Instruments Law provides as follows: "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 expressed or implied."[80] This provision is also contained in the English Bills of Exchange Act.[81] This act further provides that "the fact that the holder has reason to believe that the bill will on presentment be dishonored does not dispense with the necessity for presentment."[82] The rule of the statute is in substantially all respects declaratory of the common law.

b. *Exercise of reasonable diligence.*— It is a well-established rule that if the residence or place of business of the person primarily liable upon a negotiable instrument is not known and cannot be ascertained by reasonable diligence, and if such person cannot be found after a diligent search, a failure to present the instrument to him for payment will not relieve the indorser.[83] It has been held that if the maker has no known residence or place of business, the holder will be excused from making any demand whatever.[84] But to excuse the failure to demand payment it must be shown that due diligence was used to ascertain the whereabouts of the maker, or the location of his residence or place of business.[85] The holder of an instrument in exercising due diligence to make a demand is not required to go outside of the State; so if the maker or acceptor departs from the State before the maturity of the instrument, and leaves to the knowl-

negligence or want of reasonable diligence in not making such presentment. The whole rule, therefore, more properly stated is, that the presentment must be made on the day on which the bill becomes due, unless it is not in the power of the holder, by the use of reasonable diligence, so to present it."

80. Neg. Inst. L. (N. Y.), § 142. For the same section in statutes of other States see Appendix.

81. English Bills of Exchange Act, 46(2), *a*, *b*, and *c*.

82. English Bills of Exchange Act, 46(2-*a*).

83. Steward v. Eden, 2 Caines (N. Y.), 121, 2 Am. Dec. 222; Duncan v. McCullough, 4 Serg. & R. (Pa.) 480; Galpin v. Hurd, 3 McCord (S. C.), 394.

The fact that the maker of a note could not be found in the city wherein it was executed does not excuse a demand of payment, as against the indorser. Hahn v. Brown, 101 Cal. 445, 35 Pac. 1035; Woodruff v. Daggett, 20 N. J. L. 526.

84. Adams v. Leland, 30 N. Y. 309; Ratcliff v. Planters' Bank, 2 Sneed (Tenn.), 424; Shepherd v. Citizens' Ins. Co., 8 Mo. 272; McKee v. Boswell, 33 Mo. 567.

85. Otis v. Hussey, 3 N. H. 346; Davis v. Eppler, 38 Kan. 629, 16 Pac. 793.

edge of the holder no person to represent him, a demand will be unnecessary to bind the indorser.[86] Where the maker of a note has absconded before its maturity, a demand of payment will be excused.[87] As to what will constitute reasonable diligence the circumstances in each particular case must control. Where the holder of a note makes a diligent inquiry of all the parties thereto within his reach, and he is unable to ascertain from them the residence of the maker, a personal demand on the maker will be excused.[88] But if the inquiry by the holder to ascertain the residence of the maker of the note is confined merely to the place where the note is dated sufficient diligence is not shown to charge the indorser.[89]

86. Magruder v. Bank of Washington, 9 Wheat. (U. S.) 598, 6 L. Ed. 170; Whitely v. Allen, 56 Iowa, 234, 9 N. W. 190; Caldwell v. Porter, 17 N. H. 27; Adams v. Leland, 30 N. Y. 309; Gist v. Lybrand, 3 Ohio, 307, 17 Am. Dec. 595; Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206; Hale v. Burr, 12 Mass. 86; Taylor v. Snyder, 3 Den. (N. Y.) 145, 45 Am. Dec. 457; Bruce v. Lytle, 13 Barb. (N. Y.) 163; Lehman v. Jones, 1 Watts & S. (Pa.) 126, 37 Am. Dec. 455; Gillespie v. Hannahan, 4 McCord (S. C.), 503; Ratcliff v. Planters' Bank, 2 Sneed (Tenn.), 425.

87. **Circumstances under which demand may be dispensed with.**—In the case of Taylor v. Snyder, 1 Den. (N. Y.) 145, 150, the court in giving its opinion upon this subject uses the following language: "Where a promissory note is not made payable at any particular place, the general rule of law is that in order to charge the indorser payment must be demanded of 'the maker personally, or at his dwelling-house or other place of abode, or at his counting-house or place of business.' But, although such is the general rule, yet, under various circumstances, a demand in any form or manner may be dispensed with. It is a question of diligence, and if a demand is known to be impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder. Thus where the maker has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold the indorser. Where the maker is a seaman on a voyage, having no domicile in the State, the indorser is liable without a demand being made (Barnett v. Wills, 4 Leigh [Va.], 114), but, although the maker may be absent on a voyage, if he has a domicile in the State, payment must be demanded there. Dennie v. Walker, 7 N. H. 199; Whitter v. Graffam, 3 Me. 82. In other cases where the maker has no known residence or place at which the note can be presented for demand, the holder will in like manner be excused from making any demand whatever. But in all such cases, the reason for not making a demand must be shown on the trial of the cause. It must appear that the maker had absconded, was at sea, or had no known domicile or place where the note would be presented. The rule is strict, that a demand must be made, or a proper excuse shown for its omission."

88. Staylor v. Ball, 24 Md. 183. In the case of Adams v. Leland, 5 Bosw. (N. Y.) 411, affd. in 30 N. Y. 309, it was held that where the notary went to the last place of business of the makers, and was sent from there to another place, and was there told that the makers had removed to the West, the notary used reasonable diligence in ascertaining the whereabouts of such makers. See also Belmont Bank v. Patterson, 17 Ohio, 78.

89. Hartford Bank v. Green, 11 Iowa, 476. Where a note was lodged at a bank for collection, and demand for payment was made there with inquiry of the officers as to the residence of the maker, the directors were at

c. *Insolvency of principal debtor.*— The general rule, supported by the weight of authority, is that the mere insolvency of the drawee or acceptor of a bill of exchange is not an excuse for the neglect to present it for payment,[90] and it seems to have been held that the insolvency of the maker of a promissory note, although known to the indorser, will not dispense with demand of payment.[91] But there are a number of authorities which maintain the doctrine that where the maker of a note is insolvent when it falls due, or is without property sufficient to pay it, the holder has an immediate right of action against the indorser, though he had knowledge of such insolvency, without a preliminary demand on the maker.[92] But even under this doctrine the reputed insolvency of the maker is not sufficient to dispense with the demand; it must be such an absolute and notorious insolvency as leaves no doubt of the fact.[93]

d. *Waiver of presentment.*— It is the right of an indorser or drawer that a demand should be made upon the person primarily liable on the instrument, but notice of nonpayment being for his benefit may be waived by him.[94]

The right of demand and notice is not a part of the contract, but is a step in the legal remedy, and may be waived at any time.[95] A waiver may be made in behalf of an indorser or drawer by one of a partnership,[96] or by a duly authorized agent;[97] the waiver may

once consulted, and her name was not found. No inquiry was made of the actual holder of the note and it appeared that the maker, being a married woman, kept a boarding-house in the city; it was held that due diligence had not been used in presenting the note for payment. Packard v. Lyon, 5 Duer (N. Y.), 82.

90. Smith v. Miller, 52 N. Y. 545; Jackson v. Richards, 2 Caines (N. Y.), 343; Hunt v. Wadleigh, 26 Me. 271, 45 Am. Dec. 108; Hawley v. Jette, 10 Ore. 31, 45 Am. Rep. 129.

91. Phipps v. Harding, 70 Fed. Cas. No. 468, 17 C. C. A. 203; Adams v. Torbert, 6 Ala. 865; Buck v. Cotton, 2 Conn. 126, 7 Am. Rep. 251; Kimmel v. Weil, 95 Ill App. 15; Groton v. Dallheim, 6 Me. 476; Farnum v. Fowle, 12 Mass. 89, 7 Am. Dec. 35; Whitten v. Wright, 34 Mich. 92; Jackson v. Richards, 2 Caines (N. Y.), 343; Moore v. Alexander, 63 App. Div. (N. Y.) 100, 71 N. Y. Supp. 420; O'Neil v. Meighan, 33 Misc. (N. Y.) 613, 68 N. Y. Supp. 888.

92. Forbes v. Rowe, 48 Conn. 413; Hawkinson v. Olson, 48 Ill. 277; Couch v. First Nat. Bank, 64 Ind. 92; Gibbs v. Cameron, 9 Serg. & R. (Pa.) 198, 11 Am. Dec. 699; McClellan v. Clark, 2 Brev. (S. C.) 106. But see *contra*, Allwood v. Haseldon, 2 Bailey (S. C.), 457.

93. Oliver v. Munday, 3 N. J. L. 982; Keddell v. Ford, 3 Brev. (S. C.) 178, 6 Am. Dec. 569.

94. Stanly v. McKelrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; Robinson v. Barnett, 19 Fla. 670, 45 Am. Rep. 24; Pollard v. Bowen, 57 Ind. 232; Taunton Bank v. Richardson, 5 Pick. (Mass.) 436; Emery v. Hobson, 62 Me. 578, 16 Am. Rep. 513; Power v. Mitchell, 7 Wis. 161.

95. Barclay v. Weaver, 19 Pa. St. 396, 57 Am. Dec. 661.

96. Darling v. March, 22 Me. 184; Driggs v. Driggs, 11 N. Y. St. Rep. 256.

97. Whitney v. South Paris Mfg. Co., 39 Me. 316.

be by a parol agreement made before the instrument falls due.[98] The Negotiable Instruments Law provides that: "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 dis-"honor."[99] When a negotiable instrument contains in the body thereof an express waiver of demand and notice, it forms a part of the contract which is binding upon each indorser.[1] A waiver may be implied from an agreement or promise made by a party liable upon the instrument to pay it at maturity.[2] An agreement

98. Maples v. Traders' Deposit Bank, 15 Ky. L. Rep. 879; Keyes v. Winter, 54 Me. 399; Fuller v. McDonald, 8 Me. 213, 23 Am. Dec. 499; Field v. Nickerson, 13 Mass. 131; Porter v. Kembell, 53 Barb. (N. Y.) 467; Annville Nat. Bank v. Kettering, 106 Pa. St. 531, 51 Am. Rep. 536; Worden v. Whitehall, 7 Wis. 161.

Parol testimony.— It has been decided that parol testimony to prove a waiver does not contradict the written contract between the indorser and holder; and that a promise to pay if not paid by the other parties when due, made by an indorser at the time of indorsing, may be regarded as a waiver of a demand upon the maker. Boyd v. Cleveland, 4 Pick. (Mass.) 525. And in the case of Hibbard v. Russell, 16 N. H. 410, 41 Am. Dec. 733, the court said: "It is perfectly settled, that a waiver of demand and notice need not be in writing, but that the modification that such waiver gives to the contract, created by the indorsement and delivery of the negotiable paper, is not such as is by the Statute of Frauds required to be put in writing; that no fixed verbal formula is necessary to constitute such a waiver, but that like any other fact it may be proven by direct evidence, or inferred from the expressions and conduct of the parties."

99. Neg. Inst. L. (N. Y.), § 182. See *post*, chap. IX. It has also been held that when an indorser of a note writes on the back of it "Notice of protest waived by me," that evidence is inadmissible to show that he did not intend to waive presentment for payment. Buckley v. Bentley, 42 Barb. (N. Y.) 646. See also Wolford v. Andrews, 29 Minn. 250, 13 N. W. 167; Hammett v. Trueworthy, 51 Mo. App. 281; Fisher v. Price, 37 Ala. 407.

1. Woodward v. Lowry, 74 Ga. 148; Dunnigan v. Stevens, 122 Ill. 396, 13 N. E. 651; Rooker v. Morris, 61 Ind. 286; Sohn v. Morton, 92 Ind. 170; Iowa Valley State Bank v. Sigstad, 96 Iowa, 491, 65 N. W. 407; Phillips v. Deppo, 93 Iowa, 35, 61 N. W. 216; Bryant v. Lord, 19 Minn. 396; Smith v. Pickham, 8 Tex. Civ. App. 326, 28 S. W. 565; Furth v. Baxter, 24 Wash. 608, 64 Pac. 798; Hoover v. McCormick, 84 Wis. 215, 54 N. W. 505.

2. Implied waiver.— In the case of Cady v. Bradshaw, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557, the facts relied upon to constitute a waiver were as follows: Prior to the date at which the note matured, the defendant called upon the plaintiff and asked him if he would extend the note another year if the interest should be paid. The plaintiff responded that he was willing if the defendant would leave his name upon it; let it be as it was. The plaintiff further asked the defendant if he and Mr. Rowland would let their names remain on the note, and the defendant said yes, if the plaintiff would let the note stand just as it was before the maturity of the note. The plaintiff saw Rowland who consented to the extension. The court said: "The question presented, therefore, is whether the facts proven constitute a waiver of the indorser's right to a demand of payment, and notice of nonpayment thereof. Now, it is true that the indorser did not say in so many words, 'I waive demand and notice of nonpayment,' but when he asked that the time of payment be extended a year, he, in fact,

between the holder of an instrument and a drawer or indorser to extend the time of payment, if made before the maturity of the instrument, constitutes a waiver of demand and notice.[3] An agreement to renew paper after its maturity is a waiver, and is not affected by the failure of the indorser to fulfil his agreement.[4] The manner and effect of waiving notice of dishonor is considered in the next chapter.

§ 102. Instrument dishonored by nonpayment.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "The instrument is dishonored by nonpayment "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

requested that no demand of payment be made at maturity. That request, coupled with his promise to let his name remain on the note if the time of payment should be extended, must, I think, be held to constitute in legal effect a waiver of demand and notice of nonpayment." See also Sheldon v. Horton, 43 N. Y. 93, 3 Am. Rep. 669; Hunter v. Hook, 64 Barb. (N. Y.) 475; Spencer v. Harvey, 17 Wend. (N. Y.) 489; Leffingwell v. White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97; Martin v. Perqua, 65 Hun (N. Y.), 225, 20 N. Y. Supp. 285.

The following cases are also to the effect that where an indorser promises to pay a note, whereby the holder is induced not to present it, that it constitutes a waiver of demand and notice.

United States.— Pugh v. McCormick, 14 Wall. 361; Reynolds v. Douglass, 12 Pet. 497; Sigerson v. Mathews, 20 How. 496, 15 L. Ed. 989.

California.— Bryant v. Wilcox, 49 Cal. 47; Mintorn v. Fisher, 7 Cal. 573.

Connecticut.— Norton v. Lewis, 2 Conn. 478.

Kansas.— Markland v. McDaniel, 51 Kan. 350, 32 Pac. 1114, 20 L. R. A. 96; Glaze v. Ferguson, 48 Kan. 157, 29 Pac. 396.

Maine.— Marshall v. Mitchell, 35 Me. 221; Keyes v. Winter, 54 Me. 399; Lane v. Stewart, 20 Me. 98.

Maryland.— Schley v. Merrit, 37 Md. 352; Geyser v. Kershner, 4 Gill & J. 305, 23 Am. Dec. 566.

Massachusetts.— Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Taunton Bank v. Richardson, 5 Pick. 436; Boyd v. Cleveland, 4 Pick. 524.

New Hampshire.— Amoskeag Bank v. Moore, 37 N. H. 539, 75 Am. Dec. 156.

Ohio.— Kyle v. Green, 14 Ohio, 440.

Pennsylvania.— Jenkins v. White, 147 Pa. St. 303, 23 Atl. 556; Sieger v. Second Nat. Bank, 132 Pa. St. 307, 19 Atl. 217.

Rhode Island.— Whittier v. Collins, 15 R. I. 44, 23 Atl. 39.

West Virginia.— Compton v. Gilman, 19 W. Va. 312, 42 Am. Rep. 776; Hale v. Danforth, 46 Wis. 554, 1 N. W. 284.

3. Glaze v. Ferguson, 48 Kan. 157, 29 Pac. 396; Sheldon v. Horton, 43 N. Y. 93, 3 Am. Rep. 669; Hudson v. Wolcott, 39 Ohio St. 618. In the case of Bush v. Gilmore, 45 App. Div. 89, 61 N. Y. Supp. 682, it was held where the holder of a note was requested by the indorsers to delay suit thereon after the note became due, that such indorser cannot take advantage, as a defense, of a failure to make a demand and serve notice of protest.

4. Leary v. Miller, 61 N. Y. 488; Iowa City Nat. Bank v. Ryerson, 23 Iowa, 508.

"unpaid."[5] A similar provision is contained in the English Bills of Exchange Act.[6] This section is declaratory of the common law.[7] We have already considered the necessity of presentment for payment in order to bind parties secondarily liable on the instrument,[8] and also the necessity of a demand as a condition precedent to an action against the maker of a note, or the acceptor of a bill of exchange.[9] It has been held that the holder of a note is not bound to present it a second time; and if there were no funds ready to pay it when first presented, it is immaterial that funds were subsequently deposited on the same day.[10] A right of action accrues to the holder of a promissory note upon the day of its maturity, if a demand had been made within a reasonable time on such day, and payment had been refused.[11] In such a case the refusal of payment constitutes a dishonor of the instrument. If there has been no express refusal the right of action does not accrue until the day after the day on which it falls due.[12]

b. *Liability of person secondarily liable.*— The Negotiable Instruments Law provides that: "Subject to the provisions of this "act, when the instrument is dishonored by nonpayment, an im-"mediate right of recourse to all parties secondarily liable "thereon, accrues to the holder."[13] A similar provision is contained in the English Bills of Exchange Act.[14] A distinction should be made between a right of recourse and a right of action. The holder's right of action against the drawer or indorser dates from the time when notice of dishonor is or ought to be received by such drawer or indorser.[15] There are authorities in this

5. Neg. Inst. L. (N. Y.), § 143. For the same section in statutes of other States see Appendix.

6. English Bills of Exchange Act, 1882, § 47(1).

7. *In re* East of England Banking Co., L. R., 4 Ch. (Eng.) 18.

8. See *ante*, § 90(*c*).

9. See *ante*, § 90(*b*).

10. Etheridge v. Ladd, 44 Barb. (N. Y.) 69.

11. Vandesande v. Chapman, 48 Me. 262; Veazie Bank v. Winn, 40 Me. 62; Estes v. Tower, 102 Mass. 65, 3 Am. Rep. 439.

12. Moore v. Horsley, 42 Ark. 163; Holland v. Clark, 32 Ark. 697; Wilcombe v. Dodge, 3 Cal. 260, 58 Am. Dec. 411; Raefle v. Moore, 58 Ga. 94; Sutcliffe v. Humphreys, 58 N. J. L. 42, 32 Atl. 706; Smith v. Aylesworth, 40 Barb. (N. Y.) 104.

13. Neg. Inst. L. (N. Y.), § 144. For the same section in statutes of other States see Appendix.

14. English Bills of Exchange Act, 1882, § 47(2).

15. Castrique v. Bernabo (1884), 6 Q. B. (Eng.) 498.

When right of action accrues against drawer or indorser.— In the case of Kennedy v. Thomas, L. R., 1894, 2 Q. B. (Eng.) 759, section 47 of the English Bills of Exchange Act, from which this section was derived, was construed. The court said: "As regards section 47 of the act, I do not construe it as the plaintiff's counsel contends that it should be construed. It does not say that on the presentation and dishonor of the bill an immediate right of action against the drawer and the indorsers accrues to the holder, and I do not think that country to the effect that a right of action immediately accrues to the holder against an indorser where, after the exercise of due diligence, notice of nonpayment of the instrument is sent to such indorser.[16]

§ 103. Time of maturity.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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."[17]

Under the English Bills of Exchange Act, when the last day of grace falls on Sunday, Christmas day, Good Friday, or a day appointed by lawful proclamation as a public fast or thanksgiving day, the bill is due and payable on the preceding business day; but when the last day of grace is a bank holiday other than Christmas day or Good Friday, or when the last day of grace is a Sunday, and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.[18] The above section is that contained in the New York statute. The section as contained in other States has been modified to some extent. In

is the meaning. It would be very anomalous if, in respect to the same bill of exchange, rights of action against different persons were to accrue at different times. In my opinion, section 47 means only that the holder of the bill may, immediately upon payment being refused by the acceptor, give notice to the drawer and the indorsers, telling them that he shall hold them liable upon it. But they, as well as the acceptor, still have the whole of the last day of grace in which to pay the bill, and if it is not paid before the end of that day, the holder's right of action against them becomes complete. It is for the benefit of the holder that he should be able to give notice of dishonor on the last day of grace, because by so doing he obtains a right of action against the drawer and the indorsers earlier than he otherwise would."

16. Rowland v. Rowe, 48 Conn. 432; Bell v. Hagerstown Bank, 7 Gill (Md.), 216; Flint v. Rogers, 15 Me. 67; Shed v. Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209; New England Bank v. Lewis, 2 Pick. (Mass.) 125.

But in the case of Smith v. Bank of Washington, 5 Serg. & R. (Pa.) 317, a notice was sent to the indorser of a note by mail on the 13th, which would reach him on the 19th. It was held that a suit commenced on the 16th was too soon.

17. Neg. Inst. L. (N. Y.), § 145. For the same section in statutes of other States see Appendix.

18. English Bills of Exchange Act, 1882, § 14(1).

those States which have adopted the act, where the Saturday half-holiday was observed, the section as stated above is retained.[19]

b. *General rule as to instruments payable on Sunday or a holiday.*— The statute has changed the general rule; in most jurisdictions, unless it has been otherwise established by statute, it is held that where an instrument matures on a Sunday or a holiday, that a demand of payment should be made on the preceding business day.[20] The general tendency of legislation on this subject in all the States has been toward a modification of the rule established by the custom of merchants, and the rule as to instruments falling due on Sunday or a holiday, as stated in the statute, is now almost universally applicable in this country.

c. *Instruments payable on Saturday.*— The provisions of the statute relating to the presentment for payment of instruments falling due or becoming payable on Saturday is inserted in recognition of the statutes of the several State creating a Saturday half-holiday.[21] In Michigan, under a statute providing that every Saturday from twelve o'clock noon until twelve o'clock at night, as regards the presentment of notes for payment, shall be a half-holiday, and that such notes shall be payable and presentable for acceptance and payment on the business day next succeeding such half-holiday, but that every Saturday shall, for the holding of a court or the transaction of any business authorized by law, be deemed a business day, it was held that presentment for payment of a note maturing on Sunday should be made on Monday.[22]

19. See the statute as contained in the Appendix, with notes indicating the sections of the act in the several States which have adopted it.

20. **Presentment on preceding day when instrument falls due on Sunday or a holiday, see:**

United States.— Thornton v. Stoddert, Fed. Cas. No. 14,000; Doremus v. Burton, Fed. Cas. No. 402, 5 Biss. 57.

California.— Hibernia Bank v. O'Grady, 47 Cal. 579.

Kentucky.— Chamberlain v. Maitland, 5 B. Mon. 448; Offut v. Stout, 4 J. J. Marsh. 332.

Maine.— Homes v. Smith, 20 Me. 264.

Maryland.— Sheppard v. Spates, 4 Md. 400.

Massachusetts.— Barker v. Parker, 6 Pick. 80; Farnum v. Fowle, 12 Mass. 89, 7 Am. Dec. 35.

New York.— Ransom v. Mack, 2 Hill, 587, 38 Am. Dec. 602; Mechanics & Farmers' Bank v. Gibson, 7 Wend. 460; Johnson v. Haight, 13 Johns. 470.

South Carolina.— Furnan v. Harman, 2 McCord, 436.

Texas.— Hirshfield v. Fort Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639.

21. Among the States which have adopted the Saturday half-holiday are Maine (Laws 1897, chap. 259); Massachusetts (Act of May 28, 1895); Michigan (Laws 1893, chap. 185); New Jersey (Laws 1895, chap. 43); New York (Laws 1897, chap. 614); Pennsylvania (Act of May 31, 1983).

22. Hitchcock v. Hogan, 99 Mich. 124, 57 N. W. 1095; Hagerty v. Engle, 43 N. J. L. 299.

§ 104. Days of grace.

a. *Statutory provision.*— Under the Negotiable Instruments Law, as adopted in most of the States, a negotiable instrument is payable at the time fixed therein without grace.[23] In some of the States adopting the act days of grace are still retained in certain cases and under certain conditions. As in Massachusetts where the act was originally enacted containing the provision abolishing days of grace, and was afterward amended to provide "that on all drafts and bills of exchange made payable within the "commonwealth at sight, three days of grace shall be allowed "unless there is an express stipulation to the contrary."[24] A similar provision is also contained in the Rhode Island Act.[25] It is provided in the North Carolina Act that the laws in force in that State with regard to days of grace "shall remain in force "and shall not be construed to be repealed by this act."[26] But in many States, where the Negotiable Instruments Law has not been adopted, days of grace have been abolished.[27] And in some States grace is allowed on bills payable at sight, but not on any other instruments;[28] while in others grace is allowed on all instruments except those payable on demand or at sight;[29] and in others it is allowed on all negotiable instruments, regardless of the date of their maturity.[30] Days of grace were abolished by the French Code,[31] and by most if not all of the various European Codes since framed, more or less, on that model, and now, with the exception possibly of Russia, exist among the English-speaking races only.[32] The English Bills of Exchange Act retains days of grace, although at the time of its adoption there was considerable sentiment in favor of the abolishment thereof.[33]

23. Neg. Inst. L. (N. Y.), § 145. See *ante*, § 103(*a*).

24. Massachusetts Acts 1899, chap. 130.

25. Neg. Inst. L. (R. I.), § 93.

26. Neg. Inst. L. (N. C.), § 197.

27. The following States have, besides those which have adopted the act, abolished days of grace: California, Delaware, Idaho, Illinois, Montana, New Hampshire, New Jersey, Vermont, and West Virginia.

28. Maine, Wyoming, and Massachusetts and Rhode Island under Negotiable Instruments Law.

29. Georgia, Kansas.

30. Alabama, Arizona, Indiana, Mississippi, New Mexico, Oklahoma, and South Carolina.

In the following States grace is allowed on all negotiable instruments except those payable on demand: Kentucky, Michigan, Minnesota, Missouri, Nebraska, and Texas.

31. Code de Commerce, liv. 1, tit. 8, art. 135.

32. Byles on Bills (16th ed.), 282. See German Exchange Law, Art. 33; Italian Code, Art. 290.

33. English Bills of Exchange Act, 1882, § 14. See Appendix.

b. *When allowed.*— Days of grace are allowed on promissory notes, as well as bills of exchange, although it was once insisted that grace should not be allowed on notes and inland bills.[34] The allowance of grace is regulated by statute in a number of States; and in those States the statute will control as against the law merchant. But when recourse is had to the rules of the law merchant, it may be considered as well established that bills of exchange, and ordinary promissory notes, payable at some stated future time are entitled to days of grace.[35] And it is a general principle of the law merchant that paper payable on demand shall not have grace.[36] But bills of exchange payable at sight have been held in some States as entitled to grace,[37] and the Negotiable Instruments Law, as in force in Massachusetts and Rhode Island, has provided the same thing. But there are enough authorities in conflict with this principle to create a doubt as to the general rule.[38] Each case will, in any event, be determined by the law and custom of the jurisdiction in which it arises. Checks are not entitled to grace;[39] but in many jurisdictions grace is allowed upon a check payable at a future time.[40] This is not an invariable rule, and has given rise to considerable discussion.[41] But custom

34. Jones v. Fales, 4 Mass. 245, 253; Barker v. Parker, 6 Pick. (Mass.) 80; Ponsonby v. Nicholson, 4 Har. & McH. (Md.) 72; Tassel v. Lewis, 1 Ld. Raym. (Eng.) 743; Cramlington v. Evane, 2 Vent. (Eng.) 307.

35. Norton v. Lewis, 2 Conn. 478; Hudson v. Matthews, 1 Morris (Iowa), 94; Chambliss v. Matthews, 57 Miss. 306; McCoy v. Farmer, 65 Mo. 244; Turk v. Stahl, 53 Mo. 437; Cook v. Darling, 2 R. I. 383. In some States it has been held that ordinary promissory notes not payable at a bank are not entitled to days of grace. Dalton City Co. v. Haddock, 54 Ga. 584; Luce v. Shoff, 70 Ind. 152; Bowley v. Bowley, 41 Me. 542; Isham v. Fox, 7 Ohio St. 317. But, as stated in the text, in nearly all of those States the question is determined by statutory enactment.

36. Somerville v. Williams, 1 Stew. (Ala.) 484; Rhodes v. Seymour, 36 Conn. 1; Sackett v. Spencer, 29 Barb. (N. Y.) 180; Pusey v. New Jersey West Line R. Co., 14 Abb. Pr. (N. S.) (N. Y.) 434; Smith v. Blythewood, 1 Rice (S. C.), 245, 33 Am. Dec. 111.

37. Hart v. Smith, 15 Ala. 807, 50 Am. Dec. 161; Wards v. Sparks, 53 Ark. 519, 14 S. W. 898, 10 L. R. A. 703; Green v. Raymond, 9 Neb. 295, 2 N. W. 881.

38. Minturn v. Fisher, 4 Cal. 35; Commercial Bank v. Union Bank, 19 Barb. (N. Y.) 391; Sleeper v. Ingersoll, 2 Ohio Dec. 166. But a foreign bill of exchange or promissory note, payable at sight, is entitled to grace by the general law merchant. Cribbs v. Adams, 13 Gray (Mass.), 597.

39. *In re* Brown, Fed. Cas. No. 1,985, 2 Story (U. S.), 502; Minturn v. Fisher, 4 Cal. 35; Wood River Bank v. First Nat. Bank, 36 Neb. 744, 55 N. W. 239.

40. Georgia Nat. Bank v. Henderson, 46 Ga. 487, 12 Am. Rep. 590; Henderson v. Pope, 39 Ga. 361; Culter v. Reynolds, 64 Ill. 321; Harrison v. Nicollet Nat. Bank, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746; Ivory v. Missouri State Bank, 36 Mo. 475, 88 Am. Dec. 150; Morrison v. Bailey, 5 Ohio St. 13, 64 Am. Dec. 632.

41. *In re* Brown, Fed. Cas. No. 1,985, 2 Story (U. S.), 502; Way v. Towle, 155 Mass. 374, 29 N. E. 506,

and usage will also control in this instance.[42] The maker of a note payable in installments at future times certain, with interest, is entitled to grace on both the principal and the interest;[43] but where the installment due is merely interest on the principal, grace is not allowed.[44]

c. *Computation of days of grace; presentment for payment.*— In computing days of grace, the day upon which an instrument becomes due and payable according to its tenor is not to be counted. The day following is the first day of grace.[45] Where the last day of grace falls on Sunday or a legal holiday, it is the rule, as declared by the English Bills of Exchange Act, and in many of the United States, that the presentment for payment should be made on the day preceding.[46] But by statute and by authority of the courts in a few States the presentment should in such a case be made on the following day.[47] A demand for

31 Am. St. Rep. 552; Champion v. Gordon, 70 Pa. St. 474, 10 Am. St. Rep. 681.

42. **Grace is the creature of custom.**—"Usages constitute a large portion of commercial rules; and to that source solely the allowance of days of grace on commercial paper is to be traced. No rule of the common law or statutory provision impressed that feature upon the character of commercial paper. It has its origin in usage and to usage it owes its existence. It has now become, it is true (where it is applicable), parcel of the contract; and is no longer an indulgence of grace, but is, and long has been, a matter of right; * * * but this custom does not apply to every species of commercial paper. In its application to bills it does not exist at all places; and it varies, moreover, at the different places, in the time of grace it allows; and this case shows, we think, that with us it does not embrace checks on banks, though made payable at a day certain, subsequent to their date, and notwithstanding their resemblance to inland bills of exchange. * * * The allowance of grace is wholly the child of usage; and a custom or usage that a particular species of paper or inland bills shall be payable without grace, is just as admissible and equally valid as a custom or usage that another species of paper or inland bills shall be entitled to grace. The usage or custom which excludes grace certainly does not more impugn or qualify the general rules of the law merchant, or of the common law, than the custom which allows it; and yet the custom which allows it is acknowledged to be valid." See Kilgore v. Bulkley, 14 Conn. 362, 367, note (opinion of Jones, Ch. J.).

43. Coffin v. Loring, 5 Allen (Mass.), 153.

44. Macloon v. Smith, 49 Wis. 200, 5 N. W. 336.

45. Bell v. Sackett, 38 Cal. 407.

46. Homes v. Smith, 20 Me. 264; Farnum v. Fowle, 12 Mass. 89, 7 Am. Dec. 35; Barlow v. Planters' Bank, 7 How. (Miss.) 129; Kuntz v. Tempel, 48 Mo. 71; West v. Lee, 50 How. Pr. (N. Y.) 313; Sheldon v. Benham, 4 Hill (N. Y.), 129, 40 Am. Dec. 271, in which case it was held that payment of a note cannot be demanded on the 4th of July, so as to charge the indorser, but if that be the last day of grace, demand should be made on the 3d. Ransom v. Mack, 2 Hill (N. Y.), 587; Mechanics, etc., Bank v. Gibson, 7 Wend. (N. Y.) 460; Ontario Bank v. Petrie, 3 Wend. (N. Y.) 456.

47. Brennan v. Vogt, 97 Ala. 647, 11 South. 893; First Nat. Bank of Hastings v. McAllister, 33 Neb. 646, 50 N. W. 1040; Hagerty v. Engle, 43 N. J. L. 299.

payment of an instrument entitled to grace on the last day of grace is sufficient to charge an indorser;[48] but a demand before that time is premature and ineffectual.[49]

§ 105. Time; how computed.

a. *Statutory provision.*— The Negotiable Instruments Law provides as follows: " Where the instrument is payable at a fixed " period after date, after sight, or after the happening of a speci- " fied 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." [50] The Statutory Construction Law of New York provides that " in computing any specified number of days, weeks, or months from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning." [51] A similar provision is contained in the laws of many of the States.

b. *General rule.*— The rule of the Negotiable Instruments Law does not differ from that of the common law. Independent of the statute, the rule is that in ascertaining the time of maturity

48. Lenox v. Roberts, 2 Wheat. (U. S.) 373, 4 L. Ed. 264; Renner v. Bank of Columbia, 9 Wheat. (U. S.) 581, 6 L. Ed. 166, where it was held that to charge an indorser demand must be made of the maker on the third day after that limited in the note; and that even the mutual agreement of the principal parties will not alter this rule. Crenshaw v. McKiernan, Minor (Ala.), 295; Guignon v. Union Trust Co., 156 Ill. 135, 40 N. E. 556, 47 Am. St. Rep. 186; Cook v. Renick, 19 Ill. 598; Coleman v. Carpenter, 9 Pa. St. 178, 49 Am. Dec. 552; Garland v. West, 9 Baxt. (Tenn.) 315; Cary-Lombard Co. v. First Nat. Bank, 86 Tex. 299, 24 S. W. 260.

49. Edgar v. Greer, 8 Iowa, 394, 74 Am. Dec. 316; Farnum v. Fowle, 12 Mass. 89, 7 Am. Dec. 35; Jones v. Fales, 4 Mass. 245; Leavitt v. Simes, 3 N. H. 14; Griffin v. Goff, 12 Johns. (N. Y.) 423.

50. Neg. Inst. L. (N. Y.), § 146. For same section in statutes of other States see Appendix.

51. Stat. Const. L. (N. Y.), § 27.

Mode of computing months.— The rule as declared in section 26 of the New York Statutory Construction Law is in substance a revision and re-enactment of the rule as it had existed in the original Revised Statutes of New York of the year 1828. Such section is as follows:

" § 26. **Month.**— In a statute, contract or public or private instrument, unless otherwise provided in such contract or instrument or by law, the term month means a calendar month and not a lunar month. A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last months so counted having the same numerical order in days of the month, as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted."

of an instrument payable in a given number of days, the day of the date should be excluded.[52] The rule as to computing time by months as stated in the New York Statutory Construction Law, contained in a preceding note, is that which is in force in most jurisdictions. Unless otherwise provided by statute, or established by usage, months are always reckoned as calendar months, and where a bill or note is payable a certain number of months after date, it falls due on the day of the month corresponding with the day of date;[53] this, of course, is without the allowance of grace.

§ 106. Effect of instrument payable at a bank.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: " 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." [54]

b. *Effect of statute; general rule.*— There is a decided conflict of authority as to the right of a bank at which a negotiable instrument is made payable, to apply in payment thereof the funds of the maker or acceptor on deposit in such bank at the time of the maturity of the instrument. It is somewhat difficult to determine from the decided cases the doctrine most worthy of acceptance. It is evident, however, that the framers of the Negotiable Instruments Law considered that the weight of authority was in support of the doctrine that where a maker of a note specifies a bank in which he is a depositor as a place of payment, his evident purpose is to charge his account at the bank with the payment of the note, and that the bank is, therefore, authorized to accept the note as an order to apply his deposit in payment of such note.[55] There can be no doubt that

52. Bradley v. Northern Bank of Alabama, 60 Ala. 252; Fisher v. State Bank, 7 Blackf. (Ind.) 610; Henry v. Jones, 8 Mass. 415; Woodbridge v. Brigham, 12 Mass. 403, 7 Am. Dec. 85.

53. Wagner v. Kenner, 2 Rob. (La.) 395; Barlow v. Planters' Bank, 7 How. (Miss.) 129; Leffingwell v. White, 1 Johns. Cas. (N. Y.) 99, 1 Am. Dec. 97; Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160; McMurchey v. Robinson, 10 Ohio, 496; Bank of Tennessee v. Officer, 3 Baxt. (Tenn.) 173; Ripley v. Greenleaf, 2 Vt. 129.

54. Neg. Inst. L. (N. Y.), § 147. For the same section in statutes of other States see Appendix.

55. See Crawford on Negotiable Instruments Law of New York, note to section 147, where Mr. Crawford, the reputed framer of the law, says: "There is some conflict in the decisions as to the authority of a bank to pay a note or acceptance made payable there. The rule adopted in the statute is the one sustained by the weight of authority; and is also the rule which is most convenient in practice."

the statute has settled and made uniform the rule in all States which have adopted it. The statute has evidently changed the rule in Tennessee, where it was held in a well-considered case[56] that a bank has no implied authority to pay to a third person a note made by a depositor payable at its place of business, simply because he has funds there sufficient for that purpose, in the absence of any established course of dealings, or previous instructions so to apply such deposits. This rule was apparently based on sound reasoning and ample authority.[57] But there are a number of well-considered cases which go to the full extent of hold-

56. **Note payable at bank where maker has funds deposited.**— Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 10 S. W. 774, 10 Am. St. Rep. 669, 3 L. R. A. 273. This contains a careful analysis of all the leading authorities on both sides of this question, summarizes them completely, and ends with the conclusion "that there is no implied authority for a bank to pay to a third party a note made payable at its place of business simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instructions to so apply the deposits." In speaking of the authorities upon this question the court says: "We recognize the fact that it is of prime importance that the several States in this Union should, as far as may be, without doing violence to well-settled principles of State jurisprudence, endeavor to bring about and maintain as much certainty and uniformity of decision on questions of commercial law as can be accomplished. In response to this idea we would, upon the question now before us, yield much of the strong conviction we entertain thereon in the endeavor to place ourselves in line with the current of authority, if a strong and steady current could be formed, which would not threaten to engulf and destroy distinctions which have been long and well settled in this State. While we must concede that the weight of text-book authority is in support of defendant's contention, we are unable to discover that the weight of judicial decision is in the same direction. Moreover, we are constrained to believe that the contrary view is more in harmony with well-settled adjudications in this State upon principles presenting analogous questions, and that the current of adjudged cases is certainly as strong in the same direction." Citing McGill v. Ott, 10 Lea (Tenn.), 147.

57. The rule in Tennessee is the same as that in Illinois. See Wood v. Merchants' Sav. L. & T. Co., 41 Ill. 267; Ridgely Nat. Bank v. Patton, 109 Ill. 479; Haines v. McFerren, 19 Ill. App. 172. And in Indiana, in the case of Scott v. Shirk, 60 Ind. 160, the court said: "A bank of deposit has no power to apply a money deposit in its possession belonging to the maker of a promissory note payable at such bank to the satisfaction of such note without his consent." To the same effect is National Exchange Bank v. National Bank of North America, 132 Mass. 151, where the court says: "The case expressly finds that Carrick, Calvert & Co. never have given any authority to the plaintiff to pay their notes out of their funds on deposit. Such authority cannot be implied merely from the fact that they made their notes payable there." And in Edwards on Bills and Notes (3d ed., 1882), § 195, it is said: "The better opinion undoubtedly is that the bank has no right to pay out the money of a depositor except upon his order, or with his assent." See also St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526; Newman on Bank Deposits, § 119, p. 120; Selover on Bank Collections, § 42.

ing that a note payable at a bank is in effect the equivalent of a check or draft on the bank in favor of the holder of a note, and that the bank is in default if it allows the paper to go to protest, in case the maker has money due him from the bank, on account, generally applicable to the payment of drafts or checks.[58] In an Indiana case,[59] Mitchell, J., said: "While we are not inclined to the view that a promissory note, negotiable and payable at a bank, is in all respects the equivalent of a check drawn by the maker against a fund on deposit in the bank, so as to require the banker to pay the note, on presentation, out of funds applicable to that purpose, we can conceive of no valid reason why a note or bill thus drawn shall not be held to authorize the banker to pay and thereby become subrogated to all the rights of the holder to the same extent as if it had purchased the paper after maturity. One who has drawn a note or bill payable at a bank must have done so for some purpose, and he cannot be heard to say, after his banker had paid a just debt for which he had given a note, to which the maker claims no defense, that the payment was wholly voluntary and unauthorized. In such a case the banker who has paid the note is entitled to hold it as the equitable owner or purchaser, and is entitled to set it off in a suit to recover a balance due the depositor on a general account."

58. **Note payable at bank equivalent to check or draft.**— Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82; Indig v. National City Bank, 80 N. Y. 100; Griffin v. Rice, 1 Hilt. (N. Y.) 184; Commercial Bank v. Henninger, 105 Pa. St. 496; German Nat. Bank v. Foreman, 138 Pa. St. 474, in which case it appeared that a bank which had discounted a note had, when it matured, funds of the maker on deposit applicable to the note and sufficient to pay it, but the maker, who conceived that he had a defense against the payee, induced the bank not to charge the note to his account, but to bring suit thereon against the payee, who was also indorser. It was held that the indorser was discharged by the bank's failure to collect the note out of the funds of the maker in its hands. It will be noticed upon an examination of the two Pennsylvania cases that the banks had become the holder of the notes in question, and that there then existed in favor of the banks a right of set-off against any deposit which the makers may have had in the banks at the maturity of the notes; the effect of the ruling in these cases is to prevent banks from waiving this right to the prejudice of indorsers.

In the case of Riverside Bank v. First Nat. Bank, 74 Fed. 276, 20 C. C. A. 181, it was held that the payment of a note by the bank at which it is made payable, although made under misapprehensions of the state of the maker's account with the bank, concludes the bank as against the holder of the note, who has surrendered it, and the payment cannot be recovered back of the holder.

59. Bedford Bank v. Acoam, 125 Ind. 584, 25 N. E. 713, 21 Am. St. Rep. 258, 9 L. R. A. 560.

§ 107. What constitutes payment in due course.

The Negotiable Instruments Law provides as follows: "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." [60] This is a statutory declaration of a general rule, and is inserted here because in the Negotiable Instruments Law it is included in the article on "Presentment for Payment," which is made the basis of this chapter. We will consider this section in connection with a subsequent chapter on "Discharge of Negotiable Instruments." [61]

60. Neg. Inst. L. (N. Y.), § 148. For same section in statutes of other States see Appendix.

61. Chap. 11, *post*.

CHAPTER IX.

Notice of Dishonor.

§ 108. To Whom Notice of Dishonor Must be Given.

a. Statutory provision.
b. Protest; notice of dishonor.
c. Effect of failure to give notice.
d. Notice to a drawer, or one of successive indorsers.
e. Notice of dishonor of nonnegotiable instruments.
f. Notice to party or agent; statutory provision.
g. Service of notice where party is dead; statutory provision.
h. Notice to partners; statutory provision.
i. Notice to persons jointly liable; statutory provision.
j. Notice to bankrupt or insolvent; statutory provision.

§ 109. By Whom Notice to be Given.

a. Statutory provision.
b. General rule.

§ 110. Notice by Agent.

a. Authority of agent; statutory provision.
b. When agent may give notice; statutory rule.

§ 111. Benefits of Notice.

a. Where notice is given by or on behalf of holder; statutory provision.
b. Where given by or on behalf of party entitled to give notice; statutory rule.

§ 112. Sufficiency and Form of Notice.

a. When notice sufficient.
   (1) Statutory provision.
   (2) Misdescription of instrument and mistake.
b. Form of notice.
   (1) Statutory provision.
   (2) Notice may be oral.
   (3) General rule as to sufficiency of notice.
   (4) Service by mail.

§ 113. Time Within Which Notice Must be Given.

a. General and statutory rule.
b. Delay in giving notice, when excusable; statutory provision.
c. Where parties reside in the same place; statutory provision.
d. Where parties reside at different places; statutory provision.
e. Notice to successive indorsers; statutory provision.

§ 108. To whom notice of dishonor must be given.

a. *Statutory provision.*— The Negotiable Instruments Law provides as follows: "Except as herein otherwise provided, when a "negotiable instrument has been dishonored by nonacceptance or "nonpayment, 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." [62] A similar provision is contained in the English Bills of Exchange Act.[63]

62. Neg. Inst. L. (N. Y.), § 160. For same section in statutes of other States see Appendix. Section construed, Phillips & Ebling Brewing Co. v. Reinheimer, 32 Misc. (N. Y.) 594, 66 N. Y. Supp. 458.

63. English Bills of Exchange Act, § 48. Under the French Code, articles 168–170, the omission to give due notice of protest discharges the indorsers, but the drawer is not discharged unless he can show that the drawee had sufficient funds in his hands when the bill was dishonored. Under the German Exchange Act, article 45, the omission to give due notice of protest deprives the holder of his right to interest and damages, but he can still recover the amount of the bill, unless his omission has caused actual damage.

b. *Protest; notice of dishonor.*— In a strict and technical sense the term "protest" is not applicable to promissory notes; technically it means only the formal declaration drawn up and signed by a notary.[64] In the Negotiable Instruments Law a protest is applied to a foreign bill dishonored by nonacceptance, or if duly accepted, dishonored by nonpayment.[65] But in a popular sense, and as used among men of business, the term includes all the steps necessary to charge a drawer or indorser.[66] A notice of dishonor, as will be observed hereafter, does not require the formality of a technical protest. It implies that the drawer of a bill, and each indorser of a negotiable instrument shall be notified of the instrument's dishonor, and the fact that such drawer or indorser already has knowledge of the dishonor of the instrument is not material; the notice must inform him that the instrument has been duly presented for payment; that it has been dishonored, and that the holder looks to him for payment.[67] In this chapter, as in the Negotiable Instruments Law, the term "notice of dishonor" will be used, and it should be distinguished in its meaning from that of the term "protest" as more technically used, in relation to foreign bills of exchange, in a subsequent chapter of this work.

c. *Effect of failure to give notice.*— The drawer of a bill of exchange, or an indorser of any negotiable instrument will not be liable thereon, where the instrument has been dishonored by nonacceptance or nonpayment, unless a notice of such dishonor be given to such drawer or indorser.[68] The necessity of notice and

64. Coddington v. Davis, 1 N. Y. 186; Townsend v. Lorain Bank, 2 Ohio St. 345; Story on Bills, § 276.

65. Neg. Inst. L. (N. Y.), § 260. See *post*, chap. XIV, § 164, p. 609.

66. **Meaning of term "protest."**— In the case of Coddington v. Davis, 1 N. Y. 186, the court said: "The term 'protest' in a strict technical sense is not applicable to promissory notes. The word, however, as I apprehend, has by general usage acquired a more extensive signification, and in a case like the present includes all those cases which by law are necessary to charge the indorser. When among men of business a note is said to be protested, something more is understood than an official declaration of a notary. The expression would be used indefinitely to indicate a series of acts necessary to confer an additional into an absolute liability whether its acts were performed by a mere clerk or a public officer." See also Townsend v. Lorain Bank, 2 Ohio St. 345; White v. Keith, 97 Ala. 668, 12 South. 611.

67. **Meaning of term "notice."**— Jagger v. National German-American Bank, 53 Minn. 386, 55 N. W. 545. In the case of Burg v. Legge, 5 M. & W. (Eng.) 418, 420, the court said: "There must be proof of a notice given from some party entitled to call for payment of the bill, and conveying in its terms intelligence of the presentment, dishonored, the parties to be held liable in consequence. That is the true meaning of the word 'notice,' when used in declarations of this kind, and the mere knowledge of the party is not enough." See also Carter v. Flower, 16 M. & W. (Eng.) 749; Brown v. Ferguson, 4 Leigh (Va.), 37, 24 Am. Dec. 707.

68. McGruder v. Union Bank, 3 Pet. (U. S.) 90, 7 L. Ed. 612; Pryor v.

the effect of omission is the same as that of a demand of payment, which has already been considered. Reference should be made to the cases cited in the notes under the preceding chapter in this connection.[69] If a party is discharged from liability by an omission to give notice of dishonor, he is also discharged from liability for the debt or other consideration for which the instrument was given.[70]

d. *Notice to a drawer, or one of successive indorsers.*— The effect of a failure to give notice of dishonor to a drawer or indorser is to relieve such party from liability; the indorser to whom the notice is given is charged with the liability, and the other indorsers are released therefrom. Thus, if the indorser of a bill of exchange is given notice of dishonor, it is sufficient to bind him, although notice is not given the drawer.[71] And it is not necessary for the holder of a note to give notice of nonpayment to a prior, in order to hold a subsequent indorser;[72] he is only required to notify the indorser to whom he intends to look for payment.[73] It belongs to each indorser to see for himself that prior indorsers are duly fixed with the liability, if he would have a remedy over against them.[74] And where a notice is thus given by each indorser to his

Bowman, 38 Iowa, 92; Rea v. Dorrance, 19 Me. 137; Weber v. Matthews, 101 Mass. 461; Coon v. Pruden, 26 Minn. 105; Cayuga County Bank v. Warden, 1 N. Y. 413.

69. See *ante*, chap. VII, § 90.

70. Bridges v. Bury, 3 Taunt. (Eng.) 131; Jones v. Savage, 6 Wend. (N. Y.) 659; Woodcock v. Bennett, 1 Cow. (N. Y.) 711.

71. Hare v. Henty, 10 C. B. (N. S.) (Eng.) 65; Prideaux v. Criddle, L. R., 4 Q. B. (Eng.) 455; Moule v. Brown, 4 Bing. N. C. (Eng.) 266; Piner v. Clary, 17 B. Mon. (Ky.) 645; Moody v. Mack, 43 Mo. 210; Gough v. Staats, 13 Wend. (N. Y.) 549; Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 443; New Hanover Bank v. Kenan, 76 N. C. 340.

72. Baker v. Morris, 25 Barb. (N. Y.) 138.

73. **Only indorser to be charged need be notified.**— Henry v. State Bank, 3 Ind. 216; Carter v. Bradley, 19 Me. 62, 36 Am. Dec. 735; Wood v. Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597; Spencer v. Ballou, 18 N. Y. 327; Lawson v. Farmers' Bank, 1 Ohio St. 206; Struthers v. Blake, 30 Pa. St. 139; Cardwell v. Allan, 33 Gratt. (Va.) 160; Westfall v. Farwell, 13 Wis. 504; Big Sandy Nat. Bank v. Chilton, 40 W. Va. 491, 21 S. E. 774. In the case of Henry v. State Bank, *supra*, it was held that an indorser who has received due notice of the protest for nonpayment of a note held by a bank, will not be discharged because a prior indorser was not thus notified, notwithstanding it was the usage of the bank to notify all indorsers of paper not paid at maturity. And in Westfall v. Edwards, 13 Wis. 504, it was held to be no defense to an action by the holder against an indorser who was properly notified, to show that the holder attempted to notify other indorsers, but failed.

74. **Each indorser to see that prior indorser is notified.**— In the case of Spencer v. Ballou, 18 N. Y. 327, the court said: "The only remaining objection by the defendant to his being held liable in this suit, is founded upon the direction by the plaintiff to the notary public not to charge the prior indorser, and the exclusion of evidence that the prior indorser would have been charged but for that direction. The

immediate indorser it will inure to the benefit of the holder, and fix the liability of all of them.[75]

e. *Notice of dishonor of nonnegotiable instruments.*— The better rule seems to be that an indorser of a nonnegotiable instrument is liable, although no notice of dishonor is given him by the holder.[76] This rule is based upon the theory that nonnegotiable instruments are not within the protection of the law merchant, and that a person indorsing such an instrument for transfer is not an indorser in a commercial sense, and the paper does not, on its face, import a contract of indorsement.[77] But there are a number of decisions in conflict with this principle, to the effect that notice of dishonor

plaintiff was under no obligation to the defendant to charge the prior indorser, and might lawfully direct that notice of the protest be served only on the defendant. The holder of a note is required to charge only the indorsers to whom he desires to look for payment, and it belongs to each indorser to see for himself that prior indorsers are duly fixed, if he would have a remedy over against them." And in Lawson v. Farmers' Bank, 1 Ohio St. 206, 221, the court said: "It is claimed on behalf of the plaintiffs in error in this case that the notice of dishonor of the bill should have been sent immediately to them, instead of being sent, as it was in the first place, to the Bank of Salem. The holder is not bound to give notice of the dishonor to any more than his immediate indorser. And each party to a bill has the same time after notice to himself, for giving notice to other parties beyond him, that was allowed to the holder after the default." In Baker v. Morris, 25 Barb. (N. Y.) 138, the court said: "It was not necessary for the holder in order to charge the subsequent indorser, to give notice of nonpayment to the prior indorser; it belongs to each party to a note or bill to give notice, or to see that notice is given, to all prior parties to whom he would resort in case it should be necessary." Citing Morgan v. Woodworth, 3 Johns. Cas. (N. Y.) 89; 3 Kent's Comm. 105, 108; Chitty on Bills, 530. See also Lynn First Nat. Bank v. Smith, 132 Mass. 227; Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212; Wood v. Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597; Manchester Bank v. Fellows, 28 N. H. 302; West River Bank v. Taylor, 34 N. Y. 128; Mead v. Engs, 5 Cow. (N. Y.) 303.

75. United States Bank v. Goddard, 5 Mason (U. S.), 366; West River Bank v. Taylor, 34 N. Y. 128; Metropolitan Bank v. Engel, 66 App. Div. (N. Y.) 273, 72 N. Y. Supp. 691.

76. **Notice not required to bind indorser of nonnegotiable instruments.** —Ish v. Mills, Fed. Cas. No. 7,104, 1 Cranch C. C. (U. S.) 567; Huse v. Hamblin, 29 Iowa, 501, 4 Am. Rep. 244; Billingham v. Bryan, 10 Iowa, 317; Richards v. Warring, 1 Keyes (N. Y.), 576; White v. Low, 7 Barb. (N. Y.) 204; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403. In the case of Haber v. Brown, 101 Cal. 445, 35 Pac. 1035, it was held that in respect to the immediate indorsee of the payee of a nonnegotiable promissory note, the indorsement will ordinarily create the same liabilities and obligations as the indorsement of a negotiable note. The court said: "It is unnecessary to decide in this case whether demand and notice of nonpayment of a nonnegotiable note indorsed in blank by the payee is required to be given in every case of a transfer of such a note in order to entitle the immediate indorsee of the payee to recover thereon against the payee; but such demand and notice ought to be required where the words written over the blank indorsement show that the signature was considered and treated by the indorser as if it were an indorsement of negotiable paper."

77. Richards v. Warring, 1 Keyes (N. Y.), 576.

must be given to an indorser of a nonnegotiable instrument, otherwise he will be discharged from his liability.[78]

f. *Notice to party or agent; statutory provision.*— The Negotiable Instruments Law provides that: "Notice of dishonor may "be given either to the party himself or to his agent in that "behalf." [79] This is in effect the same as a provision contained in the English Bills of Exchange Act.[80] The rule seems to be the same as that which exists independent of the statute. It has been held that it is the duty of the drawer or indorser of a bill, if he be absent from his place of business or residence, to see that there is some person there to receive notice on his behalf.[81] Where an agent has authority to indorse for his principal, it will be sufficient to give notice of dishonor to the agent.[82] And where an agent is employed in liquidation of the affairs of a copartnership, a service upon him will be sufficient to bind the firm as an indorser.[83] It seems to have been generally accepted as true that where a merchant or trader indorses a bill, a notice of dishonor left with his clerk at his place of business is sufficient to bind him.[84] Where

78. Jones v. Robinson, 11 Ark. 504, 54 Am. Dec. 212; San Diego Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866; Parker v. Riddle 11 Ohio, 103; Aldis v. Johnson, 1 Vt. 136.

In the case of Hart v. Eastman, 7 Minn. 74, it was concluded that as between the indorser of a nonnegotiable instrument, and his immediate indorsee, the indorsement operates in legal contemplation as a bill of exchange. "That it was the request of the indorser that the maker (who stands in this respect very much in the situation of an acceptor) would pay the amount to the indorsee. That it might be treated with strict propriety as an authority given to the indorsee to receive the money due on the note, and also as an undertaking that it shall be paid to him upon due presentment, and, therefore, as involving, in case of dishonor, and due notice thereof, the ordinary responsibility of an indorser of negotiable paper."

79. Neg. Inst. L. (N. Y.), § 168. For same section in statutes of other States see Appendix.

80. English Bills of Exchange Act, 1882, § 49(8).

81. Allen v. Edmundson, 2 Exch. (Eng.) 723.

82. Firth v. Thrush, 8 B. & C. (Eng.) 391.

In New York it has been held in a recent case that a notice of protest of a draft may be served upon an agent of the payee and indorser of the draft, where the agent has authority to make and indorse drafts, and has authority to act and has acted as the general agent of the payee in the conduct of his business, and has had full charge of the acts and dealings with the bank at which the paper was discounted. Persons v. Kruger, 45 App. Div. (N. Y.) 187, 60 N. Y. Supp. 1071; s. c., 52 App. Div. (N. Y.) 635, 66 N. Y. Supp. 1135. See also Lake Shore Nat. Bank v. Butler Colliery Co., 51 Hun (N. Y.), 63, 68, 3 N. Y. Supp. 771.

83. Fassin v. Hubbard, 55 N. Y. 465.

84. Allen v. Edmundson, 2 Exch. (Eng.) 723; Viale v. Michael, 30 L. T. (N. S.) (Eng.) 453.

A notice left in the office and usual place of business of the indorser with a person in charge of the office is sufficient. Edson v. Jacobs, 14 La. 494; Sullivan v. Godwin, 20 La. Ann. 33; Lord v. Appleton, 15 Me. 270; Mercantile Bank v. McCarthy, 7 Mo. App. 318.

Notice of protest left at a custom-it is attempted to charge an indorser by a service of a notice of dishonor upon his agent, it must appear that it was within the scope of the agent's duties to receive such notice.[85] Notice of dishonor may be properly served upon the general agent of a corporation.[86]

g. Service of notice where party is dead; statutory provision.— The Negotiable Instruments Law provides that: "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."[87] This provision is similar to the rule of the English Bills of Exchange Act;[88] and is in most respects similar to the rule as it exists independent of the statute.[89] If the indorser is known to be dead by the holder, a notice of dishonor addressed to him will not suffice to charge his estate.[90] And a notice was held sufficient where it was directed to the estate of the deceased at his last post-office address, upon the maturity of the note, and notice was subsequently given to the executor when appointed.[91] And an executor named in a will which has not been probated, is a personal representative of the deceased upon whom notice of dishonor may be

house on the desk of an absent indorser, with the person in charge of the office, is sufficient as having been made at the place of business of the indorser. Bank of Commonwealth v. Mudgett, 45 Barb. (N. Y.) 663.

A notary testified that he gave the notice to a boy whom he met in the indorser's yard, and who said he was the indorser's boy; that he saw the boy go with it toward the house, but did not see him enter the door; held that this was not a sufficient service. Adams v. Wright, 14 Wis. 408.

85. New York & Atl. Contracting Co. v. Selma Sav. Bank, 51 Ala. 305, 23 Am. Rep. 552.

Authority of agent.— In the case of King v. Griggs, 82 Minn. 387, 85 N. W. 162, where it was held that the authority of the agent may be implied as well as express; and if the circumstances are such as to warrant the implication that the relation of principal and agent subsists between the party entitled to notice, and the one to whom it is given, it will operate as effectually to charge the principal as though the agent had been expressly authorized.

86. Bank of Auburn v. Putnam, 1 Abb. Ct. App. 80, 3 Keyes (N. Y.), 343.

87. Neg. Inst. L. (N. Y.), § 169. For same section in statutes of other States see Appendix.

88. English Bills of Exchange Act, 1882, § 49(9).

89. Mr. Chalmers says (Bills of Exchange [5th ed.], p. 160): "This is probably declaratory, though there was no English decision in point. It has been held in New York that notice sent to an indorser in ignorance of his death was sufficient. Merchants' Bank v. Birch, 17 Johns. (N. Y.) 24. The act appears to confirm this view."

90. Cayuga County Bank v. Bennett, 5 Hill (N. Y.), 236; Louisiana State Bank v. Dumartrait, 4 La. Ann. 483.

91. Bank of Port Jefferson v. Darling, 91 Hun (N. Y.), 236, 36 N. Y. Supp. 153.

properly served.[92] Notice to one of two or more personal representatives of a deceased drawer or indorser will be sufficient.[93] It is also a general rule that where the indorser is dead, and no personal representatives have been appointed or can be discovered by reasonable diligence, notice of dishonor should be addressed to the last place of residence of the deceased indorser.[94] If the holder of the instrument have no knowledge of the death of the indorser or drawer it will be sufficient to bind the estate of decedent if the notice of dishonor be sent to the place where he resided prior to his death.[95] And it was held that, although the holder had knowledge of the death of the indorser, a notice mailed to his last place of residence would bind his estate, if it was ultimately delivered to the administrators of the decedent.[96]

h. *Notice to partners; statutory provision.*— The Negotiable Instruments Law provides that: "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." [97] This same rule has been laid down in a number of cases.[98] If a bill drawn on a firm by one of its members in the partnership business is presented and payment refused, the drawer will be bound without a notice of dishonor, since the knowledge of the partner who refused payment will be deemed notice of nonpayment to all the members of the firm, including the drawer.[99] The dissolution of the firm does not affect the authority of one of its members to receive a notice of dishonor of paper indorsed by the firm prior to such dissolution.[1]

92. Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773.

93. Beals v. Peck, 12 Barb. 245; Carolina Nat. Bank v. Wallace, 13 S. C. 247, 36 Am. Rep. 694.

94. Dodson v. Taylor, 56 N. J. L. 11, 28 Atl. 316; Goodnow v. Warren, 122 Mass. 79, 23 Am. Rep. 289.

95. Planters' Bank v. White, 2 Humph. (Tenn.) 112; Barnes v. Reynolds, 5 Miss. 114.

96. Beals v. Peck, 12 Barb. (N. Y.) 245.

97. Neg. Inst. L. (N. Y.), § 170. For same section in statutes of other States see Appendix.

98. Notice to partners.— Coster v. Thomason, 19 Ala. 717; Magee v. Dunbar, 10 La. 546; Wheeler v. Maillot, 20 La. Ann. 75. Where notice is given to surviving member of partnership it is sufficient to hold legal representatives of deceased partner; Dabney v. Stidger, 12 Miss. 749; Fourth Nat. Bank v. Altheimer, 91 Mo. 190, 3 S. W. 858; Riddle v. McBeth, 2 Ohio Dec. 606; Collins v. Bank of Titusville, 1 Walk. (Mich.) 194; Cocke v. Bank of Tennessee, 6 Humph. (Tenn.) 51.

Where a draft was drawn and discounted by a bank for the benefit of a firm, one of the members of which was cashier of the bank, notice of nonpayment, acquired by him in the course of the bank's business, is notice to the firm. Citizens' Sav. Bank v. Hays, 96 Ky. 365, 29 S. W. 20.

99. Gowan v. Jackson, 20 Johns. (N. Y.) 176.

1. Effect of dissolution.— Hubbard v. Matthews, 54 N. Y. 43, 50. As

i. *Notice to persons jointly liable; statutory provision.*— The Negotiable Instruments Law also provides that: "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." [2] This same provision is found in the English Bills of Exchange Act.[3] There has never been any English decision to this effect, and the rule of the English statute seems to have been based upon the rule as laid down in American courts.[4] The rule is well established in this country that notice to one of two or more joint indorsers or drawers, who are not partners, is not sufficient to charge all of them.[5] But in Kentucky it has been held that notice to one joint indorser is sufficient to bind the other indorser.[6] If one of two payees, who have indorsed a note payable to their order, dies before the maturity of the note, no recovery can be had against the survivor unless it is shown that the estate of his coindorser was duly charged with notice.[7]

was stated by Chancellor Kent in Griswold v. Waddington, 16 Johns. (N. Y.) 438: "A dissolution of a partnership only has respect to the future. The parties remain bound by all antecedent engagements. The partnership may be said to continue as to everything that is past and until all pre-existing matters are wound up and settled. See also Brown v. Turner, 15 Ala. 832; Coster v. Thomason, 19 Ala. 717.

2. Neg. Inst. L. (N. Y.), § 171. For same section in statutes of other States see Appendix.

3. English Bills of Exchange Act, 1882, § 49(11).

4. Chalmers on Bills of Exchange, p. 160.

5. The leading American case to this effect seems to be that of Willis v. Green, 5 Hill (N. Y.), 232, 40 Am. Dec. 351. The court in this case said: "It has been the settled commercial rule that copayees, not partners, must each indorse in order to negotiate the paper. It would seem consistently, if not necessarily to follow from this doctrine, that their interests, though joint as to the remedies against them on the paper, are so far distinct and separate as it respects each other, that notice of default of the maker should be given to both. In the ordinary case of a partnership the interest is not only joint, but each member is a general agent of the concern; and hence notice to one is notice to all. But here no such agency exists, as is sufficiently shown from the fact that each party must act for himself in the negotiation of the note." See also Shepherd v. Hawley, 1 Conn. 367, 6 Am. Dec. 244; State Bank v. Slaughter, 7 Blackf. (Ind.) 133; People's Bank v. Keech, 26 Md. 521, 90 Am. Dec. 118; Miser v. Trovinger, 7 Ohio St. 281; Sayre v. Frick, 7 Watts & S. (Pa.) 383; Boyd v. Orton, 16 Wis. 495.

6. Higgins v. Morrison, 4 Dana (Ky.), 100. And in Tennessee, under a statute regulating the liability of joint obligors, it has been held that one of two joint indorsers of a note is bound by notice of nonpayment given to himself alone. Jarnagin v. Stratton, 95 Tenn. 619, 32 S. W. 625.

7. Willis v. Green, 5 Hill (N. Y.) 252, 40 Am. Dec. 351. It was further held in this case, where it appeared, after the note fell due, the surviving indorser took from the maker a bond and warrant of attorney to secure the payment of the note, and that he had collected thereon nearly the whole of the amount thereof, that this constituted an admission by him that the proper steps had been taken to charge both indorsers.

j. *Notice to bankrupt or insolvent; statutory provision.*— The Negotiable Instruments Law provides that: "Where a party has "been adjudged a bankrupt or an insolvent, or has made an as- "signment for the benefit of creditors, notice may be given either "to the party himself or to his trustee or assignee." [8] This is also the rule of the English Bills of Exchange Act.[9] It was a general rule, in force in England prior to the statute, that a notice to a bankrupt is sufficient if his bankruptcy was not known to the holder;[10] and it has also been there held that notice to the one indorser is sufficient to bind his estate, even after he had been adjudicated a bankrupt and a trustee had been appointed.[11] It was declared in an Ohio case, but by a divided court, that where an assignment is made by an indorser for the benefit of all his creditors, before the maturity of the note, notice of nonpayment should be given to the indorser, and that notice to his assignee is not sufficient to fix his liability.[12] But this is not the rule as supported by the weight of authority. The better doctrine is, that when a general assignment has been made as contemplated by law, notice to the assignee of the dishonor of paper indorsed by the assignor will bind the estate of the assignor.[13] The statute has disposed of this difficulty by expressly declaring that in case of an assignment for the benefit of creditors notice may be given to either the assignor or assignee.

§ 109. By whom notice to be given.

a. *Statutory provision.*— The Negotiable Instruments Law contains the following provision: "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 up, would have a right to reimbursement "from the party to whom the notice is given." [14] The English Bills of Exchange Act requires the notice to be given by or on

8. Neg. Inst. L. (N. Y.), § 172. For same section in statutes of other States see Appendix.
9. English Bills of Exchange Act, 1882, § 49(10).
10. Chitty on Bills, p. 380; Rohde v. Proctor, 4 B. & C. (Eng.) 517; Camidge v. Allerby, 6 B. & C. (Eng.) 373.
11. *Ex parte* Baker, 4 Ch. D. (Eng.) 795.
12. House v. Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813.
13. Callahan v. Bank of Kentucky, 82 Ky. 231; Donnell v. Lewis County Sav. Bank, 80 Mo. 165; American Nat. Bank v. Junk Bros. Lumber & Mfg. Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492.
14. Neg. Inst. L. (N. Y.), § 161. For same section in statutes of other States see Appendix.

behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.[15]

b. *General rule.*— Story says: "The notice must also, in general, come from the holder, or his agent (for notice by an agent is equivalent to notice by the principal); and it will not be sufficient, that it comes from a mere stranger to the bill, however early or regular in other respects it may be." [16] The rule, as thus stated, is qualified so that notice will be sufficient, "although not given by the holder, or his agent, if it comes from some person who holds the bill when it is dishonored, or who is a party to the bill, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement thereof, for, under such circumstances, the notice will, in general, inure to the benefit of all the other parties to the bill, whether they are antecedent or subsequent parties thereon, to the party who gives the notice." [17] It will thus be noticed that the rule of the statute is in substance that derived by Judge Story from the authorities in existence at the time he wrote.[18] It has been said that the meaning of the rule that the holder must give notice is, not that he may not do it by an agent, as any other commercial act, but that it shall not be given by some other party on the bill, not standing in the relation in which the holder does, and who has no right to give it and try to make the indorser responsible, when the holder may be willing to waive a resort to him.[19] The statute authorizes a notice "by or on behalf" of the person permitted to give it; it should not, probably, be construed to permit a notice to be given in behalf of such person

15. English Bills of Exchange Act, 1882, § 49(1).

16. Story on Bills of Exchange, § 303.

17. Story on Bills of Exchange, § 304.

18. **Notice from holder or person entitled to reimbursement.**— Bank of Utica v. Smith, 18 Johns. (N. Y.) 230; Smedes v. Utica Bank, 20 Johns. (N. Y.) 372; Safford v. Wyckoff, 1 Hill (N. Y.), 11; Chitty on Bills, chap. 10, pp. 524, 527; Bayley on Bills, chap. 7, § 2, pp. 254–256. Mr. Bayley says: "The notice must come from the holder, or from some party entitled to call for payment or reimbursement. It has indeed been held that notice from the acceptor to the drawer, that he had not been able to pay it, and that it was then in plaintiff's hands, was sufficient; but that might, perhaps, have been on the ground that the acceptor wrote for the plaintiff, and as his agent. A notice from the holder, or any other party, will inure to the benefit of every other party who stands between the person giving the notice, and the person to whom it is given. Therefore, a notice from the last indorsee to the drawer will operate as a notice from each indorser. It is nevertheless prudent in each party who receives a notice, to give immediate notice to those parties against whom he may have a right to claim; for the holder may have omitted notice to some of them, and that will be no protection; or there may be difficulties in proving such notice."

19. Harris v. Robinson, 4 How. (U. S.) 336, 346, 11 L. Ed. 1000.

without his consent or authority. Such a notice may be given by the holder or other party who may be compelled to pay the instrument, by a notary, or by any other person acting as agent of the holder, or such other party; this is the general rule, sustained by all the authorities, without regard to the rule as declared in the statute.[20]

§ 110. Notice by agent.

a. *Authority of agent; statutory provision.*— The Negotiable Instruments Law provides that: "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." [21] This is also the rule as contained in the English Bills of Exchange Act.[22] The statutory rule is the same as that at common law. A notary public, in giving notice of dishonor, acts as an agent of the person who employs him, and not as a public officer.[23] And it has been held that if the holder of a note sends it to an agent for collection, it is sufficient to hold a prior indorser, if the agent give notice of the dishonor, in due time, to his principal, and if the latter without delay transmits notice to such prior indorser.[24] But, as a rule, one who receives a note for collection

20. **Notice to be given by agent** or other party acting under authority of holder, see the following cases:

United States.— Austin v. Miller, Fed. Cas. No. 661, 5 McLean, 153, affd. in 13 How. 218, 14 L. Ed. 119; Bank of United States v. Goddard, Fed. Cas. No. 917, 5 Mason, 366; Burke v. McKay, 2 How. 66, 11 L. Ed. 181.

Alabama.— Todd v. Neal, 49 Ala. 266; Foster v. McDonald, 3 Ala. 34.

Delaware.— Standard Sewing Mach. Co. v. Smith, 1 Marv. 330, 40 Atl. 1117.

Iowa.— Mt. Pleasant Branch of State Bank v. McLeran, 26 Iowa, 306.

Kansas.— Bank of Lindsborg v. Ober, 31 Kan. 599, 3 Pac. 324.

Kentucky.— Stivers v. Prentice, 3 B. Mon. 461.

Maryland.— Brailsford v. Williams, 15 Md. 150, 74 Am. Dec. 559.

Massachusetts.— Stanton v. Blossom, 14 Mass. 116, 7 Am. Dec. 198.

Michigan.— Cromer v. Platt, 37 Mich. 132, 26 Am. Rep. 503.

New York.— Cole v. Jessup, 10 N. Y. 96, affg. 9 Barb. 395; Van Hoesen v. Van Alstyne, 3 Wend. 75; Mead v. Engs, 5 Cow. 303; Tunno v. Lague, 2 Johns. Cas. 1.

North Carolina.— Bank of Cape Fear v. Seawell, 9 N. C. 560; Brower v. Wooten, 4 N. C. 507, 7 Am. Dec. 692.

South Carolina.— Haslett v. Poultney, 1 Nott & McC. 466.

Texas.— Beal v. Alexander, 6 Tex. 531.

21. Neg. Inst. L. (N. Y.), § 162. For same section in statutes of other States see Appendix.

22. English Bills of Exchange Act, 1882, § 49(2).

23. Bank of Lindsborg v. Ober, 31 Kan. 599, 3 Pac. 324.

Duty of notary public.— It is no part of the official duty of a notary public, by the general law merchant or State statute, to give notice of the protest or dishonor of a bill or note; and though it is usual and convenient for the notary to give the notice in such case, he is the mere agent of the holder or party authorized to give the notice. Swayze v. Britton, 17 Kan. 625.

24. First Nat. Bank v. Smith, 132 Mass. 227.

is deemed the holder thereof for the purpose of giving notice of dishonor;[25] although he would himself be protected if he only gives such notice to his principal.[26] It has been held that the bank at which a note is made payable, or that has the note for collection, and a notary having it, as agent for the owner, for the purpose of making demand and protest, are to be regarded as holders within the meaning of the rule prescribing the manner in which notice is to be given to indorsers upon nonpayment.[27] The notice may be

25. **Notice by holders for collection.** — When a bill is left at a bank for collection, although the bank has no interest in it, yet for the purposes of receiving and transmitting notices, it is to be considered as the real holder. Warren v. Gilman, 17 Me. 360; Freeman's Bank v. Perkins, 18 Me. 292; Burnham v. Webster, 19 Me. 232; Mead v. Engs, 5 Cow. (N. Y.) 303; West River Bank v. Taylor, 34 N. Y. 128; Powell v. State Bank, 1 Disn. (Ohio) 269; Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105.

26. **Notice to antecedent indorser** is sufficient to bind such indorser even if other parties are not notified. It follows that if a bank holding a note for collection gives notice of dishonor to the principal who indorsed it, it will be sufficient to bind the principal. Griffith v. Assmann, 48 Mo. 66. In the case of Wamesit Bank v. Buttrick, 11 Gray (Mass.), 387, the court said: "The facts show that due diligence was used in giving notice of the dishonor of the note to the defendant. Notices in due form, directed to all the indorsers, of the nonpayment of the note were seasonably put into the post-office in New York under cover to the last indorser. This was according to the usage and practice of merchants and bankers, and shows a sufficient compliance with the rule of law requiring notice to indorsers of the dishonor of a note or bill of exchange. It is immaterial that the holder or last indorser held the note for collection only, and was not an indorser for a valuable consideration." See also Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212: Church v. Barlow, 9 Pick. (Mass.) 547.

In the case of Farmers' Bank of Bridgeport v. Vail, 21 N. Y. 485, it was held that the indorser of a promissory note dishonored on Sunday is duly charged where the agent for its collection, not being able to ascertain the indorser's residence, mails notice of its nonpayment on the following Monday to his principal, and the principal, on the next day after receiving it, mails notice to the indorser. It is immaterial whether or not the holder of the note appears upon it as indorser.

27. Manchester Bank v. Fellows, 28 N. H. 302.

Notice by notaries as agents.—A notary who presents and protests a bill of exchange is authorized by his character and employment to give notice to the various parties to the bill. Greene v. Farley, 20 Ala. 322; Renick v. Robbins, 28 Mo. 339. The authority of a notary to give a notice of dishonor is to be inferred from the fact that the bill was in his possession. Burbank v. Beach, 15 Barb. (N. Y.) 326. Where it appears that a notary had his place of business in the office of the plaintiff's attorney, and that the husband of the plaintiff came in with the note and told the notary of the presentment, and that subsequently the attorney came in, and he and the notary talked the matter over, and it was then decided to send the notice of nonpayment, it is sufficient to show the authority of the notary to act. It is not essential that the notary who signed the notice should have had personal knowledge of the making of the demand for payment, where the notary did not act in his official capacity, nor certify to the protest of the note, but simply gave notice to the indorser that the note had been presented for payment, and that payment had been refused. Meise v. Newman, 78 Hun (N. Y.), 426, 29 N. Y. Supp. 201. See also Harris v. Robinson, 4 How. (U. S.) 336; Swayze v. Britton, 17 Kan. 625; Cowperthwaite v. Sheffield, 1 Sandf. (N. Y.) 416.

properly given by the agent in his own name,[28] as is also provided in the statute. While the general rule is that the party giving notice of dishonor should be a party to the instrument, or some one acting under the authority of such party, yet liberal presumptions will be indulged in, in favor of such authority when the contrary is not made to appear.[29]

b. *When agent may give notice; statutory rule.*— The Negotiable Instruments Law provides: "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."[30] This is the same as a provision of the English Bills of Exchange Act,[31] and is in all respects declaratory of the rule of the law merchant.[32]

§ 111. Benefits of notice.

a. *Where notice is given by or on behalf of holder; statutory provision.*— The Negotiable Instruments Law provides that: "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."[33] This is substantially the same as a provision of the English Bills of Exchange Act.[34] It is declaratory of the general rule. In an

In the case of Cabot Bank v. Warner, 92 Mass. 522, it was held that a notice made out by a notary public and signed by mistake with the name of the maker, without the authority of the maker, is insufficient to bind prior indorsers.

28. Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773.

29. Payne v. Patrick, 21 Tex. 680.

30. Neg. Inst. L. (N. Y.), § 165. For same section in statutes of other States see Appendix.

31. English Bills of Exchange Act, 1882, § 49(13). In the English case of Bray v. Hadwen, 5 M. & S. (Eng.) 68, decided in 1816, a bill payable in London was indorsed in blank by the holder, and deposited with a country banker for collection. The country banker's London agent presented it for payment, and gave him due notice of its dishonor. The country banker on the day after the receipt of such notice gave notice to his customer, who in turn gave a similar notice to his indorser. It was held that the indorser had received due notice. See also Clode v. Bayley, 12 M. & W. (Eng.) 51; Goodall v. Polhill, 14 L. J. C. P. (Eng.) 146.

32. Farmers' Bank of Bridgeport v. Vail, 21 N. Y. 485; Eagle Bank v. Hathaway, 5 Metc. (Mass.) 212; Wamesit Bank v. Buttrick, 11 Gray (Mass.), 387.

33. Neg. Inst. L. (N. Y.), § 163. For same section in statutes of other States see Appendix.

34. English Bills of Exchange Act, 1882, § 49(3).

early New York case,[35] which is cited by Mr. Chalmers as the basis of this rule, it was held that a notice given by the holder of a note or bill to the several indorsers inures to the benefit of the indorsees, or preceding parties; so that the first indorser of a note who has received notice of its nonpayment from the holder, but not from the second or subsequent indorsers, is liable to such subsequent indorser in the same manner as if the notice had been received from him. Although notice of nonpayment, given by a holder of a note to an indorser, inures to the benefit of the other parties thereto, an inability to learn the proper place for giving such notice which excuses the holder is not available to another indorser who possesses the necessary information.[36] If an indorser receive notice from any one who is a party, he is liable to any subsequent indorser though he may have received no notice from him.[37]

b. *Where given by or on behalf of party entitled to give notice; statutory rule.*— The Negotiable Instruments Law provides that: "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 sub- "sequent to the party to whom notice is given." [38] The English Bills of Exchange Act contains a similar provision.[39]

§ 112. Sufficiency and form of notice.

a. *When notice sufficient.*— (1) *Statutory provision.*— The Negotiable Instruments Law contains the following provision: "A written notice need not be signed, and an insufficient written "notice may be supplemented and validated by verbal communi- "cation. A misdescription of the instrument does not vitiate the "notice unless the party to whom the notice is given is in fact "misled thereby." [40] The English Bills of Exchange Act contains a similar provision.[41] This is in effect declaratory of the general rule.[42]

35. Stafford v. Gates, 18 Johns. (N. Y.) 327.

36. Beale v. Parish, 20 N. Y. 407.

37. Mead v. Engs, 5 Cow. (N. Y.) 303.

In the case of Jordan v. Ford, 7 Ark. 416, it was held that notice from the holder of a note will inure to the benefit of every other party who stands between the persons giving the notice and the person to whom it is given.

38. Neg. Inst. L. (N. Y.), § 164. For same section in statutes of other States see Appendix.

39. English Bills of Exchange Act, 1882, § 49(4).

40. Neg. Inst. L. (N. Y.), § 166. For same section in statutes of other States see Appendix.

41. English Bills of Exchange Act, 1882, § 49(7).

42. Holditch v. Canty, 4 Bing. N. C. (Eng.) 411. In this case notice was given by a holder to an indorser, of the dishonor of a bill by an executor, in these terms: "Messrs. H. are surprised to hear that Mr. G.'s bill was returned to the holder unpaid." This

(2) *Misdescription of instrument and mistake.*—A misdescription of the note will not render the notice of dishonor insufficient if it does not mislead the person to whom the notice is given, and if it so designates and distinguishes the note as to leave no reasonable doubt in his mind what note was intended.[43] The variance must be such as to convey no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility.[44] A failure to state the name of the owner or holder of the instrument,[45] a misstatement in the amount,[46] the omission of the date and time of payment,[47] or the fact that the

was followed by a visit from the indorser to the holder on the same date, in which he expressed his regret, and promised that he would write to the other parties, by whom or by himself the holder should be paid, it was held sufficient to render him liable.

43. Gilbert v. Dennis, 3 Metc. (Mass.) 495; Gates v. Beecher, 60 N. Y. 518, 19 Am. Rep. 207.

44. Variance not material unless party notified is misled.— Bank of Alexandria v. Swann, 9 Pet. (U. S.) 33, 9 L. Ed. 40. The following cases are also to this effect:

Alabama.— Crawford v. Branch Bank of Mobile, 7 Ala. 205; Moorman v. Bank of Alabama, 3 Port. 353; Saltmarsh v. Tuthill, 13 Ala. 390.

Connecticut.— Kilgore v. Bulkley, 14 Conn. 362; Gill v. Palmer, 29 Conn. 54.

Florida.— Spann v. Baltzall, 1 Fla. 301, 46 Am. Dec. 346.

Indiana.— Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Maine.— King v. Hurley, 85 Me. 525, 27 Atl. 463; Wood v. Watson, 53 Me. 300; Waterman v. Vose, 43 Me. 504.

Maryland.— Sassar v. Farmers' Bank, 4 Md. 409.

Massachusetts.— Smith v. Whiting, 12 Mass. 6, 7 Am. Dec. 25.

Michigan.—Snow v. Perkins, 2 Mich. 238.

Missouri.— Townsend v. Heer Dry Goods Co., 83 Mo. 503; Renick v. Robbins, 28 Mo. 339.

New Jersey.— Dodson v. Taylor, 56 N. J. L. 11, 28 Atl. 316.

New York.— Bank of Cooperstown v. Woods, 28 N. Y. 545; Hodges v. Shuler, 22 N. Y. 114; Youngs v. Lee, 12 N. Y. 551; Cook v. Litchfield, 9 N. Y. 279; Cayuga County Bank v. Warden, 1 N. Y. 413; Bank of Rochester v. Gould, 9 Wend. 279; Northup v. Cheney, 27 App. Div. 418, 50 N. Y. Supp. 389.

Ohio.— Powell v. State Bank of Ohio, 1 Disn. 269.

Pennsylvania.—Tobey v. Lenning, 14 Penn. St. 483.

Tennessee.— Myers v. Bank of Tennessee, 3 Head, 330; Ross v. Planters' Bank, 5 Humph. 335.

45. Marine v. United States Bank, 11 Wheat. (U. S.) 431, 6 L. Ed. 512; Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Shrieve v. Duckham, 1 Litt. (Ky.) 194; Brady v. Davis, 26 Me. 45; Shed v. Brett, 1 Pick. (Mass.) 401, 11 Am. Dec. 209.

46. Bank of Alexandria v. Swann, 9 Pet. (U. S.) 33, 9 L. Ed. 40; King v. Hurley, 85 Me. 525, 27 Atl. 463; Snow v. Perkins, 2 Mich. 238.

47. Shelton v. Braithwaite, 7 M. & W. (Eng.) 436; Youngs v. Lee, 12 N. Y. 551; Tobey v. Lenning, 14 Pa. St. 483; Ross v. Planters' Bank, 5 Humph. (Tenn.) 335.

Omission of time of payment.— In the case of Gates v. Beecher, 60 N. Y. 518, 10 Am. Rep. 207, the notice did not mention the time of payment, otherwise than as it might possibly be inferred from the naming of the day on which it was alleged to have been presented for payment. It was held that the absence of a statement, even at the same time with an wrong person was described as the last indorser,[48] are not such defects as will mislead the person to whom the notice is given and are, therefore, immaterial. The object of the notice is simply to inform the indorser of the nonpayment by the maker, and that he is held liable for the payment of the note, and if the notice accomplishes this object it is sufficient, though it misdescribe the note in some particulars.[49] It has been held, however, that a notice of dishonor of a promissory note must name the maker or it will not be sufficient to change the indorser.[50]

b. *Form of notice.*—(1) *Statutory provision.*— The Negotiable Instruments Law provides as follows: "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 nonacceptance or nonpayment. It may in all "cases be given by delivering it personally or through the mails."[51] A similar provision is contained in the English Bills of Exchange Act.[52]

(2) *Notice may be oral.*— Independent of the provisions of the statute a notice of dishonor may be either verbal or in writing. It is, however, better to give the notice in writing, because thereby the evidence of it will be better preserved in case the fact becomes a matter of dispute.[53]

absence of a statement of the date and amount, there being no evidence of any other note to which the notice could apply, was not a fatal omission.

48. Myers v. Bank of Tennessee, 3 Head (Tenn.), 330.

49. Snow v. Perkins, 2 Mich. 238, 243.

50. **Name of maker must be included.** — Home Ins. Co. v. Green, 19 N. Y. 518, 75 Am. Dec. 361. In this case the notice contained a description of the note in the following terms:

"A noted dated, Buffalo, June 18, 1855, for $1,151, drawn by ...., payable at three months date, and indorsed by you," etc. The court said: 'I am of the opinion that the notice was not sufficiently certain. The most descriptive feature of a note is the name of the maker. The date, amount, and time of the payment, and the statement that the party served with the notice was an indorser, might or might not recall it to his recollection. One indorsing frequently for the accommodation of different persons, and keeping no bill-book, would not, by means of such a notice, ordinarily be able to identify the paper on which he was sought to be charged; nor would one who indorsed and negotioted his own business paper, if his transactions of that kind were responsible, be much more likely to know what particular paper had been dishonored."

51. Neg. Inst. L. (N. Y.), § 167. For same section in statutes of other States see Appendix.

52. English Bills of Exchange Act, § 49(5). See also the following English cases as to the sufficiency of a notice of dishonor: King v. Bickley, 2 Q. B. (Eng.) 419; Bailey v. Porter, 14 M. & W. (Eng.) 44; Armstrong v. Christiani, 5 C. D. (Eng.) 687; Paul v. Joel, 27 L. J. Exch. (Eng.) 380; Maxwell v. Brain, 10 L. T. (N. S.) (Eng.) 301; Bain v. Gregory, 14 L. T. (N. S.) (Eng.) 601.

53. Martin v. Brown, 75 Ala. 442; Thompson v. Williams, 14 Cal. 160; Pierce v. Schaden, 5 Call (Va.), 406;

(3) *General rule as to sufficiency of notice.*— Justice Story,[54] in speaking of the form of the notice of dishonor to be given or sent to the indorser, says: "No precise form of words is necessary to be used upon such occasions; still, however, it is indispensable that it should either expressly, or by just and actual implication, contain in substance the following requisites: (1) A true description of the note so as to ascertain its identity; (2) an assertion that it has been duly presented to the maker at its maturity and dishonored; (3) that the holder or other person giving notice looks to the person to whom the notice is given for reindorsement and indemnity." The notice of dishonor is not sufficient unless it expressly or by implication shows that the instrument was presented for payment, and payment thereof was refused.[55] It must show that the presentment for payment was made at the proper time, and, therefore, a notice which has no date, which states that the note has been "this day presented for payment," and payment refused, is defective.[56] The word "protest" or "protested," used in a notice of dishonor, imports the taking of such steps as are requisite to charge the indorser or drawer of a bill with his demand and refusal.[57]

Merrit v. Woodbury, 14 Iowa, 299; Ticonic Bank v. Stackpole, 41 Me. 321, 66 Am. Dec. 246; First Nat. Bank v. Hatch, 78 Mo. 13; Cuyler v. Stevens, 4 Wend. (N. Y.) 566.

54. Story on Promissory Notes, § 348; Artisans' Bank v. Backs, 12 Pet. (U. S.) 100, 104.

55. **Notice must state that presentment was made.**— In the case of Arnold v. Kenlock, 50 Barb. (N. Y.) 44, it was held that a notice giving the date of the maturity of the note, not properly describing the instrument, but merely stating that it had not been paid, and requesting payment, was not sufficient to charge the indorser. See also Littlehale v. Maberry, 43 Me. 264; Page v. Gilbert, 60 Me. 485; Armstrong v. Thurston, 11 Md. 548; Pickham v. Macy, 9 Metc. (Mass.) 174; Fisk v. Morse, 16 N. H. 271; Porter v. Thom, 167 N. Y. 584, 60 N. E. 1119; Townsend v. Lorain Bank, 2 Ohio St. 345.

56. Wynn v. Alden, 4 Den. (N. Y.) 163. But in the case of the Artisan's Bank v. Backus, 36 N. Y. 100, an undated notice of protest was held sufficient which properly described the note and which showed upon its face that the note was due ninety days from a specified date.

57. **Notice must show presentment and refusal to pay.**— Beals v. Peck, 12 Barb. (N. Y.) 245. In this case the court said: "It seems to me, therefore, as the word 'protest' and its preterit 'protested,' are words of well-known signification among business and commercial men, when used in relation to commercial paper, and are unnecessarily understood to mean the taking of such steps in the case of a bill of exchange, as are requisite to charge the indorser and drawer, except the notice; that is payment and refusal; that when used in reference to a promissory note, the same force and meaning attaches to them as would when used in relation to a bill of exchange; and that the import and demand and refusal has charge in the one case as the other." See also Young v. Bennett, 7 Bush (Ky.), 474; First Nat. Bank v. Hatch, 78 Mo. 13; Fox v. Newell, 1 Ohio Dec. 378. In the case of Cook v. Litchfield, 5 Sandf.

(4) *Service by mail.*— The statute provides that a notice of dishonor may be given by mail. It was the rule of commercial law that where the parties resided at the same place the notice must be personal. The statute by providing generally that service may be made, either personally or by mail, has recognized the obvious fact that the reason for the former rule has ceased to exist. In a number of States provision is made by statute for the service of such a notice by mail where the parties reside in the same place.[58]

§ 113. Time within which notice must be given.

a. *General and statutory rule.*— The Negotiable Instruments Law provides that: "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."[59] This is also the effect of the rule as contained in the English Bills of Exchange Act.[60] The general rule is that the notice must be given within a reasonable time after its dishonor.[61] The law, independent of the statute, has determined with great precision what constitutes reasonable time; it is a mixed question of law and fact, to be determined by the ordinary rules of commercial law, applicable to the particular case, and the circumstances under which the case arose.[62] The general rules, except as modified by the

(N. Y.) 330, affd. in 9 N. Y. 279, it was held that a notice which states that the note "was, on the day the same became due, duly protested for nonpayment," communicates, by a necessary implication, the facts that a demand of payment was made on the proper day, and at the proper place, and was refused, and is, therefore, a valid notice.

58. Alabama (Code, § 1777). In Illinois (Hurd's Stats., 1901, chap. 99, § 12, p. 1235), it is provided that notice may be given by mail in towns of 10,000 inhabitants or more. In Michigan (Howell's Stat., §§ 1586, 1591), and Minnesota (Stat., §§ 2230, 2232, 2274, 2275), notice may be sent by mail in all cases. In New Jersey, service may be made by mail. Gen. Stat. 1895, p. 2606, § 16. In New York service by mail has been authorized in all cases by Laws 1857, chap. 416, which was repealed by the Negotiable Instruments Law.

59. Neg. Inst. L. (N. Y.), § 173. For the same section in statutes of other States see Appendix.

60. English Bills of Exchange Act, 1882, § 49(12), where it is provided that notice may be given as soon as the bill is dishonored, and must be given within a reasonable time thereafter. See also Burbridge v. Manners, 3 Campb. (Eng.) 193; Hine v. Allely, 4 B. & Ad. (Eng.) 624; Hirschfield v. Smith, L. R., 1 C. P. (Eng.) 351; Bray v. Hadwen, 5 M. & S. (Eng.) 68; Berridge v. Fitzgerald, 38 L. J. Q. B. (Eng.) 335.

61. Bull v. First Nat. Bank, 14 Fed. 612; Eldridge v. Rogers, Minor (Ala.), 392; Phelps v. Blood, 2 Root (Conn.), 518; Noble v. Kentucky Bank, 3 A. K. Marsh. (Ky.) 262; Bank of North America v. Vardon, 2 Dall. (Pa.) 78; German-American Bank v. Atwater, 165 N. Y. 36, 58 N. E. 763.

62. Edwards on Bills and Notes, p. 615.

Reasonable time.— The time within which a notice of dishonor should be given is not fixed by any unvarying rule under the common law. "It was only requisite that demand should be statute, are still in force, and subject to the statute will still be used in determining what constitutes reasonable time. Notice of dishonor given the day the bill or note becomes due is not too soon; for although payment may still be made within the day, nonpayment on presentment is a dishonor.[63] A demand of payment at any reasonable hour of the day on which an instrument falls due, and a refusal to pay, will warrant notice of dishonor to any of the prior parties.[64]

made immediately upon maturity of the paper, and that notice of nonpayment should be given within a reasonable time; and a reasonable time would depend to a great extent upon the means of transportation and the facilities existing at the point where the paper was presented for payment for the transmission of that class of intelligence. In most of the States of the Union, by adjudged cases, where no statute prescribes the time within which notice shall be given, the term 'reasonable time' has been defined with such certainty and precision as to furnish almost a fixed rule upon that subject. * * * Of course no rule can be framed by which it can be stated as a matter of law, within what time, generally, a notice of nonpayment must be given in order to bind an indorser, for that would depend upon the particular facts of each case; but where the facts are undisputed, and the time allowed to elapse is manifestly unreasonable, it may be pronounced with perfect confidence that in a certain case the notice was not timely given. The question then becomes one of law and not of fact, and the court may and should pronounce thereon without submitting it to a jury." *Per* Atkinson, J., in Pattillo v. Alexander, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616.

Time deemed unreasonable as to promissory notes: Nine days, Morris v. Gardner, Fed. Cas. No. 9,830, 1 Cranch C. C. (U. S.) 213; three months after demand, Keyes v. Fenstermaker, 24 Cal. 329; eight days, Hussey v. Freeman, 10 Mass. 84; two months, Crain v. Colwell, 8 Johns. (N. Y.) 299; five months, Sice v. Cunningham, 1 Cow. (N. Y.) 397; six days, Borst v. Winckel, 14 Hun (N. Y.), 138; ten days, Deininger v. Miller, 7 App. Div. (N. Y.) 409, 40 N. Y. Supp. 195; six days, State Bank v. Smith, 7 N. C. 70; fourteen days, Hubbard v. Troy, 24 N. C. 134.

As to bills of exchange: Nine days, United States v. Barker, Fed. Cas. No. 14,519; fifteen days, Brown v. Turner, 11 Ala. 752; nineteen days, Green v. Darling, 15 Me. 141; three days if both parties reside in same town, Bryden v. Bryden, 11 Johns. (N. Y.) 187.

Useless delay will discharge an indorser. West River Bank v. Taylor, 7 Bosw. (N. Y.) 466. The failure of the indorsee of a draft to notify the notary of the address of his indorser, and of the notary to make inquiries in regard thereto of the drawee or others, in consequence of which the notices of protest are first sent to the indorsee, thereby causing an unnecessary delay of two days in serving notice of protest on the indorser, releases the indorser from liability. First Nat. Bank v. Farneman, 93 Iowa, 161, 61 N. W. 424.

63. Burbridge v. Manners, 3 Campb. (Eng.) 193; Youngs v. Lee, 12 N. Y. 551; Cook v. Litchfield, 5 Sandf. (N. Y.) 330; Lindenberger v. Beal, 6 Wheat. (U. S.) 104.

64. In the case of Whitwell v. Brigham, 19 Pick. (Mass.) 117, 122, the court said: "The law merchant, however, has a modification of the principle operating upon negotiable instruments, by which mercantile paper is considered as falling due upon demand, on the last day of grace. And a demand made at any reasonable hour within the day, and a refusal to pay, will warrant notice to any of the prior parties and authorize the commencement of an action." See also Bank of Alexandria v. Swann, 9 Pet. (U. S.) 33; Coleman v. Carpenter, 9 Pa. St. 178.

b. *Delay in giving notice, when excusable; statutory provision.* — The Negotiable Instruments Law contains the following provision: "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." [65] This provision is the same as that of the English Bills of Exchange Act, from which it was evidently derived.[66] It is declaratory of the general rule which is a deduction from that other general rule that a notice of dishonor must be given within a reasonable time.[67] The absence from home of an indorser is no excuse for a delay in giving notice, since it is not necessary that the service should be personal.[68] If the residence of an indorser is unknown, or if through the fault of the indorser in writing his name the notice was misdirected, the delay occasioned thereby is excusable, if due diligence was used in transmitting the notice.[69] The existence of a malignant and contagious

65. Neg. Inst. L. (N. Y.), § 184. For the same section in statutes of other States see Appendix.

66. English Bills of Exchange Act, 1882, § 50(1).

67. **Rule not changed by statute.** — Firth v. Thrush, 8 B. & C. (Eng.) 387; Gladwell v. Turner, L. R., 5 Exch. (Eng.) 61. In the case of Studdy v. Beesty, 60 L. T. (N. S.) (Eng.) 647, in speaking of the change made by the statute, and referring to the case of Allen v. Edmundson, 2 Exch. (Eng.) 719, the court said: "That case is no authority for saying that, where delay arises from the person who has to give the notice not knowing where to give it, he is excused from giving it altogether. Under those circumstances the person who has to give the notice must not rest on his inability at the time to find the person to whom it is to be given. He can serve the notice when he does find out where to serve it. That is the old law. The statute only carries out the old law. By the statute notice of dishonor must be given, and must be given within a reasonable time after the dishonor. Then by section 50 (1), delay in giving notice is excused when the delay is caused by circumstances beyond the control of the party giving the notice, and not imputable to his fault; but the section goes on to say that when the cause of delay ceases to operate the notice must be given with reasonable diligence."

68. Lawrence v. Ralston, 3 Bibb (Ky.), 102; McCrummen v. McCrummen, 5 Mart. (N. S.) (La.) 159; Central Nat. Bank v. Levin, 6 Mo. App. 543.

69. **Residence unknown.** — If the holder of a note cannot, by diligent inquiry, find the residence of an indorser, it is sufficient to charge him, if notice of nonpayment be given at the first opportunity. Blodgett v. Durgin, 32 Vt. 361. See also Vigers v. Carlton, 14 La. 89, 33 Am. Dec. 575; Eager v. Brown, 11 La. Ann. 625; Robison v. Barber, 3 Am. L. J. (Pa.) 59; Nichol v. Bate, 7 Yerg. (Tenn.) 305, 27 Am. Dec. 505; Marsh v. Barr, 1 Meigs (Tenn.), 68.

Delay caused by illegible writing of indorser. — Where an indorser of a note wrote his name in the usual manner and in good faith, using the initial letter only of his Christian name, but it was written in such a manner that a person not acquainted with the indorser's Christian name would read it A. C. instead of M., and the notary who protested the note read it A. C. and addressed the notice of protest to A. C. H., it was held that the mistake in addressing disease at the place where the indorser resides is an excuse for delay in giving a notice of dishonor.[70] If war has suspended commercial intercourse between localities, notice of dishonor need not be given; and a notice sent by mail during the suspension of commercial intercourse is nugatory, and notice must be again given as soon as commercial intercourse is resumed.[71] After the cause of the delay has been removed due diligence must be used in giving notice; we will hereafter consider what constitutes due diligence in giving notice of dishonor.[72]

c. *Where parties reside in the same place; statutory provision.*— The Negotiable Instruments Law contains the following provision: "Where the person giving and the person to receive notice reside "in the same place, notice must be given within the following "times:

"1. If given at the place of business oı the person to receive "notice, it must be given before the close of business hours on the "day following;

"2. If given at his residence, it must be given before the usual "hours of rest on the day following;

"3. If sent by mail, it must be deposited in the post-office in "time to reach him in usual course on the day following." [73]

The English Bills of Exchange Act provides that: "In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless (*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonor of the bill." [74] It will be noticed that the effect of the two provisions is substantially the same; in both cases a fixed limit

the notice was directly attributable to the manner and form of the indorser's handwriting in making the indorsement; that the notice sent was a good notice, in law, to the indorser, and that he could not make the mistake which he had thus occasioned available to shield himself from liability; and, although a delay of several days occurred because of the misdirection, it was a good notice to charge the indorser. Manufacturers & Traders' Bank v. Hazard, 30 N. Y. 226.

70. Tunno v. Lague, 2 Johns. Cas. (N. Y.) 1, 1 Am. Dec. 14; Hanauer v. Anderson, 84 Tenn. 340.

71. Peters v. Hobbs, 25 Ark. 67, 91 Am. Dec. 526; Norris v. Despard, 38 Md. 487; Harden v. Boyce, 59 Barb. (N. Y.) 425; Farmers' Bank of Virginia v. Gunnell, 26 Gratt. (Va.) 131.

But after the war has terminated the notice must be given within a reasonable time. Turner v. Patton, 49 Ala. 406; Harp v. Kenner, 19 La. Ann. 63; Bynum v. Apperson, 9 Heisk. (Tenn.) 632; Bank of Old Dominion v. McVeigh, 29 Gratt. (Va.) 546.

72. See *post*, § 117 (*c*). See also Manufacturers & Traders' Bank v. Hazard, 30 N. Y. 226.

73. Neg. Inst. L. (N. Y.), § 174. For the same section in statutes of other States see Appendix.

74. English Bills of Exchange Act, 1882, § 49(12*a*).

is made to what will be regarded as a reasonable time after the dishonor of the bill or note; in both where the parties reside in the same place the notice will not bind the party to receive the notice unless it reach him on the day after the dishonor. The statute seems to have disregarded the existence of the general rule that where the parties reside in the same place notice by mail will be insufficient to charge the person to be served with the notice;[75] and is evidently in recognition of the rule as laid down in a number of cases that if the notice deposited in the post-office directed to one residing in the same place is actually received within a reasonable time it is sufficient.[76] The authorities are generally in support of the rule that a notice is served within a reasonable time after the dishonor of an instrument, where the parties reside in the same place, if the notice reach the party entitled to receive it on the day following the dishonor.[77] If the notice is served personally the statute applies the rule, which obtains in the case of presentment for payment,[78] that the service be made before the usual hours of rest on the day following the dishonor.

d. *Where parties reside at different places; statutory provision.* — The Negotiable Instruments Law provides as follows: "Where "the person giving and the person to receive notice reside in different places, the notice must be given within the following "times:

"1. If sent by mail, it must be deposited in the post-office in "time to go by mail the day following the day of dishonor, or if "there be no mail at a convenient hour on that day, by the next "mail thereafter.

"2. If given otherwise than through the post-office, then within "the time that notice would have been received in due course of "mail, if it had been deposited in the post-office within the time "specified in the last subdivision."[79]

The English Bills of Exchange Act requires that in such cases

75. See § 112, (*b*), (4), *ante*.

76. Hyslop v. Jones, Fed. Cas. No. 6,990, 3 McLean (U. S.), 96; Foster v. McDonald, 5 Ala. 376; Grinman v. Walker, 9 Iowa, 426; Phelps v. Stocking, 21 Neb. 443, 32 N. W. 217; Cornett v. Hafer, 43 Kan. 60, 22 Pac. 1015; Cabot Bank v. Warner, 10 Allen (Mass.), 522.

77. Rowe v. Tepper, 13 C. B. (Eng.) 249; Smith v. Mullett, 2 Campb. (Eng.) 208; Lockwood v. Crawford, 18 Conn. 361; Barker v. Webster, 10 Iowa, 593; Smith v. Roach, 7 B. Mon. (Ky.) 17; Eagle Bank v. Chapin, 3 Pick. (Mass.) 180; Moore v. Somerset, 6 Watts & S. (Pa.) 262.

78. See *ante*, § 92 (*c*).

79. Neg. Inst. L. (N. Y.), § 175. For the same section in statutes of other States see Appendix. See Mohlman Co. v. McKane, 60 App. Div. (N. Y.) 546, 69 N. Y. Supp. 1046.

"the notice be sent off on the day after the dishonor of the bill, if there be a post at a convenient hour on that day, and if there be no post on that day, then by the next post thereafter."[80] This is in effect the same as the above provision of the Negotiable Instruments Law. The great weight of authority supports the rule that where the party to give the notice, and the party to receive it reside in different places, between which there is a mail, the notice may be sent by mail on the day succeeding the dishonor.[81] And if a notice be given by the holder to an indorser by mail, addressed to the indorser at the post-office nearest his residence, and deposited in the post-office at the proper time, the indorser will be charged whether he received the notice or not.[82] The letter containing the notice must be posted early enough to be sent by mail on the day succeeding the dishonor of the instrument.[83] It has been held that

80. English Bills of Exchange Act, 1882, § 49(12*b*).

81. **Notice by mail where parties reside in different places**, see the following cases:

United States.— Lenox v. Roberts, 2 Wheat. 373; Alexandria Bank v. Swann, 9 Pet. 33.

Alabama.— Knott v. Venable, 42 Ala. 186.

Florida.— Sanderson v. Sanderson, 20 Fla. 304.

Indiana.— Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

Kentucky.— Hickman v. Ryan, 5 Litt. 24.

Maine.— Goodman v. Norton, 17 Me. 381.

Maryland.— Bell v. Hagerstown Bank, 7 Gill, 216.

Massachusetts.— Grand Bank v. Blanchard, 23 Pick. 305; Eagle Bank v. Hathaway, 5 Metc. 212; Talbot v. Clark, 8 Pick. 51.

Nebraska.— Phelps v. Stocking, 21 Neb. 443, 32 N. W. 217.

New Hampshire.— Carter v. Burley, 9 N. H. 558.

New Jersey.— Sussex Bank v. Baldwin, 17 N. J. L. 487.

New York.— Mead v. Engs, 5 Cow. 303; Robinson v. Ames, 20 Johns. 146, 11 Am. Dec. 259; Mohlman Co. *v.* McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046.

North Carolina.— National Bank v. Bradley, 117 N. C. 526, 23 S. E. 455.

Pennsylvania.— Stephenson v. Dickson, 24 Pa. St. 148, 62 Am. Dec. 369.

82. The following cases support this doctrine:

United States.— Dickins v. Beal, 10 Pet. 572, 9 L. Ed. 538; Bussard v. Levering, 6 Wheat. 102, 5 L. Ed. 215.

Connecticut.— Shepard v. Hall, 1 Conn. 329.

Maine.— Loud v. Merrill, 45 Me. 516.

Maryland.— Citizens' Bank v. Grafflin, 31 Md. 507, 1 Am. Rep. 66; Sasscer v. Farmers' Bank, 4 Md. 409.

Massachusetts.— Shedd v. Brett, 1 Pick. 401, 11 Am. Dec. 209; Stanton v. Blossom, 14 Mass. 116, 7 Am. Dec. 198.

Mississippi.— Ellis v. Commercial Bank, 8 Miss. 294, 40 Am. Dec. 63.

New York.— Ireland v. Kip, 11 Johns. 231; Price v. McGoldrick, 2 Abb. N. C. 69; Townsend v. Auld, 8 Misc. 516, 28 N. Y. Supp. 746.

Ohio.— Liggitt v. Wing, 31 Wkly. L. Bul. 85; Walker v. Stetson, 14 Ohio St. 89, 84 Am. Dec. 362.

Pennsylvania.— Woods v. Neeld, 44 Pa. St. 86; Jones v. Lewis, 8 Watts & S. 14.

83. Hickman v. Ryan, 5 Litt. (Ky.) 24; Talbot v. Clark, 8 Pick. (Mass.) 51; United States v. Barker, Fed. Cas. No. 14,520, 2 Wash. C. C. (U. S.) 464, affd. in 12 Wheat. (U. S.) 559, 6 L. Ed. 728.

Posting the notice on the day following the date of dishonor will not constitute a service within sufficient time unless the posting is early enough in the day for the mail leavif two mails leave the same day by the same route to the place of residence of the indorser, it is sufficient to deposit the notice in the post-office in time to go by either mail of that day, inasmuch as the fractions of the day are not counted.[84] But on the other hand there are a number of cases to the effect that the notice should be so posted as to go by the first convenient mail on the day following the dishonor.[85] The statute does not prescribe the particular mail on the day following the day of dishonor by which the notice should be sent, and presumably the rule of the statute will permit a post-

ing on that day. Lenox v. Roberts, 2 Wheat. (U. S.) 373, 4 L. Ed. 264; Bank of Alexandria v. Swann, 9 Pet. (U. S.) 33, 9 L. Ed. 40; Goodman v. Norton, 17 Me. 381; Chick v. Pillsbury, 24 Me. 458, 41 Am. Dec. 394; Carter v. Burley, 9 N. H. 558; Manchester Bank v. White, 30 N. H. 456; Denny v. Palmer, 27 N. C. 610.

84. **Where more than one mail leaves on the day following dishonor,** it is immaterial by which mail the notice is sent; it is only necessary that it be posted early enough to go by a mail of that day. Whitwell v. Johnson, 17 Mass. 449, 454.

In the case of Howard v. Ives, 1 Hill (N. Y.), 263, a notice was mailed in Troy directed to an indorser residing in Lansingburgh at 9 A. M. of the day following the dishonor; it was held that the notice was timely, though the mail from Troy to Lansingburgh closed at 8 A. M.

And in Smith v. Poillon, 87 N. Y. 590, 41 Am. Rep. 402, the second indorser of a promissory note residing in Warren, Maine, received due notice of dishonor thereof by mail; wishing to consult counsel in respect thereto, he drove on the same day to the neighboring town of Thomaston; he there mailed notice of dishonor to the defendants residing in New York by a mail leaving at 1:40 P. M., which passed through Warren, his place of residence, at 2 P. M.; there was also a mail leaving Thomaston at 10:10 A. M., and Warren at 9:30. It was held that the notice was timely. See also Lawson v. Farmers' Bank, 1 Ohio St. 206.

85. Haskell v. Boardman, 8 Allen (Mass.), 38, in which the court said: "The rule is that such notices should go by the next practicable post after the day on which the holder receives notice of the dishonor of the note;" Burgess v. Vreeland, 24 N. J. L. 71; Sussex Bank v. Baldwin, 17 N. J. L. 496; Stephenson v. Dickson, 24 Pa. St. 152, 62 Am. Dec. 369; Peabody Ins. Co. v. Wilson, 29 W. Va. 536.

Conflicting authorities.— In the case of Smith v. Poillon, 87 N. Y. 590, 597, 41 Am. Rep. 402, Earl, J., said: "From a careful examination of all these authorities and many others it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this State. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation, and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law."

ing at any time so that the notice may go by any mail on such following day.

The general rule has been well stated in the following language: "When the parties reside in different places or States, the notice may be sent by the mail of the day of the default; but if not it must be deposited in the office in time for the mail of the next day, provided the mail of that day be not made up and closed at an unreasonably early hour. If, however, the mail of that day be closed before a reasonable time after early business hours, or if there be no mail sent out on that day, then it must be deposited in time for the next possible post." [86]

Where the notice is transmitted otherwise than by mail, the rule is, independent of statute, that the notice will be sufficient if it reach the party entitled to receive it during the business hours of the day on which it would have reached him had it been sent by mail.[87] The holder of a bill or note has a right to adopt a private conveyance, instead of the mail, for the transmission of a notice of dishonor; but in such a case it is incumbent upon the holder to show that due diligence was used.[88]

e. *Notice to successive indorsers; statutory provision.*— Each indorser is entitled, as we have seen, to a notice of dishonor from his indorsee;[89] each indorser is entitled to one day for giving notice to the party next liable;[90] but the time is to be calculated from the

86. *Per* Bartley, J., in Lawson v. Farmers' Bank, 1 Ohio St. 206, 215. In the case of Chick v. Pillsbury, 24 Me. 458, the doctrine on this subject has been more fully examined than perhaps in any of the older cases; and the rule adopted was, that the notice, in order to charge the indorser living in another place or State, *must* be deposited in the post-office in time to be sent by the mail of the day succeeding the day of the dishonor, providing the mail of that day be not closed at an unreasonably early hour, or before early and convenient business hours.

87. **Notice sent by private hand.** — Bancroft v. Hall, Holt's Nisi Prius Rep. (Eng.) 476, where it was held that it is sufficient, provided there be no essential delay, if the holder send notice by a private hand; and although such notice should thereby reach the drawer later in the day than if it had been sent by mail, he will not on that account be discharged. And it was further held in this case that notice of the dishonor of a bill of exchange given at the counting-house of a merchant or manufacturer between the hours of six and seven in the evening is not too late.

88. Jarvis v. St. Croix Mfg. Co., 23 Me. 287.

89. See *ante*, § 108; Butler v. Duval, 4 Yerg. (Tenn.) 265.

90. **Notice by one indorser to party next liable,** see the following cases:

United States.—United States Bank v. Goddard, 5 Mason, 366.

Alabama.— Whitman v. Farmers' Bank, 8 Port. 258.

Arkansas.—Davis v. Hanly, 12 Ark. 645.

Iowa.— First Nat. Bank v. Farneman, 93 Iowa, 161, 61 N. W. 424.

Kentucky.— Smith v. Roach, 7 B. Mon. 17.

Louisiana.— Barker v. Whitney, 18 La. 575.

day on which the notice is in fact received, and is not to be enlarged because the notice was received earlier than might in strictness have been required.[91] And it is no objection to a notice by an indorser, that it was not received so soon by an earlier indorser as it would have been if transmitted directly to him by the holder, provided it was sent with reasonable diligence by each indorser as he received it.[92] The notice may properly take its regular course from one indorsee to his immediate indorser, and thus by circuitous route to the first indorser,[93] and all parties receiving the notice will be bound thereby, if due diligence is used by all of them.[94]

Where one of successive indorsers was not notified of the dishonor of the instrument within a reasonable time by the holder or a subsequent indorsee, his prior indorser will be discharged, and if he voluntarily pays the bill or note, such prior indorser may avail himself of the defense of want of diligence in giving the

Maine.—Allen v. Avery, 47 Me. 287; Freeman's Bank v. Perkins, 18 Me. 292; Farmer v. Rand, 16 Me. 453.

Massachusetts.— Haskell v. Boardman, 8 Allen, 38; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177, 3 Am. Rep. 445; Fitchburg Bank v. Perley, 2 Allen, 433; True v. Collins, 3 Allen, 438.

Missouri.— Renshaw v. Triplett, 23 Mo. 213.

New Hampshire.—Manchester Bank v. Fellows, 28 N. H. 302; Carter v. Burley, 9 N. H. 558.

New Jersey.— State Bank v. Ayers, 7 N. J. L. 131.

New York.— West River Bank v. Taylor, 7 Bosw. 466, affd. in 34 N. Y. 128; Ogden v. Dobbin, 2 Hall, 112; Higgins v. Barrowcliffe, 14 Jones & S. 540; United States Bank v. Davis, 2 Hill, 451; Wynen v. Shappert, 6 Daly, 558; Metropolitan Bank v. Engel, 66 App. Div. 273, 72 N. Y. Supp. 691.

North Carolina.— National Bank v. Bradley, 117 N. C. 526, 23 S. E. 455.

Ohio.— Lawson v. Farmers' Bank, 1 Ohio St. 206.

Pennsylvania.— Stephenson v. Dickson, 24 Pa. St. 148, 62 Am. Dec. 369; Struthers v. Blake, 30 Pa. St. 142; Etting v. Schuylkill Bank, 2 Pa. St. 355, 44 Am. Dec. 205.

Rhode Island.— Mitchell v. Cross, 2 R. I. 437.

Tennessee.— Simpson v. Turney, 5 Humph. 419, 42 Am. Dec. 443.

Wisconsin.— Linn v. Horton, 17 Wis. 151.

91. Farmer v. Rand, 16 Me. 453.

92. Linn v. Horton, 17 Wis. 151.

93. **Indorsee may take regular course of mails** to notify his immediate indorser, see West River Bank v. Taylor, 7 Bosw. (N. Y.) 466, affd. in 34 N. Y. 128. When a note is presented for payment and payment is refused, the holder acts with reasonable diligence, if he gives notice by the regular course of mail to the indorser from whom he received it that he may transmit notice to his immediate indorsers, who may take the same course as to the prior indorsers; and if the indorsers in due season adopt the regular course of mail for transmitting notice from one to the other, and by that reason the route to the first indorser is made circuitous, it is not want of diligence on their part, and he cannot set up the manner of giving the notice, and the delay occasioned by it as a defense. Ogden v. Dobbin, 2 Hall (N. Y.), 112.

94. Linn v. Horton, 17 Wis. 151; Whitman v. Farmers' Bank, 8 Port. (Ala.) 258; Carter v. Burley, 9 N. H. 558; Metropolitan Bank v. Engel, 66 App. Div. (N. Y.) 273, 72 N. Y. Supp. 691.

notice.[95] There is no distinction made where a bill or note is indorsed to a bank for collection; the bank is regarded as a holder and has a day to give its principal notice, who in turn has another day to give his indorser notice.[96]

The Negotiable Instruments Law provides that: "Where a "party receives notice of dishonor, he has, after the receipt of such "notice, the same time for giving notice to antecedent parties that "the holder has after the dishonor." [97] This is substantially the same as the rule contained in the English Bills of Exchange Act,[98] and is, as we have already seen, declaratory of the general rule.

§ 114. Service of notice by mail.

a. *In general.*—We have already considered the propriety of serving notice of dishonor by mail.[99] The general rule that where the person to be notified and the person required to give the notice reside in the same place, the notice must be served personally or by leaving it at the place of business or residence of the person to be notified has been abrogated by statute or by the Negotiable Instruments Law in nearly all the States; and in some other States the rule has been modified or limited by force of recent decisions. The notice, if served by mail, should be directed to the post-office where

95. Brown v. Ferguson, 4 Leigh (Va.), 37, 24 Am. Dec. 707.

96. **Notice where instrument was indorsed for collection.**— A banker presenting a bill for his customer has the same time to give notice to his customer as if he were the holder for his own benefit, and the customer has the same time, as if such had been the case, to transmit notice to former parties. McNeil v. Wyatt, 3 Humph. (Tenn.) 125. See also Myers v. Courtney, 11 Phila. (Pa.) 343; West River Bank v. Taylor, 7 Bosw. (N. Y.) 466, affd. in 34 N. Y. 128; Warren v. Gilman, 17 Me. 360; Fish v. Jackman, 19 Me. 467, 36 Am. Dec. 769. A bank to which a note was indorsed for collection is to be regarded as a party to the paper for all the purposes of receiving and giving notice to charge the prior parties. When an indorser intends charging previous indorsers by consecutive notices, and they reside in different places, due diligence will have been used when notice is sent the day following that on which it is received. The rule is the same though the paper is indorsed from one to another agent for collection merely. Each of such indorsers is to be regarded as a party for all the purposes of charging prior parties. Farmers' Bank v. Vail, 21 N. Y. 485.

An agent to whom a negotiable note is intrusted for collection, whether by indorsement or mere delivery, is treated in the matter of giving notice of nonpayment as an indorsee of the note. He is entitled to the usual time to notify his principal of nonpayment, and the principal to the usual time thereafter to notify antecedent indorsers. But if the agent has failed to give notice to his principal in due time, the latter is cut off, though he may thereafter use due diligence in communicating notice to antecedent parties. Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66.

97. Neg. Inst. L. (N. Y.), § 178. For same section in statutes of other States see Appendix.

98. English Bills of Exchange Act, 1882, § 49(14).

99. See *ante*, § 112, (*b*), (4).

the party is in the practice of receiving his mail, although it may not be his nearest post-office.[1] But if the person whose duty it is to give the notice has no knowledge of the post-office where the indorser receives his mail, it will be sufficient to direct the notice to the place where he resides, or to the post-office nearest to his place of residence.[2] Where a party indicates on the instrument

1. **Notice mailed to post-office where party receives his mail.**— Bank of United States v. Carneal, 2 Pet. (U. S.) 543, 7 L. Ed. 513. In this case Justice Story said: "When notice is sent by the mail, it is sufficient to direct it to the town where the party resides, if it is a post town. If it is not, then to the post-office or post town nearest to his residence, if known. But the rule as to the nearest post-office is not of universal application, for if the party is in the habit of receiving his letters at a more distant post-office, or through a more circuitous route, and that fact is known to the person sending notice, notice sent by the latter mode will be good. And where the party is in the habit of receiving his letters at various post-offices, to suit his own convenience or business, it may be sufficient to send it to either. The object of the law in all these cases is to enforce the transmission of the notice by such a route as that it may reach the party in a reasonable time. See also Sherman v. Clark, Fed. Cas. No. 12,763, 3 McLean (U. S.), 91; Walker v. Bank of Augusta, 3 Ga. 486; Glasscock v. Bank of Missouri, 8 Mo. 443; Hazelton Coal Co. v. Ryerson, 20 N. J. L. 129; Reid v. Payne, 16 Johns. (N. Y.) 218, 8 Am. Dec. 311; Bank of Geneva v. Howlett, 4 Wend. (N. Y.) 328; Cuyler v. Nellis, 4 Wend. (N. Y.) 398; Morris v. Husson, 4 Sandf. (N. Y.) 93; Montgomery Bank v. Marsh, 7 N. Y. 481; Gist v. Lybrand, 3 Ohio St. 307, 17 Am. Dec. 595; Walker v. Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Mercer v. Lancaster, 5 Pa. St. 160.

A note payable at plaintiff's bank was protested and a notice thereof was sent to two post-offices in the adjoining town, where the defendant resided. The defendant did business and received his letters in the town where the bank was situated, but it did not appear that he had specified any place where such notice should be sent to him, or that the plaintiff knew that he received his letters at that place; it was held that the notice was sufficient. Seneca County Bank v. Neass, 3 N. Y. 442.

2. **Nearest post-office.**— In the case of Forbes v. Omaha Nat. Bank, 10 Neb. 338, 6 N. W. 393, it was held that where the drawer or indorser of an instrument resides out of the corporate limits of a city where it was dishonored, but nearer to the post-office in that city than any other, a notice directed to such post-office was sufficient. And in Hazelton Coal Co. v. Ryerson, 20 N. J. L. 129, it was held that a notice of dishonor may be sent by mail directed either to the post-office nearest his residence, or to the office to which he usually resorts for letters; or if he be in the habit of receiving his letters through several offices, then it may be directed to either. See also Worsham v. Goar. 4 Port. (Ala.) 441; Timms v. Delisle, 5 Blackf. (Ind.) 447; Bell v. State Bank, 7 Blackf. (Ind.) 456; Bank of Columbia v. Magruder, 6 Harr. & J. (Md.) 172, 14 Am. Dec. 271; Bell v. Hagerstown Bank, 7 Gill (Md.), 216.

Rule in New York.— In the case of Downer v. Remer, 21 Wend. N. Y.) 10, it was held that notice of protest sent by mail directed to the town where the party resides is sufficient. although there are several post-offices in the same town, unless the holder knew that it should be directed differently. And where an indorser resided in the village of Palatine Bridge, in which there was a post-office, where he received letters occasionally, and had a place for the transaction of business in the village of Canajoharie, distant about half a mile from Palatine Bridge, and kept a box in the post-office at Canajoharie, and received most of his letters there, it was held that a notice addressed to him at Canajoharie was sufficient to charge him. Montgomery County Bank v. Marsh, 7 N. Y. 481.

his place of residence,[3] or expressly directs as to the manner of addressing letters to him,[4] it will be sufficient to transmit notice to him at such place or in the manner so directed.

b. *Diligence to ascertain address.*— Due diligence must be used by the holder of an instrument to ascertain by inquiry the residence of the person whom it is sought to charge.[5] A notice mailed

3. Morris v. Husson, 4 Sandf. (N. Y.) 93; Bank of Utica v. Bender, 21 Wend. (N. Y.) 643; Bartlett v. Robinson, 39 N. Y. 187; Walker v. Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Crowley v. Barry, 4 Gill (Md.), 194.

4. Where the residence of the indorser is known, and he has actually given orders as to the mode of directing his letters, any deviation therefrom, or from the ordinary course of transmission to the place of his residence, is assumed at the risk of the holder of the note. Paterson Bank v. Butler, 12 N. J. L. 268.

5. **Due diligence to make inquiry.**— In the case of Barnwell v. Mitchell, 3 Conn. 101, a bill was drawn and dated in Alexandria, on persons residing in New York, who accepted it. The drawer's residence was in fact in Fairfield, Conn., which fact was publicly known, and was particularly known to one of the acceptors. The bill was protested for nonpayment; and immediately afterward two letters containing notice were mailed in New York, one addressed to him at Alexandria, and one at New York, and a third letter, addressed to him at New York, was left at the counting-house of the acceptors. It was held that, although the holder was ignorant of the drawer's place of residence, yet as it did not appear that he had used due diligence to make inquiry, the notice was insufficient.

What constitutes due diligence in making inquiry is a question of law, unless there is dispute as to the facts. Utica Bank v. Bender, 21 Wend. (N. Y.) 643, 34 Am. Dec. 281.

Where it appears that a notary in protesting a note which had been discounted by a bank inquires only of the receiving teller as to the indorser's residence, there is not a sufficient show of diligence to excuse further search, and to charge the indorser on notice mailed to his last known place of residence. Sweet v. Woodin, 72 Mich. 393, 40 N. W. 471. But where the indorser of a promissory note resides in a town in which there are two post-offices, of which fact the holder is ignorant, a notice of dishonor addressed to the indorser at the town generally is sufficient, unless he proves that he is accustomed to receive his letters at one of the post-offices only, and that the holder of the note might have ascertained that fact by reasonable inquiry. Burlingame v. Foster, 128 Mass. 125.

In the case of Gawtry v. Doane, 51 N. Y. 84, 92, the court said: "On the next day after the presentment, a clerk of the holders took a notice of nonpayment in the usual form, signed by the notary, and looked in the New York city directory for the name of the defendant with the view of giving him the notice. Not finding it there, he inquired for his residence of one of the makers, and was informed by him that he lived at Brewsters, Putnam county, and he then mailed the notice to him with that address. The address of the defendant was not upon the note. Inquiry was made of one of the makers, for whose accommodation the note was indorsed. This was, within all the cases, due diligence and, therefore, sufficient to charge the defendant, even if he did not receive the notice." See also Requa v. Collins, 51 N. Y. 144, in which case it was held that the degree of diligence required to charge an indorser, under the provisions of the Act of 1857, chap. 416 (since repealed by the Negotiable Instruments Law), in relation to commercial paper, authorizing service of notice of protest by mail, where the reputed residence of the indorser is at the same place where the note is payable, is no greater than that required by the common law in a case where the place of payment differs from the place of residence. See, generally, Harris v. Robinson, 4 How.

without due inquiry to the place where the instrument was drawn is not sufficient to bind an indorser.[6] There is no presumption that due diligence was used by a holder in ascertaining the indorser's correct address;[7] it is for the holder to show that he has given due notice, or has failed only after due diligence.[8] It has been held where the officers of a bank were informed at the time of discounting a note that the indorsers resided in a certain place, that they were not bound to make further inquiries, but could act upon the information thus received, and that unless they knew that such indorsers had changed their residence, a notice addressed to such former residence will be sufficient to bind them.[9] Looking into a directory to ascertain the address of a party to be charged is not, of itself, sufficient to show due diligence in making an inquiry.[10] Merely consulting a directory should not be deemed the

(U. S.) 336, 11 L. Ed. 1000; Lambert v. Ghiselin, 9 How. (U. S.) 552, 13 L. Ed. 254; Wood v. Corl, 4 Metc. (Mass.) 203; Cabot Bank v. Russell, 4 Gray (Mass.), 167; King v. Griggs, 82 Minn. 387, 85 N. W. 162; Sanderson v. Reinstadler, 31 Mo. 483; Cuyler v. Nellis, 4 Wend. (N. Y.) 398; Harger v. Bemis, 1 T. & C. (N. Y.) 460; University Press v. Williams, 48 App. Div. (N. Y.) 188, 62 N. Y. Supp. 986; Walker v. Stetson, 14 Ohio St. 89, 84 Am. Dec. 362; Central Nat. Bank v. Adams, 11 S. C. 452, 32 Am. Rep. 495; Marsh v. Barr, 1 Meigs (Tenn.), 68; Planters' Bank v. Bradford, 4 Humph. (Tenn.) 39.

6. Foard v. Johnson, 2 Ala. 565, 36 Am. Dec. 421. The fact that a bill is dated at a particular place is insufficient evidence of the drawer's residence or post-office to relieve the holder of making diligent inquiry as to the nearest post-office to the drawer's residence, or to warrant him in sending notice there as being his nearest post-office. Tyson v. Oliver, 43 Ala. 455. See also Lowery v. Scott, 24 Wend. (N. Y.) 358, 35 Am. Dec. 627; Barnwell v. Mitchell, 3 Conn. 101; Hill v. Vanell, 3 Me. 233.

7. Eaton v. McMahon, 42 Wis. 484.

8. Barr v. Marsh, 9 Yerg. (Tenn.) 253.

9. **Change of residence.**— In Ward v. Perrin, 54 Barb. (N. Y.) 89, the action was against the indorser of a note payable four months from date. At the time the indorsement was made, and for about two months thereafter, the indorser resided in Rochester. About two months before the note fell due he removed from Rochester to Bergen. The note was protested, and notice of protest was mailed to the defendant at Rochester. The court held that the holders of the note were not bound to make any further inquiries, and that they could act upon the information as to the indorser's residence which they received when they discounted the note; that they had the right, when the note matured, to assume that the indorser continued to reside in Rochester, and to act accordingly in taking the requisite steps to charge him, unless they knew that in the meantime he had changed his residence.

As to failure of bank to send notices to place indicated by holder of the note who had deposited it for collection, see Howard v. Van Gieson, 46 App. (N. Y.) 77, 61 N. Y. Supp. 341.

10. **Consulting a directory.**— In the case of Bacon v. Hanna, 137 N. Y. 379, 33 N. E. 303, 20 L. R. A. 495, the court said: "Under the statute (Laws 1857, chap. 416), where the notary relied on a reputed residence he was required to act from 'the best information obtained by diligent inquiry.' Merely looking into a directory is not enough. The sources of error in that process are too many and too great. Such books are accurate enough in a general way, and

best information to be obtained by diligent inquiry.[11] Where a notice is misdirected, and due diligence was used by the holder to ascertain the residence of the indorser, it will, nevertheless, be sufficient to charge him.[12]

c. *Miscarriage in mails.*— The Negotiable Instruments Law provides that: "Where notice of dishonor is duly addressed and "deposited in the post-office, the sender is deemed to have given "due notice, notwithstanding any miscarriage in the mails." [13] This is also the rule contained in the English Bills of Exchange Act,[14] and seems to be declaratory of the general rule.[15] The gen-

convenient as an aid or assistance, but they are private ventures, created by irresponsible parties, and depending upon information gathered as cheaply as possible, and by unknown agents. Their help may be invoked, but, as was said in Lawrence v. Miller, 16 N. Y. 235, their error may excuse the notary but will not charge the defendant." See also Cuming v. Roderick, 167 N. Y. 571, 60 N. E. 1109; Greenwich Bank v. De Groot, 7 Hun (N. Y.), 210; Baer v. Leppert, 12 Hun (N. Y.), 516.

11. Greenwich Bank v. De Groot, 7 Hun (N. Y.), 210.

12. **Misdirection after due diligence.** — In the case of Lambert v. Ghiselin, 9 How. (U. S.) 552, 13 L. Ed. 254, it was held that where a notice is sent, after the exercise of due diligence, a right of action immediately accrues to the holder, and subsequent information as to the true residence of the indorser does not render it necessary for the holder to send him another notice. Chief Justice Taney said: "The law does not require actual notice. It requires reasonable diligence only, and reasonable efforts, made in good faith, to give it. And if sufficient inquiries have been made, and information received upon which the holder has a right to rely, a mistake as to the nearest post-office or usual post-office does not deprive him of his remedy. He has done all that the law requires; and the notice thus sent fixes the liability of the indorser as effectually as if he had actually received it. This we think is the true rule, and the only one that gives certainty and security in transactions on commercial paper."

13. Neg. Inst. L. (N. Y.), § 176. For the same section in statutes of other States see Appendix.

14. English Bills of Exchange Act, 1882, § 49(15).

15. Woodstock v. Houldsworth, 16 M. & W. (Eng.) 124; Mackay v. Judkins, 1 F. & F. (Eng.) 208; Rennick v. Tighe, 8 W. R. (Eng.) 391.

Use of mails; holder not liable for miscarriage.— In the case of Shed v. Brett, 1 Pick. (Mass.) 401, 410, the court said: "For the mail being established by the standing laws of the Government for the purpose principally of facilitating the transmission of mercantile correspondence, and it being by far the most usual conveyance of letters and generally the most sure as to time and safe in every other respect, all men who deal in mercantile paper are presumed to assent, and even to expect, that such information as they may want will be communicated in this way. And thus the post-office becomes their agent; and if it happen to fail from any unexpected cause, he who made the right use of it by placing his letter there properly directed, has done all his duty, and the consequence must fall upon him who has to receive. It is not difficult to foresee, that if this doctrine be not true, great inconveniences and uncertainties would attend the transaction of business with negotiable paper, and a clog would be put upon its circulation, which would have a mischievous effect upon that credit which is so essential to commercial activity. The only perfectly sure way of fixing a party to a bill or note by notice of its dishonor would be to send it by a special messenger who would be able to testify to its actual delivery; and this would eral rule is, independent of statute, that if due diligence is used in mailing a notice it is immaterial whether or not the notice was received.[16] It is legal diligence in the holder of a bill if he avail himself in due time of the means of communicating notice which are afforded by the mails; but he is not answerable for any defects in the outlines or details of the regulations of the mails, for the route in which the letter is carried, the time which elapses from its deposit in the office and its delivery, or the mode of carrying or distributing the mails.[17]

d. *What constitutes deposit in post-office; statutory provision.*— The Negotiable Instruments Law provides that: "Notice is "deemed to have been deposited in the post-office when deposited "in any branch post-office or in any letter-box under the control "of the post-office department." [18] This provision is declaratory of the rule as declared in a number of cases. It was said in a recent Massachusetts case that "the deposit of the notice in a post-office box on the street was just the same, in legal effect, as if it had been deposited in a box at the post-office." [19]

be excessively burdensome and expensive. There is indeed no hardship to the indorser in the rare case of a failure of actual notice, which can be compared in its effect to the general mischief which would ensue, if proof of an actual reception of notice were necessary. If the cost of it must be borne by the holder, it would materially diminish the value of the securities, and to a man of much business would be a great item in his expenses; and if it fell upon the indorser, as it ought to do, it would greatly increase his misfortune. It is much for the interest of the whole, that the common vehicle of intelligence, the mail, should be resorted to; and when this is employed the holder of the paper should be discharged of all further duty." See also Windham Bank v. Norton, 22 Conn. 213; Pier v. Heinrichsoffen, 67 Mo. 163; Lord v. Appleton, 15 Me. 270.

16. Harris v. Robinson, 4 How. (U. S.) 336, 11 L. Ed. 1000; Sasscer v. Farmers' Bank, 4 Md. 409; Munn v. Baldwin, 6 Mass. 316; Morse v. Chamberlain, 144 Mass. 406, 11 N. E. 560; Sanderson v. Reinstadler, 31 Mo. 483; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; Washington Banking Co. v. King, 14 N. J. L. 415; Chapman v. Ogden, 165 N. Y. 642, 59 N. E. 1120; Cook v. Forker, 193 Pa. St. 461, 44 Atl. 560; United States Nat. Bank v. Burton, 58 Vt. 426, 3 Atl. 756; Walworth v. Seaver, 30 Vt. 728, 73 Am. Dec. 332; Benedict v. Schmeig, 13 Wash. 473, 43 Pac. 374.

17. Dickins v. Beal, 10 Pet. (U. S.) 572, 9 L. Ed. 538.

18. Neg. Inst. L. (N. Y.), § 177. For the same section in statutes of other States see Appendix.

19. Johnson v. Brown, 154 Mass. 105, 27 N. E. 994, citing Skilbeck v. Garbett, 7 Q. B. (Eng.) 846; Pearce v. Langfit, 101 Pa. St. 507.

Street letter-boxes are a legal part of the post-office system, and a letter containing a notice of protest, deposited in one of them, is equivalent to a letter delivered at the post-office. Wood v. Callaghan, 61 Mich. 402, 28 N. W. 162; Greenwich Bank v. De Groot, 7 Hun (N. Y.), 210; but otherwise as to a deposit in a private letter-box in a private office. Townsend v. Auld, 10 Misc. (N. Y.) 343, 31 N. Y. Supp. 29.

§ 115. Where notice must be sent.

a. *Statutory provision.*— The Negotiable Instruments Law provides as follows: "Where a party has added an address to his "signature, notice of dishonor must be sent to that address; but "if he has not given such address, then the note must be sent as "follows:

"1. Either to the post-office nearest to his place of residence, or "to the post-office where he is accustomed to receive his letters; or

"2. If he live in one place, and have his place of business in "another, notice may be sent to either place; or

"3. If he is sojourning in another place, notice may be sent to "the place where he is so sojourning.

"But where the notice is actually received by the party within "the time specified in this act, it will be sufficient, though not sent "in accordance with the requirements of this section."[20]

b. *Sufficiency of address.*— Ordinarily an address upon a notice which contains the name of the indorser, with the town and State, is sufficient, although the street and number is omitted.[21] But this would not be so where the indorser had added to his indorsement the designation of his street and number.[22] Where there are towns of the same name in different States the indorser will not be charged with notice where it is deposited in the post-office without the name of the State, and it reaches him a long time after the dishonor.[23] A notice addressed to an indorser to the county where he lives is insufficient where there are several post-offices in such county.[24] A mistake in the name of the post-office to which the notice is sent is not inoperative where it appears that the post-office is as well known by one name as another.[25]

§ 116. Waiver of notice.

a. *In general.*— The right to a notice of dishonor belonging to a party to a negotiable instrument may, like the right to a demand of payment of the party primarily liable, be waived by such party.[26] The effect of a waiver of notice is to dispense with such

20. Neg. Inst. L. (N. Y.), § 179. For the same section in statutes of other States see Appendix.

21. Morse v. Chamberlain, 144 Mass. 406, 11 N. E. 560; True v. Collins, 3 Allen (Mass.), 438; Benedict v. Rose, 16 S. C. 629.

22. Bartlett v. Robinson, 9 Bosw. (N. Y.) 305, affd. in 39 N. Y. 183.

23. Beckwith v. Smith, 22 Me. 125, 38 Am. Dec. 290.

24. Bank of Illinois v. Taylor, 7 T. B. Mon. (Ky.) 576.

25. Bank of Geneva v. Howlett, 4 Wend. (N. Y.) 328.

26. Stanley v. McElrath, 86 Cal. 449, 25 Pac. 16, 10 L. R. A. 545; Robinson v. Barnett, 19 Fla. 670, 45

notice as a condition precedent to the liability of a party.[27] We have already considered in another chapter the principles affecting the waiver of demand of payment by the party whose right it is to require that such demand be made; and many of these principles are equally applicable to a waiver of a notice of dishonor.[28]

b. *How waiver of notice may be made; statutory provision.*—The Negotiable Instruments Law provides that: "Notice of dishonor may be waived, either before the time of giving notice has "arrived or after the omission to give due notice, and the waiver "may be express or implied."[29] This is the same as a provision of the English Bills of Exchange Act, from which it evidently was derived.[30]

c. *Waiver after omission to give notice.*—Accurately speaking, there can only be a waiver of demand and notice by an indorser before the maturity of the instrument; nevertheless the indorser can waive due proof of the demand and of the fact that the instrument has been dishonored, or what is more to the purpose, he can so act toward the holder of the instrument as to render the fact that demand was not made or notice was not given wholly immaterial.[31] It is not usual to distinguish between a waiver made before or after the maturity of the instrument; it can be made in one case as well as in the other.[32] If an indorser, with full knowledge of the laches of the holder in neglecting to protest a bill or note, unequivocally assents to continue his liability, or to be responsible as though the protest had been made, he will be held to have waived the right to object, and will stand in the same position as if he had been regularly charged by presentment, demand, and notice.[33] This assent must be clearly established and will not be inferred from doubtful or equivocal acts or language. It has been frequently held that a promise by an indorser to pay the note or bill after he has been discharged by a failure to protest

Am. Rep. 24; Hoadley v. Bliss, 9 Ga. 303; Pollard v. Bowen, 57 Ind. 232; Emery v. Hobson, 62 Me. 578, 16 Am. Rep. 513; Taunton Bank v. Richardson, 5 Pick. (Mass.) 436; Kyle v. Green, 14 Ohio, 490; Barclay v. Weaver, 19 Pa. St. 396, 57 Am. Dec. 661; Power v. Mitchell, 7 Wis. 161.

27. Emery v. Hobson, 62 Me. 578, 16 Am. Rep. 513.

28. See *ante*, § 101 (*d*).

29. Neg. Inst. L. (N. Y.), § 180. For same section in statutes of other States see Appendix.

30. English Bills of Exchange Act, 1882, § 50(2*b*).

31. Yeager v. Farwell, 13 Wall. (U. S.) 6, 20 L. Ed. 476; Hoadley v. Bliss, 9 Ga. 303.

32. Yeager v. Farwell, 13 Wall. (U. S.) 6, 20 L. Ed. 476; Rindge v. Kimball, 124 Mass. 209; Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365; Matthews v. Allen, 16 Gray (Mass.), 594; Harrison v. Bailey, 99 Mass. 620; Third Nat. Bank v. Ashworth, 105 Mass. 503.

33. Ross v. Hurd, 71 N. Y. 14.

it, will bind the indorser provided he had full knowledge of the laches when the promise was made.[34] The presumption is, where a new promise is made to pay the instrument after its maturity, by the indorser or drawer that due notice of its dishonor was given to him.[35] Where an indorser writes to the holder of a note on the

34. Knowledge of laches must be shown, and the new promise after the omission to give the notice must be made unequivocally. See the following cases:

United States.— Sigerson v. Mathews, 20 How. 496, 15 L. Ed. 989; Thornton v. Wynn, 12 Wheat. 183, 6 L. Ed. 595.

Alabama.— Kennon v. McRea, 7 Port. 175.

California.— Curtis v. Sprague, 51 Cal. 239.

Georgia.—Chamberlain v. Stowe, 24 Ga. 310.

Illinois.—Givens v. Merchants' Nat. Bank, 85 Ill. 442; Kupfer v. Galena Bank, 34 Ill. 328, 85 Am. Dec. 309; Toby v. Burly, 26 Ill. 426; Walker v. Rogers, 40 Ill. 278, 89 Am. Dec. 348.

Indiana.— Dickerson v. Turner, 12 Ind. 223.

Iowa.— Allen v. Harrah, 30 Iowa, 363; Closz v. Miracle, 103 Iowa, 198, 72 N. W. 502.

Kentucky.— Bank of United States v. Leathers, 10 B. Mon. 64; Landrum v. Trowbridge, 2 Metc. 281.

Maine.— Thomas v. Mayo, 56 Me. 40; Byram v. Hunter, 36 Me. 217; McPhetres v. Halley, 32 Me. 72; Hunt v. Wadleigh, 26 Me. 271, 45 Am. Dec. 108.

Maryland.— Turnbull v. Maddux, 68 Md. 579, 13 Atl. 334; Beck v. Thompson, 4 Harr. & J. 531.

Massachusetts.— Hobbs v. Straine, 149 Mass. 212, 21 N. E. 365; Third Nat. Bank of Boston v. Ashworth, 105 Mass. 503; Harrison v. Bailey, 99 Mass. 620, 97 Am. Dec. 63; Arnold v. Dresser, 90 Mass. 435; Matthews v. Allen, 16 Gray, 494, 77 Am. Dec. 430; Low v. Howard, 11 Cush. 268; Franklin Bank v. Freeman, 16 Pick. 539.

Michigan.— Newberry v. Trowbridge, 13 Mich. 263.

Minnesota.— Amor v. Stoeckle, 76 Minn. 180, 78 N. W. 1046.

Missouri.— State Bank v. Bartle, 114 Mo. 276, 21 S. W. 816; Harness v. Davis County Sav. Bank, 46 Mo. 357; Workingmen's Banking Co. v. Blell, 57 Mo. App. 410.

New Hampshire.— Norris v. Ward, 59 N. H. 487; Edwards v. Tandy, 36 N. H. 540; Rogers v. Hackett, 21 N. H. 100; Ladd v. Kenny, 2 N. H. 240, 9 Am. Dec. 77.

New Jersey.— Glassford v. Davis, 36 N. J. L. 348; Barkalow v. Johnson, 16 N. J. L. 397.

New York.— O'Rourke v. Hanchett, 89 Hun, 611, 35 N. Y. Supp. 328; Richard v. Boller, 51 How. Pr. 371, 6 Daly, 460; Hunter v. Hook, 64 Barb. 469; Buckley v. Bently, 42 Barb. 646; Bruce v. Lytle, 13 Barb. 163; Tebbets v. Dowd, 23 Wend. 379; Keeler v. Bartine, 12 Wend. 110; Jones v. Savage, 6 Wend. 658; Trimble v. Thorne, 16 Johns. 152; Crain v. Colwell, 8 Johns. 299; Miller v. Hackley, 5 Johns. 375, 4 Am. Dec. 372; Duryee v. Dennison, 5 Johns. 248.

Ohio.— City Nat. Bank v. Clinton County Nat. Bank, 49 Ohio St. 351, 30 N. E. 958.

Oregon.— Johnson v. Arrigoni, 5 Ore. 485.

Pennsylvania.— Oxnard v. Varnum, 111 Pa. St. 193, 2 Atl. 224; Loose v. Loose, 36 Pa. St. 538; Richter v. Selin, 8 Serg. & R. 425.

Rhode Island.— Glaser v. Rounds, 16 R. I. 235, 14 Atl. 863.

South Carolina.— Oliver v. Brown, 1 Rich. Eq. 62.

Tennessee.—Golladay v. Bank of the Union, 2 Head, 57; Durham v. Price, 5 Yerg. 300, 26 Am. Dec. 267.

In the case of Parks v. Smith, 155 Mass. 26, 28 N. E. 1044, demand of payment of a note was not made at its maturity, and it was held that the plaintiff must show that the defendant, having knowledge that she was discharged of all liability, had renewed her liability by payments or subsequent promises to pay.

35. Breed v. Hillhouse, 7 Conn. 523; Tobey v. Burly, 26 Ill. 426; Ralston v. Bullits, 3 Bibb (Ky.), 261; Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190; Harral v. Steinberger, 17

last day of grace, stating that the maker cannot pay but that the indorser held himself responsible, it is a waiver of notice of the dishonor of the note, notwithstanding several days elapsed between the sending and receipt of the letter.[36] The new promise must be unequivocal and made with a full knowledge of the nature of the obligation assumed.[37] It would not be sufficient for the indorser to simply assert that "he felt himself bound for the payment" of the note or bill.[38] As stated by Judge Story:[39] "The promise must be unequivocal, and amount to an admission of the right of the holder; or the act done must be of a nature clearly importing a like admission of the right. If it be defective in either respect, if it be a conditional offer of payment unaccepted, then and in such case the holder has no right to insist upon it as a waiver. So if the promise be qualified, it must be received with its qualification, and cannot be insisted on as an absolute waiver." A waiver of due notice of dishonor by the indorser or drawer after maturity may be implied from his acts.[40] And where indorsers induced a person to purchase the instrument carrying their names from the holder, after it became due, but did not disclose to the purchaser that they were discharged for want of notice, their silence is equivalent to an affirmation that they were still liable as indorsers, and they will be estopped to set up a want of such notice.[41] A part

Misc. (N. Y.) 274, 40 N. Y. Supp. 353; Pierson v. Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Walker v. Laverty, 6 Munf. (Va.) 487.

36. Yeager v. Farwell, 13 Wall. (U. S.) 6, 20 L. Ed. 476. In the case of Corner v. Pratt, 138 Mass. 446, the indorser telegraphed to the holder to wait until the maker could be seen by the indorser, and he afterward promised to pay the note; it was held to be a waiver of demand and notice.

37. **Waiver must be unequivocal.** —Laporte v. Landry, 4 Mart. (N. S.) (La.) 125. In the case of Isbell v. Lewis, 98 Ala. 550, 13 South. 335, notice of dishonor was not given an indorser; he said he did not desire to escape legal or moral obligation to pay, but that he had been advised by his attorney that he was under no legal obligation whatever, and he, therefore, asserted that he was under no liability; but he offered to give or indorse a new note for one-half of the old note, or pay one-half thereof, if the bank would release him from all further liability on the paper; both these propositions were expressly declined. It was held that the defendant had not waived notice of dishonor. See also Barkalow v. Johnson, 16 N. J. L. 397.

38. Campbell v. Varney, 12 Iowa, 43; Creamer v. Perry, 17 Pick. (Mass.) 332, 27 Am. Dec. 297.

39. Story on Bills of Exchange, § 321.

Where the drawee refused to pay on presentment, and the refusal being communicated to the drawer, he promised the holder that he would arrange with the drawee, so that the draft should be paid, it was held that legal notice of dishonor was waived. Byram v. Hunter, 36 Me. 217; Davis v. Miller, 88 Iowa, 114, 55 N. W. 89. See also Robbins v. Vose, 53 Me. 36; Gove v. Vining, 7 Metc. (Mass.) 212; Quaintance v. Goodrow, 16 Mont. 376, 41 Pac. 76.

40. Staylor v. Ball, 24 Md. 183; Patterson v. Vose, 43 Me. 552; Carson v. Alexander, 34 Miss. 528.

41. **Inducements offered by indorser to purchaser of note.**—Lib-

payment of an instrument by an indorser is, unless explained and qualified by accompanying circumstances, sufficient evidence of the waiver of the failure to give due and timely notice of dishonor.[42]

d. *Waiver express or implied.*— The waiver may be either verbal or in writing.[43] A verbal agreement at the time of the transfer of the note by indorsement, dispensing with a demand and notice, forms part of the contract of transfer and binds the indorser.[44] The waiver may result 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.[45] A promise made by an indorser or drawer, before the maturity of the instrument, that he will pay it, operates as a waiver of notice; because, relying on such promise, the holder may not present the instrument for payment and may neglect to give notice of its dishonor.[46] It is not neces-

bey v. Pierce, 47 N. H. 309. Where a note has been protested for non-payment, and the indorsers sell the note without erasing their indorsement, they are estopped by their acts from controverting their liability on the note. St. John v. Roberts, 31 N. Y. 441, 88 Am. Dec. 287.

An indorser of a promissory note who has not been duly notified of the dishonor of the note may so act as to waive his defense upon that ground. And when such indorser, with full knowledge that he has been discharged from liability by failure of such notice, states to the holder of such note that he expects to have to pay it, but requests the holder to try and collect it of the maker, he thereby recognizes his liability to pay the same. Parsons v. Dickinson, 23 Mich. 56.

42. Whitaker v. Morrison, 1 Branch (Fla.), 25, 44 Am. Dec. 627; Curtiss v. Martin, 20 Ill. 557; Washer v. White, 16 Ind. 136; Sigourney v. Wetherell, 6 Metc. (Mass.) 553; Glascow v. Pratte, 8 Mo. 336, 40 Am. Dec. 142; Johnson v. Crane, 16 N. H. 68; Buckley v. Bentley, 42 Barb. (N. Y.) 646; Linthicum v. Caswell, 160 N. Y. 702, 57 N. E. 1115; Shaw v. McNeill, 95 N. C. 535; Levy v. Peters, 9 Serg. & R. (Pa.) 125, 11 Am. Dec. 679; Sherer v. Easton Bank, 33 Pa. St. 134; Knapp v. Runals, 37 Wis. 135.

Payment of interest by a wife, who was an indorser on her husband's note, made by her individual check, but on account of her husband's liability as maker is not such an acknowledgment of her own liability on the note as to constitute a waiver of notice. Porter v. Thom, 167 N. Y. 584, 60 N. E. 1119. See also Werr v. Kohles, 64 App. Div. (N. Y.) 117, 71 N. Y. Supp. 713.

43. Maples v. Traders' Deposit Bank, 15 Ky. L. Rep. 879; Murphy v. Citizens' Sav. Bank, 22 Ky. L. Rep. 1872, 62 S. W. 1028; Keyes v. Winter, 54 Me. 399; Lane v. Stewart, 20 Me. 98; Field v. Nickerson, 13 Mass. 131; Edwards v. Tandy, 36 N. H. 540; Porter v. Kemball, 53 Barb. (N. Y.) 467; Annville Nat. Bank v. Kettering, 106 Pa. St. 531, 51 Am. Rep. 536.

44. Worden v. Mitchell, 7 Wis. 161. See also Sloan v. Gibbes, 56 S. C. 480, 35 S. E. 408.

45. Cady v. Bradshaw, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557. In this case an indorser before the maturity of a note called upon the holder and requested him to extend the note for another year. To this the holder agreed if the indorser would "let his name be on it and let it be as it was," to which the indorser consented. It was held that this constituted in legal effect a waiver of demand and notice. See also Ticonic Bank v. Johnson, 21 Me. 426.

46. **Promise to pay as waiver.**— See Sigerson v. Mathews, 20 How. (U. S.) 496, 15 L. Ed. 989. In the

sary that the waiver should be direct and positive, but it must be clearly established, and will not be inferred from doubtful or equivocal acts or language.[47] The offer by an indorser, prior to the maturity of a note, to execute a new note in renewal, is a waiver of notice of dishonor, since it shows that the indorser did not expect the note to be paid at maturity, and was, therefore, not injured by the failure to give the notice.[48] There has been considerable conflict of authority as to whether the taking of indemnity by an indorser or drawer operates as a waiver of notice of dishonor. There are a number of cases to the effect that where an indorser has taken security or other indemnity sufficient to protect himself from any loss because of his indorsement, he thereby impliedly waives his right to a notice of dishonor.[49] In any event,

case of Markland v. McDaniel, 51 Kan. 350, 32 Pac. 1114, 20 L. R. A. 96, it was held where indorsers of a negotiable note tell the holder before maturity not to do anything with the note, and that they will pay it, it is unnecessary in order to charge them as such indorsers, that formal demand of payment be made on the maker, and notice given to the indorsers of his failure to pay, but both demand and notice will be deemed waived. See also Minturn v. Fisher, 7 Cal. 573; Keyes v. Winter, 54 Me. 399; Lane v. Stewart, 20 Me. 98; Marshall v. Mitchell, 35 Me. 221; Schley v. Merrit, 37 Md. 352; Boyd v. Cleveland, 4 Pick. (Mass.) 524; Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101; Sieger v. Second Nat. Bank, 132 Pa. St. 307, 19 Atl. 217; Hale v. Danforth, 46 Wis. 554, 1 N. W. 284. In the case of Russell v. Cronkite, 32 Barb. (N. Y.) 282, it appeared that on the day before the maturity of the note the holder and maker called on the indorser and the maker said: "He has come to notify you to make you holden." The holder then said: "If you don't say it it all right, I shall notify you on the last day," etc. The indorser said: "The note is perfectly good; put yourself to no trouble; it is all right." It was held that notice of dishonor was waived.

47. Ross v. Hurd, 71 N. Y. 14; Cady v. Bradshaw, 116 N. Y. 188, 22 N. E. 371, 5 L. R. A. 557. In the case of Glaze v. Ferguson, 48 Kan. 159, the court said: "That the presentment of a note, as well as notice and protest can be dispensed with by agreement or waiver, is a familiar doctrine of the text-books. The waiver may be either verbally or in writing. It may be expressed in strict terms, or inferred from the words or acts of the party. It may result from any understanding between the parties which is of such a character as to satisfy the mind that a waiver is intended."

48. Jenkins v. White, 147 Pa. St. 303, 23 Atl. 556.

49. Stephenson v. Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281; Holman v. Whiting, 19 Ala. 703; Mead v. Small, 2 Me. 207; Beard v. Westerman, 32 Ohio St. 29; Develing v. Ferris, 18 Ohio, 170; Durham v. Price, 5 Yerg. (Tenn.) 300, 26 Am. Dec. 267.

Taking security not a waiver.—In the case of Woodman v. Eastman, 10 N. H. 359, 367, the court said: "An indorser of a note, who holds a mortgage for its security, unless there is at the time of the indorsement, or afterward, some other evidence of waiver, seems to have the same right to be exonerated by the neglect of the holder, as any other indorser. In such case, if there was but one note secured by the mortgage, the indorsee would either be entitled to the benefit of the mortgage, upon the ground that it passed as an incident; or the mortgage would be destroyed by the transfer of the note, and the holder would have a right to attach the land. If there were other demands secured by the mortgage and there must be something more than the mere taking of security; there must be a taking of funds or property of the maker sufficient to meet the payment of the note or there must have been an assignment of all the property, real and personal, belonging to the maker, for that purpose.[50] It would seem that effect of taking the security would be controlled by the purpose for which it was given; if for the purpose of supplying the indorser with the means of pay-

retained by the mortgagee, it might be different, but that could not change the nature of the case. If by the indorsement the note was so separated from the mortgage that the latter was no longer a security, the indorsee might attach the equity of redemption. In either case there would be nothing to show that it was within the contemplation of the parties that the right to require demand and notice should be waived, and, of course, nothing to show even an implied agreement to that effect."

Among other cases to the same effect are Kramer v. Sandford, 4 Watts & S. (Pa.) 328; Moses v. Ela, 43 N. H. 557, 82 Am. Dec. 175; Whittier v. Collins, 15 R. I. 44, 23 Atl. 39; Nilson v. Senier, 14 Wis. 380.

50. **Sufficient funds or property to meet note.**— This whole question was considered in Kramer v. Sandford, 4 Watts & S. (Pa.) 328, upon principle, and all the authorities were ably reviewed, and the court arrived at the following conclusions: (1) That demand and notice were not necessary where the indorser had taken a general assignment of the maker's property, upon the ground that in such a case the indorser had obtained everything which notice was intended to enable him to obtain. (2) That in other cases of security, the question was whether the indorser had, as between himself and the maker, become the party whose duty it was to take up the note; and (3) that where no waiver of recourse to the maker by the indorser had taken place there no implied waiver of notice existed. See also Seacord v. Miller, 13 N. Y. 55, where it is held that there must be something more than the mere precaution by an indorser of taking security from his principal, to operate as a dispensation of a regular demand and notice. There must be the taking into his possession of funds or property of the principal, sufficient for the purpose of meeting the payment of the note; or he must have an assignment of all the property, real and personal, of the makers for that purpose.

The following cases are to the same effect: Burroughs v. Hannegan, Fed Cas. No. 2,205, 1 McLean (U. S.), 309; Carlisle v. Hill, 16 Ala. 398; Holland v. Turner, 10 Conn. 308; Marshall v. Mitchell, 34 Me. 227; Marine Bank v. Smith, 18 Me. 99; Duvall v. Farmers' Bank, 9 Gill & J. (Md.) 31; Walters v. Munroe, 17 Md. 154, 77 Am. Dec. 328; Creamer v. Perry, 17 Pick. (Mass.) 332, 27 Am. Dec. 297; National Hudson River Bank v. Reynolds, 57 Hun (N. Y.), 307, 10 N. Y. Supp. 669; Spencer v. Harvey, 17 Wend. (N. Y.) 489; Bruce v. Lytle, 13 Barb. (N. Y.) 163; Swann v. Hedges, 3 Head (Tenn.), 251; Walker v. Crouch, 5 Leigh (Va.), 522.

Assignment of all of maker's property, before the maturity of the note, to the indorser, for the express purpose of meeting the note when it becomes due, will operate as a waiver of notice. Stephenson v. Primrose, 8 Port. (Ala.) 155, 33 Am. Dec. 281; Clift v. Rodger, 25 Hun (N. Y.), 39; Coddington v. Davis, 3 Den. (N. Y.) 16; Mechanics' Bank v. Griswold, 7 Wend. (N. Y.) 165; Barton v. Baker, 1 Serg. & R. (Pa.) 334, 7 Am. Dec. 620. But see *contra*, Moses v. Ela, 43 N. H. 557, 82 Am. Dec. 175.

But where a general assignment is made to an indorser for the benefit of all the creditors of the maker, and is sufficient only for the payment of a small portion of the debts of the maker, the indorser is entitled to notice of dishonor. Woodbury v. Crum, Fed. Cas. No. 17,969, 1 Biss. (U. S.) 284; Second Nat. Bank v. McGuire, 33 Ohio St. 295, 31 Am. Rep. 539.

ing the note at its maturity there can be no question but that it would operate as a waiver of notice.[51]

e. *By whom made.*— The waiver of notice of dishonor must be made by the party whose right it is to receive such notice; the declarations of any other person are not admissible to show a waiver by such party.[52] A waiver may be made by an agent of the indorser or drawer,[53] or by any person having his consent.[54] A member of a firm, being authorized to bind the firm, may waive a notice of dishonor in its behalf,[55] and the same is true as to the officer of a corporation.[56]

f. *Whom affected by waiver; statutory provision.*— The Negotiable Instruments Law provides that: "Where the waiver is "embodied in the instrument itself, it is binding upon all the par- "ties; but where it is written above the signature of an indorser, "it binds him only."[57] It is a general rule that a waiver of demand and notice written over the signature of an indorser is *prima facie* evidence that it was done with his privity and consent, and is, therefore, binding on him;[58] and in such a case evidence is inadmissible to show what was the indorser's intent in writing the words constituting the waiver.[59] Independent of the statute, the rule is that a waiver of notice contained in the instrument is binding upon all indorsers.[60] Such a waiver forms a part of the con-

51. Armstrong v. Chadwick, 127 Mass. 156; National Hudson River Bank v. Reynolds, 57 Hun (N. Y.), 307, 10 N. Y. Supp. 669.

52. May v. Boisseau, 8 Leigh (Va.), 180. In the case of Pierce v. Whitney, 29 Me. 188, it was held, in an action against an indorser, that evidence that the maker of a note addressed a letter to the holder, informing him that he should not be able to pay it at maturity, and requesting an extension, is not admissible to excuse a presentment of the note at the maker's place of residence and business, at its maturity. See also Lee Bank v. Spencer, 6 Metc. (Mass.) 308, 39 Am. Dec. 734; Applegarth v. Abbott, 64 Cal. 459.

53. Whitney v. South Paris Mfg. Co., 39 Me. 316.

54. Glaze v. Ferguson, 48 Kan. 157, 29 Pac. 346.

55. Darling v. March, 22 Me. 184; Driggs v. Driggs, 11 N. Y. St. Rep. 256; Baer v. Leppert, 12 Hun (N. Y.), 516. But this principle does not apply to a dormant partner. Mauney v. Cort, 80 N. C. 300, 30 Am. Rep. 80.

56. Luddington v. Thompson, 4 App. Div. (N. Y.) 117, 38 N. Y. Supp. 768.

57. Neg. Inst. L. (N. Y.), § 181. For same section in statutes of other States see Appendix.

58. Burt v. Parish, 9 Ala. 211; Fisher v. Price, 37 Ala. 407; Savings Bank v. Fisher (Cal.), 41 Pac. 490; City Sav. Bank v. Hopson, 53 Conn. 453, 5 Atl. 601; Carmena v. Mix, 15 La. 165; Farmer v. Rand, 14 Me. 225; Wolford v. Andrews, 29 Minn. 250, 13 N. W. 167; Furber v. Caverly, 42 N. H. 74.

59. Hayes v. Fitch, 47 Ind. 21; Buckley v. Bentley, 42 Barb. (N. Y.) 646.

60. Woodward v. Lowry, 74 Ga. 148; Dunnigan v. Stevens, 122 Ill. 396, 13 N. E. 651; Gordon v. Montgomery, 19 Ind. 110; Neal v. Wood, 23 Ind. 523; Rooker v. Morris, 61 Ind. 286; Sohn v. Morton, 92 Ind. 170; Phillips v. Dippo, 93 Iowa, 35, 61 N. W. 216;

tract; and an indorser is deemed to have adopted the waiver by his contract of indorsement, and his liability becomes fixed by the dishonor of the bill.[61]

g. *Effect of waiver of protest.*— The Negotiable Instruments Law provides that: "A waiver of protest, whether in the case of "a foreign bill of exchange or other negotiable instrument, is "deemed a waiver not only of a formal protest, but also of pre-"sentment and notice of dishonor." [62] This is declaratory of the general rule,[63] although there are some authorities to the effect that a waiver of notice and protest does not make a demand unnecessary.[64] Justice Story has said that "agreements of this sort

Iowa Valley State Bank v. Sigstad, 96 Iowa, 491, 65 N. W. 407; Bryant v. Merchants' Bank, 8 Bush (Ky.), 43; Woodman v. Thurston, 8 Cush. (Mass.) 157; Smith v. Pickham, 8 Tex. Civ. App. 326, 28 S. W. 565.

Words stamped on back of instrument.— The words "for value received, I hereby waive demand and notice of demand, protest, and notice of protest and nonpayment," when not written over the name of the first indorser by himself, but printed upon the back of the note with a rubber stamp, before any of the names of a number of required accommodation indorsers were written thereupon, are not limited to the first of such indorsers, but must be deemed a part of the note, and, notwithstanding the use of the singular number, must be presumed to be the joint and several contract of all of the indorsers, who must be presumed to have read the words and to have adopted them as a part of their contract; and each of such indorsers are bound by such waiver. Farmers' Exchange Bank v. Altura Gold Mill & Mining Co., 129 Cal. 263, 61 Pac. 1077.

61. Lowry v. Steele, 27 Ind. 168; Jacobs v. Gibson, 77 Mo. App. 244.

62. Neg. Inst. L. (N. Y.), § 182. For same section in statutes of other States see Appendix.

63. **Waiver of protest is waiver of demand and notice.**— The following cases are in support of the rule of the statute:

California.— First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866; Matthey v. Gally, 4 Cal. 62, 60 Am. Dec. 595.

Connecticut.— Cook v. Pomeroy, 65 Conn. 466, 32 Atl. 935.

Georgia.— National Exchange Bank v. Kimball, 66 Ga. 753.

Indiana.— Fitch v. Citizens' Nat. Bank, 97 Ind. 211; Gordon v. Montgomery, 19 Ind. 110; Culver v. Marks, 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377.

Kansas.— Baker v. Scott, 29 Kan. 136, 44 Am. Rep. 628.

Louisiana.— Harvey v. Nelson, 31 La. Ann. 434, 33 Am. Rep. 222; O'Leary v. Martin, 21 La. Ann. 389; Guyther v. Bourg, 20 La. Ann. 157.

Maine.— Hallowell Nat. Bank v. Marston, 85 Me. 488, 27 Atl. 529; Farmer v. Sewall, 16 Me. 456.

Massachusetts.— Johnson v. Parsons, 140 Mass. 173, 4 N. E. 196.

Minnesota.— Wolford v. Andrews, 29 Minn. 250, 43 Am. Rep. 201.

Missouri.— Johnson County Sav. Bank v. Lowe, 47 Mo. App. 151; Jacard v. Anderson, 37 Mo. 91.

New York.— Backus v. Shipherd, 11 Wend. 629; Porter v. Kemball, 53 Barb. 467; Coddington v. Davis, 1 N. Y. 186; Hood v. Hallenbeck, 7 Hun, 364; Seabury v. Hungerford, 2 Hill, 80; Benton v. Martin, 40 N. Y. 345.

North Carolina.— Shaw v. McNeill, 95 N. C. 535.

Ohio.— Macilvaine v. Bradley, 2 Ohio Dec. 55; Dye v. Scott, 35 Ohio St. 194, 35 Am. Rep. 604.

Pennsylvania.— Annville Nat. Bank v. Kettering, 106 Pa. St. 531, 51 Am. Rep. 536; Day v. Ridgway, 17 Pa. St. 303; Scott v. Greer, 10 Pa. St. 103; Valley Nat. Bank v. Urich, 191 Pa. St. 556, 43 Atl. 354.

64. Scull v. Mason, 43 Pa. St. 99;

(for waiver of presentment or notice) are always construed strictly, and are not extended beyond the fair import of the terms."[65] It has, therefore, been said that necessity for presentment for payment at maturity is not obviated by a "waiver of notice."[66]

§ 117. When notice may be dispensed with.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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."[67] The English Bills of Exchange Act contains a similar provision.[68]

b. *In general.*— The want of funds belonging to a drawer in the hands of the drawee, known to the holder of the bill of exchange, will not excuse the want of a notice of dishonor to an indorser of the bill,[69] but in such a case the drawer will not be entitled to a notice of dishonor.[70] But as stated in the opinion of the court in the case of Dickins v. Beale, an extract of which is included in the preceding note, there are exceptions to the rule that a drawer

Sprague v. Fletcher, 8 Ore. 367, 34 Am. Rep. 587; Wall v. Bry, 1 La. Ann. 312; Ball v. Greaud, 14 La. Ann. 312, 74 Am. Dec. 431; Wilkins v. Gillis, 20 La. Ann. 538, 96 Am. Dec. 425.

65. Story on Promissory Notes, § 272.

66. Voorhies v. Atlee, 29 Iowa, 49; Drinkwater v. Tebbets, 17 Me. 16; Berkshire Bank v. Jones, 6 Mass. 524, 4 Am. Dec. 175; Backus v. Shipherd, 11 Wend. (N. Y.) 629.

67. Neg. Inst. L. (N. Y.), § 183. For same section in statutes of other States see Appendix.

68. English Bills of Exchange Act, 1882, § 150(2-2).

69. Carew v. Duckworth, L. R., 4 Exch. (Eng.) 319; Ralston v. Bullitts, 3 Bibb (Ky.), 261.

70. **Want of funds is an excuse.**— In the case of Dickins v. Beal, 10 Pet. (U. S.) 572, 9 L. Ed. 538, the court said: "An established exception to the general rule that notice of the dishonor of a bill must be given to a drawer is, where he has no funds in the hands of the drawee, but of this exception there are some modifications. If the drawer has made, or is making a consignment to the drawee and draws before the consignment comes to hand. If the goods are *in transitu* and the bill of lading is omitted to be sent to the consignee or the goods were lost. If the drawer has any funds or property in the hands of the drawee; or there is a fluctuating balance between them in the course of their transactions; or a reasonable expectation that the bill would be paid; or if the drawee has been in the habit of accepting the bills of the drawer without regard to the state of their accounts, this would be deemed equivalent to effects; or if there was a running account between them. In all such cases the drawer is considered as justified in drawing; as so far having a right to draw that 'the transaction cannot be denominated a fraud, for in such a case it is a fair commercial transaction, in which the drawer has a reasonable expectation that his bill will be honored; and he is entitled to the same notice as a drawer with funds, or authority to draw without funds.' But unless he draws under some such circumstances, his drawing without funds, property or authority, puts the transaction out of the pale of commercial usage and law; and as he can in no wise suffer by want of notice of the dishonor of his drafts, it is deemed a useless form."

will not be entitled to notice where there are no funds in the hands of the drawee. Where there is a reasonable expectation upon the part of the drawer that the bill will be honored by his drawee, notice must be given to him.[71] The principles which apply to the effect of a failure to present a bill for payment or to making a demand for the payment of a note may also be applied to a failure to give a notice of dishonor.[72]

c. *Diligence required.*— The underlying principle of all decisions upon the subject is that reasonable diligence must be used by the holder of an instrument in getting notice of its dishonor to the party entitled thereto.[73] The law does not include every possible exertion which might have been made to effect notice of the dishonor of an instrument.[74] The determination of what constitutes reasonable diligence will depend upon the circumstances in each particular case. If the facts are undisputed it will be for the courts to determine whether due diligence has been used,[75] but if there is controversy as to the facts the question of due diligence is one for the jury under proper instructions from the court.[76] The inquiry by the holder of a note of those who would be likely to know the indorser's residence, who profess to know and incorrectly inform him as to such residence, is sufficient diligence so that if a notice be addressed to such residence the indorser will be charged.[77] It is enough that the holder of a bill make diligent inquiry for the indorser and acts upon the best information he can procure. If, after doing so, the notice fails to reach the indorser,

71. Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 708; Welch v. Taylor Mfg. Co., 82 Ill. 580.

Reasonable expectations.— In the case of Cathell v. Goodwin, 1 Har. & G. (Md.) 468, 471, it was said "that reasonable grounds required by law are not such as would excite a thorough hope, a wild expectation, or a remote probability that the bill might be honored, and such as create a full expectation, a strong probability, of its payment; such, indeed, as would induce a merchant of common prudence and ordinary regard for his commercial credit to draw a like bill."

The fact that a bill has been executed by the drawee is a circumstance favorable to an expectation that the bill be honored. Campbell v. Pettengill, 7 Me. 126, 20 Am. Dec. 349. But such an acceptance is not conclusive. Mobley v. Clark, 28 Barb. (N. Y.) 390; Kinsley v. Robinson, 21 Pick. (Mass.) 327.

72. See *ante*, §§ 90, 91.

73. Hobbs v. Straine, 149 Mass. 212.

74. Bank of Port Jefferson v. Darling, 91 Hun (N. Y.), 236.

75. Wheeler v. Field, 6 Metc. (Mass.) 290.

76. Wyman v. Adams, 12 Cush. (Mass.) 210.

77. Bartell v. Isbell, 31 Conn. 296, 83 Am. Dec. 146; Palmer v. Whitney, 21 Ind. 58; Brighton Market Bank v. Philbrick, 40 N. H. 506; Chapman v. Liscomb, 1 Johns. (N. Y.) 294; Beal v. Parish, 24 Barb. (N. Y.) 243; Libby v. Adams, 32 Barb. (N. Y.) 542; Barr v. Marsh, 9 Yerg. (Tenn.) 252.

the misfortune falls on him and not on the holder. There must be ordinary or reasonable diligence, such as men of business usually exercise when their interest depends upon obtaining correct information. The holder must, however, act in good faith and not on incorrect and doubtful information when better could have been obtained.[78]

d. *When notice need not be given to drawer; statutory provision.*— The Negotiable Instruments Law provides that: "Notice "of honor 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 hav- "ing 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."[79]

A similar provision is contained in the English Bills of Exchange Act.[80] The only difference being that under the English act the following provision is substituted for subdivision 4: "Where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the holder." The effect of these two provisions is apparently the same. Where a bill of exchange is drawn by one partner on and accepted by another, and the two have a common partner, notice of the dishonor of the bill is not necessary to charge the drawers.[81] The reason of the rule of the statute that where the drawer and drawee are the same person, no notice need be given to the drawer, is that

78. **Party must act on best information obtainable,** see Bank of Utica v. Bender, 21 Wend. (N. Y.) 643; Palmer v. Whitney, 21 Ind. 58. In the case of Lawrence v. Miller, 16 N. Y. 235, it appeared that a notary public employed to give notice of nonpayment to an indorser left a written notice at the place of business, in the city of New York, on a person other than an indorser, and bearing the same name, no person being there present. He had no information in respect to the residence of the indorser, except that a person of the same name had a place of business in the city of New York, and upon going to the place of business of the holder of the note, for the purpose of making further inquiry, was unable to find the holder or to obtain any further information. The notice not reaching the indorser, it was held that he was discharged.

79. Neg. Inst. L. (N. Y.), § 185. For same section in statutes of other States see Appendix.

80. English Bills of Exchange Act, 1882, § 50(2–c).

81. New York & Alabama Contracting Co. v. Selma Sav. Bank, 51 Ala. 305, 23 Am. Rep. 552; Gowan v. Jackson, 20 Johns. (N. Y.) 176; West Branch Bank v. Fulmer, 3 Pa. St. 399.

such an instrument is, when accepted, treated as a promissory note, and the drawee thereof as the maker, and, therefore, not entitled to notice.[82] In addition to the cases mentioned in the statute, a drawer is not entitled to notice where he has agreed to pay the bill in case of the failure of the acceptor or drawee.[83] It seems likely, however, that the mere taking of security as a protection on the part of the drawer would not deprive him of his right to a notice of dishonor.[84]

e. *When notice need not be given to indorser; statutory provision.*— The Negotiable Instruments Law contains the following provision: "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 hav-"ing 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 accom-"modation."[85]

This provision is the same as that contained in the English Bills of Exchange Act.[86] The statute is declaratory of the general rule. In a recent case decided under the Massachusetts Negotiable Instruments Law, it has been held that an implied waiver of presentment for payment by an indorser, which, except for such waiver or presentment, would have been made to him, that under subdivision 2 of the above section the waiver excuses notice to the indorser of the dishonor of the note.[87] As has already been noticed in the case of a drawer of a bill, an indorser who has received sufficient funds to secure him for his indorsement is not entitled to notice of the dishonor of the instrument.[88] We have also stated in another place that the taking of security sufficient

82. Chicago, Cinn. & L. R. R. Co. v. West, 37 Ind. 211, 216; Bailey v. South Western R. R. Bank, 11 Fla. 266; Fairchild v. Ogdensburg, C. & R. R. Co., 15 N. Y. 337.

83. Wright v. Andrews, 70 Me. 86, 35 Am. Rep. 308. This case was one where an indorser had received security upon his promise to pay a promissory note. The same principle would seem to be applicable to the case of a drawer of a bill.

84. Creamer v. Perry, 17 Pick. (Mass.) 332, 28 Am. Dec. 217; Haskell v. Boardman, 8 Allen (Mass.), 38; Seacord v. Miller, 13 N. Y. 551; Woodman v. Eastman, 10 N. H. 359; Holland v. Turner, 10 Conn. 308.

85. Neg. Inst. L. (N. Y.), § 186. For same section in statutes of other States see Appendix.

86. English Bills of Exchange Act, 1882, § 50 (2–*d*).

87. *In re* Swift, 106 Fed. 65.

88. See *ante*, note 83, § 117 (*d*).

to cover the contingent liability of an indorser upon his indorsement is a waiver of notice of dishonor.[89]

§ 118. Notice of dishonor by nonacceptance.

a. *Notice not required where notice of nonacceptance has been given.*— The Negotiable Instruments Law provides: "Where due "notice of dishonor by nonacceptance has been given, notice of a "subsequent dishonor by nonpayment is not necessary, unless in "the meantime the instrument has been accepted." [90] The English Bills of Exchange Act contains a similar provision.[91]

b. *Necessity for notice.*— The Negotiable Instruments Law provides: "That an omission to give notice of dishonor by non-"acceptance does not prejudice the rights of an holder in due "course subsequent to the omission." [92] The English Bills of Exchange Act contains a similar provision.[93] There is no necessity for the presentment of a bill, payable at a fixed date, for acceptance; but its payment may be demanded at its maturity.[94] But if a bill is presented for acceptance, and its acceptance is refused, notice should be given to the drawer and to each indorser;[95] such nonacceptance constitutes a dishonor of the bill and the same rules apply in such cases as where the bill is dishonored for nonpayment.

§ 119. Protest of negotiable instrument.

The Negotiable Instruments Law provides: "Where any nego-"tiable instrument has been dishonored it may be protested for "nonacceptance or nonpayment, as the case may be; and protest is "not required, except in the case of foreign bills of exchange." [96] The protest of bills of exchange is the subject of a subsequent chapter of this work to which reference is here made.[97]

89. See *ante*, § 116 (*d*).
90. Neg. Inst. L. (N. Y.), § 187.
91. English Bills of Exchange Act, 1882, § 49 (2).
92. Neg. Inst. L. (N. Y.), § 188.
93. English Bills of Exchange Act, 1882, § 48 (1). See Roscow v. Hardy, 12 East (Eng.), 434; Dunn v. O'Keefe, 5 M. & S. (Eng.) 282.
94. See chap. XIII, § 141 (*b*).
95. Pendleton v. Knickerbocker Life Ins. Co., 5 Fed. 238; Union Nat. Bank v. Marr, 6 Bush (Ky.), 614; House v. Adams, 48 Pa. St. 261. In the case of Stanton v. Blossom, 14 Mass. 116, 7 Am. Dec. 198, it was held that the drawer is entitled to notice of nonacceptance, although his effects in the hands of the drawee are attached after the bill is drawn and before it is presented. See also Warder v. Tucker, 7 Mass. 449, 5 Am. Dec. 62; Commercial Bank v. Union Bank, 19 Barb. (N. Y.) 391.
96. Neg. Inst. L. (N. Y.), § 189.
97. See chap. XV, *post*.

CHAPTER X.

Discharge of Negotiable Instruments.

§ 120. How discharged; statutory provision.

The Negotiable Instruments Law provides: "A negotiable in-
"strument 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."[98] The English Bills of Exchange Act provides, in effect, for the discharge of a bill by payment in due course, as provided in the above section.[99] The English act also authorizes the discharge by the party accommodated,[1] and provides also that the bill is discharged where it is intentionally canceled by the holder or his agent, and the cancellation is apparent thereon,[2] and where an acceptor of a bill becomes the holder thereof after its maturity in his own right.[3] "Payment in due course," means payment made at or after the maturity of the instrument to the holder in good faith and without notice that his title is defective.[4]

§ 121. Discharge by payment.

a. *By whom payment to be made.*— The maker of a promissory note and the acceptor of a bill of exchange are primarily liable upon the bill or note, and are bound to pay it at its maturity.[5] When a negotiable instrument is paid by or on behalf of the maker of the note or the acceptor of the bill it ceases to exist as a valid contract; and the indorsers thereon and the drawer thereof are discharged.[6] If the instrument is transferred to the maker or acceptor in the regular course of trade, it is extinguished.[7] When commercial paper is paid by an accommodation party whose debt it appears to be, it is commercially dead, and no longer re-

98. Neg. Inst. L. (N. Y.), § 200. For same section in statutes of other States see Appendix.

99. English Bills of Exchange Act, § 59 (1).

1. English Bills of Exchange Act, § 59 (3).

2. English Bills of Exchange Act, § 63 (1).

3. English Bills of Exchange Act, § 61.

4. Neg. Inst. L. (N. Y.), § 148; *ante*, § 107.

5. Edwards on Bills and Notes, p. 532.

6. **Effect of payment.**— In the case of Ballard v. Gremburch, 24 Me. 336, the court said: "A bill of exchange, promissory note, or order, made payable to a particular person, which has been paid by one, whose duty it was to make the payment, without any right to call upon another party to repay the amount, is no longer a valid contract. It has performed its office, and ceases to be a legal entity. See also Dooley v. Virginia Fire and Marine Ins. Co., Fed. Cas. No. 3,999, 3 Hughes (U. S.), 221; American Bank v. Jenness, 2 Metc. (Mass.) 288; Christman v. Harman, 29 Gratt. (Va.) 494. As to payment by person receiving note for collection, see Peoples & Drovers' Bank v. Craig, 63 Ohio St. 374, 59 N. E. 102.

7. **Transfer of note or bill to maker.** — Wallace v. Branch Bank, 1 Ala. 565; Long v. Bank of Cynthiana, 1 Litt. (Ky.) 290. In the case of Mattix v. Leach, 16 Ind. App. 112, 43 N. E. 969, it was held where the maker of a note after being discharged in bankruptcy, and, therefore, under no obligation to pay it, contracted with

tains the character that it originally had. It is then but evidence of the transaction, and the accommodation party who has paid it may use it as such in connection with other proof, to compel reimbursement from the real debtor.[8]

If the maker of a note as the agent of another person purchases the note, recovery thereon by such person will not be defeated.[9] But if the maker, in paying the money to the holder, does not indicate that he acts in behalf of a third person and the holder accepts it as a payment, it will operate as a discharge of the note.[10] Where a payment is made by a third person at the request of the maker the instrument will be extinguished, and a subsequent transfer by the payee to the person who makes the payment will not revive it.[11] Where a note is paid by one of two or more joint

the payee to purchase it, and for that purpose paid certain sums to him, such sums will be treated as payments made on the note in favor of sureties thereon, since a bankrupt maker of a note after his discharge cannot purchase and indorse it as against his sureties.

8. First Nat. Bank v. Maxfield, 83 Me. 576, 22 Atl. 479; Pearce v. Wilkins, 2 N. Y. 469; Muir v. Demarce, 12 Wend. (N. Y.) 468; De Barry v. Withers, 44 Pa. St. 356; Planters' Bank v. Douglas, 2 Head (Tenn.), 699; Sublett v. McKinney, 19 Tex. 438.

Payment by accommodation party. — In Edwards on Bills and Notes, p. 532, it is said: "When a bill is accepted for the accommodation of the drawer and paid by the acceptor, a contract is raised or implied on the part of the drawer to indemnify the acceptor; or refund to him the amount so paid with such damages as he may have sustained in the transaction. Citing Baker v. Martin, 3 Barb. (N. Y.) 634. But though an action may be maintained on this implied contract, it cannot be based upon the bill itself, for as a security it has answered the purpose for which it was drawn, and has been canceled. Griffith v. Reed, 21 Wend. (N. Y.) 502; Wing v. Terry, 5 Hill (N. Y.), 160. Having been paid, it remains in the hands of the acceptor as a voucher to be used by him in his settlement with the drawer, or as an item of evidence in an action brought for the recovery of the money paid. The same principles apply to the case of a promissory note made for the accommodation of the payee, or of some other person to whom it is delivered for negotiation."

9. Bowman v. St. Louis Times, 87 Mo. 191.

10. Cason v. Heath, 86 Ga. 438, 12 S. E. 678; White v. Fisher, 62 Ill. 258; Eastman v. Plumer, 32 N. H. 238.

11. Moran v. Abbey, 63 Cal. 56.

Payment by guarantor.— In the case of Voltz v. National Bank, 158 Ill. 532, 42 N. E. 69, 30 L. R. A. 155, it appeared that a national bank guaranteed the payment of the checks of another bank for the purpose of clearing the checks of the latter through a clearing-house. Such bank afterward paid one of the checks guaranteed by it, and it was indorsed by it. It was held that, the check being paid pursuant to the guaranty, the bank was not necessarily a volunteer, and was not, therefore, precluded from claiming the rights of the person to whom the payment was made.

Where one guarantees payment of a note or check, and on default of payment by the principal debtor pays the same to the holder, the law will imply a promise to repay on the part of the persons primarily liable, and the guarantor will be subrogated to the rights of the holder to whom he makes payment. Babcock v. Blanchard, 86 Ill. 165; Hamilton v. Johnston, 82 Ill. 39.

makers, the note is thereby extinguished;[12] and payment made by a joint promisor on a note due cannot, by an arrangement with the payee, be revoked so as to revive the debt against the third party.[13] If, before maturity, a note is assigned to one of several joint makers, the assignment operates as a discharge of the note.[14] Payments by a person secondarily liable upon an instrument, as by an indorser or drawer, do not discharge the instrument. This subject will be discussed in a later section.[15]

b. *To whom payment should be made.*— Payment of a bill or note should be made to the holder and real owner thereof or to some person authorized by him to receive it.[16] The possession of a negotiable instrument by a person other than the payee is *prima facie* evidence of the right to receive payment for the owner;[17] and this is so, although the instrument has not been indorsed by the payee.[18] Where money is paid to the holder of a note a demand should be made for the surrender and delivery thereof; if this is not done the payment is made at the risk of the person paying it, and if the party receiving payment had no right thereto, the payment will not discharge the note as against the true owner.[19]

If notice of the loss or theft of an instrument be given to the person liable to pay, such person will not be protected in a payment made to the finder or to the thief or any other person, unless a clear title to the instrument is established, or adequate indem-

12. Gulett v. Sweat, 6 Ill. 476; Hopkins v. Farwell, 32 N. H. 425; Rockingham v. Claggett, 29 N. H. 292.

13. Frost v. Martin, 26 N. H. 422; Davis v. Stevens, 10 N. H. 186.

Payment by one of several accommodation makers.— When one of several accommodation makers of a joint and several promissory note paid the same, and subsequently transferred and delivered it for a valuable consideration to a third person, the note itself is extinguished by the payment, and while it cannot be sued upon as a note, it remains, in the hands of the maker who paid it, the evidence of his right to reimbursement from his comakers. Dillenbeck v. Dugart, 97 N. Y. 303, 49 Am. Dec. 525.

14. Gordon v. Wansey, 21 Cal. 77; Swen v. Newell, 19 Colo. 397, 35 Pac. 734; Stevens v. Hannan, 86 Mich. 13, 49 N. W. 874; s. c., 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125; Kneeland v. Miles (Tex. Civ. App.), 24 S. W. 1113.

15. See § 123, *post*.

16. Edwards on Bills and Notes, p. 537.

17. Streeter v. Poor, 4 Kan. 412; Cothran v. Collins, 29 How. Pr. (N. Y.) 113.

18. Paulman v. Claycomb, 75 Ind. 64; Edwards v. Parks, 60 N. C. 598.

19. Wheeler v. Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231. But see Reid v. Kellogg, 8 S. Dak. 596, 67 N. W. 687, where, under section 4497 of the Compiled Laws of North Dakota, which provides that a person paying a negotiable instrument may require as a condition precedent that the same be surrendered, it was held that the section did not prevent a payment to one who has been given ostensible authority to receive it from being binding on the payee, although no demand was made for the instrument.

nity is given against the claim of any other person.[20] If a note is paid by the maker to a fraudulent holder without notice of the fraud, he is discharged from liability.[21] The possession by an assumed agent of a promissory note payable to the order of the payee, but not indorsed by him, is not of itself sufficient to authorize a payment thereof to such agent.[22] A note may be discharged by a payment to one of two or more joint payees.[23] Where payment is made in good faith to the person having possession of a note or other instrument payable to bearer, it will discharge the debtor, since the possession of such an instrument is strong *prima facie* evidence of a right to receive payment.[24] Mere suspicion that the holder of such a note is not its legal owner will not justify the maker in refusing payment, but to exonerate him there must be circumstances amounting to clear proof that the possession is fraudulent.[25] If a person is not in the actual possession of a negotiable instrument, a payment to him is presumptively unauthorized.[26] But it has been held that the fact that a supposed agent of the payee was not in possession of the instrument at the time the maker made payment to him, is not conclusive as to his lack of authority to receive the payment, although the maker knew that the note had been transferred to a bank for collection.[27]

20. **Payment to finder or thief.** — Solomons v. Bank of England, 13 East (Eng.), 135. In the case of Cothran v. Collins, 29 How. Pr. (N. Y.) 113, it was held that the payment of a note which has been lost or stolen from the real owner, by the maker thereof, to the finder or thief, under the belief that he was the true owner, but under circumstances showing that the maker was grossly negligent in not learning the facts, and which would have excited suspicion in an ordinary person, is not available as a defense in an action against the maker by the real owner of the note.

21. Alexander v. Rollins, 14 Mo. App. 109; Brennan v. Merchants & Manufacturers' Bank, 62 Mich. 343, 28 N. W. 881.

22. Doubleday v. Kress, 50 N. Y. 410, 10 Am. Rep. 502; Central Trust Co. v. Folsom, 167 N. Y. 285, 289, 60 N. E. 599; Wangner v. Grimm, 169 N. Y. 421, 429, 62 N. E. 569. In the case of Whelan v. Reilly, 61 Mo. 565, it was held that the fact of the possession of notes and a deed of trust by an attorney, to whose firm they are shown to have been intrusted, was presumptively enough to authorize a payment to such attorney. As to payments to agents holding a note for collection see Johnson v. Hall, 5 Ga. 384; Padfield v. Green, 85 Ill. 529.

23. Delano v. Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201; Perry v. Perry, 98 Ky. 242, 32 S. W. 755; Bruce v. Bonney, 12 Gray (Mass.), 107.

24. Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167; Paris v. More, 60 Ga. 90; Chimberg v. Gale Harrow Mfg. Co., 38 Kan. 228, 16 Pac. 462; Barnett v. Ringgold, 80 Ky. 289; Lamb v. Matthews, 41 Vt. 42; Ames v. Drew, 31 N. H. 475.

25. Stoddard v. Burton, 40 Iowa, 582.

26. Holland v. Van Beil, 89 Ga. 223, 15 S. E. 302; Fortune v. Stockton, 182 Ill. 454, 55 N. E. 367; Draper v. Rice, 56 Iowa, 114, 8 N. W. 797, 41 Am. Rep. 88; South Branch Lumber Co. v. Littlejohn, 31 Neb. 606, 48 N. W. 476.

27. Quinn v. Dresbach, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138.

Where payment was made to the husband of the payee who had not possession of the note at the time, it was held to have been made at the maker's risk.[28]

Payment to the original payee without requiring production of the paper will not necessarily discharge the maker; it is a duty of the maker to require the production of the paper or to otherwise satisfy himself that the payee is still entitled to receive payment.[29] After an indorsement for value by the payee, a payment to him is not a discharge of the instrument, unless it can be shown that the payee had a right to receive the same.[30] If the maker have notice of an assignment or transfer of the note, payment to the payee will not in any event operate as a discharge.[31] If a note is payable at a bank, but is not left there for collection, the mere deposit of money at the bank by the maker, to be applied in payment of the note, will not discharge the maker; in such case the bank receiving the money is to be regarded as the agent of the maker and not of the payee.[32] But where the note is left by the holder at the bank

28. Dunn v. Hornbeck, 72 N. Y. 80.

29. **Payment to original payee.**— Bank of the University v. Tuck, 96 Ga. 456, 23 S. E. 467, in which case the court says: "One who pays a negotiable promissory note, executed by himself, to any person other than the holder, without taking up the instrument, ought to see to it that the person receiving payment has a right to make the collection. By making the note negotiable, the maker expressly contracts to pay the same to any person who may lawfully acquire title to it in due course of trade. He, therefore, cannot rest upon the assumption that payment to the original payee will necessarily discharge him. Of course, as against one who takes a promissory note after its maturity, the maker may set up the defense that he had already paid it to the original payee before its assignment by the latter; but where one takes such a note before its maturity, such a plea of payment will not, in other instances, be available. The rule as settled by the authorities seems to be, that in such a case the holder, notwithstanding the previous payment of the note by the maker to the original payee, may collect it again, unless one of three things appear: (1) That the payee was the holder's general agent for the collection of such paper; or, (2) had special authority to collect in the particular instance; or, (3) that the money collected by the payee in fact reached the holder's hands." See also Exchange Bank v. Johnson, 30 Fed. 588; Loughbridge v. Wilson, 102 Ga. 524, 27 S. E. 665; Tuck v. National Bank, 108 Ga. 446, 33 S. E. 983; Hollinshead v. John Stuart & Co., 8 N. Dak. 35, 77 N. W. 89, 42 L. R. A. 659.

30. Perry v. Bray, 68 Ga. 293; Paris v. Moe, 60 Ga. 90; City Bank v. Taylor, 60 Iowa, 66, 14 N. W. 128; Wilkinson v. Sargent, 9 Iowa, 521; Doe v. Callow (Kan.), 67 Pac. 824; Hoffacker v. Manufacturers' Nat. Bank (Md.), 23 Atl. 579; Williams v. National Bank, 72 Md. 441, 20 Atl. 191; Farmers' Bank v. Maxwell, 32 N. Y. 579; Harpending v. Gray, 76 Hun (N. Y.), 351, 27 N. Y. Supp. 762.

31. Barbour v. Washington Fire and Marine Ins. Co., 60 Ala. 433; Mitchell v. Friedley, 126 Ind. 545, 26 N. E. 391; Merriam v. Bacon, 5 Metc. (Mass.) 95; National Bank of South Carolina v. Estell, 4 Baxt. (Tenn.) 413; Holden v. Kirby, 21 Wis. 149.

32. **Deposit of money at bank where instrument is payable.**— Ward v. Smith, 7 Wall. (U. S.) 447, 19 L. Ed. 207; First Nat. Bank v. Hall, 119 Ala. 64, 24 South. 526; Wood v. Mer-

where it is made payable, the bank becomes the holder's agent for the collection of the note, and the maker will be discharged by a payment at the bank, although the bank does not pay over the amount to the holder.[33]

c. *How payment to be made.*— A bill or note payable in anything else than money is not negotiable, and is not governed by rules applicable to the payment of negotiable instruments. It follows, therefore, that a negotiable promissory note or a bill of exchange cannot be discharged except by a payment of money.[34] The holder of such an instrument is not bound to accept anything in payment thereof, but money, at its true and proper value.[35]

In a previous section we have considered what constitutes money, currency, or current funds.[36] As a general rule an executory agreement will not operate as an extinguishment of the note; as where an oral agreement was made by an heir with an administrator that the balance due on a note of the estate against her should be deducted from her share before final settlement;[37] and

chants' Sav., etc., Co., 41 Ill. 267; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189; Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546; First Nat. Bank v. Chilson, 45 Neb. 257, 63 N. W. 362; Adams v. Hackensack Imp. Co., 44 N. J. L. 638, 43 Am. Rep. 406; Hills v. Place, 48 N. Y. 520; Hollinshead v. John Stuart & Co., 8 N. Dak. 35, 77 N. W. 89, 42 L. R. A. 659; Corey v. Hunter, 10 N. Dak. 5, 84 N. W. 570; Williamsport Gas Co. v. Pinkerton, 95 Pa. St. 62; Richards v. Jefferson, 20 Wash. 166, 54 Pac. 1123; Bartel v. Brown, 104 Wis. 493, 80 N. W. 801. But in the case of Lazier v. Horan, 55 Iowa, 75, 7 N. W. 457, 39 Am. Rep. 147, it was held that where a note is made payable at a bank, and at its maturity the maker deposits in the bank the amount of the note, to be applied to its payment when presented, and the bank afterward fails, such deposit constitutes a complete defense to an action on the note. The court in stating its reasons for its decision said: "The note was made payable at a bank; these institutions are depositories of money; they are also collection agencies through which by much the larger part of that branch of the business of this country is transacted. When a note is made payable at a bank, the parties expect the collection to be made through the bank. It is true, when the defendant deposited the money, the bank while holding it was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorize the bank to pay the note. By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that payment may be made at the bank, it means that payment is to be made to the bank."

33. Smith v. Essex County Bank, 22 Barb. (N. Y.) 627. See also Ward v. Smith, 7 Wall. (U. S.) 447, 19 L. Ed. 207.

34. Edwards on Bills and Notes, p. 550. See Zinsser v. Columbia Cab Co., 66 App. Div. (N. Y.) 514, 73 N. Y. Supp. 287.

35. Chitty on Bills, p. 433.

36. See § 37, (*b*), (*c*).

37. Taylor v. Lewis, 146 Mass. 222, 15 N. E. 617. But see, generally, Moseby v. Lewis, 4 Litt. (Ky.) 159; Noble v. Edes, 51 Me. 34; Cary v. Bancroft, 14 Pick. (Mass.) 315, 25 Am. Dec. 393; Robertson v. First Nat. Bank, 41 Mich. 356, 1 N. W. 1033.

an agreement to deliver property or perform services in payment of a note will not extinguish the note until the property has been received or the services have been performed.[38] If the holder of a note at its maturity takes the check of the payee and surrenders the note, it does not operate as a payment, unless it is expressly received as such, or the circumstances clearly show that such was the intention of the parties.[39] Where a holder accepts the check of a third person in payment of the note, it will not operate to discharge the note, unless it was received with the express understanding that it should have such an effect.[40] But a person who takes a check in payment on a note or bill must use due diligence to obtain the money thereon, and if he is guilty of laches, whereby the drawer is injured, it will operate as a payment and discharge.[41]

38. Walker v. Greene, 22 Ala. 679; Graydon v. Patterson, 13 Iowa, 256, 81 Am. Dec. 432.

Agreement to receive payment in services or property.— Where it was agreed that the payee of a note should receive payment in services of a debtor of the maker, performance of part of the services will not operate as a payment *pro tanto*, the contract being an entirety. Weeks v. Elliott, 33 Me. 488. And in the case of Damon v. De Bar, 83 Mich. 262, 47 N. W. 216, it was held that a voluntary promise by the payee of a note to receive a quantity of posts in part payment, which the maker agreed to have ready on his farm, is of no validity until the posts have been accepted by the payee; and where they are burned on the maker's farm before acceptance, the payee is entitled to recover the amount of the note. And see, generally, Hook v. White, 36 Cal. 299; Bacon v. Lamb, 4 Colo. 578; Nashua L. R. Co. v. Nutting, 15 Gray (Mass.), 25; Nunnemacker v. Johnson, 38 Minn. 390, 38 N. W. 351; Whittaker v. Ordway, 69 N. H. 182, 38 Atl. 789; Cushman v. De Mallie, 46 App. Div. (N. Y.) 379, 61 N. Y. Supp. 878; Brady v. Wasson, 6 Heisk. (Tenn.) 131; Dudley v. Stiles, 32 Wis. 371.

39. Payment by check.— Olcott v. Rathbone, 5 Wend. (N. Y.) 490; Burkhalter v. Second Nat. Bank, 42 N. Y. 538; Kelty v. Second Nat. Bank, 52 Barb. (N. Y.) 328. In the last case it was held that the giving of a check on the presentment of a draft to the drawee does not amount to a payment of the draft if the check is not paid; and a subsequent return of the check on receipt of the draft, and its protest in due season, preserves the life of the draft, and entitles the holder to recover the amount from the drawer. In the case of Strong v. King, 35 Ill. 9, 85 Am. Dec. 336, it was held that the reception of a check by the holder from the drawee, upon presentation of a bill of exchange, will be considered as an absolute payment when so agreed by the parties. See, generally, Henry v. Connelly, 48 Ark. 267, 3 S. W. 181; Heartt v. Roads, 66 Ill. 351.

40. In the case of Pratt v. Foot, 9 N. Y. 463, revg. 12 Barb. (N. Y.) 212, it appeared that a person offered to a bank in payment of a note nearly due, a check drawn upon the bank by one of its own customers. The bank declined to accept it as payment, but consented to retain and apply its proceeds to the note if the check were paid on the day the note fell due. On that day a balance appeared against the drawer of the check; but soon after new credits having been made to him, the bank charged the check to his account, and credited the note as paid. This transaction was held to operate as an absolute payment of the note. See also Canonsberg Iron Co. v. Union Nat. Bank (Pa.), 6 Atl. 574.

41. Crowell v. Wing, 1 Hall (N. Y.), 56; First Nat. Bank of Meadville v. Fourth Nat. Bank of New York, 16 Hun (N. Y.), 332; Merchant

Where a new bill or note is accepted in the place of one which has matured, the original instrument is not thereby discharged, unless by an understanding or agreement of the parties to that effect.[42] But in Massachusetts the rule seems to be that where a new note is given for the amount due on an old note between the same parties, it will be presumed to have been received in payment of the old note and will operate as a discharge thereof unless the contrary is shown.[43] Where a part payment is made on a note and a new note given for the balance, the original note will be deemed to have been discharged, upon the ground that by such a transaction it is presumed that all the differences between the parties were adjusted and settled when the new note was given.[44] But where a note is surrendered to the maker, and new notes of a third person are delivered to the payee, the acceptance of such new notes constitutes a conditional payment only, unless it was agreed that they should be received as an absolute payment.[45] Where a note is left at a

Nat. Bank v. Samuel, 20 Fed. 664. See Robbins v. Klein, 60 Ohio St. 199, 54 N. E. 94.

42. Accepting new notes of maker. — In the case of Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265, it appeared that a bank, holding notes for collection, accepted other notes of the maker, payable to the bank for the principal sum, and credited the bank account of the payee therewith surrendering the notes. No credit was given the account of the payer of the notes as for borrowed money, and no cash passed in the transaction. The bankers absconded, and the owner of the surrendered notes sued the maker; it was held that there was no payment and the owner could recover. See also Savings Bank of San Diego County v. Central Market Co., 122 Cal. 28, 54 Pac. 223; Williams v. Chisholm, 128 Ill. 115, 21 N. E. 215; Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Tyler v. Hyde, 80 Ill. App. 123; Jones v. Rider, 60 N. H. 452; Holland Trust Co. v. Waddell, 75 Hun (N. Y.), 104, 26 N. Y. Supp. 98; First Nat. Bank v. White, 60 N. J. Eq. 487, 46 Atl. 1092; Moses v. Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609; Boston Nat. Bank v. Jose, 10 Wash. 185, 38 Pac. 1026; First Nat. Bank v. Finck, 100 Wis. 446, 76 N. W. 608. But where a note is delivered to the maker, and a new note given in its stead, no action can be maintained on the original note, upon the ground that the surrender of the note is evidence that it was extinguished by agreement of the parties. Wickenkamp v. Wickenkamp, 77 Ill. 92; Neff v. Clute, 12 Barb. (N. Y.) 466; Horne v. Young, 40 Ga. 193. And the intention that a renewal note is to be accepted in payment of the original is sufficiently shown by the indorsement of the word "paid" upon the original, with the knowledge and consent of the payee. Montague v. Bill, 14 Ky. L. Rep. 890.

43. Willis v. Twambley, 13 Mass. 204; Huse v. Alexander, 2 Metc. (Mass.) 157; Adams v. Jenkins, 16 Gray (Mass.), 146; Devey v. Bell, 5 Allen (Mass.), 165; Agawam Nat. Bank v. Downing, 169 Mass. 297, 47 N. E. 1016. But whether it operates as a discharge is a question of fact, depending upon the circumstances surrounding the transactions, and the intention of the parties. Kendall v. Life Assur. Soc., 171 Mass. 568, 51 N. E. 464.

44. Piper v. Wade, 57 Ga. 223; Compton v. Patterson, 28 S. C. 115, 5 S. E. 270; Cable v. Hardin, 67 N. C. 472.

45. Van Eps v. Dillaye, 6 Barb. (N. Y.) 244; Stevens v. Anderson, 30 Ind. 391; Merchants' Nat. Bank v. Good, 21 W. Va. 455; Gresham v. Morrow, 40 Ga. 487; Hedge v. McQuade, 11 Cush. (Mass.) 352; Woods v. Woods, 127 Mass. 141.

bank for collection the bank is only authorized to accept money in payment, unless by the express consent of the holder it may receive something else.[46]

§ 122. Discharge otherwise than by payment.

a. *By cancellation and surrender.*— The rule seems to be well settled by the authorities that where an obligee delivers up the obligation which he holds against another party, with the intent and for the purpose of discharging the debt, where there is no fraud or mistake alleged or proven, that such surrender operates in law as a release and discharge of the liability thereon; nor is any consideration required to support such a transaction when it has been fully executed.[47] So where the holder of a promissory note voluntarily cancels the same and surrenders it to the maker, in the absence of mistake or fraud, it will operate in law as a release and discharge of the maker's liability.[48] The gift of a promissory note by the holder to the maker extinguishes the note and the debt evidenced thereby.[49] A surrender of a note or bill to the person primarily liable thereon is *prima facie* evidence of a discharge,[50] and if made for the purpose and with the intent of discharging the debt, it will have that effect.[51] Where words are written on the face of this instrument indicating that it has been discharged or satisfied in full, by, or with the consent of, the owner the instrument is extinguished.[52] A mere promise by the

46. Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265.

47. In the case of Beach v. Endress, 51 Barb. (N. Y.) 570, it was held that no action is maintainable on a bond, in the absence of fraud or mistake, after the money due on a bond or undertaking has been paid by the obligors, and receipted in full on the back of the bond by one of the obligees, and the bond delivered up to the obligors for the purpose of being canceled. See also Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176; Doty v. Wilson, 5 Lans. (N. Y.) 10; Albert's Exrs. v. Ziegler's Exrs., 29 Pa. St. 50.

48. Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176.

Where the payee of a promissory note, in her last sickness, handed the note to her sister, to be given to the maker in payment for boarding and taking care of her, it was held that this was a valid cancellation of the note. Edwards v. Campbell, 23 Barb. (N. Y.) 423. See also Booth v. Smith, Fed. Cas. No. 1,649, 3 Woods (U. S.), 19; Tarbell v. Parker, 101 Mass. 165; Miller v. Tharel, 75 N. C. 148.

49. Hale v. Rice, 124 Mass. 292; Stewart v. Hidden, 13 Minn. 43; Edwards v. Campbell, 23 Barb. (N. Y.) 423; *In re* Campbell, 7 Pa. St. 100, 47 Am. Dec. 503.

50. Sherman v. Sherman, 3 Ind. 337; Fellows v. Kress, 5 Blackf. (Ind.) 536.

51. Vanderbeck v. Vanderbeck, 3 Stew. (N. J.) 265; Miller v. Tharel, 75 N. C. 148. But a surrender or cancellation without the consent of the owner does not discharge the maker. McLemore v. Hawkins, 46 Miss. 715. See also Clark v. Butts, 73 Minn. 361, 76 N. W. 199.

52. Succession of Foerster, 43 La. Ann. 190, 9 South. 17.

payee to surrender the note to the maker does not discharge the latter from his liability thereon.[53] Where the return or surrender of a note is induced by fraud, the maker is not released from liability thereon;[54] and where a note has been surrendered by mistake upon the supposition that it was fully paid, the maker will remain liable for the balance still unpaid.[55]

b. *Statutory provision as to cancellation.*— The Negotiable Instruments Law provides that: "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."[56] This is, in effect, the same as a provision of the English Bills of Exchange Act,[57] and seems to be declaratory of the general rule.[58]

c. *By accord and satisfaction.*— A distinction should be made between an extinguishment and a satisfaction of a bill or note. As for an example, as stated by Justice Story, taking a security of a higher description, such as a bond or judgment, will extinguish the claim of the holder upon the note against the party giving the security; but it will not amount to a satisfaction thereof, so as to discharge the other parties upon the note.[59] And although an agreement never to sue the maker will operate as an extinguishment of the debt as to him, it is not a satisfaction as to the other parties to the note.[60] It is a general rule that whatever is received by the payee of a note in full satisfaction of the claim against the

53. Greenbaum v. Elliott, 60 Me. 25.

54. Reynolds v. French, 8 Vt. 85, 30 Am. Dec. 456; Shurer v. Green, 3 Coldw. (Tenn.) 419; Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998.

55. Banks v. Marshall, 23 Cal. 223; Manufacturers' Bank v. Thompson, 129 Mass. 438, 37 Am. Rep. 376; Blodgett v. Bickford, 30 Vt. 731, 73 Am. Dec. 334. In the case of Liesemer v. Burg, 106 Mich. 124, 63 N. W. 999, a note was delivered by the payee to the maker when payment was demanded, and retained by the maker, although the full amount was not paid, the maker having claimed a credit which the payee refused to allow. It was held that the maker could not destroy the character of the note as an evidence of indebtedness, by marking it "paid."

56. Neg. Inst. L. (N. Y.), § 204. For same section in statutes of other States see Appendix.

57. English Bills of Exchange Act, § 63 (3). And see Novelli v. Rossi, 2 B. & Ad. (Eng.) 757; Castrique v. Imrie, L. R., 4 H. L. (Eng.) 435; Warwick v. Rogers, 5 M. & G. (Eng.) 340; Prince v. Oriental Bank, 3 App. Cas. (Eng.) 325.

58. Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176.

59. Story on Promissory Notes, § 409; Fisher v. Fisher, 98 Mass. 303; Tradesmen's Nat. Bank v. Looney, 99 Tenn. 278, 42 S. W. 149, 38 L. R. A. 837.

60. Dean v. Newhall, 8 T. R. (Eng.) 168; Fowell v. Forrest, 2 Saund. (Eng.) 47, n.

maker is a satisfaction as to all other parties who are collaterally liable with the maker.[61] And it has been held that where the maker of a note, at the request of a payee, gave several new notes, and the old note was given up and canceled, such new notes created a new indebtedness, and constituted an accord and satisfaction of the original debt.[62] One of the principles applicable to an accord and satisfaction is that where the debt or demand is liquidated, or certain and is due, payment by the debtor and receipt by the creditor of a less sum is not a satisfaction thereof, although the creditor agrees to accept it as such, if there be no release under seal, or no new consideration given.[63] So where the amount due on a note or bill is fixed and determined, and is due, a payment of a less amount will not operate as a discharge. But the rule would not apply where the amount due is in dispute.

d. *By renunciation; statutory provision.*— The Negotiable Instruments Law provides that: "The holder may expressly re-"nounce his rights against any party to the instrument, before, at "or after its maturity. An absolute and unconditional renuncia-"tion 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." [64] The English Bills of Exchange Act contains a similar provision.[65] It seems to be a new rule in America, in the form stated in the statute, although it is probable that any written instrument renouncing the rights of a holder of a note in favor of the maker would operate as a discharge of the note.[66] The requirement that the renunciation be in writing, unless the instrument is

61. Story on Promissory Notes, § 402.

62. *In re* Dixon, 13 Fed. 109, 2 McCrary (U. S.), 556.

63. 1 Cyc. of Law and Proc., p. 319; People v. Hamilton County, 56 Hun (N. Y.), 459, 10 N. Y. Supp. 88.

64. Neg. Inst. L. (N. Y.), § 203. For same section in statutes of other States see Appendix.

65. English Bills of Exchange Act, § 62.

66. Cuyler v. Cuyler, 2 Johns. (N. Y.) 186. In the case of Campbell v. Skinner, 30 Mich. 32, a judgment debtor had given his promissory note for a portion of the amount of the judgment against him, as a part of some contemplated arrangement in reference to the judgment, and this arrangement was afterward abandoned for another compromise arrangement made by the judgment creditor with third persons, which was inconsistent with the idea of leaving such a note outstanding against the debtor to be paid in addition to such compromise: it was held that such latter agreement when performed would operate, in the absence of anything showing a contrary intent, to cut off or invalidate the note as between the parties to it.

delivered up, was a new provision in the English act, and was inserted in accordance with the Scotch law.[67]

e. *By alteration.*—A negotiable instrument, which has been materially altered without the assent of all the parties liable thereon, is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.[68] The effect of the unauthorized alteration of a negotiable instrument upon the rights of the parties will be considered in the next chapter.

f. *By operation of law.*—When a judgment is obtained on a note or bill, the bill or note is thereby extinguished and merged in the judgment.[69] But this doctrine only applies to the relation between the plaintiff and defendant. The judgment alone, without actual satisfaction, is no extinguishment as between the plaintiff and other parties not jointly liable with the original defendant, whether those parties be prior or subsequent to the defendant.[70] But a judgment against one of several joint makers, obtained in an action against him alone, is a bar to an action by the plaintiff against the other makers, and the note as to all the makers is merged in the judgment.[71] The issuing of execution against the person or property of one party to a negotiable instrument does not extinguish the plaintiff's remedy against the other parties.[72] By the common law the appointment of the maker of a note or acceptor of a bill as an executor of the estate of the holder of the instrument will operate as a discharge;[73] as will also a bequest of the instrument to the maker or acceptor by the will of the holder.[74] The intermarriage of the maker of a note with the payee or holder will, unless otherwise provided by statute, discharge the maker from all liability thereon.[75] A discharge in bankruptcy, unless otherwise provided by the statute, releases a bankrupt from all his provable debts,[76] and, therefore, will dis-

67. Chalmers on Bills of Exchange, p. 212.

68. Neg. Inst. L. (N. Y.), § 205. For same section in statutes of other States see Appendix.

69. Bayley on Bills, chap. 9, p. 335; Byles on Bills (16th ed.), 314; Story on Promissory Notes, § 407; Claxton v. Swift, 2 Show. (Eng.) 441; Norris v. Aylett, 2 Campb. (Eng.) 329.

70. Claxton v. Swift, 2 Show. (Eng.) 441; Byles on Bills (16th ed.), 314.

71. Suydam v. Barber, 18 N. Y. 468.

72. Byles on Bills (16th ed.), 315; Porter v. Ingraham, 10 Mass. 88; Hayling v. Mulhall, 2 W. Bl. (Eng.) 1235.

73. Freakley v. Fox, 9 B. & C. (Eng.) 130; Story on Bills, § 443.

74. Hobart v. Stone, 10 Pick. (Mass.) 215; Story on Promissory Notes, § 407.

75. Curtis v. Brooks, 37 Barb. (N. Y.) 476.

76. American Bankr. Act, 1898, chap. 3, § 17*a;* Dean v. Justices Munic. Ct., 173 Mass. 453, 53 N. E. 893, 2 Am. B. R. 163.

charge as to the bankrupt, but not as to the other parties, all bills accepted, or notes made by him.[77]

§ 123. Discharge of persons secondarily liable.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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." [78]

b. *In general.*— 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." [79] The party primarily liable upon a note is the maker; the party primarily liable on a bill of exchange is the acceptor; all others are secondarily liable. The parties primarily liable on a negotiable instrument are for certain purposes, and to a certain extent, principals, and those secondarily liable are sureties to such principals, liable only in case of default of the principals. Although the parties secondarily liable are sureties for those primarily liable, as between themselves they are not merely cosureties, but each prior party is a principal in respect to each subsequent party.[80] For example, as between the holder and the maker of a note, the maker is the principal, and each indorser is a surety for him; but as between the holder and the first indorser, the first indorser is the principal, and the subsequent or second indorser is his surety, and so on in the order of their indorsement.

77. *Ex. p.* Jacobs, L. R., 10 Ch. (Eng.) 211; Ward v. Johnson, 13 Mass. 148.

The liability of a person who is a codebtor with, or a guarantor, or in any manner a surety for, a bankrupt is not altered by the discharge of such bankrupt. 5 Cyc. 401; American Bankr. Act, 1898, § 16a.

78. Neg. Inst. L. (N. Y.), § 201. For the same section in the statutes of other States see Appendix.

79. Neg. Inst. L. (N. Y.), § 3.

80. Byles on Bills (16th ed.), 322.

And where a bill of exchange has been accepted by the drawee, and is afterward indorsed by successive parties, the drawee becomes acceptor and a principal, and the drawer and each successive indorser becomes a surety for the party immediately preceding. It is important to bear in mind the relationship of the parties to such instruments, for the purpose of determining the general rules of the law of principal and surety as applied to the rights and liabilities of such parties. It is a fixed and established rule of this law, that a discharge of a principal is a discharge of the surety; for the engagement of the surety, being but an accessory to the principal's agreement, terminates with it.

We have already seen that a drawer of a bill engages to pay the amount thereof to the holder, "or to any subsequent indorser, who may be compelled to pay it;"[81] and a general indorser on a negotiable instrument engages to pay the amount thereof, to the holder, "or to any subsequent indorser who may be compelled to pay it," provided it be duly presented, dishonored, and proper proceedings on dishonor be duly taken.[82] Each party to a bill or note is, therefore, bound to protect and indemnify each subsequent party; and each indorser may, therefore, insist that no transactions be had between the holder and any prior party which will lessen or impair in any way his right of recourse to such prior party.[83]

c. *By discharge of instrument.*—Any act which absolutely discharges or extinguishes the instrument releases all parties thereto from liability. Thus, payment by the principal debtor discharges each person secondarily liable. A release of the acceptor or maker discharges each indorser;[84] and a release of one of several joint acceptors or makers is a release of all.[85] As we have already

81. Neg. Inst. L. (N. Y.), § 111. See § 81, *ante.*

82. Neg. Inst. L. (N. Y.), § 116. See § 86, *ante.*

83. Ross v. Jones, 22 Wall. (U. S.) 576, 587, where the court said: "If the holder of a negotiable promissory note does anything, the effect of which is to suspend, impair, or destroy the right of the prior parties to indemnity from those otherwise liable over to them, he cannot resort to the parties affected by his conduct to make good the default of the maker of the instrument. Simple indulgence, however, or mere delay to enforce payment, without a binding contract to give time, will not, under the general rules of commercial law, have that effect, even in the case of a party occupying strictly the contract relation of a surety."

84. Eldredge v. Chacon, Fed. Cas. No. 4,329; Lynch v. Reynolds, 16 Johns. (N. Y.) 41; Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231.

85. Byles on Bills (16th ed.), 326. But if it appear on the face of the deed of release that it was the paramount intention of the parties that the others should be held liable, this

seen, a discharge of a principal debtor in bankruptcy will not release or discharge the other parties.[86] But it has been held that a discharge of the acceptor of a bill by a compromise agreement under bankruptcy proceedings instituted in a foreign country to which the drawer was not made a party, will release the drawer from liability.[87] Where a maker is discharged in consideration of the payment of a part of the note, the indorsers are also discharged.[88] But where the acceptor has no funds of the drawer in his hands, it has been held that a discharge of the acceptor by the payee does not discharge the drawer.[89] The drawer and indorsers are so far regarded in the light of sureties to the acceptor and maker, that they are discharged by the holder's accord and satisfaction of the maker's or acceptor's liability.[90]

d. *By discharge of prior party.*— If the holder of a note or bill releases a party from liability it will also release all parties who are liable on the instrument subsequent to the party released. This is a general principle lying at the foundation of the law of commercial paper. It necessarily follows from that other fundamental rule which makes an indorser of commercial paper liable for the amount thereof to the holder or any subsequent indorser who may be compelled to pay it. As between the first and subsequent indorsers, the former must be regarded in the light of a principal; he stands behind them on the paper, and is bound to

intention will be carried into effect by disregarding the form of the deed, and construing the release as a covenant not to sue. Solly v. Forbes, 2 Brod. & Bing. (Eng.) 38; Henderson v. Stobart, 5 Exch. (Eng.) 99; Price v. Barker, 4 El. & Bl. (Eng.) 760.

86. See preceding section.

87. **Effect of discharge in foreign bankruptcy proceedings.**— Phelps v. Borland, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755. In this case the defendant, a citizen of this country, drew his bill of exchange upon a Liverpool firm, which he sold to plaintiffs, residents of this State. The bill was accepted by the drawees, but they having failed, it was protested for nonpayment. The plaintiffs, who were originally not parties to the bankruptcy proceedings, voluntarily and without the consent of the defendant appeared and proved their claim, and accepted the composition decreed. In an action on the bill it was held that the defendant drawer was thereby released from liability, upon the ground that the foreign discharge would not, in itself, have been a defense as against the American holder of the bill, and the plaintiffs, if they had not surrendered their rights, might have proceeded by attachment against any of the property of the bankrupts within the jurisdiction of the courts of this State; and the acceptance of the composition agreement by the plaintiffs destroyed this right to which the defendant would have succeeded by way of subrogation upon the payment of the debt.

88. Abat v. Holmes, 3 La. 351; Farmers' Bank v. Blair, 44 Barb. (N. Y.) 641.

89. Sargent v. Appleton, 6 Mass. 85, 4 Am. Dec. 90.

90. Edwards on Bills and Notes, p. 294. See Douglass v. White, 3 Barb. Ch. (N. Y.) 621.

take it up in case of default of the maker. A discharge of him, therefore, by the holder, on general principles operates to release them.[91] Bearing in mind that the relationship existing between the first indorser and the subsequent indorsers is that of principal and sureties, it follows that if the holder does any act impairing the claim of a surety against the principal, it may be shown in defense by the surety.[92] And if, by the *laches* or act of the holder, the surety's means of indemnity are impaired, his liability is discharged to the extent of the loss sustained by reason of the neglect or act.[93] The necessary implication from this rule would seem to require the surety's absolute discharge, when the responsibility of the principal, who is liable to him for the whole debt, has been lost by the act of the holder.[94] The release of an indorser does not affect the liability of a prior indorser.[95]

e. *By extension of time or postponing right to sue.*— The rule of the statute is declaratory of that which exists at common law. The rule as stated by Judge Story is: "If there be any valid agreement (that is, one founded upon a valuable consideration and operative in point of law) between the maker and the holder, whereby the holder agrees to give credit to the maker of the note after it is due, or whereby the payment is postponed to a future day, and this agreement is made without the consent of the indorser, they will be thereby absolved from all obligation to pay the same." [96] It is a general principle of the law of principal and surety, which is peculiarly applicable to the case of a maker or

91. Newcomb v. Raynor, 21 Wend. (N. Y.) 108, 34 Am. Dec. 219.

Effect of discharge of parties.— In the case of Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231, the court said: "It is a general rule that whatever discharges the maker or acceptor of a bill or note discharges the drawer and indorser, who are sureties, for the contract which they undertook to assume thus passes out of existence by the act of the beneficiary. It is also said that 'whatever discharges a prior indorser discharges all subsequent indorsers for the reason that he stood between them and the holder, and on making payments each one could have had recourse against him but from which his discharge precludes him.' The contracts of the parties to a note are said to be like the links of a pendant chain, if the holder dissolves the first every link falls with it."

An agreement by the holder of a note to release an indorser thereon from all liability, after such indorser had assigned his property for the benefit of creditors, and the holder had acquired a lien by presenting a claim to the assignee, releases a subsequent indorser. Plankington v. Gorman, 93 Wis. 560, 67 N. W. 1128. See also Hawkins v. Thompson, Fed. Cas. No. 6,246, 2 McLean (U. S.), 111.

92. Beardsley v. Warner, 6 Wend. (N. Y.) 613.

93. Barhydt v. Ellis, 45 N. Y. 111.

94. Shutts v. Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231.

95. Kennon v. McRea, 7 Port. (Ala.) 175; Bank of Kentucky v. Floyd, 4 Metc. (Ky.) 159.

96. Story on Promissory Notes, § 413.

acceptor of a negotiable instrument and the indorsers or drawer thereof, that any act of the creditor, or holder, by which he precludes himself from demanding performance of the principal, or entitles the latter to claim an exemption from performance of his contract during an appreciable interval of time, however small, will inure as a discharge of the surety.[97] Any agreement entered into by the holder of a negotiable instrument with the person primarily liable thereon, without the consent of the indorsers, so as to preclude the holder from suing on the instrument at its maturity, discharges the indorsers from their liability.[98] The reason for the rule may be stated thus: "If the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and

97. Scott v. Saffold, 37 Ga. 384.

98. **Extension of time.**— A large number of cases might be cited in which this doctrine has been declared; it will perhaps be sufficient to call attention to the following:

United States.— McLemore v. Powell, 12 Wheat. 554; Sprigg v. Bank, 14 Pet. 207, 10 L. Ed. 422; Ross v. Jones, 22 Wall. 587, 589, 22 L. Ed. 734; Bank of U. S. v. Hatch, 6 Pet. 260, 8 L. Ed. 391; Bank of U. S. v. Lee, Fed. Cas. No. 921, 3 Cranch C. C. 288.

Alabama.— Inge v. Branch Bank of Mobile, 8 Port. 108.

Connecticut.— Lockwood v. Crawford, 18 Conn. 361.

Delaware.— McDowell v. Bank of Wilmington, 1 Harr. 369.

Florida.— Fridenburg v. Robinson, 14 Fla. 130.

Georgia.— Parmelee v. Williams, 72 Ga. 42; High v. Cox, 55 Ga. 662; Scott v. Saffold, 37 Ga. 384.

Kentucky.— Higgins v. Morrison, 4 Dana, 100; Kentucky Bank v. Floyd, 4 Metc. 159.

Louisiana.— Hine v. Bailey, 16 La. 213, 35 Am. Dec. 214; Shaw v. Nolan, 8 La. Ann. 25.

Maine.— Pierce v. Whitney, 22 Me. 113; Lowney v. Perham, 20 Me. 235.

Maryland.— Williams v. Hall, 9 Gill, 347.

Massachusetts.— Way v. Dunham, 166 Mass. 263, 44 N. E. 220; Hutchins v. Nichols, 10 Cush. 299; Allen v. Brown, 124 Mass. 77.

Missouri.— Noll v. Oberhellman, 20 Mo. App. 336; Owings v. McKenzie, 133 Mo. 323, 33 S. W. 802; Commercial Bank of Lexington v. Wood, 56 Mo. App. 214.

New Jersey.— Bell v. Martin, 3 Har. 167; Westervelt v. Frech, 33 N. J. Eq. 451; Nightingale v. Meginnis, 34 N. J. L. 461.

New York.— Mothram v. Mills, 2 Sandf. 189; Greene v. Bates, 74 N. Y. 333; Pomeroy v. Tanner, 70 N. Y. 547; Carey v. White, 52 N. Y. 138; Board of Education v. Fonda, 77 N. Y. 350; German-American Bank v. Niagara Cyc. Co., 13 App. Div. 450, 43 N. Y. Supp. 602; Myers v. Wells, 5 Hill. 463; Sizer v. Heacock, 23 Wend. 81; Taylor v. Allen, 36 Barb. 294; Bank of Chenango v. Curtiss, 19 Johns. 326.

North Carolina.— First Nat. Bank v. Lineberger, 83 N. C. 454, 35 Am. Rep. 582.

Ohio.— Duble v. Cincinnati & C. R. Co., 3 Ohio Dec. 346; Raught v. Black, 2 Disn. 477.

Pennsylvania.— Delaware County Trust, etc., Co. v. Haser, 199 Pa. St. 17, 48 Atl. 694; Schiebeneck v. Anchor Sav. Bank, 111 Pa. St. 187, 2 Atl. 485; Hagey v. Hill, 75 Pa. St. 108; Okie v. Spencer, 2 Whart. 253, 30 Am. Dec. 251.

South Carolina.— Sharpe v. Bingley, 1 Mill Const. 367, 12 Am. Dec. 643; Shirtliffe v. Gilbert, 1 Bay, 466.

Wisconsin.— Hamilton v. Prouty, 50 Wis. 592, 7 N. W. 659, 36 Am. Rep. 866.

the maker could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his consent, it is to his prejudice, and discharges him."[99] But mere delay in enforcing payment of a bill or note will not release the indorser.[1] Nor is a mere indulgence sufficient; there must be a fixed and definite contract, for a good and valid consideration, obligatory upon the holder, by which he is precluded from proceeding to enforce his remedies against prior parties, and thus affecting the legal or equitable rights of the indorsers.[2] A discharge by a holder of the person primarily

99. *Per* Story, J., in McLemore v. Powell, 12 Wheat. (U. S.) 554.

The reason given why the extension of time for payment discharges the indorser, drawer, or surety, is because the creditor thereby inflicts an injury on him, and deprives him of the means of relieving himself, either by paying the debt, and immediately proceeding against the principal (being substituted to the creditor's rights) or by filing his bill *quia timet* to compel the debtor to pay the creditor, for the surety's exoneration; for, if the creditor could not himself, in consequence of his own agreement, compel the principal debtor to pay neither could the indorser, drawer, or surety, who, in such case, asserts the rights of the creditor for his own safety. Wright v. Independence Nat. Bank, 96 Va. 728, 32 S. E. 459, 70 Am. St. Rep. 889, citing Norris v. Crummey, 2 Rand. (Va.) 333; Shannon v. McMullin, 25 Gratt. (Va.) 212.

1. Powell v. Waters, 17 Johns. (N. Y.) 176; Powers v. Silberstein, 19 Jones & S. (N. Y.) 321; Hurst v. Trow's Printing and Bookbinding Co., 2 Misc. (N. Y.) 361, 22 N. Y. Supp. 371, 30 Abb. N. C. 1; Higgins v. Morrison, 4 Dana (Ky.), 100; Inge v. Branch Bank of Mobile, 8 Port. (Ala.) 108.

An indefinite extension of time for payment, granted by the holder to the maker, does not release the indorser. Peoples' Bank v. Le Grand, 103 Pa. St. 309, 49 Am. Rep. 123. And in the case of Edwards v. Bedford Chair Co., 41 Ohio St. 17, where, after a promissory note had been protested, the maker asked the holder "for additional time as a favor," and the holder said that he was willing to show any reasonable favor;" the maker then said that he would give paper drawn on his customers, and did so when he got it; no time for the indulgence was named. It was held that as the time granted was not specified, and the arrangement furnished no means for determining it, the holder retained the right to sue the maker at pleasure. And the court said: "Nothing was said as to the number of days, or months, asked for or granted; no time was named for delivering the drafts. The authorities are united in holding that unless the extension agreed upon is for a time certain, or so described that it can be rendered certain, it does not discharge the surety; it does not take away the right of the holder to bring suits against the maker at pleasure."

2. **Mere indulgence or delay** on the part of the holder toward a principal debtor in enforcing payment does not discharge the indorser. Wilson v. Foot, 11 Metc. (Mass.) 285; Agricultural Bank v. Bishop, 6 Gray (Mass.), 317; Allen v. Brown, 124 Mass. 77; Wilson v. Powers, 130 Mass. 127; Haydenville Sav. Bank v. Parsons, 138 Mass. 53. "To discharge the defendant there must have been a valid agreement between the plaintiff and the debtor to extend the time or vary the contract, or the defendant must have been led by the representations of the plaintiff to change his situation, either, for instance, by surrendering security or forbearing to take security, or otherwise to his loss." Way v. Dunham, 166 Mass. 263, 44 N. E. 220. See also Lockwood v. Crawford, 18 Conn. 361; Freemans v. Rollins, 13 Me. 202; Page v. Webster, 15 Me. 249, 33 Am. Dec. 608; Bank of Utica v.

liable on the instrument will not discharge the indorser, if there be an agreement between the holder and such person that the indorser be not thereby discharged.[3] The extension of time given to one of two or more makers does not discharge the others, unless they are sureties to the knowledge of the holder.[4] But where a joint maker signs for accommodation, and this fact is known to the holder, an extension granted to the principal maker without the consent of the accommodation maker will release him from liability.[5]

f. *Effect of extension upon accommodation parties.*— It has been frequently held that where the holder of a bill or note knew that the acceptor or maker of an instrument was for accommodation of the drawer or indorser, an extension of time given to the drawer or indorser, to the prejudice of such acceptor or maker,

Ives, 17 Wend. (N. Y.) 501; Taylor v. Allen, 36 Barb. (N. Y.) 294.

Validity of agreement; consideration.— The indulgence which will release an indorser must be given upon a good consideration, for a limited and definite time, within which the creditor's right of action is suspended; and the payment of a part of the debt by the principal, and accepting claims to be applied when collected in further payment under a verbal agreement not to sue, constitute no such legal consideration for the promise of forbearance. Varnum v. Bellamy, Fed. Cas. No. 16,886, 4 McLean (U. S.), 87.

Contract to give time must be enforceable.—A contract by the holder of a note to give time to the maker must be a valid and enforceable contract as against the holder or it will not operate to discharge the indorser. See the following cases:

United States.— *Ex parte* Balch, Fed. Cas. No. 789, 2 Low. 440; Corbett v. Woodward, Fed. Cas. No. 3,223, 5 Sawy. 403; Cooper v. Gibbs, Fed. Cas. No. 3,194, 4 McLean, 396.

Alabama.— Branch Bank of Huntsville v. Steele, 10 Ala. 915.

Arkansas.— Hazard v. White, 26 Ark. 155.

California.— Smith v. Pearson, 52 Cal. 339.

Georgia.— Stallings v. Johnson, 27 Ga. 564.

Indiana.— State Bank v. Wymond, 7 Blackf. 363.

Maine.— Williams v. Smith, 48 Me. 135; National Bank v. Dow, 79 Me. 275, 9 Atl. 730.

Maryland.— Ives v. Bosley, 35 Md. 262; Planters' Bank v. Sellman, 2 Gill & J. 230.

Massachusetts.— Wilson v. Powers, 130 Mass. 127; Jennings v. Chase, 10 Allen, 526.

New Jersey.— Nightingale v. Meginnis, 34 N. J. L. 461.

New York.— Van Rensselaer v. Kirkpatrick, 46 Barb. 194.

In the case of McLemore v. Powell, 12 Wheat. (U. S.) 554, it was held: (1) That an agreement between the creditor and principal debtor for delay, or otherwise changing the nature of the contract to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties; and (2) that a mere agreement by the holder of a bill with the drawer for delay, without any consideration for it, and without any communication with or assent of the indorser, will not discharge the latter, after he has been fixed in his responsibility by the refusal of the drawee, and due notice to himself.

3. Hagey v. Hill, 75 Pa. St. 108, 15 Am. Rep. 583; Morse v. Huntington. 40 Vt. 488.

4. Williams v. Scott, 83 Ind. 405. But see *contra*, Thompson v. Bowne, 39 N. J. L. 2.

5. Barron v. Cady, 40 Mich. 259.

will discharge such parties.[6] If the holder have no knowledge of the fact that the maker or acceptor is an accommodation party, an extension given to the indorser or drawer will not discharge the maker or acceptor; this is upon the principle that each party to a negotiable instrument is liable in accordance with the clearly apparent capacity which he has voluntarily assumed in respect to such instrument.[7] The English rule has been opposed to the discharge of an accommodation maker or acceptor by an indulgence to an indorser or drawer, for whose benefit the bill or note was accepted or made; and the cases are nearly all to the effect that such a maker or acceptor is to be regarded and treated as a principal debtor.[8] And there are also American cases which have adopted the English rule.[9] The statute only provides for the discharge by an extension of time of a person secondarily liable on the instrument. By the terms of the statute a person is primarily liable who by the terms of the instrument is absolutely required to pay the same; all others are secondarily liable.[10] An accommodation maker or acceptor is absolutely 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.[11] It would seem to follow that the statute has disposed of the conflict of authority upon this question by holding the accommodation acceptor or maker to his apparent engagement as a principal debtor, and making him liable notwithstanding an indulgence given to the indorser or drawer for whose benefit he became a party to the instrument.

6. Gordon v. Third Nat. Bank, 144 U. S. 97, 12 Sup. Ct. 657, 36 L. Ed. 360; *In re* Goodwin, Fed. Cas. No. 5,549, 5 Dill. 140; American, etc., Mtge. & Ins. Co. v. Marquam, 62 Fed. 960; Hall v. Capital Bank of Macon, 71 Ga. 715; McInerney v. Lindsay, 97 Mich. 238, 56 N. W. 603.

7. Hoge v. Lansing, 35 N. Y. 136; Grafton Bank v. Kent, 4 N. H. 221, 17 Am. Dec. 414; Canadian Bank v. Coumbs, 47 Mich. 358; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270.

8. Fentam v. Pocock, 5 Taunt. (Eng.) 192; Bank of Ireland v. Beresford, 6 Dow. (Eng.) 234; Nichols v. Norris, 3 B. & Ad. (Eng.) 41; Strong v. Foster, 17 C. B. (Eng.) 201.

9. Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283, where it was held that the maker of an accommodation note is liable to the holder, although the latter knew that it was for the indorser's accommodation; and that giving an extension of time to the indorser did not discharge the maker. See also Cronise v. Kellogg, 20 Ill. 11; Anderson v. Anderson, 4 Dana (Ky.), 352; Howard Banking Co. v. Welchman, 6 Bosw. (N. Y.) 280; Montgomery County Bank v. Walker, 9 Serg. & R. (Pa.) 229.

10. Neg. Inst. L. (N. Y.), § 3.

11. Neg. Inst. L. (N. Y.), § 55. See § 55 (*g*), *ante*.

§ 124. Rights of parties who discharge instruments.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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

"2. Where it was made or accepted for accommodation, and "has been paid by the party accommodated."[12] A somewhat similar provision is contained in the English Bills of Exchange Act;[13] the difference in the two provisions is one of language and form, but not of substance or effect.

b. *Rights against maker or acceptor.*—At any time after the maturity of a note an indorser may pay the amount thereof to the holder and recover such amount in a suit against the maker.[14] And where an indorser has been compelled to pay a note he may recover the amount of the maker.[15] And where a suit is brought prior to the intervention of the Statute of Limitation, but judgment is recovered and payment made by the indorser subsequent thereto, the amount may be recovered of the maker in a suit against him by the indorser although at the time such suit is brought the statute has intervened and the holder could not have recovered of the maker; the statute begins to run as against the indorser when the payment was made by him on the judgment.[16] But the indorser of a note does not become a creditor of the maker of the note until he has paid the amount thereof to the holder.[17] Where a

12. Neg. Inst. L. (N. Y.), § 202. For the same section in statutes of other States see Appendix.

13. English Bills of Exchange Act, § 59 (2 *a*, *b*, and 3).

14. Tuscaloosa Cotton Seed Oil Co. v. Perry, 85 Ala. 158, 4 South. 635; Folsom v. Carli, 5 Minn. 333, 80 Am. Dec. 429.

15. Morgan v. Reintzel, 7 Cranch (U. S.) 273, 3 L. Ed. 340; Godfrey v. Rice, 59 Me. 308; Ainslee v. Wilson, 7 Cow. (N. Y.) 532.

16. Godfrey v. Rice, 59 Me. 308.

17. Farmers' Bank v. Gilpin, 1 Harr. (Del.) 561.

The indorser cannot maintain an action upon a note against the maker, so long as the indorsee has the right to demand payment of the maker. If the indorsee has obtained a judgment against the indorser, and collected part of it, that will not entitle the indorser to maintain an action upon the note against the maker. Little v. Ingalls, 13 N. H. 44. And where the maker of a note gave to his indorsers a mortgage to indemnify them, with a covenant to pay the notes subsequent to their maturity, all recovery against the maker on account of the notes prior to that period is precluded, although the indorsers are compelled to pay the notes earlier. Duval v. Farmers' Bank, 9 Gill & J. (Md.) 31.

As to assignment for benefit of creditors as a release of the maker from a suit in behalf of indorsers see Reed suit is brought jointly against a maker and an indorser, and after judgment was recovered against them both, the indorser paid it, he is entitled to the benefit of the judgment against the maker.[18] Where a judgment is obtained by the holder against the maker, and an indorser pays the amount thereof, he has the same right to an assignment of the judgment that he has to the note when he pays it.[19] An indorser who has been sued upon his indorsement, and a judgment recovered with costs, cannot recover the amount of the costs of the maker.[20] It has been held that an indorser may recover the whole amount due on a note in an action brought in his own name against the maker although a part thereof has been paid by a prior indorser to the holder of the note, and a proportional part of the amount recovered will be held by the plaintiff in trust for such indorser.[21]

c. *Rights as against prior party.*— The payment or discharge of a note or bill by an indorser does not release a prior party of his liability, but an action may be maintained against him by the

v. Tarbell, 4 Metc. (Mass.) 93. If the indorser and maker of a note are both insolvent, the holder may prove the note for the full amount thereof against the estate of each, but the amounts received from the two estates will not in any event be permitted to exceed in the aggregate the amount of the note. *In re* Meyer, 78 Wis. 615, 48 N. W. 55, 23 Am. St. Rep. 435; Miller's Estate, 82 Pa. St. 113, 22 Am. St. Rep. 754; Citizens' Bank v. Kendrick, etc., Co., 92 Tenn. 437, 21 S. W. 1070, 36 Am. St. Rep. 96. In the last case it was also held that an indorser for an insolvent debtor is, before the payment of the debt, entitled to prove his claim as such indorser against the estate of the insolvent.

18. **Payment of judgment by indorser.**—Davis v. Perrine, 4 Edw. Ch. (N. Y.) 62. In the case of Mechanics' Bank v. Hasard, 13 Johns. (N. Y.) 353, where suits are brought against the maker and indorser of a promissory note, and the indorser pays the amount, and it is agreed between the holder and indorser that the suit against the maker shall be prosecuted for the benefit of the indorser, it was held that the maker cannot avail himself of the payment by the indorser as a defense in the suit against him.

19. State Bank v. Wilson, 1 Dev. (N. C.) 484; Allin v. Williams, 97 Cal. 403, 32 Pac. 441; Folsom v. Carli, 5 Minn. 333, 80 Am. Dec. 429.

20. Peers v. Kirkham, 46 Mo. 146; Fenn v. Dugdale, 31 Mo. 580; Woodman v. Eastman, 10 N. H. 359; Steele v. Sawyer, 2 McCord (S. C.), 459; Overton v. Hardin, 6 Coldw. (Tenn.) 375.

21. **Recovery of whole amount where part is paid by receiver.**— Ward v. Tyler, 52 Pa. St. 393. In the case of Madison Square Bank v. Pierce, 137 N. Y. 444, 33 N. E. 557, 20 L. R. A. 335, it was held that an indorsee of a promissory note given and transferred for value may recover the whole amount from the maker, although a portion of such amount has been paid by the receiver in insolvency of the indorser, and hold the judgment *pro tanto* as trustee for the indorser, since upon the merger of the note in the judgment, the indorser can only proceed through the judgment or against its proceeds, and such judgment and payment thereunder will discharge the note utterly.

indorser for the amount paid by him.[22] And the payment by an indorser, of a judgment rendered on a bill against a prior indorser, does not extinguish the bill as between him and such prior indorser, but gives him a right of action thereon against such prior indorser and all other prior parties.[23] The general rule is that payment of a bill or note by an indorser is a satisfaction of it only in respect to subsequent indorsers; for a bill is not discharged, and finally extinguished, until paid by or in behalf of the acceptor; nor a note until paid by or in behalf of the maker.[24] The rights and liabilities of accommodation indorsers *inter se* are the same as those of ordinary indorsers.[25] We have considered in another place the rights and liabilities of successive accommodation indorsers;[26] the rule is that unless there be an agreement to the contrary, successive indorsers for the accommodation of a third person are liable in the same order as indorsers for value, though each of them knew that the indorsement was for accommodation.[27] And where a subsequent accommodation indorser pays the note he may recover the whole amount paid of a prior accommodation indorser.[28]

22. The payment of a bill by an indorser to his indorsee does not extinguish the bill, as between the indorser who makes the payment, and the parties who stand before him in the order of liability. Story on Bills, § 422. And see the following cases:

United States.— McDonald v. McGruder, 3 Pet. 470, 7 L. Ed. 744; Camden v. Doremus, 3 How. 515, 11 L. Ed. 705.

Alabama.— Cotten v. Bradley, 38 Ala. 508; Boyd v. Taliaferro, 13 Ala. 424.

California.— Coye v. Palmer, 16 Cal. 158.

Colorado.— Watson v. Hahn, 1 Colo. 494.

Massachusetts.— Martin v. Ingersoll, 8 Pick. 1.

New Hampshire.— Rushworth v. Moore, 36 N. H. 188; Johnson v. Crane, 16 N. H. 68.

New York.—Wyckoff v. De Graff, 98 N. Y. 134; Sanders v. Gillespie, 59 N. Y. 250. Per Lee v. Onderdonk, 19 Barb. 562; Butler v. Wright, 20 Johns. 367.

Tennessee.— Turpin v. Williams, 1 Sneed, 397; Tucker v. Pruett, 4 Yerg. 553.

West Virginia.— Nichols v. Porter, 2 W. Va. 13, 94 Am. Dec. 500; Conway v. Odbert, 2 W. Va. 25.

23. Cotten v. Bradley, 38 Ala. 506.

24. Edwards on Bills and Notes, p. 535.

25. Crutcher v. Bank of Kentucky, 4 Litt. (Ky.) 436; Keeler v. Bartine, 12 Wend. (N. Y.) 110.

Where several persons have indorsed a bill, separately and necessarily, for the accommodation of the drawee, they are not bound to pay in equal proportions as cosureties, unless there is a special agreement to that effect; and where one of them pays the bills he has a right to assign the bill as collateral security for a pre-existing debt, or otherwise negotiate, and the assignee or transferee may sue the payee who was also an indorser. McCarty v. Roots, 21 How. (U. S.) 432, 16 L. Ed. 162.

26. See § 89, (c), *ante*.

27. Moore v. Cushing, 162 Mass. 594, 39 N. E. 177, 44 Am. St. Rep. 393.

28. Kirscher v. Conklin, 40 Conn. 77; Rowland v. Smith, 49 Conn. 404; McGurk v. Huggett, 56 Mich. 187, 22 N. W. 308; Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109.

d. *Right to negotiate.*— If an indorser takes up a dishonored note or bill, he is at liberty to put it again in circulation.[29] This is in view of the rule that a bill or note does not lose its negotiable character by being dishonored, and the indorsement, although made after dishonor, follows the nature of the original contract, and is negotiable unless it contains express words of restriction.[30] The Negotiable Instruments Law provides that: "An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise."[31] Upon the payment or discharge of the instrument by a party secondarily liable, he is entitled to its possession, and he may then treat it as any other instrument received by him in the due course of commercial transactions.[32] The only exceptions to this rule are those stated in the statute. Where an accommodation note is paid at its maturity by the real debtor, although he is not a party to it, it cannot be thereafter transferred by him so as to give it validity against the accommodation maker and indorser.[33]

29. Edwards on Bills and Notes, p. 535.

30. Leavitt v. Putnam, 3 N. Y. 494.

31. Neg. Inst. L. (N. Y.), § 77. For same section in statutes of other States see Appendix. See also § 67, *ante*, p. 343.

32. **Rule as to transfer of overdue paper.**— The following rules are stated in the case of Cottrell v. Watkins, 89 Va. 801, 17 S. E. 328, 19 L. R. A. 754, as bearing upon the rights of an indorser who has paid the instrument: "(1) A negotiable note may be transferred at any time while it remains a good subsisting, unpaid note, whether before or after maturity, and in the latter case even though it be protested for nonpayment, and bear upon its face the stamp of dishonor. (2) That payment of a dishonored note by an indorser does not extinguish its negotiability, though it discharges the liability of subsequent indorsers, whose liability will not be revived by his putting the note in circulation."

33. Cottrell v. Watkins, 89 Va. 801, 17 S. E. 328, 19 L. R. A. 754.

In the case of Chester v. Dorr, 41 N. Y. 279, it was held that an accommodation indorser, without consideration, of a promissory note is not liable to a transferee of the note after maturity from the person for whose accommodation it was indorsed, although such transferee paid a full consideration.

CHAPTER XI.

Alteration and Forgery.

§ 125. Effect of alteration.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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."[34] This provision is in effect the same as a provision of the English Bills of Exchange Act.[35]

b. *Effect of alteration.*— If an alteration of an instrument is made prior to its delivery, it will not void the instrument.[36] The alteration of a negotiable instrument after its execution will not invalidate it if made without a fraudulent intent.[37] But there are authorities to the effect that a material alteration of an instrument made by one of the parties thereto without the consent of another will avoid the instrument, although such party had no actual fraudulent design.[38] If the alteration be made by a

34. Neg. Inst. L. (N. Y.), § 205. For same section in statutes of other States see Appendix. Section construed, Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134; Schwartz v. Wilmer, 90 Md. 136, 44 Atl. 1059.

35. English Bills of Exchange Act, § 64 (1).

36. Webb v. Mullins, 78 Ala. 111; Cady v. Bond, 19 Me. 461, 36 Am. Dec. 767; Ward v. Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387; Williams v. Starr, 5 Wis. 531. It has been held that until acceptance or negotiation, a bill drawn for a debt due from the drawee to the drawer, and while in the hands of the drawee and before acceptance, does not become a valid security. Ratcliff v. Planters' Bank, 2 Sneed (Tenn.), 424. But if a bill prior to its acceptance is altered by the payee and accepted as altered, the acceptor himself may be held, but the instrument will be void as to the drawer and those who indorsed prior to acceptance. Walton v. Hastings, 4 Campb. (Eng.) 223.

37. **Fraudulent intent.**— Montgomery R. R. Co. v. Hurst, 9 Ala. 513; Croswell v. Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; Gordon v. Robertson, 48 Wis. 493, 4 N. W. 579. In the case of Church v. Fole, 142 Mass. 12, 6 N. E. 764, which arose under a statute providing that an action might be brought upon an attested note within twenty years after the cause of action accrues, it was held that if a promissory note is attested, before delivery, without the procurement or knowledge of either party, and the note is accepted by the payee, without any knowledge that it has been attested, and without relying upon the attestation as a part of the contract, the attestation is not such a material alteration as will make the note void, but may be stricken out.

38. **Intent not material.**— In the case of Draper v. Wood, 112 Mass. 315, the word "we" was inserted for "I" in the body of the note and the words "at twelve per cent." were added. The court held that this constitutes a material alteration of the instrument, and if done without the knowledge of one of the promisors it was void as against him, although the payee had no knowledge of the alteration, and it was made without fraudulent intent. In the case of Booth v. Powers, 56 N. Y. 22, it was held that to void a note altered in a material particular without authority after execution, it is not necessary to show fraudulent intent, and the court said: "If a note be altered in a material particular, without authority, after execution that voids the note. It is not of moment whether it was done with fraudulent intent save as the existence of such intention affects the right to resort to the original indebtedness; and then the fact of the unauthorized material alteration is a matter for the consideration of the jury in determining the question of fraudulent intention." See also Fay v. Smith, 1 Allen (Mass.), 477, 79 Am. Dec. 752.

stranger to the instrument, the rights of the parties are not affected.[39]

c. *Authority and consent of parties.*—A duly authorized agent of one of the parties to an instrument may consent to its alteration. If an agent makes an alteration without the knowledge or consent of his principal and not within the scope of his authority, his act is that of a stranger, and will not render the note void.[40] If one of two or more joint makers consent to a material alteration of the note, it will not be binding upon the other joint makers.[41] If a note is signed by the members of a firm, in their individual names and not as a firm, one of the makers cannot bind the others to a material change without their consent.[42] But a member of a firm while acting in behalf of the firm may bind the other members by his consent to a material alteration.[43] It is a general rule that the alteration of a negotiable instrument made with the consent of a party liable thereon will not avoid the instrument as to him.[44] The consent to an alteration may be given after as well as before it was made.[45] Where a person after full knowledge of an alteration unconditionally promises to pay, it is

39. Alteration by stranger.—An alteration in a written instrument made by one not a party thereto, without the knowledge or assent of the party, and in a matter not material, does not invalidate the instrument; the alteration is of no effect and the original validity of the instrument remains. Gleason v. Hamilton, 138 N. Y. 353, 34 N. E. 283, 21 L. R. A. 210. In 2 Cyc. 151, it is said: "Erasures, interlineations, and changes, however material, made in and upon an instrument by a stranger to it, are in legal contemplation wholly immaterial and ineffective to give to the instrument any other or different meaning or operation than that which attached to it before such interlineation."

A change of an indorsement by a thief will not affect the instrument, or the rights of the owner thereon. Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Densmore v. Duncan, 57 N. Y. 573. See also Eckert v. Louis, 84 Ind. 99; Blakey v. Johnson, 13 Bush (Ky.), 197, 26 Am. Rep. 254.

40. Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; White Sewing Machine Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313; Port Huron Engine & Thresher Co. v. Sherman, 14 S. Dak. 461, 85 N. W. 1008.

41. Flanigan v. Phelps, 42 Minn. 186, 43 N. W. 1113; Goodman v. Eastman, 41 N. H. 455; McVey v. Ely, 5 Lea (Tenn.), 428.

42. Horn v. Newton City Bank, 32 Kan. 518, 4 Pac. 1022.

43. Taylor v. Taylor, 12 Lea (Tenn.), 714; Howell v. Adams, 68 N. Y. 314.

44. Grimstead v. Briggs, 4 Iowa, 559; Humphreys v. Guillow, 13 N. H. 385, 38 Am. Dec. 499; Vidvard v. Cushman, 35 Hun (N. Y.), 18; Wooley v. Constant, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246. In the case of Stoddard v. Penniman, 113 Mass. 386, it was held that an alteration of a note, made with the assent of a party thereto, with a view to its immediate discount, but upon an agreement to obtain the consent of another party to it, then absent, does not, although such consent was not obtained, render the note so negotiated invalid.

45. Pelton v. Prescott, 12 Iowa, 567; Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331; Conable v. Smith, 61 Hun (N. Y.), 185, 15 N. Y. Supp. 924.

a sufficient ratification;[46] if a party subsequent to the alteration and with knowledge thereof makes a payment upon an instrument, either of the principal or interest, he will be held to have ratified the alteration;[47] and if the party liable on an instrument, with knowledge of the alteration, applies for and receives an extension of the time of payment, he will be deemed to have ratified it.[48]

d. *Presumptions as to alterations.*— If upon its face the instrument appears to be valid, it is incumbent upon the party alleging a material alteration to establish it.[49] But where an alteration is apparent upon the face of an instrument, the party claiming under it is bound to show that the alteration was made under such circumstances that it does not affect his right to recover. Or, in other words, when the circumstances are such, as shown by the proof, that it is evident that an alteration has been made in an instrument, the burden of proof is shifted and the party producing the instrument must explain the alteration.[50] And where an alteration is shown, the plaintiff will be required to prove that it was made with the consent of the defendant.[51] If the appearance of

46. Emerson v. Opps, 9 Ind. App. 581, 34 N. E. 840; Goodspeed v. Cutler, 75 Ill. 534.

47. Jacobs v. Gilreath, 45 S. C. 46, 22 S. E. 757; Evans v. Foreman, 60 Mo. 449; Johnson v. Johnson, 66 Mich. 525, 32 N. W. 413; Prouty v. Wilson, 123 Mass. 297.

48. Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331.

49. Burden of proof on party alleging alteration.— Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498, 24 Am. St. Rep. 832; Conable v. Keeney, 61 Hun (N. Y.), 624, 16 N. Y. Supp. 719; Odell v. Gallup, 62 Iowa, 253, 17 N. W. 502; Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569; Franklin v. Baker, 48 Ohio St. 296, 27 N. E. 550, 29 Am. St. Rep. 547.

In the case of Smith v. United States, 2 Wall. (U. S.) 219, 17 L. Ed. 788, the court said: "The general rule is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon the instrument, or is made so by extraneous evidence, the party producing the instrument and claiming under it is bound to remove the suspicion by accounting for the alteration." See also Wisdom v. Reeves, 110 Ala. 418, 18 South. 13; Averman v. Robb, 52 Miss. 653, 24 Am. Rep. 682; Simpson v. Davis, 119 Mass. 269; Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122, 21 N. E. 168; Gowdey v. Robbins, 3 App. Div. (N. Y.) 353, 38 N. Y. Supp. 280; Hill v. Gooley, 46 Pa. St. 259; Gettysburg Nat. Bank v. Chisholm, 169 Pa. St. 564, 32 Atl. 730.

In the case of Citizens' Nat. Bank v. Williams, 174 Pa. St. 66, 34 Atl. 303, it was said: "One who takes a promissory note with a material alteration on its face takes it with notice that it has been tampered with, and he is chargeable with all the consequences of such knowledge, and he cannot recover upon it unless the alteration is affirmatively shown by him to have been innocently made, without prejudice to the rights of the party sought to be charged with liability."

50. Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569. In this case it was shown by evidence that the word "drawer" was substituted for the word "order" and it was held that it was for the plaintiff to show that the alteration was made with the defendant's knowledge. See also Winter v. Pool, 100 Ala. 503, 14 South. 411.

51. Mundy v. Stephens, 61 Fed. 77,

an instrument is such as to produce a suspicion as to its validity, it seems to be the rule that the entire question as to whether material alterations have been made therein, is a question of fact for the jury, and the party producing the instrument has the burden of explaining the suspicious appearance.[52] And where an instrument appears on its face to have been materially altered, and it is alleged that the alteration was made prior to the execution or delivery of the instrument, the party who produced the instrument must prove that fact.[53] This rule, however, is not universally adopted; in many jurisdictions it is held that the presumption is that a material alteration was made subsequent to the execution of the instrument.[54]

§ 126. What constitutes a material alteration.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Any alteration which changes:

"1. The date;

9 C. C. A. 366; Glover v. Gentry, 104 Ala. 222, 16 South. 38; Capital Bank v. Armstrong, 62 Mo. 59; Dewees v. Bluntzer, 70 Tex. 406, 7 S. W. 820.

52. 2 Cyc. 243, citing among other cases the following: Hayden v. Goodnow, 39 Conn. 164; Harris v. Jacksonville Bank, 22 Fla. 501, 1 South. 140, 1 Am. St. Rep. 201; Case Threshing Machine Co. v. Peterson, 51 Kan. 713, 33 Pac. 470; Acker v. Ledyard, 8 Barb. (N. Y.) 514.

53. Chism v. Toomer, 27 Ark. 108; Dodge v. Haskell, 69 Me. 429; Heffner v. Werick, 32 Pa. St. 423; Kennedy v. Moore, 17 S. C. 464.

54. **The question of presumption and burden of proof,** where interlineations or erasures appear on the face of an instrument, is one upon which there is a multitude of authorities and much conflict of opinion. Any attempt to cite or consider the innumerable cases on this question would be both impracticable and useless. The rule adopted by some authorities is that the presumption, in the absence of evidence to the contrary, is that the alteration was made before execution, and, therefore, that no exception is required in the first instance; while others hold, in accordance with the instruction of the trial court in this case, that the presumption of law is that the alteration was made after delivery, and, therefore, the burden is upon the holder to explain it and show that it was made under circumstances that would not invalidate the instrument. Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 12 Am. St. Rep. 754, 4 L. R. A. 196. The court in this case goes on to say: "Unless the alteration was of such a suspicious character as to furnish intrinsic evidence to the contrary, we think the natural inference would be that it was a legitimate part of the instrument, and was made at or before its execution. We are, therefore, of opinion that the correct rule is that the burden is upon the maker to show that the alteration was made after delivery, or, to state the proposition with more precision, the proof of omission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act, and this *prima facie* evidence will stand as binding proof, unless the maker can rebut it by showing by evidence that the alteration was made after delivery and that the question when, by whom, and with what intent the alteration was made is one of fact to be submitted to the jury upon the whole evidence, intrinsic and extrinsic." See also Farmers' Loan & Trust Co. v. Olson, 92 Iowa, 770, 61 N. W. 199; Hagan v. Merchants & Bankers' Ins. Co., 81 Iowa, 321, 46 N. W. 1114, 25 Am. St. Rep. 493.

"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 altera-"tion."[55] A somewhat similar provision is also contained in the English Bills of Exchange Act.[56]

b. *In general.*— It is not every alteration of an instrument which will invalidate it. As has been stated, "Any change in words or form merely, even if made by an interested party, which leaves the legal effect and identity of the instrument unimpaired, and which in no manner affects the rights, duties, or obligations of the parties, and leaves the sense and meaning of the instrument as it originally stood, is not material and will not destroy the instrument or discharge the parties from liability thereon."[57] The effect of an alteration in a negotiable instrument depends upon its nature, the person by whom, and the intention with which, it was made. If none of the rights or interests, duties, or obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial.[58]

55. Neg. Inst. L. (N. Y.), § 206. For same section in statutes of other States see Appendix. Section construed and applied. Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134.

56. English Bills of Exchange Act, § 64 (2).

57. 2 Cyc. 190, and cases cited.

58. **Alteration not material unless rights are affected.**— Vogle v. Ripper, 34 Ill. 106. In the case of Reilly v. First Nat. Bank, 148 Ill. 349, 35 N. E. 1120, it appeared that the purchasers of goods gave the seller in payment therefor their note payable at a bank. In order to have it discounted by the bank, the seller signed his name below the makers', intending thereby to indorse the note. Afterward he induced the cashier to change the note so as to make it payable to his order, and he immediately indorsed and guaranteed it to the bank, erasing his signature on the face of the note. It was held that this alteration, though made with the makers' knowledge, did not invalidate the note, since it did not change their liability. In the case of Iowa Valley State Bank v. Sigstad, 90 Iowa, 491, 65 N. W. 407, the words were written upon the back of a note above the defendant's signature and without his knowledge. The defendant was an indorser on the note. It was held that since the legal effect of the instrument was to make the defendant liable in case the makers failed to pay at maturity the addition of the words "payment guaranteed," could not affect his liability and were, therefore, immaterial. And where, when a note was delivered, the rate of interest was not specified in the blank space therefor, it was held that the insertion of the figure "6" in the blank space was not a real alteration, since without the insertion of such figure the note would have borne the same rate of interest. James v. Dalbey, 107 Iowa, 463, 78 N. W. 51.

c. *Date, time, and place of payment.*— The date of an instrument is a material part thereof, and it cannot be changed without materially affecting the rights of the parties to the instrument.[59] Any change in the date of an instrument, whereby the time of payment is accelerated, is a material alteration, and when made without the consent of the maker, destroys its validity.[60] The time of payment specified in a negotiable instrument is also a material part thereof, and any alteration therein without the consent of the parties will avoid the instrument.[61] And where a change in the place of payment of a bill or note is made without the consent of all the parties, it constitutes a material alteration and will avoid the instrument.[62] It has been held in New York that the validity of a note is not affected by inserting therein the name of a bank at which a note should be paid, if such bank is located in the village where all the parties liable on the note reside.[63] If no place of payment is specified in the instrument, it is a material alteration to insert therein a place of payment.[64]

d. *Amount; medium of payment; addition of interest clause.*— Any alteration in the amount for which a negotiable instrument is given voids the instrument as to all parties liable thereon. The rule is the same however little the change in amount may be,[65]

59. Alkire v. Jahle, 123 Ill. 496, 17 N. E. 693, 5 Am. St. Rep. 540; Owings v. Arnott, 33 Mo. 406; Wyman v. Yeomans, 84 Ill. 403.

60. **Change of date.**— Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 52 Am. Rep. 152, in which the court says: "The absence of a date upon a negotiable instrument at its inception, or the fact that it is post or antedated, may not be material upon the question of its validity, but when a date has been once inserted and its time of payment has been thus fixed, such date is material and cannot be altered without the consent of the maker." See Armstrong v. Penn, 105 Ga. 229, 31 S. E. 158; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Mitchell v. Ringgold, 3 Harr. & J. (Md.) 159, 5 Am. Dec. 433; Brown v. Straw, 6 Neb. 536, 29 Am. Rep. 369; Bowers v. Jewell, 2 N. H. 543; Newman v. King, 54 Ohio St. 273, 43 N. E. 683, 56 Am. St. Rep. 705, 35 L. R. A. 471; Miller v. Stark, 148 Pa. St. 164, 23 Atl. 1058. The acceptor of a bill may alter the date thereof before he accepts, and the concurrence of the other parties in the alteration will bind him. Ratcliff v. Planters' Bank, 2 Sneed (Tenn.), 425.

61. Stayner v. Joyce, 82 Ind. 35; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Ives v. Farmers' Bank, 2 Allen (Mass.), 236; Henderson v. Wilson, 7 Mass. 65.

62. White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; Adair v. Egland, 58 Iowa, 314, 12 N. W. 277; Whitesides v. Northern Bank, 10 Bush (Ky.), 501, 19 Am. St. Rep. 74; Troy City Bank v. Lannan, 19 N. Y. 477; Southwark Bank v. Gross, 35 Pa. St. 80.

63. Etz v. Place, 81 Hun (N. Y.), 203, 30 N. Y. Supp. 765; Shuler v. Gilette, 12 Hun (N. Y.), 280.

64. Gwin v. Anderson, 91 Ga. 827, 18 S. E. 43; Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808: Townsend v. Star Wagon Co., 10 Neb. 615, 7 N. W. 274, 35 Am. Rep. 493.

65. Winkles v. Guenther, 98 Ga. 472, 25 S. E. 527.

and is applicable whether the amount is reduced or increased.[66] If the alteration is made in the marginal figures of a note, so as to make them correspond with the amount specified in the body of the instrument, it is not such an alteration as will vitiate the note.[67] The insertion in the note of a provision for the payment of costs and counsel fees is a material alteration.[68] If an instrument does not upon its face as originally executed bear interest, the insertion or addition of an interest clause is a material alteration,[69] and any change made in the rate, whether to increase or diminish it, is a material alteration.[70] The change of the time from which an instrument will bear interest, as where the instrument originally bore interest after its maturity, and by the change it was made to bear interest from date, constitutes a material alteration.[71] It is a material alteration as to the maker

66. Hewins v. Cargill, 67 Me. 554; State Sav. Bank of St. Joseph v. Shaffer, 9 Neb. 1, 1 N. W. 980, 30 Am. Rep. 394.

67. Fisk v. McNeal, 23 Neb. 726, 37 N. W. 616, 8 Am. St. Rep. 162; Horton v. Horton, 71 Iowa, 448, 32 N. W. 452. In the case of Merritt v. Boyden (Ill.), 60 N. E. 907, it was held that the marginal figures placed above and outside the body of a note are not a part of the note itself, and that the alteration thereof will not necessarily deprive a purchaser of his character of a *bona fide* holder.

68. Monroe v. Paddock, 75 Ind. 422. In the case of Decorah First Nat. Bank v. Laughlin, 4 N. Dak. 391, 61 N. W. 473, the erasure of an agreement contained in a promissory note to pay the expense of collection including attorney's fees was an alteration of the instrument, because with those words included it was a non-negotiable note and the erasure converted a nonnegotiable into a negotiable instrument.

69. Brown v. Jones, 3 Port. (Ala.) 420; Post v. Losey, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677; Shepherd v. Whetstone, 51 Iowa, 457, 1 N. W. 753, 33 Am. Rep. 143; Waterman v. Vose, 43 Me. 504; Brady v. Mann, 37 Mich. 1; Jones v. Bangs, 40 Ohio St. 139, 48 Am. Rep. 664. In the case of McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372, the defendant indorsed a note with the time and place of payment in blank, and delivered the same to the maker, who filled in the blanks and added the words "with interest;" it was held that as there was no authority to add the interest clause, it was a material alteration. See also Bonstead v. Cuyler, 116 Pa. St. 551, 8 Atl. 848.

70. Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92; Thompson v. Massie, 41 Ohio St. 307; Heath v. Blake, 28 S. C. 406, 5 S. E. 642.

Where a note in blank to be used as a security is signed or indorsed by a person and delivered to another, it authorized the person to whom it is delivered to fill the blanks in respects essential to the completion of the note as such; but in the absence of an express authority, none can be implied from the delivery to insert a special agreement that after maturity the note should draw a special rate of interest greater than the regular rate, although the law of the State where the note was made permits special agreements to be made for the rate specified. Weyerhauser v. Dunn, 100 N. Y. 150, 2 N. E. 274. See, generally, Weaver v. Leseure, 89 Ill. App. 628; Howie v. Lewis, 14 Pa. Super. Ct. 232; Merritt v. Boyden, 191 Ill. 136, 60 N. E. 907.

71. Dietz v. Harder, 72 Ind. 208; Nelson v. Dutton, 51 Mich. 416, 16 N. W. 791; Courcamp v. Weber, 39 Neb. 533, 58 N. W. 187.

and all sureties,[72] to insert or add a clause to an instrument making it payable in gold or in specie.[73]

e. *Change in number or relation of parties.*— It is a general rule that any change in the personality, number, or relations of the parties to an instrument is a material alteration.[74] The addition to a note after its execution of the name of a maker, with the permission of the holder, but without the knowledge of the original maker, affects the validity of the note as to the original maker and the sureties.[75] There is some conflict of authority upon this proposition. There are a number of cases to the effect that the addition of a name as a maker of a negotiable instrument will not affect the liability of the parties thereto.[76] The statute has, to a certain extent at least, disposed of this apparent conflict by definitely declaring that any alteration which changes the number of the parties is a material alteration. This leaves the question in each State where the statute has been enacted to be determined upon the fact as to whether it was intended by the addition of the name of the party that he should be bound as a joint promisor with the original maker, or as a surety or guarantor only. If the intent was that he should be bound in the latter capacity, the addition of his name will not be a material alteration.[77]

72. Hanson v. Crawley, 41 Ga. 303; Wills v. Wilson, 3 Ore. 308; Bogarth v. Breedlove, 39 Tex. 561.

73. Darrow v. Rippey, 63 N. E. 318.

74. 2 Cyc. 212. And see Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134.

75. McVane v. Scott, 46 Barb. (N. Y.) 379. See also Houck v. Graham, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727; Hamilton v. Hooper, 46 Iowa, 515, 26 Am. Rep. 161; Singleton v. McQuerry, 85 Ky. 41, 2 S. W. 652; Anderson v. Bellinger, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680; Brown v. Johnson, 126 Ala. 93, 28 South. 579, 51 L. R. A. 403. In the case of Montgomery v. Crossthwaite, 90 Ala. 553, 8 South. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140, it was held that the addition of "and Co." to his signature by the maker of a promissory note, without the knowledge or consent of the indorser, will discharge him, although such addition was made without authority from the partnership.

76. **Additional name of maker.**— In the case of Brownell v. Winne, 29 N. Y. 400, 86 Am. Dec. 314, where a note made payable to "W." or bearer, was delivered to "W.," who thereupon applied to the plaintiff to advance money upon it, and the plaintiff consented to do so if "W." would sign his name to it. "W." signed his name under that of the maker, and delivered the note to the plaintiff, who let him have the money thereon. It was held that the addition of "W.'s" name to the note was not such a material alteration as to void the note. See also McCaughey v. Smith, 27 N. Y. 49; Hochmark v. Richler, 16 Colo. 263, 26 Pac. 818; Gano v. Heath, 36 Mich. 441; Produce Exchange Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162. The addition of the name of a maker before the delivery of the note does not release those previously signing, although done without their knowledge. Evans v. Partin (Ky.), 56 S. W. 648.

77. 2 Cyc. 222, citing among other cases, Rudolph v. Brewer, 96 Ala. 189, 11 South. 314; Reilly v. First Nat. Bank of Springfield, 148 Ill. 349, 35 N. E. 1120; Union Bank. Co. v. Mar-

f. *Alterations affecting negotiability.*—Any material change in an instrument which operates to change it from a nonnegotiable to a negotiable instrument, is a material alteration.[78] Where a note is made payable to order, it is a material alteration to erase the word "order" and insert in place thereof the word "bearer," without the consent of the maker.[79]

§ 127. Statutory provision as to forged signatures.

The Negotiable Instruments Law provides that: "Where a "signature is forged or made without authority of the person "whose signature it purports to be, it is wholly inoperative, and "no right to retain the instrument, or to give a discharge therefor, "or to enforce payment thereof against any party thereto, can be "acquired through or under such signature, unless the party "against whom it is sought to enforce such right is precluded from "setting up the forgery or want of authority."[80] This section is taken from the English Bills of Exchange Act and states the rule of law as generally accepted.[81] Nothing is better settled than that a forged signature does not pass title to commercial paper, and does not justify a payment made on such paper.

§ 128. Forged instrument or indorsement thereon.

a. *In general.*— Blackstone defines forgery to be the fraudulent making or alteration of a writing to the prejudice of another man's right.[82] The essence of forgery is an intent to defraud, so that one may be guilty of forgery if he fraudulently signs his name, although it is identical with that of the person who should

tin, 113 Mich. 521, 71 N. W. 867. In the case of Mersman v. Werges, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. Ed. 641, it was held that the addition of the signature of a surety to a note, without the consent of the maker, is not a material alteration of the note, and does not discharge the maker. See also Miller v. Finley, 26 Mich. 294, 12 Am. Rep. 306; International Bank v. Parker, 88 Mo. App. 117.

78. **Insertion of word "bearer."**— An unauthorized alteration of a nonnegotiable promissory note by a payee after the execution thereof by the insertion of the word "bearer," after the name of the payee, is a material alteration which will nullify the instrument. Walton Plow Co. v. Campbell, 35 Neb. 173, 52 N. W. 883, 16 L. R. A. 468. See also Porter v. Hardy, 10 N. Dak. 551, 88 N. W. 458.

79. Sherman v. Rollberg, 11 Cal. 38; McCauley v. Gordon, 64 Ga. 221, 37 Am. Rep. 68; Needles v. Shaffer, 60 Iowa, 65, 14 N. W. 129; Croswell v. Lebree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; Belknap v. National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105; Booth v. Powers, 56 N. Y. 221; Flint v. Craig, 59 Barb. (N. Y.) 319; McDaniell v. Whitsett, 96 Tenn. 10, 33 S. W. 567; Union Nat. Bank v. Roberts, 45 Wis. 373.

80. Neg. Inst. L. (N. Y.), § 42. For same section in statutes of other States see Appendix.

81. English Bills of Exchange Act, § 24.

82. 4 Bl. Comm. 247.

have signed.[83] The essential elements of the crime are: (1) A false making of some instrument in writing; (2) a fraudulent intent; (3) an instrument apparently capable of effecting a fraud.[84] Any person who signs a fictitious, false, or assumed name to an instrument, with intent to defraud another, is guilty of a forgery.[85]

b. *Making or alteration of instrument.*—Where a blank check, note, or bill is signed by a principal and left with his agent for a specified purpose, to be filled out by such agent as directed by him, it has been held a forgery for such agent to fraudulently fill out such instrument and make it payable to himself.[86] But this is not universally held,[87] as will be seen by a reference to preceding sections relating to instruments executed in blank.[88] Any wrongful and fraudulent alteration of a negotiable instrument whereby a party thereto is injuriously affected constitutes a forgery.[89] But the subject of alterations of negotiable instruments has already been considered in this chapter, and it will be seen that the principles controlling the effect of such alterations upon the rights of the parties are somewhat different from those where the signatures of the parties thereto have been forged.

An instrument which, upon its face, is invalid and not binding upon the alleged parties is not the subject of forgery.[90] But it has been held that an indictment for the forgery of a promissory note may be sustained notwithstanding the instrument did not contain the name of the payee.[91]

83. Commonwealth v. Foster, 114 Mass. 311, 19 Am. Rep. 353. In the case of United States v. Long, 30 Fed. 678, the court said: "One may be guilty of forgery if he fraudulently signs his name, although it is identical with that of the person who should have signed. Thus, if a bill of exchange is payable to A. B. or order, and it comes to the hand of a person named A. B. who is not the payee, and who fraudulently indorses it for the purpose of obtaining the money, this is a forgery. See also Beattie v. National Bank of Illinois, 174 Ill. 571. 51 N. E. 602, 66 Am. St. Rep. 318; Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49.

84. State v. Wheeler, 20 Ore. 192, 25 Pac. 394, 23 Am. St. Rep. 119.

85. People v. Brown, 72 N. Y. 571, 28 Am. Rep. 183; Luttrell v. State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760; State v. Wheeler, 20 Ore. 192, 25 Pac. 394, 23 Am. St. Rep. 119.

86. Caulkins v. Whisler, 29 Iowa, 495, 4 Am. Rep. 236; Hooper v. State, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

87. Putnam v. Sullivan, 4 Mass. 45, 3 Am. Dec. 206.

88. See § 45.

89. Commonwealth v. Hide, 94 Ky. 517, 23 S. W. 195; State v. Higgins, 60 Minn. 1, 61 N. W. 816, 27 L. R. A. 74; State v. Kattlemann, 35 Mo. 105; State v. Robinson, 16 N. J. L. 507; State v. Floyd, 5 Strobh. (S. C.) 58, 53 Am. Dec. 689.

90. Rembert v. State, 53 Ala. 467, 25 Am. Rep. 639; Abbott v. Rose, 62 Me. 239, 16 Am. Rep. 427; People v. Shall, 9 Cow. (N. Y.) 778.

91. Harding v. State, 54 Ind. 359; State v. Baumon, 52 Iowa, 68, 2 N. W. 956; Commonwealth v. Paulus, 11

c. *Forged indorsement.*— No title, legal or equitable, can be acquired to a note originally obtained by fraud and passed by means of a forged indorsement, in fraud of the rights of the maker.[92] Where a check payable to the order of a payee was delivered to him, and it afterward came into the possession of one not entitled to it, who forged the payee's indorsement, and passes it to another person who received the money on it, such person is liable to the payee and not to the drawer.[93] The liability of the indorsee on a forged indorsement is not affected by the fact that he acted in good faith in taking the instrument; the forged indorsement passed no title to him, and he is not entitled to any of the benefits of a *bona fide* holder of the instrument.[94] Where a thief or finder of negotiable paper, payable to order, which has been indorsed and put into circulation by the payee, erases the indorsement, and subsequently personating the payee, forges his signature and transfers the paper to a *bona fide* purchaser for value, no title passes as against the true owner.[95] A lawful custodian of a note payable to the order of a particular payee, who forges the name of the payee, cannot thereby transfer to an innocent purchaser for value, a valid title to the instrument as against the payee.[96]

§ 129. When party is precluded from setting up forgery.

a. *Estoppel.*—A party, against whom it is sought to enforce payment under a forged signature, is precluded from setting up the forgery, where he is estopped, either by conduct amounting to estoppel *in pais,* or by the implied warranties which attach to the act of issuing, accepting, or indorsing negotiable paper. The rule of estoppel has been laid down by Lord Denman as follows: "Where one by his words or conduct willfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different

Gray (Mass.), 305; Kennedy v. State, 33 Tex. Crim. Rep. 183, 26 S. W. 78.

92. Carpenter v. Northborough Nat. Bank, 123 Mass. 66; Key v. Knott, 9 Gill & J. (Md.) 342; Wells v. Sutton, 91 Ind. 280.

93. Hensel v. Chicago, St. Paul, M. & O. R. Co., 37 Minn. 87, 33 N. W. 329.

94. Onondaga County Sav. Bank v. United States, 64 Fed. 703, 12 C. C. A. 407.

95. Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496.

96. Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. Rep. 883. See also Buckley v. Second Nat. Bank, 35 N. J. L. 400, 10 Am. Rep. 249; Rowe v. Putnam, 131 Mass. 281.

state of things as existing at the same time." [97] It is generally held that negligence amounting to a breach of duty supplies the place of intent.[98] There are also cases where a party may be concluded from asserting his original rights to property in consequence of his acts or conduct, in which the presence of fraud, actual or constructive, is wanting, as where one of two innocent parties must suffer from the negligence of another, he, by whose agency the negligence was occasioned, will be held to bear the loss; but where the condition of affairs is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.[99]

After considering the cases in relation to the doctrine of estoppel, it may be said that its essential elements are: (1) A false representation or concealment, where there is a duty to speak, of a material fact, or negligence in this respect amounting to a breach of duty; (2) the representation or concealment must be with a knowledge of the facts, or at least a reckless disregard of the facts; (3) it must have been made with the intention that the other party should act upon it or have been of such a nature that a reasonable man would take it to be true and believe that it was meant to be acted upon; (4) the other party must have been, without negligence, ignorant of the truth of the matter; (5) the other party must have acted upon the false representation or concealment.

97. Pickard v. Sears, 6 Ad. & El. (Eng.) 469, 474.

Rule of estoppel.— The principle is stated more broadly by the same judge (Lord Denman) in the case of Gregg v. Wells, 10 Ad. & El. (Eng.) 90, as follows: "A party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterward dispute that fact in an action against the person whom he has himself assisted in deceiving."

The rule was further extended by Parke, B., in Freeman v. Cooke, 18 L. J. Exch. (Eng.) 114, by the following comment upon the rule as laid down in Pickard v. Sears, *supra:* "By the term 'willfully,' however, in that rule we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect."

98. In Manufacturers' Bank v. Hazard, 30 N. Y. 226, it was said: "It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead and actually has misled another acting upon it in good faith, and exercising reasonable care and diligence under all the circumstances that is enough."

99. Brant v. Virginia Coal & Iron Co., 93 U. S. 326, 23 L. Ed. 927.

It will be seen from these rules, that the doctrine of estoppel cannot be asserted to bind one by a forged signature, unless the party asserting the doctrine has parted with something or incurred a liability by reason of the false representation or concealment of a material fact. Hence a number of cases which hold that one is never bound by a forged signature except by reason of the operation of the rule of estoppel, are to the effect that where, after the holder has acquired the instrument, a person liable thereon has, without new consideration, promised to pay such instrument, this promise will be void and of no effect. The theory on which these cases proceed is that as no one can be lawfully delegated to commit an unlawful act, a subsequent ratification of such unlawful act is impossible.[1] Of course, in the case of a new consideration there

1. **Forged signature cannot be ratified.**— There are many well-considered cases to the effect that as forgery of an instrument involves a crime and public wrong, beside being opposed to public policy, it cannot be ratified so as to bind the person whose name has been forged, in the absence of an estoppel *in pais*, without a new consideration for the promise. See Henry v. Heeb, 114 Ind. 275, 16 N. E. 606, 5 Am. St. Rep. 613; Woodruff v. Monroe, 33 Md. 146; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; McHugh v. County of Schuylkill, 67 Pa. St. 391, 5 Am. Rep. 445; Shisler v. Vandike, 92 Pa. St. 447, 37 Am. Rep. 702.

The leading case upon this question is that of Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546, which was an action upon a promissory note on which Wright's name had been forged. After Workman became the owner of the paper, Wright promised to pay the note. The court ably commented upon the cases against and in favor of the ratification of forged signatures. We here insert an extract from the opinion:

"Under the pleadings and finding of the court below, it may be assumed that the name of Calvin Wright was a forgery, as there was evidence tending to show the fact, and we cannot say that the conclusion reached in this respect was clearly against the testimony. It is claimed, however, that his admissions and promises to pay the note ratified the unauthorized signature. Had Workman, the owner of the note, taken it upon the faith of these admissions, or had he at all changed his status by reason thereof, such facts would create an estoppel which would preclude Wright now from his defense. This appears from most of the authorities cited in the case. But no foundation for an estoppel exists. All these statements of Wright, whatever they were, were made after Workman became the owner of the paper. Workman did not act upon them at all. He was in no way prejudiced by them, nor did they induce him to do or omit to do anything whatever to his disadvantage. But it is maintained that, without regard to the principle of estoppel, these admissions and promises are a ratification of the previously unauthorized act upon the well-known maxim, '*Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*'

"Upon principle we cannot see how a mere promise to pay a forged note can lay the foundation for liability of the maker so promising when the promise was made, as it was, under the circumstances set forth in the record. In addition to the fact that there are no circumstances to create an estoppel, there was no consideration for the promise. Wright received nothing, and it is a simple *nudum pactum*. The consideration for a promise may be either an advantage to the promisor or a detriment to the promisee, but here neither exists. Wright had signed a note, and when the one in suit was shown him, said he would

would be a fresh contract which would presumably bind the person making the new promise.

b. *Ratification.*— Notwithstanding the cases which hold that one is never bound by a forged signature except by reason of the operation of the rule of estoppel, there are a number of other cases, which may well be said to constitute a majority, and to control the question, that hold that a person may ratify his forged signature to a negotiable instrument so as to be bound thereby.[2] In a leading Massachusetts case[3] the court said: "It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner in which the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature, and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor, as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority. It is, however, urged that public policy forbids sanctioning the ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applica-

pay it, supposing it to be the one he had signed. He was an ignorant man who could not read writing, though he could sign his name, and when he saw the paper, seeing that the signature spelt his name, and being unable to read the body of the instrument, he said it was all right, and he would pay it. But the promise was without that consideration which would make it a binding contract."

2. Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106; Forsyth v. Bonta, 5 Bush (Ky.), 547; Rudd v. Matthews, 79 Ky. 479; Harper v. Devene, 10 La. Ann. 724; Wellington v. Jackson, 121 Mass. 157; Cravens v. Gillilan, 63 Mo. 28; First Nat. Bank of Trenton v. Gay, 63 Mo. 33; Dow's Exr. v. Spenny's Exr., 29 Mo. 386; Corser v. Paul, 41 N. H. 24; Commercial Bank v. Warren, 15 N. Y. 577.

3. Greenfield Bank v. Crafts, 4 Allen (Mass.), 447.

In the case of Howard v. Duncan, 3 Lans. (N. Y.) 175, a note purporting to be signed by Spencer Duncan and Smith Duncan was indorsed to the plaintiff. The name of Smith Duncan had been forged, but it was shown that after the delivery of the note Smith Duncan told the payee of the note that "it was all right." The trial court held that the act of forgery was not the subject of ratification, but an exception to this charge was sustained by the General Term in a brief opinion. The presiding justice says: "I cannot perceive any reason why a person whose name has been forged may not adopt and affirm the signature as his own act and thereby subject himself to whatever civil liability may follow from it."

ble to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted, the guilty party was not to be prosecuted for the criminal offense."

A distinction is to be made between a case where the admission of the forgery of a signature is made with full knowledge that the signature is forged and where the admission was made under a mistaken belief that the signature was genuine. In the latter case the person will not be bound by his admission.[4] But in the former case he will be estopped from denying the signature and will be bound thereby, in accordance with the same rule, " as in the case of the adoption or ratification of an ordinary act of assumed agency; that the form of the signature not bearing any indication of the fact of its being made by another hand does not prevent the person whose name is forged from being legally holden, upon proof that the signature was previously authorized, or subsequently adopted." [5] Where a party has been led to change his position, or otherwise act to his injury, by the silence of a party to whom an instrument, with his signature attached, has been shown with a request to pay the same, such silence will be competent evidence that his signature is genuine, or if not genuine that he intends to be bound thereby.[6] One who receives the avails

4. In the case of Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546, which is often cited in opposition to the doctrine that a forged signature to a promissory note can be ratified by the person whose name is forged, it appeared that there were no circumstances to create an estoppel and there was no consideration for the promise, since the owner of the note had in no way changed his status by reason of the defendant's admissions; and it also appeared that the defendant had signed a note, and when the note in suit was shown to him, he said he would pay it, supposing it to be the one he had signed. It is thus apparent that this case is one where the party whose name had been forged had no knowledge that he was ratifying a forged signature, and of course could not be held thereby. See also Rudd v. Matthews, 79 Ky. 479; Corser v. Paul, 41 N. H. 24.

5. Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106.

6. Corser v. Paul, 41 N. H. 24.

Failure to repudiate signature.— It has recently been held in Massachusetts, in Traders' Nat. Bank v. Rogers, 167 Mass. 315, 45 N. E. 923, 57 Am. St. Rep. 458, that a mere omission by an apparent indorser, on being shown a note, to inform the holder that the indorsement was a forgery does not amount to an affirmation of his signature, unless the indorser is shown to have received some benefit from the forgery or authorized the forger to act as his agent for any purpose. The court points out that his failure to repudiate the signature was evidence in the nature of an admission, but not conclusive, especially as under the circumstances of the case the defendant might have been surprised at finding his name upon the note and not positive whether he knew the facts.

Mere acquiescence in the sale of a note by an attorney, without knowledge that the attorney had unlawfully indorsed it, is not a ratification. Sherrill v. Weisiger Clothing Co., 114 N. C. 436, 19 S. E. 365.

of notes taken by his agent, and indorsed by him as agent, cannot deny the agent's authority to make the indorsement.[7] The ratification by the payee of an indorsement made on a note, by one assuming to act as his agent without authority, operates as an assignment only from the time of the ratification.[8]

§ 130. Forgery as a defense.

An acceptor of a bill warrants the genuineness of the signature of the drawer [9] and he cannot, therefore, resist payment of the bill as against a *bona fide* holder if the drawer's name be forged.[10] An indorser of a negotiable instrument admits that, at the time of his indorsement, the instrument is valid and subsisting,[11] and he is, therefore, bound by his indorsement to subsequent parties.[12] And it has been held that a bank is entitled to recover against the second indorser of a note, although the indorsement of the name of the payee is a forgery, and although the note was offered for discount by the maker and not by the second indorser.[13] The warranty of the acceptor only extends to the genuineness of the signature, and not to the matters contained in the bill itself; it follows, therefore, that if the forgery consists in altering the amount to be paid under the bill the acceptor will not be bound thereby, and he may recover any amount paid thereon.[14] An indorser, however, by his indorsement contracts with the subsequent *bona fide* holder of the instrument, that the instrument itself, and all the signatures prior to his indorsement are genuine;[15] and the

7. Third Nat. Bank v. Butler Colliery Co., 59 Hun (N. Y.), 627, 14 N. Y. Supp. 21.

8. Clark v. Peabody, 22 Me. 500.

9. Neg. Inst. L. (N. Y.), § 112. See § 82, (*d*), *ante*.

10. Bank of United States v. Bank of Georgia, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; United States v. Bank of United States, 4 Dall. C. C. (U. S.) 235.

11. Neg. Inst. L. (N. Y.), § 116. See § 86, (*a*), (*b*), *ante*.

12. Star Ins. Co. v. Bank, 60 N. H. 445; Choquette v. Leclaire, Rap. Jud. Que., 19 C. S. (Can.) 521.

13. State Bank v. Fearing, 16 Pick. (Mass.) 533.

14. The drawees of a bill are only held to a knowledge of the signatures of their correspondents, the drawers; by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder. White v. Continental Nat. Bank, 64 N. Y. 316; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77.

15. Where a holder of a bill presents it for payment and indorses it to the acceptor, he will be held to a knowledge of the validity of his own title, and the genuineness of the indorsements, and of every part of the bill other than the signature of the drawers, within the general principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of every preceding indorsement, and of the genuineness of the instrument. Erwin v. Downs, 15 N. Y. 575; Turnbull v. Bowyer, 40 N. Y. 456; Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11.

fact that the name of the maker was forged will not affect his liability.[16]

A maker stands in a different position from that of an indorser. His obligation is only to the *bona fide* and true owner or holder of the instrument.[17] If the signature of the payee be forged upon a note and it is thus transferred unlawfully to a third person, the title of the payee to the note is not diverted, and no action could be maintained by such person against the maker. Payment made to a person who is not the true owner or holder of the note will not relieve the maker or acceptor.[18]

§ 131. Recovery of money paid on forged instrument.

a. *In general.*— It is well settled that money paid under a mistake of fact may be recovered back, however negligent the party making the mistake may have been, unless the payment has caused such a change in the position of the other parties that it would be contrary to equity to compel him to pay.[19] The most generally received exception to this rule is that the acceptor of a bill of exchange, or the banker upon whom a check has been drawn, may not recover back from a *bona fide* holder money paid upon such a bill or check by reason of the forged name of the drawer.

b. *Forged signature of drawer.*— The drawee of a bill or the banker upon whom a check is drawn is bound to know the signature of his drawer;[20] and if he pays the bill or check to a *bona fide* holder, after he has inspected or had an opportunity to inspect the signature, he cannot recover the amount so paid.[21] This

16. Lennon v. Grauer, 159 N. Y. 433, 54 N. E. 11.

17. Story on Promissory Notes, § 380.

18. In the case of Graves v. American Exchange Bank, 17 N. Y. 205, it was held that the drawee of a bill must, at his peril, pay it to the genuine payee, or a person authorized by him to receive payment; and hence, where the drawee of a bill paid it to the holder under an indorsement by a person of the same name as the payee, he is liable to the payee for the amount of the bill, though the payment was made in good faith in the ordinary course of business, and with nothing to excite suspicion. See also Depau v. Browne, Harp. (S. C.) 254; Chism v. First Nat. Bank, 96 Tenn. 641, 36 S. W. 387.

19. Keener on Quasi Contracts, chap. II. See Germania Bank v. Boutell, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635.

20. First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289.

21. Germania Sav. Bank v. Boutell, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635; Bernheimer v. Marshall, 2 Minn. 78, 72 Am. Dec. 79.

The rule that a drawee of a bill is bound to know the handwriting of the drawer and that he cannot recover back money paid to a *bona fide* holder of a forged bill, applies, in general, to a party who intervenes and takes up a protested bill for the honor of the drawer. If he pays the bill after seeing it, he is concluded by the act, and cannot recover the money, rule does not control where it can be shown that the party receiving the money, although a *bona fide* holder, contributed by his negligence to the successful consummation of the fraud, or to the mistake of fact under which the payment was made.[22] The de-

though the bill is a forgery. Goddard v. Merchants' Bank, 4 N. Y. 147. See also Salt Springs Bank v. Syracuse Sav. Bank, 62 Barb. (N. Y.) 101; White v. Continental Bank, 64 N. Y. 316, 21 Am. Rep. 612; Vogel v. Ball, 69 Tex. 604, 7 S. W. 101; Johnston v. Commercial Bank, 27 W. Va. 343, 55 Am. Rep. 315.

22. **Rebuttal of presumption as to signature; negligence.**—National Bank of North America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349; First Nat. Bank of Danvers v. First Nat. Bank of Salem, 151 Mass. 280, 24 N. E. 44.

In the latter case a forged check, purporting to be drawn upon a bank by a firm which was one of its customers, was made payable to a payee named or bearer. Another bank, of which the firm was not a customer, when the check was presented to it by an unknown person, without attempting to identify him, and upon his indorsing it in the payee's name, cashed it, and was credited with the amount as money by the drawee.

The drawee negligently failed to discover the forgery for a month or two, but then immediately notified the bank cashing the check, which was not prejudiced by the delay. It was held that the bank cashing the check must bear the loss. The court said: "In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery. It is presumed that the bank knows the signature of its own customers, and, therefore, is not entitled to the benefit of the rule which in cases of forgery permits a party to recover back money paid under a mistake of fact as to the character of the instrument by which the fraud has been effected. This presumption is only conclusive when the party receiving the money has in no way contributed to the success of the fraud, or the mistake of fact under which the payment has been made. In the absence of absolute fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud. Citing National Bank of North America v. Bangs, 106 Mass. 441, 445. Where a loss which must be borne by one of two parties alike innocent of the forgery can be traced to the neglect or fraud of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded. To entitle the holder to retain money obtained by a forgery he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as a sufficient voucher the drawee had a right to believe he had taken." Citing Ellis v. Ohio Ins. & Trust Co., 4 Ohio St. 628; Rouvant v. San Antonio Nat. Bank, 63 Tex. 610; First Nat. Bank of Quincy v. Ricker, 71 Ill. 439.

In the case of People's Bank v. Franklin Bank, 88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724, the court held, where one bank accepts and cashes a check drawn on a bank in another county, to which the signatures of the drawer and payee have both been forged, without either requiring identification of the parties to whom payment is made, or taking steps to preserve any evidence of their identity, that the bank on which it was drawn positor whose signature has been forged to a check owes to the bank the duty of examining his vouchers and reporting the forgery to it; and if this duty is not performed the bank can hold the depositor liable for all damages occasioned by such failure.[23] It has been held that if one pays a forged note, supposing the signature to be his own, he may maintain an action to recover the money so paid, provided he proceeds promptly on discovering the forgery, although the defendant at the time of such payment had surrendered to him a mortgage which he in good faith had received as collateral security for the note, but which had been executed as security for another note, of which the forged note was a copy.[24]

c. *Forged indorsement.*— A different rule exists in the case of a forged indorsement. The drawee of a bill, or the bank upon which a check is drawn, is not chargeable with knowledge of any other signature on the bill or check than that of the drawer, and by accepting or paying the bill or check does not admit the genuineness of any indorsement on it.[25] And even if a drawee draws a bill or check payable to himself or his own order, and at once indorses it, an acceptance or payment admits only the genuineness of the drawer's original signature, but not the genuineness of his indorsement.[26] It has, therefore, been held that the drawee of a bill, who, without notice of any forgery, has paid a draft to the holder to whom it was negotiated by the forged indorsement of

and by which it is paid upon its transmission thereto by the former bank can, upon discovering the forgery, recover back the amount so paid.

23. **Duty to examine vouchers.**— First Nat. Bank v. Allen, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426. In New York the cases are to the effect that the most that can be claimed against a depositor by reason of his failure to discover the forgery of checks is that retaining his account without objection after a reasonable time is deemed an acquiescence, and an admission of its correctness as by account stated, but that is only *prima facie* and not conclusive. Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Welsh v. German-American Bank, 73 N. Y. 424, 29 Am. Rep. 175; Frank v. Chemical Nat. Bank, 84 N. Y. 209, 38 Am. Rep. 501. And see, generally, Leather Mfrs.' Nat. Bank v. Morgan, 117 U. S. 96, 29 L. Ed. 811; Janin v. London & S. F. Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320.

24. Welch v. Goodwin, 123 Mass. 71, 25 Am. Rep. 24.

25. First Nat. Bank v. Northwestern Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289. See also Marine Nat. Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287.

26. Beeman v. Duck, 11 Mees. & W. (Eng.) 251; Williams v. Drexel, 14 Md. 566; First Nat. Bank v. National City Bank, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289.

the payees' names, may recover of the holder the money paid upon the draft.[27]

27. **Where prior indorsement is forged.**— In the case of Star Fire Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442, the court said: "The defendants' indorsement was a representation that they had paid or accounted, or would pay and account, to the payees for what they might receive upon it. Relying upon their indorsement and the representations which it legally carried, the plaintiffs paid the draft, and the defendants received the money or an equivalent credit, through their correspondents, who collected it. With knowledge or notice of the forgery, the plaintiffs might have resisted payment. They had no knowledge or notice or even suspicion of the character of the first indorsement, and were in no fault for not knowing it. They had a right to rely on the defendants' indorsement; and with that reliance they paid the draft, and the defendants received the money paid through an innocent mistake. * * * An acceptance of the draft warrants the genuineness of the drawer's signature, but not of the indorser's, made subsequent to the issuing of the draft and before acceptance or payment; and the payment by the drawer to one who holds by a forged indorsement of the payee's name entitles him to recover the sum paid, if reasonable notice of the forgery is given." See also Mills v. Barney, 22 Cal. 240; Merchants' Bank v. Marine Bank, 3 Gill (Md.), 96, 43 Am. Dec. 300; Carpenter v. Northborough Nat. Bank, 123 Mass. 66; Talbot v. Bank of Rochester, 1 Hill (N. Y.), 295. In the last case it was also held that the laches of a holder of the note prior to the defendant, in not giving the defendant notice of the forgery, will not affect the right of the person transmitting the note to recover of the defendant. See also Goddard v. Merchants' Bank, 2 Sandf. (N. Y.) 247; Holt v. Ross, 54 N. Y. 472, 13 Am. Rep. 615; Lewis v. White's Bank, 27 Hun (N. Y.), 396; Shaffer v. McKee, 19 Ohio St. 526.

CHAPTER XII.

Special Provisions as to Bills of Exchange; Bills in a Set.

§ 132. Bill of exchange defined; statutory provision.

The Negotiable Instruments Law provides that: "A bill of " exchange is an unconditional order in writing addressed by one " person to another, signed by the person giving it, requiring the " person to whom it is addressed to pay on demand or at a fixed " or determinable future time a sum certain in money to order or " to bearer." [28] This is also the definition contained in the English Bills of Exchange Act.[29] No particular form of words is necessary to a bill of exchange, provided it is made clear that it directs one person to pay a certain sum of money to, or to hold

28. Neg. Inst. L. (N. Y.), § 210. For same section in statutes of other States see Appendix.

29. English Bills of Exchange Act, 1882, § 3 (1).

that sum of money at the disposal of another.[30] It will not be necessary in this place to consider at length the essential features of a bill of exchange; we have already considered these features in other portions of this work.[31] We have only inserted this section in this place in order to preserve the continuity of the Negotiable Instruments Law.

§ 133. Bill not an assignment of funds in the hands of the drawee.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "A bill of itself does not operate as an assignment of "the funds in the hands of the drawee available for the payment "thereof, and the drawee is not liable on the bill unless and until "he accepts the same." [32] This provision is contained, in effect at least, in the English Bills of Exchange Act.[33] A special provision applicable to checks is contained in the Negotiable Instruments Law, which will be hereafter considered.[34] The rule of the statute is declaratory of the general rule of the mercantile law, as it exists in most jurisdictions. But in France[35] and Scotland,[36] when the drawee has funds in his hands belonging to the drawer, the bill operates as an assignment of them in favor of the holder, and creates a privity of contract between the holder and drawee.

b. *Reason for rule.*— It is a general rule that a drawee is not liable on a bill of exchange until it has been accepted by him.[37]

30. Ellison v. Collingridge, 9 B. & C. (Eng.) 570.

31. See *ante*, § 3, and chap. III.

32. Neg. Inst. L. (N. Y.), § 211. For same section in statutes of other States see Appendix.

33. English Bills of Exchange Act, § 53 (1).

34. Neg. Inst. L. (N. Y.), § 325. See *post*, § 169, chap. XVII.

35. Bravard-Hemengeal (7th ed.), p. 235; Nougier, §§ 392–431.

36. English Bills of Exchange Act, § 53 (2).

37. Dickey v. Harmon, Fed. Cas. No. 3,894, 1 Cranch C. C. (U. S.) 201; Hankin v. Squires, Fed. Cas. No. 6,025, 5 Biss. (U. S.) 186; Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Woodruff v. Hensel, 5 Colo. App. 103, 37 Pac. 948; Kimball v. Donald, 20 Mo. 577, 64 Am. Dec. 209; Missouri Pac. Ry. Co. v. Wright, 38 Mo. App. 141; Rogers v. Coit, 6 Hill (N. Y.), 322; New York & Va. State Stock Bank v. Gibson, 5 Duer (N. Y.), 574; Reilly v. Daly, 159 Pa. St. 605, 28 Atl. 493; Northumberland Bank v. McMichael, 106 Pa. St. 460, 51 Am. Rep. 529.

An order drawn by a contractor upon the owner of a building cannot be sued upon until an acceptance by the owner is shown. Woodruff v. Hensel, 5 Colo. App. 103, 37 Pac. 948. But where the order is by its terms absolutely payable and intended as an equitable assignment of an amount due upon the contract, it is not a bill of exchange, and may be sued upon without acceptance. Gurnee v. Hutton, 63 Hun (N. Y.), 197, 17 N. Y. Supp. 667; Brem v. Covington, 104 N. C. 589, 10 S. E. 706.

Attachment.— In the case of Corser v. Craig, Fed. Cas. No. 3,255, 1 Wash. C. C. (U. S.) 424, it was held that the right to the funds of the drawer in the hands of the drawee is vested in the indorsee of the bill, although it is not accepted, and such funds are not subject to attachment after suit commenced against the drawee by the indorsee in the name of the payee.

Until that time there is no privity of contract between him and the holder;[38] but privity may be created by an agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement.[39]

c. *Order payable out of a particular fund.*— Where an order is drawn, for a valuable consideration from the payee, upon a third party, payable out of a particular fund then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment of the fund, *pro tanto,* and the drawee is bound, after notice of such assignment, to apply the fund as it accrues to the payment of the order and to no other purpose, and the payee may compel such application by an action.[40] But if a draft be drawn generally upon the drawee to be paid by him in the first instance on the credit of the drawer, and without regard to the source from which the money used for its payment is obtained, the designation by the drawer of a particular fund, out of which the drawee is to subsequently reimburse himself for such payment, or a particular account to which it is to be charged, will not convert the draft into an assignment of the fund, and the payee of the draft can have no action thereon against the drawee

38. **Acceptance or promise to accept required.**— Hopkinson v. Foster, L. R., 19 Eq. (Eng.) 74; Shand v. Du Buisson, L. R., 18 Eq. (Eng.) 283. In the case of Carr v. National Security Bank, 107 Mass. 45, 47, the court said: "It is a general rule of law, that upon a promise made by one person to another for the benefit of a third from whom no consideration moves, the latter cannot sue; and the exception to this rule, which holds a person, in whose hands funds have been placed to pay creditors of the depositor, liable to actions by them, has not been extended in this Commonwealth or in England, to a case in which neither such creditors nor the amounts of their debts are named or ascertained at the date of the promise (citing Mellen v. Whipple, 1 Gray (Mass.), 317; Dow v. Clark, 7 Gray (Mass.), 198; Frost v. Gage, 1 Allen (Mass.), 262). And by our law a promise to the drawer by the drawee of a negotiable draft or bill of exchange to accept and pay the same does not make the drawee liable to an action by a holder, unless he has taken the draft on the faith of such promise; but is a mere chose in action, upon which he only to whom it was made can sue (citing Exchange Bank v. Rice, 98 Mass. 288, and s. c., 107 Mass. 37). But see cases cited in note 42, *post.*

39. Robey v. Ollier, L. R., 7 Ch. (Eng.) 695; Ranken v. Alfaro, 5 Ch. D. (Eng.) 786.

40. Brill v. Tuttle, 81 N. Y. 454. And see also Mandeville v. Welch, 5 Wheat. (U. S.) 277, 5 L. Ed. 87; Laclede Bank v. Shuler, 120 U. S. 511, 7 Sup. Ct. 640, 30 L. Ed. 704; Joyce v. Wing Yet Lung, 87 Cal. 424, 25 Pac. 545; Scholimier v. Schoendelen, 78 Iowa, 426, 43 N. W. 282, 16 Am. St. Rep. 455; Poole v. Carhart, 71 Iowa, 37, 32 N. W. 16; Bradley & Currier Co. v. Berns, 51 N. J. Eq. 437, 26 Atl. 908; People v. Flour City Life Assn., 85 Hun (N. Y.), 506, 33 N. Y. Supp. 97; Sansome v. Alexander, 16 Misc. 368, 38 N. Y. Supp. 66; Alger v. Scott, 54 N. Y. 14; McDaniel v. Maxwell, 21 Ore. 202, 27 Pac. 952, 28 Am. St. Rep. 740; Lee v. Robinson, 15 R. I. 369, 5 Atl. 290.

unless he duly accepts.[41] Where an instrument is in form a bill of exchange, and is made payable out of a particular fund, and the amount of the bill is exactly that of the fund, the bill will operate as an assignment of the fund, even without an acceptance.[42] If such an instrument was intended as an assignment of the fund it may operate as such, before a formal acceptance.[43] In such cases the instruments are not strictly bills of exchange, within the meaning of the above section of the statute. One of the essential qualifications of a bill of exchange is that it involves the personal credit and responsibility of the drawer.[44] But a mere direction as to a means of reimbursement, as, for instance, to change the amount of the bill to a certain account, does not ordinarily vitiate the instrument as a bill of exchange; and upon such an instrument, if properly accepted, the drawee is liable at all events.[45]

§ 134. Bill addressed to more than one drawee.

The Negotiable Instruments Law provides that: "A bill may "be addressed to two or more drawees jointly, whether they are "partners or not, but not to two or more drawees in the alternative "or in succession."[46] The English Bills of Exchange Act provides that: "Any order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange."[47] It is a general rule that where a bill is addressed to two or more drawees in the alternative, it is not negotiable.[48]

41. Brill v. Tuttle, 81 N. Y. 454; Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83, 17 N. E. 133.

42. Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522; Ballou v. Boland, 14 Hun (N. Y.), 355; Nimocks v. Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268; Gardner v. National City Bank, 39 Ohio St. 600, 27 N. E. 94; Shenandoah Val. R. Co. v. Miller, 80 Va. 821.

43. Kahnweiler v. Anderson, 78 N. C. 133.

44. Waters v. Carleton, 4 Port. (Ala.) 205; Curle v. Beers, 3 J. J. Marsh. (Ky.) 170; Nichols v. Davis, 1 Bibb (Ky.), 490.

In the case of Gillilan v. Myers, 31 Ill. 525, it was held that the essential qualities of a bill of exchange are that it must be payable at all events, not dependent upon any contingency, nor payable out of a particular fund, and that it be for the payment of money only, and not for the performance of any other act, or in the alternative. See also Duffield v. Johnston, 96 N. Y. 369; Hollister v. Hopkins, 13 Hun (N. Y.), 210; Cole v. Dalton, 6 Daly (N. Y.), 484; Munger v. Shannon, 61 N. Y. 251; Van Wagner v. Terrett, 27 Barb. (N. Y.) 181; Lowery v. Steward, 25 N. Y. 239, 82 Am. Dec. 346; Carran v. Little, 40 Ohio St. 397; Rice v. Ragland, 10 Humph. (Tenn.) 345, 53 Am. Dec. 737.

45. Ehrichs v. De Mill, 75 N. Y. 370.

46. Neg. Inst. L. (N. Y.), § 212. For same section in statutes of other States see Appendix.

47. English Bills of Exchange Act, § 27 (2).

48. Walrad v. Petrie, 4 Wend. (N. Y.) 576; Noxon v. Smith, 127 Mass. 485.

§ 135. Inland and foreign bills of exchange.

The Negotiable Instruments Law provides that: "An inland "bill of exchange is a bill which is, or on its face purports to be, "both drawn and payable within this State. Any other bill is a "foreign bill. Unless the contrary appears on the face of the "bill, the holder may treat it as an inland bill." [49] It is not necessary to consider at this place the distinction between an inland and foreign bill of exchange; we have discussed this subject in a preceding chapter.[50]

§ 136. When bill may be treated as a promissory note.

The Negotiable Instruments Law provides that: "Where in "a bill drawer and drawee are the same person, or where the "drawee is a fictitious person, or a person not having capacity to "contract, the holder may treat the instrument, at his option, "either as a bill of exchange or a promissory note." [51] This is the same in effect as a provision contained in the English Bills of Exchange Act.[52] Under another section of the Negotiable Instruments Law it is also provided that: "Where an 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." [53] Where a bill is drawn by the drawer upon himself it is in effect an accepted bill, and he becomes liable thereon as the acceptor;[54] and where a bill is drawn by one person in his own name upon a firm of which he is a member for the use of the firm, it is equivalent to an accepted bill and has the effect of a promissory note.[55] We have considered in a previous chapter the effect of a bill, the drawer and the drawee of which are the same person.[56]

§ 137. Referee in case of need.

The Negotiable Instruments Law provides that: "The drawer "of a bill and any indorser may insert thereon the name of a "person to whom the holder may resort in case of need, that is to "say, in case the bill is dishonored by nonacceptance or nonpay- "ment. Such person is called the referee in case of need. It is

49. Neg. Inst. L. (N. Y.), § 213. For same section in statutes of other States see Appendix.

50. See also § 6, *ante*.

51. Neg. Inst. L. (N. Y.), § 214. For same section in statutes of other States see Appendix.

52. English Bills of Exchange Act, § 5 (2).

53. Neg. Inst. L. (N. Y.), § 36 (3). See § 47, *ante*.

54. Cunningham v. Wardwell, 12 Me. 466; Commonwealth v. Butterick, 100 Mass. 12, 97 Am Dec. 65.

55. Dougal v. Cowles, 5 Day (Conn.), 511.

56. See § 40 (*c*), (2), *ante*.

"in the option of the holder to resort to the referee in case of need "or not as he may see fit." [57] This section is the same as a section of the English Bills of Exchange Act. [58] The referee in case of need is sometimes called the drawee in case of need. If a bill contains the name of the person to whom the holder may resort in case of need the bill should be presented to the person so named if the drawee refuse to accept. [59]

§ 138. Bill in set constitute one bill.

The Negotiable Instruments Law provides that: "Where a bill "is drawn in a set, each part of the set being numbered and con- "taining a reference to the other parts, the whole of the parts "constitute one bill." [60] The English Bills of Exchange Act contains the same provision. [61] This section is in all respects declaratory of the common law. [62] It is the custom, in the case of international bills, to issue them in sets of threes, each being the counterpart of the others, except that there is a clause inserted that that particular bill shall be paid in case the others remain unpaid. This is done for security, and the bills are usually sent by different mails. The German Exchange Law contains a provision to the effect that if one part of the set omit reference to the rest, it becomes a separate bill in the hands of the *bona fide* holder, [63] and this is probably the law in this country. We have in an earlier section referred quite fully to the forms and requisites of bills in a set. [64]

§ 139. Rights and liabilities of holders of different parts.

a. *Where different parts are negotiated.*— The Negotiable Instruments Law provides that: "Where two or more parts of a "set are negotiated to different holders in due course, the holder "whose title first accrues is as between such holders the true "owner of the bill. But nothing in this section affects the rights

57. Neg. Inst. L. (N. Y.), § 215.

58. English Bills of Exchange Act, § 15.

59. Chitty on Bills, 274; Story on Bills, § 219, in which it is said: "In such a case, the holder may, and indeed is bound to apply to the person so addressed, who may accept and pay the same without any previous protest, in which respect they differ from acceptors *supra protest;* and the persons so addressed, upon payment, have a complete remedy for same against the party for whose account they shall thus accept and pay the bill."

60. Neg. Inst. L. (N. Y.), § 310. For same section in statutes of other States see Appendix.

61. English Bills of Exchange Act, § 71 (1).

62. Dunkin v. Cranston, 7 Johns. (N. Y.) 442; Holdsworth v. Hunter, 10 B. & C. (Eng.) 449.

63. German Exchange Law, art. 66. See French Code, art. 147.

64. See *ante* § 8.

"of a person who in due course accepts or pays the part first "presented to him."[65] The same provision is contained in the English Bills of Exchange Act.[66]

b. *Liability where parts are indorsed to different persons.*— The Negotiable Instruments Law provides that: "Where the "holder of a set indorses two or more parts to different persons he "is liable on every such part, and every indorser subsequent to "him is liable on the part he has himself indorsed, as if such parts "were separate bills."[67] The English Bills of Exchange Act contains the same provision, which is, probably, declaratory of the common law.[68]

§ 140. Acceptance of bill in a set; payment by acceptor.

a. *Acceptance of bill in a set.*— The Negotiable Instruments Law provides that: "The acceptance may be written on any part "and it must be written on one part only. If the drawee accepts "more than one part, and such accepted parts are negotiated to "different holders in due course, he is liable on every such part as "if it were a separate bill."[69] The English Bills of Exchange Act contains a similar provision.[70]

b. *Payment by acceptor.*— The Negotiable Instruments Law provides that: "When the acceptor of a bill drawn in a set pays

65. Neg. Inst. L. (N. Y.), § 311. For same section in statutes of other States see Appendix.

66. English Bills of Exchange Act, § 71 (3).

67. Neg. Inst. L. (N. Y.), § 312. For same section in statutes of other States see Appendix.

68. English Bills of Exchange Act, § 71 (2). The section is in accordance with the German Exchange Law, art. 67.

In the case of Holdsworth v. Hunter, 10 B. & C. (Eng.) 449, the drawee of the foreign bill in a set accepted the second part, which was the first which came to his hands, and indorsed it as a collateral security for a debt. He later indorsed another part of the set which came to him to a *bona fide* holder for value, who indorsed it to the plaintiff. It was contended that the plaintiff could not recover because another party having obtained a prior acceptance was entitled to the whole set. It was held that the plaintiff was entitled to recover since the prior acceptance was only conditional, and it was intimated that had the prior acceptance been unconditional the defendant would nevertheless have been liable. In the case of Bank of Pittsburg v. Neal, 20 How. (U. S.) 107, it was held that any innocent holder of a part of a bill which had been accepted and indorsed to him may recover thereon against the acceptor without regard to the history of the other parts.

69. Neg. Inst. L. (N. Y.), § 313. For same section in statutes of other States see Appendix.

70. English Bills of Exchange Act, § 71 (4). Mr. Chalmers says (Bills of Exchange, 237): "By the German Exchange Law, art. 68, the person who forwards one part of the set for acceptance ought to indicate on the other parts where such part will be found. The person to whom the part has been forwarded by acceptance is bound to deliver it up to, or according to the orders of, the indorsee. This coincides with the practice in England.

"it without requiring the part bearing his acceptance to be de-"livered up to him, and that part at maturity is outstanding in "the hands of a holder in due course, he is liable to the holder "thereon." [71] A similar provision is contained in the English Bills of Exchange Act.[72]

c. *Effect of discharging one of a set.*— The Negotiable Instruments Law provides that: "Where two or more parts of a set are "negotiated to different holders in due course, the holder whose "title first accrues is as between such holders, the true owner of "the bill. But nothing in this section affects the rights of a per-"son who in due course accepts or pays the part first presented to "him." [73] This is also the same as a provision contained in the English Bills of Exchange Act.[74] If the acceptance is written on more than one part, and such other parts are transferred, the discharge of one part of the bill would not discharge the other parts which have been accepted and are in the hands of a *bona fide* holder.

71. Neg. Inst. L. (N. Y.), § 314. For same section in statutes of other States see Appendix.

72. English Bills of Exchange Act, § 71 (5).

73. Neg. Inst. L. (N. Y.), § 315. For same section in statutes of other States see Appendix.

74. English Bills of Exchange Act, § 71 (6).

CHAPTER XIII.

Presentment for Acceptance.

§ 141. When presentment for acceptance must be made.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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 pre- "sented 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." [75] A similar provision is contained in the English Bills of Exchange Act.[76]

b. *Presentment of bills payable after sight.*— The statute declares the general rule, which is well established in this country, that a presentment for acceptance is necessary, in order to fix the period when the bill is to be paid, in cases of bills payable at sight, or at a certain specified time after sight, or after any other event not absolutely fixed.[77] But where a bill is payable a certain number of days after date or after any other specified and fixed event, presentment for acceptance is unnecessary; and acceptance and payment of the bill may be at once demanded at its maturity.[78] Notwithstanding the fact that when a bill is payable at a day certain the drawer and indorser are not discharged if the bill is not presented until the day of payment, it is still the duty of a bank or other agent for collection to present the bill for acceptance without delay and to give immediate notice of the drawee's refusal to accept.[79]

75. Neg. Inst. L. (N. Y.), § 240. For the same section in the statutes of other States see Appendix.

76. English Bills of Exchange Act, § 39, (1), (2), (3).

77. Story on Bills of Exchange, § 228; Aymar v. Beers, 7 Cow. (N. Y.) 705; Robinson v. Ames, 20 Johns. (N. Y.) 146; Hart v. Smith, 15 Ala. 807, 50 Am. Dec. 161; Austin v. Rodman, 8 N. C. 194, 9 Am. Dec. 630.

78. Bank of Washington v. Triplett, 1 Pet. (U. S.) 25, 7 L. Ed. 37; Townsley v. Sumrall, 2 Pet. (U. S.) 170, 7 L. Ed. 37; Evans v. Bridge, 4 Port. (Ala.) 348; Landrum v. Trowbridge, 2 Metc. (Ky.) 281; Union Nat. Bank v. Marr, 6 Bush (Ky.), 614; Glasgow v. Copland, 8 Mo. 268; Walker v. Stetson, 19 Ohio St. 400, 2 Am. Rep. 405; House v. Adams, 48 Pa. St. 261, 8 Am. Dec. 588; Bank of Bennington v. Raymond, 12 Vt. 401. The indorser of the bill of exchange, for the accommodation of the drawer, payable in six months from date, is liable as an indorser upon nonpayment and notice although the bill is not presented for acceptance, and protested for nonacceptance, and notice thereof given to the indorser, until five months after its date. Oxford Bank v. Davis, 4 Cush. (Mass.) 188.

When presentment necessary.— In the case of Allen v. Suydam, 21 Wend. (N. Y.) 321, 32 Am. Dec. 555, the court said: "A bill payable at sight, or a certain number of days after sight, must be presented 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 bill accepted immediately, in order to shorten the time of payment, and thus to put a limit to the period of their liability; and also to enable them to protect themselves by other lines, before it is too late, if the bill is not accepted and paid within the time originally contemplated by them. But in relation to the bill payable at a day certain, as at a fixed time after its date, it is perfectly well settled, not only in this country and in England, but also in Scotland and France, that the drawer or indorser of the bill is not discharged by the neglect of the holder to present the same for acceptance immediately, or until the time when it becomes due and payable. If, however, such bill is actually presented for acceptance, and is dishonored before it becomes due, the notice of such dishonor must be given to the drawer or indorser without delay, or it will be discharged."

79. Allen v. Suydam, 20 Wend. (N. Y.) 321, 332, 32 Am. Dec. 555.

And while presentment in such cases is unnecessary it is advisable to present the bill for acceptance without delay, for a holder thereby strengthens his security, or in case of nonacceptance, acquires an immediate right to call on the other parties to the bill.[80] If such a bill is presented the holder must conduct himself in the same way and make protest and give notice in the same manner, as upon a bill payable at so many days after sight.[81]

§ 142. Presentment within reasonable time; effect of failure.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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." [82] This provision is also contained in the English Bills of Exchange Act.[83]

b. *General rule.*— The general rule is that a bill which is payable a certain time after date must be presented either before or at its maturity.[84] If the bill be payable at sight or at so many days after sight, or on demand, then, as stated by Judge Story, "Unless there be some acquired and determinate usage of trade which ascertains and fixes a definite time within which the presentment must be made (for undoubtedly in such a case the usage would govern), the only rule that can be laid down is that it must be presented within a reasonable time; and what will be a reasonable time must depend upon all the circumstances of each particular case." [85]

c. *What is reasonable time.*— What time will be considered reasonable time is dependent upon the circumstances of the case.[86] The Negotiable Instruments Law provides that in determining what is "reasonable time" or an "unreasonable time," regard is to be had to the language of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.[87] As was stated by Judge Bigelow:

80. Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216, 220; Allen v. Suydam, 17 Wend. (N. Y.) 368.

81. Story on Bills of Exchange, § 228.

82. Neg. Inst. L. (N. Y.), § 241. For same section in statutes of other States see Appendix.

83. English Bills of Exchange Act, § 40 (1), (2).

84. Groupy v. Harden, 7 Taunt. (Eng.) 159; Bachellor v. Priest, 12 Pick. (Mass.) 399, 406.

85. Story on Bills of Exchange, § 231.

86. Linville v. Welch, 29 Mo. 203.

87. Neg. Inst. L. (N. Y.), § 4.

"Ordinarily, the question whether a presentment was within a reasonable time is a mixed question of law and fact, to be decided by the jury under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the duty of the court to submit them to the jury. But when they are undoubted and uncontradicted, then it is competent for the court to determine whether the reasonable time required by law for the presentment has been exceeded or not." [88]

§ 143. Presentment, how made.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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 authority 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." [89] A similar provision is contained in the English Bills of Exchange Act.[90] The term "holder" is defined by statute as the payee or indorsee of the bill or note, who is in possession of it or the bearer thereof.[91] The presentment in case of a foreign bill of exchange should be made by a notary.[92] But the statute recog-

88. Prescott Bank v. Caverly, 7 Gray (Mass.), 217, 221. See also Gilmore v. Wilbur, 12 Pick. (Mass.) 124; Holbrook v. Burt, 22 Pick. (Mass.) 555. In the case of Mellish v. Rawdon, 9 Bing. (Eng.) 416, it appeared that the purchaser of a bill on Rio Janeiro, at sixty days' sight, the exchange being against him, kept it nearly five months, and the drawee failed before presentment; it was held that the delay was not unreasonable. Tindal, C. J., said: "The bill must be forwarded within a reasonable time under all the circumstances of the case, and there must be no unreasonable or improper delay. Whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case."

89. Neg. Inst. L. (N. Y.), § 242. For the same section in statutes of other States see Appendix.

90. English Bills of Exchange Act, § 41 (1).

91. Neg. Inst. L. (N. Y.), § 2.

92. Burlington First Nat. Bank v. Hatch, 78 Mo. 13.

nizes the validity of a presentment made by a duly authorized agent of the holder.

b. *To whom presentment should be made.*— The statute declares the general rule as to the proper person to whom a bill should be presented for acceptance.[93] It has been said that, "In making a demand for an acceptance, the party ought, if possible, to see the drawee personally, or some agent appointed by him to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business; but a demand for payment need not be personal, and it will be sufficient if it shall be made at one or the other place in business hours."[94] Although the statute recognizes the right of a person to authorize another to accept or refuse acceptance on his behalf, the holder may require the person acting in behalf of the drawee to clearly show his authority.[95] If a bill is addressed to two or more drawees who are not partners, it may be accepted by each of such persons individually.[96] The rules which have been hitherto discussed respecting presentment of bills and notes for payment are in many respects applicable to the presentment of bills for acceptance.[97]

c. *Place of presentment.*— In respect to the place of the presentment of a bill for acceptance it may be well to quote from the opinion of Justice Wayne in the case of Wiseman v. Chiappella,[98] as follows: "We infer, from all the cases in our books, notwithstanding many of them are contradictory to subsequent decisions, that the practice now, both in England and the United States, does not require more to be done, in the presentment of a bill of exchange to an acceptor for payment, than that the demand should be made of a merchant acceptor at his counting-room or place of business; and if that be closed, so in effect that a demand cannot be made, or that the acceptor is not to be found at his place of business, and has left no one there to pay it, that further inquiry for him is not necessary, and will be considered as due diligence; and that presenting a bill under such circumstances at the place of business of the acceptor will be *prima facie* evidence that it had been done at a proper time of the day."

93. See Daniel on Negotiable Instruments, § 455.

94. Justice Wayne in Wiseman v. Chiappella, 23 How. (U. S.) 368, 377, 16 L. Ed. 466.

95. Atwood v. Munnings, 7 B. & C. (Eng.) 278.

96. Smith v. Milton, 133 Mass. 369.

97. See chap. VIII, *ante*.

98. 23 How. (U.S.) 368, 16 L. Ed. 466.

§ 144. Presentment on certain days; presentment where time is insufficient.

a. *On what days presentment may be made.*— The Negotiable Instruments Law provides that: "A bill may be presented for "acceptance on any day on which negotiable instruments may be "presented for payment under the provisions of sections 132 and "145 of this act. When Saturday is not otherwise a holiday, pre- "sentment for acceptance may be made before twelve o'clock noon "on that day."[99] The effect of this section is to apply to presentment of bills for acceptance the provisions of the statute relating to the days on which an instrument may be presented for payment. We have already considered these provisions of the statute.[1]

b. *Presentment where time is insufficient.*— The Negotiable Instruments Law provides that: "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 reason- "able diligence, to present the bill for acceptance before pre- "senting 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."[1a] This provision is also found in the English Bills of Exchange Act,[2] and Mr. Chalmers says that it was inserted to settle a disputed point and, perhaps, alters the law.[3]

§ 145. When presentment is excused.

The Negotiable Instruments Law provides that: "Present- "ment for acceptance is excused and a bill may be treated as "dishonored by nonacceptance in either of the following cases:

"1. Where the drawee is dead, or has absconded, or is a ficti- "tious person, or a person not having capacity to contract by "bill;

99. Neg. Inst. L. (N. Y.), § 243. For same section in statutes of other States see Appendix.

1. See § 103, *ante*.

1a. Neg. Inst. L. (N. Y.), § 244. For same section in statutes of other States see Appendix.

2. English Bills of Exchange Act, § 39 (4).

3. Chalmers on Bills of Exchange, p. 133, where he says: "It settles a moot point and perhaps alters the law. Suppose a bill, payable one month after date, is drawn in New York on a Liverpool firm but is payable at a London bank. It only reaches the English holder, or his agent, on the day that it matures. He must, nevertheless, present it for acceptance to the drawees in Liverpool. The act provides that he shall not be prejudiced by so doing. Before the act the usual practice was to protest the bill in London without any presentment to the drawees, an obviously inconvenient mode of proceeding, for the holder's object is to get the bill paid, and not to run up expenses against the drawer and indorsers.

" 2. Where, after the exercise of reasonable diligence, present-
" ment cannot be made;

" 3. Where, although presentment has been irregular, accept-
" ance has been refused on some other ground." [4] This section seems to have been derived from a provision contained in the English Bills of Exchange Act.[5] The section for the most part seems to be declaratory of the common law. The last subdivision is not supported by any American authority and seems to have been arbitrarily included in the law in recognition of the rule of the English act. The provision has little meaning except in connection with the rule that the fact that the holder has reason to believe that a bill will be dishonored on presentment does not excuse presentment. This provision was included in the English act as a corollary of the subdivision above referred to.

The circumstances which will excuse a presentment for payment of a negotiable instrument are analogous to those specified in the above section as excuses for a failure to present a bill for acceptance. Reference may be made to a preceding chapter for the purpose of ascertaining the sufficiency of such circumstances.[6] A presentment for payment in the case of the death of a drawee or acceptor of a bill should be made to his personal representative, but where the bill is not yet accepted, presentment to a personal representative of the deceased drawee would be absolutely useless because of the fact that a personal representative cannot, by his own contract bind the estate of his decedent.[7]

§ 146. Dishonor by nonacceptance.

a. *When bill dishonored by nonacceptance.*— The Negotiable Instruments Law provides that: "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." [8] The English Bills of Exchange Act contains a similar provision.[9]

4. Neg. Inst. L. (N. Y.), § 245.
5. English Bills of Exchange Act, § 41 (2).
6. See § 101, *ante*.
7. Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452.
8. Neg. Inst. Law (N. Y.), § 246. For the same section in the statutes of other States see Appendix.
9. English Bills of Exchange Act, § 43 (1).

b. *Duty of holder where bill is not accepted.*— The Negotiable Instruments Law provides that: "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 "nonacceptance or he loses the right of recourse against the "drawer and indorsers." [10] A somewhat similar provision is contained in the English Bills of Exchange Act.[11] The statute permits the drawee to retain possession of the bill or at least to consider the question of his acceptance, for a period of twenty-four hours after presentment.[12] The effect of this section is that when the bill has been considered for twenty-four hours after its presentment for acceptance the person presenting it must serve notice of its nonacceptance upon the parties entitled thereto.[13] If such notice is not given or the bill is not otherwise dishonored the drawer and indorsers thereof will be discharged. Even if there be no necessity for the presentment of a bill for acceptance, if the bill be presented and its acceptance is refused, it will be necessary to treat the bill as dishonored and give notice thereof to the parties entitled thereto.[14]

c. *Rights of holder where bill is not accepted.*— The Negotiable Instruments Law provides that: "When a bill is dis-"honored by nonacceptance, an immediate right of recourse "against the drawers and indorsers accrues to the holder and no "presentment for payment is necessary." [15] A similar provision is contained in the English Bills of Exchange Act.[16] The immediate right of recourse arising on nonacceptance is an exceptional right; and seems peculiar to English and American law.[17] Under the continental codes the holder can only protest the bill for nonacceptance, and demand security from the drawer and indorsers.[18]

10. Neg. Inst. L. (N. Y.), § 247. For the same section in the statutes of other States see Appendix.

11. English Bills of Exchange Act, § 42. The section provides that when a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonored by nonacceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers. It will be noticed that in the English act the words "customary time" are used instead of "prescribed time."

12. See Neg. Inst. L. (N. Y.), § 224; § 149, *post*.

13. As to notice of dishonor by nonacceptance see chap. IX, *ante*, § 118.

14. Pendleton v. Knickerbocker Life Ins. Co., 5 Fed. 238; Landrum v. Trowbridge, 2 Metc. (Mass.) 281; Union Nat. Bank v. Marr, 6 Bush (Ky.), 614; House v. Adams, 48 Pa. St. 261, 76 Am. Dec. 588.

15. Neg. Inst. L. (N. Y.), § 248. For the same section in the statutes of other States see Appendix.

16. English Bills of Exchange Act, § 43 (2).

17. Whitehead v. Walker, 11 L. J. Exch. (Eng.) 168.

18. French Code, arts. 119, 120; German Exchange Law, arts. 25-28.

CHAPTER XIV.

Acceptance.

§ 147. Acceptance, how made.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: " The acceptance of a bill is the signification by the "drawee of his assent to the order of 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."[19] The definition of an acceptance contained in this section is the same as that contained in the English Bills of Exchange Act.[20] The requirements as to the form of the acceptance contained in the above section are also the same in substance as in the English Bills of Exchange Act.[21] After the drawee has accepted a bill he is termed the "acceptor."

b. *Acceptance may be verbal.*— Except as changed by statute the acceptance of a bill of exchange may be verbal as well as written.[22] Even prior to the adoption of the Negotiable Instruments Law statutes were in force in most of the States requiring acceptances of bills of exchange to be in writing. These statutes followed in most respects the statute of 1 & 2 George IV, chap. 78, where it was enacted that the acceptance of an inland bill of exchange should be in writing and on the bill itself. The verbal promise by a drawee to pay an existing bill is valid as an acceptance.[23]

19. Neg. Inst. L. (N. Y.), § 220. For same section in statutes of other States see Appendix.

20. English Bills of Exchange Act, § 17 (1).

21. English Bills of Exchange Act, § 17 (2), which provides that, "An acceptance is invalid unless it complies with the following conditions, namely; (a) it must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money."

22. Verbal acceptances.— The unconditional acceptance of a draft, whether or not there shall be any funds in the hands of the acceptor to discharge it, is not a promise to answer for the debt of another within the Statute of Frauds and need not, therefore, be in writing. Walton v. Mandeville, 56 Iowa, 597, 5 N. W. 776, 41 Am. Rep. 123; Dull v. Bricker, 76 Pa. St. 255. See also note to Allen v. Leavens, 26 L. R. A. 320.

The following cases are to the effect that an acceptance may be verbal:

Colorado.— Durkee v. Conklin, 13 Colo. App. 313, 57 Pac. 486.

Connecticut.— Dougal v. Cowles, 5 Day, 511; Jarvis v. Wilson, 46 Conn. 90, 33 Am. Rep. 18.

Illinois.— Sturges v. Fourth Nat. Bank, 75 Ill. 595; Nelson v. First Nat. Bank, 48 Ill. 36; Mason v. Dousay, 35 Ill. 424, 85 Am. Dec. 368; Davis v. Rittenhouse & Embree Co., 72 Ill. App. 58.

Indiana.— Spurgeon v. Swain, 13 Ind. App. 188, 41 N. E. 397.

Massachusetts.—Pierce v. Kittredge, 115 Mass. 374; Exchange Bank v. Rice, 98 Mass. 288; Putnam Nat. Bank v. Snow, 172 Mass. 569, 52 N. E. 1079.

New Hampshire.— Barnet v. Smith, 30 N. H. 256, 64 Am. Dec. 290; Edson v. Fuller, 22 N. H. 183.

New Jersey.— Williams v. Winans, 14 N. J. L. 339.

New York.—Ontario Bank v. Worthington, 12 Wend. 593.

Texas.—White v. Dienger (Tex. Civ. App.), 25 S. W. 666.

Vermont.— Arnold v. Sprague, 34 Vt. 402.

23. Verbal promise to accept.— Edson v. Fuller, 22 N. H. 183. Where

c. *By whom made.*— Except where the acceptance is for honor or *supra protest,* the acceptance must be by the drawee of the bill.[24] Where a bill is drawn upon several drawees, if not accepted by all it may be treated as dishonored; but if accepted by a part it will be a good and valid acceptance as to them.[25] Where a bill is addressed to a single drawee there cannot be a series of acceptors, but the bill must be accepted by the drawee himself or by some one for the honor of the drawer.[26] An agent may bind his principal by an acceptance in the same manner as by any other contract.[27]

d. *Form of acceptance.*— The usual form of accepting a bill of exchange is by writing upon the face of the bill the word "accepted" with the signature of the drawee appended thereto. If the acceptance is qualified, appropriate words should be used to designate the character of the qualification. It is not necessary, however, that the word "accepted" should be used; any other words that indicate that the drawee intended thereby to absolutely accept the bill will be sufficient.[28] The drawee may

one on whom an order is made states that he cannot pay it at that time, but will later, it is a valid acceptance. St. Louis Nat. Stock Yards v. O'Rielly, 85 Ill. 546. In the case of Mason v. Dousay, 35 Ill. 424, 85 Am. Dec. 368, it was held that a reply made by the drawee of the bill upon demand for payment, that it is all right, and he has told the payee that he would pay it in the course of thirty or sixty days, is a valid acceptance. See also Ward v. Allen, 2 Metc. (Mass.) 53, 35 Am. Dec. 387; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Spaulding v. Andrews, 48 Pa. St. 411.

24. Walton v. Williams, 44 Ala. 347; Smith v. Lockridge, 8 Bush (Ky.), 423; Heeman v. Nash, 8 Minn. 407, 83 Am. Dec. 790.

25. Byles on Bills (16th ed.), 258; Owen v. Von Uster, 10 C. B. (Eng.) 318; Nichols v. Diamond, 9 Exch. (Eng.) 154; Smith v. Milton, 133 Mass. 369.

26. Jackson v. Hudson, 2 Campb. (Eng.) 447, in which case Lord Ellenborough said: "But I know of no custom or usage of merchants according to which, if a bill be drawn upon one man, it may be accepted by two; the acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or failing him, by some one for the honor of the drawer. There cannot be a series of acceptors."

27. Chitty on Bills, 320. See also as to authority of agent to bind his principal § 29, (*b*), *ante.*

In the case of Bruce v. Lord, 1 Hilt. (N. Y.) 247, it was held that where the drawee accepts in his own name, adding thereto words indicating that he acted as an agent, but in such a form as to constitute a mere personal description, he will be personally liable. But he may discharge himself from the liability by showing that he accepted the bill as an agent having the authority so to do, which fact was known by the plaintiff at the time the acceptance was made. A solicitor cannot bind his clients, nor an administrator the estate, by an acceptance of an order directed to him as such solicitor or administrator. Hadlock v. Brooks, 178 Mass. 425, 59 N. E. 1009.

28. Words indicating acceptance.— In the case of Van Strum v. Liljengren, 37 Minn. 191, 33 N. W. 555, it was held that the word "except" written and signed upon the face of the bill of exchange was sufficient to constitute an acceptance, and the court accept the bill by merely writing his name across the face thereof, although it may not be a literal compliance with the statute requiring the acceptance to be in writing and signed by the drawee.[29]

e. *Holder entitled to acceptance on face of bill.*— The Negotiable Instruments Law provides that: "The holder of the 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." [30] This provision is collateral to the requirement that the acceptance be in writing and signed by the drawee. If the acceptance is not in writing the effect of the statute is to discharge the drawee from liability; if the acceptance is not written upon the instrument itself the acceptor is not liable to a subsequent holder of the bill unless he became such on the faith of an acceptance contained in a separate instrument. The effect of the above section is to require an acceptance upon the bill so that it may contain in itself a binding obligation in favor of all subsequent parties as against the acceptor.

f. *Acceptance by separate instrument.*— The Negotiable Instruments Law also provides that: "Where an acceptance is "written on a paper other than the bill itself, it does not bind the "acceptor except in favor of the person to whom it is shown and "who, on the faith thereof, receives the bill for value." [31] The object of this provision is to promote convenience in commercial transactions. It is often desirable for the purpose of avoiding delay to accept a bill which has not yet been presented by means of a telegram or a letter.[32]

§ 148. When promise to accept equivalent to acceptance.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "An unconditional promise in writing to accept

said: "No other import can be given to such writings upon the instruments by the drawee than that he thereby accepted the same, nor can there have been any other purpose in such writings than of signifying his acceptance." See also Miller v. Butler, Fed. Cas. No. 9,565, 1 Cranch C. C. (U. S.) 470; Cortelyou v. Maben, 22 Neb. 697, 36 N. W. 159.

A drawee indorsed on an order addressed to him the words, "I will see the within paid eventually;" it was held that these words were sufficient to constitute an acceptance, and that he was liable to pay on and after the date of the acceptance. Brannion v. Henderson, 12 B. Mon. (Ky.) 64.

29. Wheeler v. Webster, 1 E. D. Smith (N. Y.), 1; Spier v. Pratt, 2 Hill (N. Y.), 582, 38 Am. Dec. 600: Fowler v. Gates City Nat. Bank, 88 Ga. 29, 13 S. E. 831; Mechanics' Bank v. Yager, 62 Miss. 529.

30. Neg. Inst. L. (N. Y.), § 221. For same section in statutes of other States see Appendix.

31. Neg. Inst. L. (N. Y.), § 222. For same section in statutes of other States see Appendix.

32. See North Atchison Bank v.

"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."[33] This provision follows as a natural consequence of the rule that an acceptance by a separate instrument is binding upon the acceptor in favor of the person who, on the faith thereof, receives the bill for value.[34] The former English doctrine was that the promise to accept, given before the bill was made, amounted to an acceptance.[35] But this doctrine was afterward qualified so that a person who was not induced to take the bill by the promise to accept could not avail himself of the promise.[36] The rule in England now seems to be that a written or verbal promise to accept a bill which does not exist is not equivalent to an acceptance;[37] but the written or verbal promise to pay an existing bill is a valid acceptance and will bind the person who gives it.[38] Where a general promise to accept is issued by a person or by a bank, intended to be shown to third persons for the purpose of giving credit to bills of exchange, it constitutes a letter of credit and effectually binds the promisor to pay all bills drawn in conformity therewith, even without a formal acceptance.[39]

b. *General rule.*— The leading American case on this subject is that of Coolidge v. Payson,[40] where the leading English cases were carefully reviewed by Chief Justice Marshall, and he stated the rule to be, "That a letter written a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterward takes the bill on the credit of the letter, a

Garretson, 51 Fed. 167; Fairchild v. Feltman, 33 Hun (N. Y.), 398.

In the case of Clarke v. Cock, 4 East (Eng.), 57, 71, Lord Ellenborough said: "It may be for the convenience of mercantile affairs that the bill may be accepted by a collateral writing, without the bill itself coming to the actual touch of the acceptor, which would sometimes create great delay."

33. Neg. Inst. L. (N. Y.), § 223. For the same section in statutes of other States see Appendix.

34. Neg. Inst. L. (N. Y.), § 222. See also preceding section.

35. Byles on Bills (16th ed.), 260; Pillans v. Van Microp, 3 Burr. (Eng.) 1663; Pierson v. Dunlop, Cowp. (Eng.) 571; Mason v. Hunt, Doug. (Eng.) 284, 287.

36. Milne v. Prest, 4 Campb. (Eng.) 393, in which Gibbs, Ch. J., said: "A promise to accept not communicated to the person who takes the bill does not amount to an acceptance; but, if the person be thereby induced to take a bill, he gains a right equivalent to an actual acceptance, against the party who has given the promise to accept."

37. Johnson v. Collings, 1 East (Eng.), 98; Bank of Ireland v. Archer, 11 M. & W. (Eng.) 383.

38. Clarke v. Cock, 4 East (Eng.), 57.

39. Byles on Bills (16th ed.), 111; *In re* Agricultural Bank, L. R., 2 Ch. (Eng.) 301. See also § 18, *ante*.

40. 2 Wheat. (U. S.) 66, 4 L. Ed. 185.

virtual acceptance binding the person who makes the promise." This rule has been universally adopted by the courts in all the States and may be considered as a generally accepted doctrine in this country.[41]

c. *Form and requisites of promise.*— The promise need not be expressed in any particular form. It has, however, been generally held that it should so describe the bill to be drawn as not to permit any mistake in its identification.[42]

41. **Letter of credit promising to accept bills of exchange,** see the following cases:

United States.— Townsley v. Sumrall, 2 Pet. 181, 7 L. Ed. 386; Boyce v. Edwards, 4 Pet. 111, 7 L. Ed. 799; Wildes v. Savage, Fed. Cas. No. 17,633; Bayard v. Lathy, Fed. Cas. No. 1,131, 2 McLean, 462; Cassel v. Dows, Fed. Cas. No. 2,502, 1 Blatchf. 335.

Alabama.— Kennedy v. Geddes, 8 Port. 263, 33 Am. Dec. 289.

Illinois.—Second Nat. Bank v. Dieffendorf, 90 Ill. 396; Nelson v. Chicago First Nat. Bank, 48 Ill. 36, 95 Am. Dec. 510.

Indiana.— Beech v. State Bank, 2 Ind. 488.

Iowa.— Lindley v. Waterloo First Nat. Bank, 76 Iowa, 629, 41 N. W. 381, 14 Am. St. Rep. 254.

Kentucky.— Vance v. Ward, 2 Dana, 95.

Louisiana.—Carrollton Bank v. Tayleur, 16 La. 490, 35 Am. Dec. 219.

Maine.— Plummer v. Lyman, 49 Me. 229; Scott v. McLellan, 2 Me. 199.

Massachusetts.— Putnam Nat. Bank v. Snow, 172 Mass. 569, 52 N. E. 1070; Central Savings Bank v. Richards, 109 Mass. 413; Murdock v. Mills, 11 Metc. 5; Mayhew v. Prince, 11 Mass. 55; Storer v. Logan, 9 Mass. 55; Banorgee v. Hovey, 5 Mass. 11, 4 Am. Dec. 17.

Minnesota.— Woodard v. Griffiths-Marshall Grain Com. Co., 43 Minn. 260, 45 N. W. 433.

Mississippi.— Pollock v. Helm, 54 Miss. 1, 28 Am. Rep. 342.

New York.— Scott v. Pilkington, 15 Abb. Pr. 280; Ulster County Bank v. McFarlan, 5 Hill, 432; Bank of Michigan v. Ely, 17 Wend. 508; Ontario Bank v. Worthington, 12 Wend. 593; Goodrich v. Gordon, 15 Johns. 6; Benecke v. Haebler, 38 App. Div. 344, 58 N. Y. Supp. 16, affd. 166 N. Y. 631, 60 N. E. 1107.

North Carolina.— Nimocks v. Woody, 97 N. C. 1, 2 S. E. 249.

South Carolina.—Strohecker v. Cohen, 1 Speers, 349.

42. **Description of bill.**— In the case of Nelson v. Chicago First Nat. Bank, 48 Ill. 36, the court said, after quoting the rule as laid down by Chief Justice Marshall: "This rule has been constantly followed by the courts of this country, the only point of dispute being as to the degree of accuracy with which the promise to accept must describe the nonexisting bill, and it is objected in the present case, by counsel for the appellee, that the promise to pay by the bank did not sufficiently identify the checks to which the promise was to be applied, and the case of Boyce v. Edwards, 4 Pet. 122, is cited as an authority in point. The authority of that case is certainly to the effect that the promise of the bank cannot be treated as a technical acceptance, for want of identification of the checks. We may be permitted to say, however, that the difference between a promise to accept a particular bill or check to be thereafter drawn, and the promise to accept all checks which a person might draw for a specified purpose, is so extremely technical and refined that we should be inclined, where the plaintiff had received the check or bill upon the faith of the promise and had sued on the promise as an acceptance, to hold that it was a distinction without a difference.

It seems to us, a fair construction of the language of Chief Justice Marshall would require, not that the promise should describe the bill to be drawn and accepted, by its date and amount, and the name of the drawee, as that would be generally impossible; but merely in such a mode that there could be no possible doubt as to the

The promise to accept must be unconditional. Under certain circumstances, as where a creditor authorizes his debtor to draw on him, for the purpose of procuring such draft to be discounted for his, the drawee's, benefit, an unqualified authority by the drawee, to draw on him for a certain amount, is an unconditional promise to pay the draft.[43] The authority need not be phrased in the precise and formal language of a legal document; special promissory words are unnecessary, where the language employed sufficiently imports a legal obligation.[44] Words of limitation or direction as to the purposes or the amount for which the drafts are made are not necessarily words of condition, and do not affect the unconditional character of the promise.[45] But where a con-

application of the promise to the bill to be drawn. A description of sufficient certainty could thus be made to apply to a series of bills, as well as to one bill." See also Ulster County Bank v. McFarlan, 5 Hill (N. Y.), 432; First Nat. Bank v. Clark, 61 Md. 400, 48 Am. Rep. 114; Valle v. Cerre, 36 Mo. 575, 88 Am. Dec. 161.

43. **Authority to draw for specific purposes.**— Barney v. Worthington, 37 N. Y. 112, in which a letter was directed to a partner by another member of a firm evidently intended to authorize the firm to draw upon him in the manner and for the purposes stated therein. The court said: "The letter is to be read in the light of the surrounding circumstances; proof of which was properly admitted to aid the court in ascertaining the purpose of the paper, and in applying and interpreting its language. * * * In view of the circumstances under which it was given, the defendant's unqualified authority to draw on him for the amount was equivalent to an unconditional promise to pay the draft. The absence of technical promissory words is of no practical moment, where the language employed is such as to raise an imperative legal obligation." See also Ruiz v. Renauld, 100 N. Y. 256, 3 N. E. 182; Merchants' Bank v. Griswold, 72 N. Y. 472, 479; Smith v. Ledyard, 49 Ala. 279; Whilden v. Merchants & Planters' Bank, 64 Ala. 1, 38 Am. Rep. 1; James v. E. G. Lyons Co., 134 Cal. 189, 66 Pac. 210; Gates v. Parker, 43 Me. 544; First Nat. Bank v. Clark, 61 Md. 400, 48 Am. Rep. 114; Bissell v. Lewis, 4 Mich. 450; Burke v. Utah Nat. Bank, 47 Neb. 247, 66 N. W. 295.

A telegram in the words: "Will pay H.'s draft, $2,300, for stock," is an absolute undertaking to accept and pay. The words "for stock" merely indicate the nature of the consideration as between the drawer and acceptor. Coffman v. Campbell, 87 Ill. 98. A promise in these terms, "I have no objection to accepting for you at three and four months on the terms you propose," contained in a letter, is an absolute, and not a conditional, promise, and warrants a single draft at four months. Parker v. Greele, 5 Wend. (N. Y.) 414. And in the case of Michigan Bank v. Ely, 17 Wend. (N. Y.) 508, it was held that a written direction by a principal to his agent to make drafts on him to a certain amount, if the agent should need more funds, is an unconditional promise to accept drafts which might be drawn by the agent in the manner directed.

44. Ruiz v. Renauld, 100 N. Y. 256, 3 N. E. 182.

45. **Words limiting promise to accept.**— Bank of Michigan v. Ely, 17 Wend. (N. Y.) 508; Ulster County Bank v. McFarlan, 5 Hill (N. Y.), 532; Merchants' Bank v. Griswold, 72 N. Y. 472, in which case the defendant executed a power of attorney in the following form: "I hereby authorize Horace Loveland, as my agent, to make drafts on me from time to time, as may be necessary for the purchase of lumber on my account, and to consign the same to the care of P. W. Scribner & Co." In an action

dition precedent is attached to a promise to accept a bill, which is a substantive part of the promise and is so coupled with it as to show that the promisor did not intend to bind himself, except on compliance with the condition, it is not such an unconditional promise to accept as will support an action against the promisor as an acceptor.[46] In all cases the promise to accept must have induced the person to receive the bill; the promise must have given credit to the bill.[47] A written promise to accept a nonexisting bill will not amount to an acceptance thereof in favor of one who had subsequently received the bill without knowledge of the promise, and not on the credit thereof.[48] But it is not necessary that the written promise to accept be shown to the person who takes the bill relying on the existence of the promise; if he chooses to act without an inspection of the written promise, he will be deemed to have such information as he would have acquired by reading it.[49] A promise to accept given by a telegram will be sufficient, if it otherwise complies with the requirements.[50]

d. *Verbal promise to accept.*—At common law a verbal promise to accept a bill, if credit is given the bill, on the faith thereof, is as binding as though the promise was written.[51] No distinction

upon a draft, drawn by Loveland in his own name, and discounted by the plaintiff upon the faith and credit of, and upon the delivery of the instrument, it was held that the authority given was absolute within the prescribed limits, and was equivalent to an unconditional promise to pay drafts so drawn; that the words "as may be necessary for the purchase of lumber" did not constitute a condition precedent which the plaintiff was required to show had been performed, but it was for the agent to determine the necessity.

46. Germania Nat. Bank v. Taaks, 101 N. Y. 442, 5 N. E. 76.

47. Coolidge v. Payson, 2 Wheat. (U. S.) 66, 4 L. Ed. 185; Storer v. Logan, 9 Mass. 55; Exchange Bank v. Hubbard, 62 Fed. 112, 10 C. C. A. 295; Russell v. Wiggin, 2 Story (U. S.), 214; Lagrue v. Woodruff, 29 Ga. 648; Steman v. Harrison, 42 Pa. St. 49, 82 Am. Dec. 491.

48. McEvers v. Mason, 10 Johns. (N. Y.) 207. In the case of Exchange Bank v. Rice, 98 Mass. 288, it was held that a promise to accept a bill of exchange written after the holder took the bill would not make the drawee liable to the holder as an acceptor.

An indorsee of a bill who does not take it on the credit of the drawee's promise to accept cannot maintain an action against him on such implied acceptance. Goodrich v. Gordon, 15 Johns. (N. Y.) 6; Howland v. Carson, 15 Pa. St. 453.

49. Lewis v. Kramer, 3 Md. 265; Woodard v. Griffiths-Marshall Grain Com. Co., 43 Minn. 260, 45 N. W. 433.

50. In the case of North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145, one T., having purchased certain cattle, offered his check for $22,000 in payment. The seller refused to accept it or part with his cattle until assured that the check would be paid, and, therefore, telegraphed the drawee, asking if it would pay T.'s check for such amount. The drawee answered: "T. is good. Send on your paper." It was held that this constituted a contract to pay the check on its presentation. See also *In re* Armstrong, 41 Fed. 381; Franklin Bank v. Lynch, 52 Md. 270, 36 Am. Rep. 375.

51. Townsley v. Sumrall, 2 Pet. (U. S.) 170, 7 L. Ed. 386; Hall v. Cordell,

is apparently made between a verbal and a written promise to accept an existing bill;[52] but it has been held that a mere verbal promise to accept a nonexisting bill is not such an acceptance as will in law bind the acceptor, even if made to the person in whose favor the bill is drawn.[53] The rule of the common law is changed by statute in nearly all the States, and, of course, no longer exists in those States which have adopted the Negotiable Instruments Law.

e. *Conformity with terms of promise.*—Any person who gives a written promise to accept a bill of exchange may insist that the terms of his agreement be strictly complied with.[54] Any departure from the terms of an agreement to accept the bill of another will not bind the party sought to be charged as acceptor.[55] As where one promises to accept a draft for a specified sum, and the draft is afterward drawn for a larger sum, the promisor is not liable on the draft to any amount, nor for a breach of agreement to accept.[56] And it has been held that an agreement to accept a draft for a certain amount is not complied with by drawing for such amount with exchange on a certain place;[57] but where no place of exchange is specified the words have been declared to be surplusage.[58]

§ 149. Time allowed to accept.

The Negotiable Instruments Law provides that: "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."[59] If the acceptance of the bill is dated, such date is presumed to be the true date of the acceptance.[60] Where the acceptance is not dated the rule at common law seems to have been that the presumption is that

142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; Williams v. Winans, 14 N. J. L. 339; Light v. Powers, 13 Kan. 96; Kelley v. Greenough, 9 Wash. 659, 38 Pac. 158.

52. Kennedy v. Geddes, 8 Port. (Ala.) 263, 33 Am. Dec. 289.

53. Plummer v. Lyman, 49 Me. 229; Rulo First Nat. Bank v. Gordon, 45 Mo. App. 293; Edson v. Fuller, 22 N. H. 183.

54. Dickins v. Beal, 10 Pet. (U. S.) 572, 9 L. Ed. 538; Lienow v. Pitcairn, Fed. Cas. No. 8,341, 2 Paine (U. S.), 517; First Nat. Bank v. Bensley, 2 Fed. 609; Saulsbury v. Blandy, 53 Ga. 665; American Water-Works Co. v. Venner, 63 Hun (N. Y.), 632, 18 N. Y. Supp. 379.

55. State Nat. Bank v. Young, 14 Fed. 889.

56. Brinkman v. Hunter, 73 Mo. 172, 39 Am. Rep. 492.

57. Lindley v. First Nat. Bank, 76 Iowa, 629, 41 N. W. 381.

58. North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145.

59. Neg. Inst. L. (N. Y.), § 224. For same section in statutes of other States see Appendix.

60. Neg. Inst. L. (N. Y.), § 30. See § 44 (*b*), *ante*.

the bill was accepted before its maturity, and within a reasonable time of its date.[61] The *prima facie* presumption arising from the date of the acceptance may be rebutted, for the purpose, for instance, of ousting the Statute of Limitations.[62]

§ 150. Liability for retention or destruction of bill.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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 nonaccepted to "the holder, he will be deemed to have accepted the same."[63] This provision seems to have been taken verbatim from the New York Revised Statutes.[64]

b. *Retention of bill.*— In recognition of the principle that mere retention of the bill itself is not an acceptance, the words "mere retention of the bill is not acceptance" were added to this section in the Wisconsin act.[65] In New York it has been held under the statute that the mere retention, without a demand for a return, or a dissent to the retention, and with the permission of the owner, is not such a refusal as is contemplated by the statute; such refusal is intended as an affirmative act or an act done willfully or wrongfully by the drawee.[66] In speaking of the implied acceptance of the bill by a refusal to return it, Mr. Edwards has said:[67] "Upon principle, a refusal to return a bill accepted is not the same thing as accepting it; for the act of acceptance is not complete until the bill has been returned to the holder. Until that has been done the drawee has an opportunity of changing his

61. Roberts v. Bethell, 12 C. B. (Eng.) 778.

62. Montague v. Perkins, 22 L. J. C. P. (Eng.) 187.

63. Neg. Inst. L. (N. Y.), § 225. For same section in statutes of other States see Appendix.

64. See N. Y. Rev. Stat., pt. 2, chap. 4, tit. 2, § 11, which was repealed by the Negotiable Instruments Law. A similar provision is included in the statutes of several of the other States. See Kansas Gen. Stat. 1899, § 551; Rev. Stat. of Missouri, 1899, § 448; Code of Alabama, § 884.

65. Wisconsin Stat., § 1680*k*.

66. Matteson v. Moulton, 79 N. Y. 627, affg. 11 Hun (N. Y.), 268. In the court below it was held that the statute applies to acts of the drawee which are of the tortious character, and imply an unauthorized conversion of the bill by him only, and does not apply to cases where the bill is left willingly in the hands of the drawee by the holder, and no demand made therefor. In the case of Sands v. Matthews, 27 Ala. 399, it was held that where the drawee of the bill of exchange by permission of the payee's agent retains the bill for examination from Saturday until the following Monday, no legal obligation is thereby created against him as acceptor until that time.

67. Edwards on Bills and Notes, p. 418.

mind, and a right, if he had written an acceptance upon it, to erase it and dishonor the bill. It is, no doubt, equitable enough to hold the tortious act of destroying or appropriating the bill equivalent to an acceptance; but the one is not a contract, while the other is that and nothing else." Where a bill is kept by the drawee a considerable length of time after it is presented to him for acceptance, without returning any answer, it will, independent of the statute, be deemed an acceptance, especially if the drawee is informed when the bill is sent to him that his so keeping it without returning an answer will be deemed an acceptance.[68]

§ 151. Acceptance of incomplete bill.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "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 nonpayment. But when a bill payable after sight is "dishonored by nonacceptance 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."[69] This provision is the same in substance as a provision of the English Bills of Exchange Act.[70]

b. *Acceptance before completion of bill.*— The general rule is that a bill of exchange may be accepted prior to its completion. We have already considered cases where a promise to accept a nonexisting bill is equivalent to an acceptance.[71] If a person writes an acceptance upon a bill which is not yet perfected he will be responsible to a *bona fide* holder of the bill for value who takes it in its perfected form.[72] The principles which apply in the

68. Harvey v. Martin, 1 Campb. (Eng.) 425; Story on Bills, § 246. In the case of Mason v. Barff, 2 B. & Ald. (Eng.) 26, it was held that the mere detention of the bill that has been sent to the drawee by mail, for acceptance, with the view of waiting for funds or securities to be forwarded by the drawer, is not an implied acceptance; for here the retention of the bill is considered with the rights of both parties, unless the holder chooses to ask for the immediate return of the bill. See Bell v. Pletscher, 32 Misc. 746, 65 N. Y. Supp. 669.

69. Neg. Inst. L. (N. Y.), § 226. For same section in statutes of other States see Appendix.

70. English Bills of Exchange Act, § 18.

71. See § 148, *ante*.

72. **Acceptances on blank bills of exchange.**— In the case of Bank of Pittsburg v. Neal, 22 How. (U. S.) 107, bills of exchange were accepted on their face by the defendant; such bills were made payable to the order of the payee, who was named therein, but the names of the drawers, the address of the drawees, and the date, amount, and the time and place of payment were in blank. The payee filled up the blanks and had the bills discounted. Such bills were discounted by the bank without knowledge that they were filled up by the

case of a person who indorses or signs as maker a promissory note are applicable to an acceptance written upon the face of blank bills of exchange. The acceptor of a bill of exchange is primarily liable upon the instrument to the same extent as the maker of a promissory note. It is for this reason that the acceptor of a bill of exchange in blank is liable under the same conditions and to the same extent as the maker of a note.[73]

c. *Acceptance after maturity or dishonor.*—An acceptance after the maturity of the bill is as effectual to bind the acceptor as though it were made prior to such maturity.[74] There is a close analogy between an indorsement of a bill or note, and an acceptance of the bill, after maturity. In both cases the liability of the parties is the same as though the indorsement or acceptance were made before the maturity of the instrument, except that if the acceptance or indorsement is after maturity the time of payment is declared by law to be within a reasonable time, upon demand, while if the acceptance or indorsement is prior to maturity the time of payment is fixed at a future time by the express agreement of the parties.[75] The fact that a bill has been dishonored by nonacceptance or nonpayment does not prevent its subsequent acceptance by the drawee.[76] It is well settled that an acceptance, otherwise sufficient, is not the less so by reason of a previous refusal to accept and a protest for nonpayment.[77]

§ 152. Kinds of acceptance; general acceptance.

a. *Kinds of acceptance; statutory provision.*— The Negotiable Instruments Law provides that: "An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in

payee without authority. The court held that the bills were perfected, filled up, and negotiated by the correspondent of the defendants, to whom the blank acceptances had been indorsed as bills of exchange; and for the acts of their correspondent in that behalf, the defendants were responsible to a *bona fide* holder for value, without notice that the acts were performed without authority. Among other cases to the same effect are:

Van Duzer v. Howe, 21 N. Y. 531; Limestone Bank v. Pennick, 5 T. B. Mon. (Ky.) 25; Moiese v. Knapp, 30 Ga. 942.

73. See § 82 (*b*), *ante*.

74. Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322; Berry v. Robinson, 9 Johns. (N. Y.) 121, 6 Am. Dec. 267; Spaulding v. Andrews, 48 Pa. St. 411.

75. Leavitt v. Putnam, 3 N. Y. 494, 53 Am. Dec. 322. In the case of Grant v. Shaw, 16 Mass. 344, it was held that the promise to accept, made after the bill becomes due according to its tenor, amounts to a promise to pay immediately.

76. Stockwell v. Bramble, 3 Ind. 428; Williams v. Winans, 14 N. J. L. 339.

77. Exchange Bank v. Rice, 98 Mass. 288; Grant v. Shaw, 16 Mass. 344.

"express terms varies the effect of the bill as drawn."[78] The English Bills of Exchange Act contains a similar provision.[79]

b. *Acceptance to pay at a particular place; statutory provision.* — The Negotiable Instruments Law provides that: "An accept-"ance 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."[80] A similar provision is also contained in the English Bills of Exchange Act.[81] The acceptance is, whenever possible, to be construed as general, and not qualified; and a mere memorandum, such as a written date, inconsistent with such construction, has been rejected as being no part of the acceptance.[82] This provision of the statute is in accord with the authorities.[83]

§ 153. Qualifed acceptance.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "An acceptance is qualified, which is:

"1. Conditional, that is to say, which makes payment by the "acceptor dependent on the fulfilment 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 part 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."[84] This section is derived from a similar section of the English Bills of Exchange Act.[85] Judge Story defines a

78. Neg. Inst. L. (N. Y.), § 227.

79. English Bills of Exchange Act, § 19.

80. Neg. Inst. L. (N. Y.), § 228.

81. English Bills of Exchange Act, § 19 (2*c*.).

82. Fanshaw v. Peet, 26 L. J. Exch. (Eng.) 314; Fitch v. Jones, 5 El. & Bl. (Eng.) 246.

83. **Acceptance at designated place.** — In the case of Cox v. National Bank, 100 U. S. 714, 25 L. Ed. 739, the court said: "Text-writers of undoubted authority state that an acceptance is an engagement to pay the bill according to the tenor of the acceptance, and that a general acceptance is an engagement to pay according to the tenor of the bill. (Bayley on Bills [5th ed.), 154; Chitty on Bills, 342.) Cases arise where the drawer of a bill of exchange designates in the instrument the place of payment, and the decisions are that in such a case both the drawer and the indorser will be discharged unless the bill be there presented for payment at maturity; but some decisions hold otherwise as to the maker of a note and the acceptor of the bill, the rule being that, unless the restrictive words, 'only and not elsewhere,' are added, no presentment there at maturity or afterward is necessary to charge such a party." See also Wallace v. McConnell, 13 Pet. (U. S.) 136, 10 L. Ed. 98.

84. Neg. Inst. L. (N. Y.), § 229. For same section in statutes of other States see Appendix.

85. English Bills of Exchange Act, § 19 (2).

conditional acceptance as follows: "An acceptance is conditional or qualified when it contains any qualification, limitation, or condition different from what is expressed on the face of the bill, or from what the law implies upon a general acceptance." [86]

b. *Conditional acceptance.*— The condition may be either expressed in the acceptance itself or implied from circumstances.[87] If a party proposes to make a conditional acceptance only, and commits that acceptance to writing, he must be careful to express fully the condition therein. He is not permitted to use general terms and then exempt himself from liability by relying upon particular facts which may have some connection with the condition expressed for the reason that the particular fact is of itself susceptible of being made a distinct condition.[88] When the condition of the acceptance is that payment shall be made when the acceptor is in funds, it is binding upon the parties, and the holder cannot resort to the drawer until the acceptor has refused to pay after he has funds in his hands.[89] Where a draft is accepted payable "when I receive funds to the use of the drawer," the acceptor is liable when the moneys have been placed to his credit though he has not taken manual possession thereof.[90] Where a

86. Story on Bills, § 239.

87. **Expression of condition.**— Story on Bills, § 239; Sproat v. Mathews, 1 T. R. (Eng.) 182. Justice Bayley, in his work on Bills, chap. 6, § 1, has said: "If a man purpose making a conditional acceptance only, and commit that acceptance to writing, he should be careful to express the conditions therein; for it may at least be doubted, whether parol evidence of such conditions would be admissible; if it were, the onus of proving them would be upon the acceptor, and the proof would be of no avail, if the holder or any person under whom he claims, took the bill without notice of such conditions, and gave a valuable consideration for it. A conditional acceptance becomes absolute as soon as its conditions are performed. Thus an answer by the drawee, that he could not accept until a navy bill should be paid, was thought to operate as an absolute acceptance upon the payment of the navy bill. So an answer that the bill would not be accepted, until certain goods against which it was drawn arrived, was held virtually an acceptance, when they did arrive, and were received.

88. Coffman v. Campbell, 87 Ill. 96. In this case a telegram agreeing to accept a person's draft for a certain sum, "for stock," was held not to be a conditional contract, but an absolute undertaking to accept and pay the same; and a party discounting the draft on the faith of such a telegram is entitled to recover the amount of the party so agreeing to accept. See also United States v. Bank of Metropolis, 15 Pet. (U. S.) 377, 396, 10 L. Ed. 781.

89. Andrews v. Baggs, Minor (Ala.). 173; Campbell v. Pettengill, 7 Me. 126, 20 Am. Dec. 349.

90. Wallace v. Douglas, 16 N. C. 659, 21 S. E. 387. See also Smith v. Bates Mach. Co., 182 Ill. 166, 55 N. E. 69; Bird v. McElvaine, 10 Ind. 40; Kane v. Robertson, 26 La. Ann. 335; Wintermute v. Post, 24 N. J. L. 420; Gillespie v. Mather, 10 Pa. St. 28; Chattanooga Grocery Co. v. Livingston (Tenn. Ch.), 59 S. W. 470. In the case of Perry v. Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98, an acceptance of

bill is accepted conditioned upon the acceptor having funds of the drawer in his hands, the holder of the bill must show affirmatively that funds of the drawer were in the hands of the acceptor.[91]

If the acceptance is conditional the acceptor will not be liable thereon until the fulfilment of the condition.[92] When a draft is accepted subject to a certain condition the acceptor cannot either by his own act, or by an act in collusion with the drawer, defeat the condition, and defend the action upon the ground of a non-fulfilment of the condition.[93] Orders or drafts are frequently accepted conditioned upon the completion of a building or other construction being erected under a contract. In such cases the acceptor becomes absolutely liable upon the completion of the work or a compliance with the condition of the acceptance based upon such completion.[94]

c. *Qualified as to time.*—Where an acceptor includes in his acceptance a provision that the bill shall be payable at some time other than that specified in the bill it is a qualified acceptance.[95] Where an acceptance is made in accordance with the terms of a contract referred to in the acceptance, it will be deemed payable according to the terms of the contract, and if the time of payment is different from that specified in the bill, the acceptance will be qualified.[96] Where no time of payment is specified in the bill,

an order to pay $200 out of the first money of the drawer received by the drawee on account of a newspaper establishment was held to bind the acceptor to pay from time to time, on reasonable request, as the money is received by him.

91. Marshall v. Clary, 44 Ga. 511; Atkinson v. Marks, 1 Cow. (N. Y.) 691; Mason v. Graff, 35 Pa. St. 448; Carlisle v. Hooks, 58 Tex. 420, where an order payable out of a specific fund is accepted "when there is money in my possession from such fund," the acceptor may show, in an action against him thereon, that he has never received any money from such a fund belonging to the drawer. Hunt v. Williams, 15 R. I. 595, 10 Atl. 645.

92. Cummings v. Hummer, 61 Ill. App. 393; Liggett v. Weed, 7 Kans. 273; Schackeford v. Hooker, 54 Miss. 716; Ford v. Angelrodt, 37 Mo. 50, 88 Am. Dec. 174; Pearson v. Gooch, 69 N. H. 571, 45 Atl. 406.

93. Herter v. Goss & Edsall Co., 57 N. J. L. 42, 30 Atl. 252; Risley v. Smith, 64 N. Y. 576.

94. Hughes v. Fisher, 10 Colo. 383, 15 Pac. 702; Baker v. Dobbins, 87 Ga. 545, 13 S. E. 524; Lord v. Advent Chris. Soc., 156 Mass. 387, 36 N. E. 817; Robbins v. Blodgett, 124 Mass. 279; Jenk v. Wells, 90 Mich. 515, 51 N. W. 636; Beardsley v. Cook, 143 N. Y. 143, 38 N. E. 109; s. c., 154 N. Y. 707, 49 N. E. 126; Merserea v. Villari, 74 Hun (N. Y.), 59, 26 N. Y. Supp. 135; Quinn v. Aldrich, 70 Hun (N. Y.), 205, 24 N. Y. Supp. 33; Duffield v. Johnson, 96 N. Y. 369; Hazelton County v. Union Imp. Co., 143 Pa. St. 537, 22 Atl. 906.

95. Van Strum v. Liljengren, 37 Minn. 191, 33 N. W. 555, in which case the words "Payable the fifteenth day of May, 1883," written and signed by the drawee upon a bill of exchange drawn upon him, were held to constitute a qualified acceptance. See also Wiley v. Brice, 70 N. C. 422; Green v. Raymond, 9 Neb. 295.

96. Kellogg v. Lawrence, Lalor's Supp. (N. Y.) 332, in which case the court says: "A consideration for the acceptance of a bill of exchange is,

an acceptance to pay at a future date constitutes a qualified acceptance.[97]

d. *Rights of parties as to qualified acceptance.*— The Negotiable Instruments Law provides that: "The holder may refuse to "take a qualified acceptance, and if he does not obtain an unquali-"fied acceptance, he may treat the bill as dishonored by non-"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 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."[98] The English Bills of Exchange Act contains a similar provision.[99] Under the mercantile law as it exists in France and Germany, the holder cannot refuse a partial acceptance and he can only protest as to the balance remaining unpaid.[1] The English act limits the application of this section by providing that it does not apply to a partial acceptance, whereof due notice has been given. The omission of this provision from the Negotiable Instruments Law makes it necessary, in the case of a partial acceptance, in order to bind the drawer and indorsers, to secure their authority or assent. This evidently changes the rule as declared by some authorities.[2]

ordinarily, to be implied and need not be alleged or proved, but an acceptance may be made in such terms as to show what the consideration was, if any existed, or that the undertaking was wholly gratuitous. This acceptance was qualified conditionally. It was not an engagement to pay at the time specified in the bill, nor absolutely to pay at any time; but it was an acceptance according to the provisions of a particular contract. We must, therefore, resort to that contract to ascertain what the defendant's engagement was; to learn the time of payment, if one is therein specified and fixed, or the contingency which was to fix the time and the extent of the acceptor's liability."

97. Hasey v. White Pigeon Beet Sugar Co., 1 Doug. (Mich.) 193.

98. Neg. Inst. L. (N. Y.), § 230. For same section in statutes of other States, see Appendix.

99. English Bills of Exchange Act, § 44.

1. French Code, arts. 119, 120; German Exchange Law, arts. 25-28.

2. Mr. Daniel says: "If a bill is accepted as to part of the amount drawn for, it is a good acceptance as to the part payable in money. The holder may effect a partial acceptance, but he will discharge the drawer and indorsees unless he protests as to the residue." Daniel on Negotiable Instruments, § 516. See also Parsons on Notes and Bills, 312.

CHAPTER XV.

Protest of Bills of Exchange.

§ 154. Protest of foreign bill necessary.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Where a foreign bill appearing on its face to be "such is dishonored by nonacceptance, it must be duly protested "for nonacceptance, and where such a bill has not previously "been dishonored by nonacceptance is dishonored by nonpay-"ment, it must be duly protested for nonpayment. If it is not "so protested, the drawer and indorsers are discharged. Where "a bill does not appear on its face to be a foreign bill, protest "thereof in case of dishonor is unnecessary." [3] This provision is also contained in substantially the same form in the English

3. Neg. Inst. L. (N. Y.), § 260. For same section in statutes of other States see Appendix.

Bills of Exchange Act.[4] The provisions of this chapter have reference more particularly to the protest of foreign bills of exchange because of the fact that an inland bill does not require a formal protest. A protest means, properly speaking, a solemn declaration by the holder against any loss to be sustained by nonacceptance or nonpayment;[5] but in the popular sense it includes all the steps, after the dishonor of negotiable paper, necessary to charge a party to pay.[6] In its latter sense we have already considered the protest of negotiable paper in the chapter on Notice of Dishonor.[7] It may be well to observe here, however, that a protest of all negotiable paper by a notary public is authorized as a very proper mode of giving notice of dishonor. Its advantages are apparent in view of statutes which exist in New York and other States making the certificate of a notary *prima facie* evidence.[8]

b. *Why protest is required.*— The formal protest of a foreign bill is required because by the law of most foreign nations a protest is essential in case of the dishonor of any bill and for the sake of uniformity in international transactions. All foreign bills should be protested.[9] Besides, a protest affords satisfactory evidence of dishonor to the drawer, who, from his residence abroad, might experience a difficulty in making proper inquiries on the subject and be compelled to rely on the representation of the holder. It also furnishes the indorser with the best evidence to charge and anticipate the party abroad, for foreign courts give credit to the acts of a public functionary, in the same manner as a protest under the seal of a foreign notary is evidence, in our courts, of the dishonor of a bill payable abroad.[10] We have

4. English Bills of Exchange Act, § 51 (2).

5. Chitty on Bills, pp. 362, 363; 3 Kent's Comm. 93, 94.

6. Coddington v. Davis, 1 N. Y. 186; Townsend v. Lorain Bank, 2 Ohio St. 345.

7. See chap. IX, *ante*.

8. N. Y. Code Civ. Proc., §§ 923–926.

9. Borough v. Perkins, 2 Ld. Raym. (Eng.) 993; Trimby v. Vignier, 1 Bing. N. C. (Eng.) 151.

10. Byles on Bills (16th ed.), p. 218. Judge Story says in his work on Bills of Exchange, § 277: "The reason why the instrument is required to be made by a notary public is, that this officer is one of great public distinction and consequence in the civil law countries, before whom and in whose books, instruments of the most solemn nature are usually entered; and certified copies of those instruments are generally deemed of such high authority as to be ordinarily admissible in courts of justice in those countries."

A notarial certificate of protest is competent without further proof. This has even been so held in respect to foreign bills. See Pierce v. Inaseth, 106 U. S. 546; Brown v. Philadelphia Bank, 6 Serg. & R. (Pa.) 484. For this purpose, the different States of the Union are deemed foreign already considered the question as to whether a bill drawn in one State upon a person residing in another is a foreign bill, and have seen that in most jurisdictions such a bill is deemed a foreign bill.[11] It would seem to follow, therefore, that such a bill must be formally protested for nonacceptance or nonpayment as provided in this chapter.[12]

§ 155. Protest, how made.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "The protest must be annexed to the bill, or must "contain a copy thereof, and must be under the hand and seal of "the notary making it, and must specify:

"1. The time and place of presentment;

"2. The fact that presentment was made and the manner "thereof;

"3. The cause or reason for protesting the bill;

"4. The demand made and the answer given, if any, or the "fact that the drawee or acceptor could not be found."[13] This provision is similar in some respects to the rule contained in the English Bills of Exchange Act.[14]

b. *Requirements generally.*— The general rule is that a protest must contain a copy of the instrument. This requirement will be complied with by annexing to the protest a copy of the bill. Where a copy of the bill is included in the protest slight mistakes or variance of letters, or even words, when the substance is retained will not vitiate the protest.[15] The signature of the notary to the protest need not be written; it is sufficient if it be printed.[16] It has been held that the notarial seal is not essential to give validity to a protest.[17] There is, however, some doubt about the

to each other, so that a notarial certificate of protest under seal is good on mere production.

With the aid of the statute, if not without, courts may take judicial notice of the seal of the notary public, and as a next step may take notice of his signature also. Johnson v. Brown, 154 Mass. 105, 27 N. E. 994.

11. See § 6 (*a*), *ante*.

12. Phœnix Bank v. Hussey, 12 Pick. (Mass.) 483.

13. Neg. Inst. L. (N. Y.), § 261. For the same section in statutes of other States see Appendix.

14. English Bills of Exchange Act, § 51 (7), which provides that, "A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify (*a*) the person at whose request the bill is protested; (*b*) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor cannot be found."

15. Denniston v. Stewart, 17 How. (U. S.) 606; Moorman v. State Bank, 3 Port. (Ala.) 353; Decatur Bank v. Hodges, 9 Ala. 631.

16. Bank of Cooperstown v. Woods, 28 N. Y. 561.

17. Bank of Kentucky v. Pursley, 3 T. B. Mon. (Ky.) 238; Lambeth v. Caldwell, 1 Rob. (La.) 61.

correctness of this rule,[18] which the statute seems to have removed by requiring a protest to be under the hand and seal of the notary making it. In any event, under the statutes of most of the States a certificate of protest which is not authenticated by the hand and seal of the notary is not admissible in evidence.[19] The protest must state the time when the presentment was made,[20] but the hour of presentment need not be stated.[21] The protest should also state specifically the place where the presentment was made.[22] It is not sufficient to state that the presentment was made to the cashier of a bank, where it is necessary that the presentment be made at a bank.[23] The protest of a bill made payable at a bank, and of which the bank itself is the holder, need not give the name of the person or officer of the bank to whom the bill was presented, and by whom the answer was made.[24] Where a party has no place of business or residence, or has removed, the protest must set forth the nature of the inquiries made to ascertain his whereabouts, in order to show due and reasonable diligence in making presentment.[25]

c. *Certificate of protest as evidence.*— Since the protest of an inland bill of exchange or promissory note is not necessary, a certificate of such a protest is not evidence of a demand and notice of dishonor.[26] By statute in nearly all the States the certificate

18. Donnigan v. Wood, 49 Ala. 242, 20 Am. Rep. 275; Kirksey v. Bates, 7 Port. (Ala.) 529; Rochester Bank v. Gray, 2 Hill (N. Y.), 227.

19. Rindskoff v. Malone, 9 Iowa, 540, 74 Am. Dec. 367; Jordan v. Long, 109 Ala. 414, 19 South. 843; Stewart v. Russell, 38 Ala. 619. If a certificate of protest is properly authenticated by the seal of the notary, no proof of his signature or of his authority to act is necessary. Sims v. Hundley, 6 How. (U. S.) 1, 12 L. Ed. 319; Crowley v. Barry, 4 Gill (Md.), 194; Ross v. Bedell, 5 Duer (N. Y.), 462.

20. Palmer v. Lee, 7 Rob. (La.) 537; Burk v. Shrieve, 39 N. J. L. 214; Gardner v. Bank of Tennessee, 1 Swan (Tenn.), 419.

21. Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635.

22. Stix v. Matthews, 75 Mo. 96; Seneca County Bank v. Neass, 5 Den. (N. Y.) 329; Gardner v. Bank of Tennessee, 1 Swan (Tenn.), 419.

23. Seneca County Bank v. Neass, 5 Den. (N. Y.) 329.

24. Hindeburn v. Turner, 5 How. (U. S.) 69, 12 L. Ed. 54.

25. Baumgardner v. Reeves, 35 Pa. St. 250. A certificate of the notary on the draft stated that he presented the draft at the place of business of the drawee to the person in charge. It appeared that the drawee had two places of business in the same city. It was held that the certificate failed to show that the draft was presented at the place where it was made payable. Brooks v. Higby, 11 Hun (N. Y.), 235.

26. **Protest of inland bill not evidence of demand and notice.**— In the case of Union Bank v. Hyde, 6 Wheat. (U. S.) 572, 5 L. Ed. 333, the court said: "The protest belongs altogether to foreign mercantile transactions, upon which it is an indispensable incident to making a drawer of the bill or indorser of the note liable. On foreign bills it is the evi-

of a notary public duly attested by him is presumptive evidence of the facts stated therein, and such statutes apply to inland as well as foreign bills, although it has been held that they only apply to certificates of notaries made within the State.[27] As to all foreign bills a notary's certificate as to demand of payment and notice of dishonor is *prima facie* evidence of the facts therein stated.[28] While the certificate is *prima facie* evidence of the facts therein stated it is not so conclusive as to exclude evidence

dence of demand, and an indispensable step toward the legal notice of nonpayment, in consequence of which the undertaking of the drawer or indorser becomes absolute, hence as to foreign transactions it is justly predicated of the protest that it has a legal or binding effect, but the writing under consideration has reference exclusively to inland bills and as to them the protest has no legal or binding effect. The indorser became liable only on demand and notice, and of these facts the protest is no evidence."

In another place the court says: "By some assumed analogy, or mistaken notions of law, this practice of protesting inland bills has now become very generally prevalent; and since the inundation of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon notes, a solemnity, cogency, and legal effect have been given to such protests in public opinion, which certainly has no foundation in the law merchant. The nullity of the protest on the legal obligations of the parties to an inland bill is tested by the consideration, that independently of statutory provision (if any exists anywhere), or conventional understanding, the protest of an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of the indorsers into an absolute assumption. See also the following cases: McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651; Bond v. Bragg, 17 Ill. 69; Bank of United States v. Leathers, 10 B. Mon. (Ky.) 64; Follam v. Dupre, 11 Rob. (La.) 454; Williams v. Smith, 21 Mo. 419; Miller v. Harkley, 5 Johns. (N. Y.) 375, 4 Am. Dec. 372.

27. Kirtland v. Wanzer, 2 Duer (N. Y.), 278; Daniel v. Downing, 26 Ohio St. 578.

28. Notary's certificate of protest of foreign bill is evidence of facts stated therein, see:

United States.— Sims v. Hundley, 6 How. 1, 12 L. Ed. 319; Townsley v. Sumrall, 2 Pet. 179.

Alabama.—Martin v. Brown, 75 Ala. 442; Bradley v. Northern Bank, 60 Ala. 252.

California.— McFarlane v. Pico, 8 Cal. 626.

Georgia.— Fuld v. Thornton, 1 Ga. 306.

Indiana.— Turner v. Rogers, 8 Ind. 139; Fisher v. State Bank, 7 Blackf. 610.

Kentucky.— Tyler v. Bank of Kentucky, 7 T. B. Mon. 555; Bank of Kentucky v. Pursley, 3 T. B. Mon. 238.

Maine.— Patee v. McCrillis, 53 Me. 410; Loud v. Merrill, 45 Me. 516.

Maryland.— Citizens' Bank v. Howell, 8 Md. 530, 63 Am. Dec. 714; Ricketts v. Pendleton, 14 Md. 320.

Minnesota.— Bettis v. Schreiber, 31 Minn. 329, 17 N. W. 863.

Missouri.—Moore v. Missouri Bank, 6 Mo. 379; Guffet v. Dowdall, 17 Mo. App. 280.

New Hampshire.— Simpson v. White, 40 N. H. 540; Rushworth v. Moore, 36 N. H. 188.

New York.— McAndrew v. Radway, 34 N. Y. 511; Dunn v. Devlin, 2 Daly, 122; Bank of Commonwealth v. Mudgett, 44 N. Y. 514.

North Carolina.— Gordon v. Price, 32 N. C. 385.

Ohio.— Daniel v. Downing, 26 Ohio St. 578.

Pennsylvania.— Sherer v. Easton Bank, 33 Pa. St. 134; Baumgardner v. Reeves, 35 Pa. St. 250.

either explanatory or contradictory.[29] Since the certificate is only presumptive evidence of the facts therein stated, evidence that the party never received the notice is competent to show that it was not so mailed and directed.[30] If it appears from the face of the certificate that the notary himself has not personally performed the acts to which he has certified, it is not evidence of their performance.[31] As public officers, notaries are entitled to the presumption of law that they have performed their duty, unless the contrary appears; and the certificate must be read in harmony with the performance of such official duty unless the contrary construction is clearly indicated.[32]

The certificate is presumptive evidence of notice only when it recites facts showing that such notice has been given.[33] A statement in the certificate that the bill was presented by the notary and payment demanded, imports a demand according to the tenor of the bill,[34] and where the certificate states that notice of protest to an indorser was directed to a certain place which was his reputed place of residence, it is presumptive evidence that the place so specified was the reputed place of residence of the in-

Tennessee.— Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, 12 L. R. A. 727; Sulzbacher v. Bank, 86 Tenn. 201, 6 S. W. 129; Spence v. Crockett, 64 Tenn. 576.

29. Orono Bank v. Wood, 49 Me. 26; Adams v. Wright, 14 Wis. 408; Sexton v. Perrigo (Mich.), 85 N. W. 1096.

Certificate only presumptive evidence.— In the case of Spence v. Crockett, 5 Baxt. (Tenn.) 576, it was held that the statements made by a notary raise a presumption; they are *prima facie* true but they are open to rebuttal; being but *prima facie* evidence it may be overturned by any legal testimony that will satisfy the tribunal having cognizance of the question in dispute, that the recitals on the instrument of protest are in fact untrue. In the case of Meise v. Newman, 76 Hun (N. Y.), 341, 27 N. Y. Supp. 708, it was held that a certificate of protest is only presumptive evidence and the court said: "Although the certificate of the notary was offered in evidence in regard to this note, that it was duly presented for payment, which was duly demanded and refused, yet upon an examination of the notary, it appeared that such presentment had not been made by him and that he had no personal knowledge of its having been presented. He was told that it had been presented, and then protested the note and mailed notices. This was clearly insufficient. It showed that he had no knowledge of the verity of his certificate, and the presumption of its accuracy was rebutted."

30. Townsend v. Auld, 10 Misc. (N. Y.) 344, 31 N. Y. Supp. 29.

31. Onondaga County Bank v. Bates, 3 Hill (N. Y.), 53.

32. McAndrews v. Radway, 34 N. Y. 511.

33. Bradshaw v. Hedge, 10 Iowa, 402; Ticonic Bank v. Stackpole, 41 Me. 321, 66 Am. Dec. 246. In the case of Legg v. Vinal, 165 Mass. 555, 43 N. E. 518, it was held that a statement in the protest of a promissory note, the note remaining unpaid, that the notary "duly and officially" notified the person who signed the note on the back thereof before delivery of its dishonor, by written notice sent by mail to a certain town requiring payment, is sufficient, without also stating that such town was his correct residence or address.

34. Dakin v. Graves, 48 N. H. 45.

dorser.[35] And where the certificate states that a bill was duly presented for payment it is presumptive evidence of presentment during the proper hours of business.[36]

§ 156. By whom protest to be made.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "Protest may be made by:

"1. A notary public; or

"2. By any respectable resident of the place where the bill is "dishonored, in the presence of two or more credible witnesses."[37] This provision follows the English Bills of Exchange Act which expressly permits, when the services of a notary cannot be obtained at the place where the bill is dishonored, any householder or substantial resident of the place in the presence of two witnesses, to give a certificate, signed by them, attesting the dishonor of the bill.[38]

b. *In general.*— Independent of the statute the protest should in all cases be made by a notary public, but if no notary can be conveniently found, it has been held that the protest might be made by a private person in the presence of two witnesses.[39] It has been held that a notary public who was an officer and stockholder in a bank could not legally protest a bill held by it, for the reason that being an interested party he was incompetent as a witness.[40] But the cases upholding this doctrine are no longer applicable because of statutes providing that no person shall be excluded from being a witness by reason of interest in the cause

35. Bell v. Lent, 24 Wend. (N. Y.) 230. And where a notary states that presentment and demand were made "at the office of A. & B., the acceptors," this language imports that the office was their place of business. Burbank v. Beech, 15 Barb. (N. Y.) 326.

36. Skelton v. Dustin, 92 Ill. 49; Wiseman v. Chiappella, 23 How. (U. S.) 368, 16 L. Ed. 466.

37. Neg. Inst. L. (N. Y.), § 262. For same section in statutes of other States see Appendix.

38. English Bills of Exchange Act, § 94.

39. **Protest by person not a notary.** — Read v. Bank of Kentucky, 1 T. B. Mon. (Ky.) 91, in which the court said: "But, although a protest is essential to a recovery on such a bill (a foreign bill) and a notary is the proper officer to certify it, yet it does not follow that if there is no notary all recourse on the bill must be lost. It is more agreeable to the analogy of our law, that inferior evidence in such case should be allowed. This inferior evidence the law has been careful to select and not to trust to every kind. Hence some substantial person must protest the bill, in the presence of two credible witnesses, who can prove the fact, the person protesting being allowed to draw up and certify the fact in usual form. This mode seems to have been substantially pursued." See also Daniel on Negotiable Instruments, § 934a.

40. Herkimer County Bank v. Cox, 21 Wend. (N. Y.) 119, 34 Am. Dec. 220; Bank v. Porter, 2 Watts (Pa.), 141.

of action.[41] The cashier of a bank, although himself the maker of a note held by the bank, may act for it in protesting the note, and if notice of protest is duly sent by him as a notary to the indorser the latter will be properly charged thereby.[42] The notary can only act in protesting a bill, in the county for which he is appointed.[43] It may be stated as a general rule that the protest should be made by the notary himself, and that he cannot delegate his official character or his functions to another; it cannot be made by his clerk or deputy or by any other person acting as his agent.[44] But where the statutes of a State authorize notaries to appoint deputies, a protest made by such deputies would be recognized as sufficient.[45] If the custom and usage of a place permits a protest to be made by a clerk of the notary, it is probable that such protest would be valid.[46]

§ 157. When protest to be made.

The Negotiable Instruments Law provides that: "When a "bill is protested, such protest must be made on the day of its "dishonor, unless delay is excused as herein provided. When a "bill has been duly noted, the protest may be subsequently ex-"tended as of the date of the noting." [47] This section follows somewhat the provisions of the English Bills of Exchange Act.[48]

41. Notary not precluded because an interested party.— N. Y. Code Civ. Proc., § 828. And see Moreland v. Citizens' Sav. Bank, 97 Ky. 211, 38 S. W. 637. In the case of Nelson v. First Nat. Bank, 69 Fed. 798, 16 C. C. A. 425, the court said: "It is argued that the certificate of protest and the notice were incompetent because the notary was the cashier of the bank that held the note. It is true that, when the rule prevailed which disqualified any party interested in the action from testifying in the cause, some of the courts held that a party in interest could not protest commercial paper, on the ground that, inasmuch as he could not testify to the presentment, demand, and notice, he was disqualified from making evidence of these facts by his certificate. But in the Circuit Courts of the United States, interest in the litigation no longer disqualifies a witness; and this rule falls with its reasoning. A notary public who is the cashier of a bank may now legally protest the bank's paper."

42. Dykman v. Northridge, 1 App. Div. (N. Y.) 26, 36 N. Y. Supp. 962, affd. in 153 N. Y. 662.

43. Neely v. Norris, 2 Head (Tenn.), 595, 75 Am. Dec. 753.

44. Commercial Bank v. Barksdale, 36 Mo. 563; Onondaga County Bank v. Bates, 3 Hill (N. Y.), 53; Commercial Bank v. Varnum, 49 N. Y. 269; Sacrider v. Brown, Fed. Cas. No. 12,205, 3 McLean (U. S.), 481.

45. Lee v. Buford, 4 Metc. (Ky.) 7; Bank of Kentucky v. Garey, 6 B. Mon. (Ky.) 626; Carter v. Union Bank, 7 Humph. (Tenn.) 548.

46. Commercial Bank v. Varnum, 49 N. Y. 269.

47. Neg. Inst. L. (N. Y.), § 263. For same section in statutes of other States see Appendix.

48. English Bills of Exchange Act, § 51 (4), which provides that, "Subject to the provisions of this act, when a bill is noted or protested, it must be noted on the day of its dishonor.

This provision is declaratory of the law. The cases are to the effect that if a bill has been duly presented for acceptance or payment and dishonored, and a minute made at the time of the steps taken, which is called noting the bill, a protest may be drawn up in form afterward, at the convenience of the notary.[49] And it has been held sufficient if the protest was drawn up at any time before the trial.[50]

§ 158. Where protest to be made.

The Negotiable Instruments Law provides that: "A bill must "be protested at the place where it is dishonored, except that "when a bill drawn payable at the place of business or residence "of some person other than the drawee has been dishonored by "nonacceptance, it must be protested for nonpayment at the "place where it is expressed to be payable, and no further pre-"sentment for payment to, or demand on, the drawee is neces-"sary."[51] This section is substantially the same as a provision contained in the English Bills of Exchange Act.[52] It is probable that this section is declaratory of the common law.[53]

When a bill has been duly noted, the protest may be subsequently extended as to the date of the noting." By the French Code, art. 162, a bill is to be protested for nonpayment on the day after it is due. By the German Exchange Law, art. 41, a dishonored bill may be protested for nonpayment on the day it is due, and it must not be protested later than the second day after.

49. Bailey v. Dozier, 6 How. (U. S.) 23, 12 L. Ed. 328; Billingsley v. State Bank, 3 Ind. 375; Chatham Bank v. Allison, 15 Iowa, 357; First Nat. Bank v. Crittenden, 2 Thomp. & C. (N. Y.) 118; Union Bank v. Holcomb, 5 Humph. (Tenn.) 538; Rutland & B. R. R. Co. v. Cole, 24 Vt. 33.

50. Geralopulo v. Wieler, 20 L. J. C. P. (Eng.) 105; Orr v. McGinnis, 7 East (Eng.), 361.

The English Bills of Exchange Act, § 93, in recognition of the rule laid down in these cases, provides that, "For the purposes of this act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting."

51. Neg. Inst. L. (N. Y.), § 264. For same section in statutes of other States see Appendix.

52. English Bills of Exchange Act, § 51 (6b). This subsection was derived from 2 & 3 Will. IV, chap. 98.

53. Mitchell v. Baring, 10 B. & C. (Eng.) 4. In the case of Boot v. Franklin, 3 Johns. (N. Y.) 207, where a bill was drawn on a person residing at Liverpool, payable in London, and after being protested for nonacceptance at Liverpool was protested at London for nonpayment, and the declaration stated, "That the bill not being paid, and the holder not knowing where to present the same for payment in London, caused the same to be protested," etc. It was held that the protest for nonpayment was sufficient, and where no place of payment in London was specified in the bill, the holder was not bound to make any inquiries after the drawee there.

§ 159. Special statutory provisions as to protest.

a. *Protest for both nonacceptance and nonpayment.*— The Negotiable Instruments Law provides that: "A bill which has "been protested for nonacceptance may be subsequently pro- "tested for nonpayment." [54] This section is the same as a provision of the English Bills of Exchange Act.[55] Where a bill is dishonored by nonacceptance an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for nonpayment is necessary.[56] This being so, a protest for nonpayment after a bill has been protested for nonacceptance would not be necessary to bind the parties, except for the fact that where some of the parties are residents of a foreign country where under the laws thereof no right of action accrues on nonacceptance but only upon nonpayment at maturity; to bind such parties it might be necessary to subsequently protest for nonpayment.[57]

b. *Protest before maturity where acceptor is insolvent.*— The Negotiable Instruments Law provides that: "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 drawers and indorsers." [58] This section is also derived from a similar provision of the English Bills of Exchange Act.[59] The object of the section is to afford protection to the holder as against the parties secondarily liable, when the acceptor becomes insolvent. Under the French Code if the acceptor becomes insolvent the bill may at once be treated as dishonored and protested for nonpayment.[60] Notwithstanding the protest for better security before the maturity of the bill, no right of action accrues against the parties secondarily liable until the bill falls due.[61] The only advantage to be gained by such a protest is from the notice to such parties that they will be expected to pay at maturity.

54. Neg. Inst. L. (N. Y.), § 265. For the same section in the statutes of other States see Appendix.

55. English Bills of Exchange Act, § 51 (3).

56. Neg. Inst. L. (N. Y.), § 248. See *ante*, § 146 (c.).

57. Chalmers on Bills of Exchange, p. 172.

58. Neg. Inst. L. (N. Y.), § 266. For the same section in the statutes of other States see Appendix.

59. English Bills of Exchange Act, § 51 (5).

60. French Code, art. 163. Under the German Exchange Law, art. 29, if the acceptor fails during the currency of the bill, security can be demanded from the drawer and indorsers.

61. Byles on Bills (16th ed.), p. 220.

c. *Protest where a bill is lost or destroyed.*— The Negotiable Instruments Law provides that: "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." [62] A similar provision is contained in the English Bills of Exchange Act.[63] The loss, destruction, or wrongful detention of a bill does not excuse a protest thereof; but in such a case it must be protested as provided in the above section.

d. *When protest dispensed with.*— The Negotiable Instruments Law provides that: "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." [64] A similar provision is contained in the English Bills of Exchange Act.[65] The effect of this section is to apply to a protest the provision of the statute relating to dispensing with notice of dishonor and to an excuse for the delay in giving such a notice. We have already considered such provisions in another place, and many of the cases there cited are equally applicable to this section.[66]

62. Neg. Inst. L. (N. Y.), § 268. For the same section in the statutes of other States see Appendix.

63. English Bills of Exchange Act, § 51 (8).

64. Neg. Inst. Law (N. Y.), § 267. For the same section in the statutes of other States see Appendix.

65. English Bills of Exchange Act, § 51 (9).

66. See Neg. Inst. L. (N. Y.), §§ 183, 184; *ante*, § 117, and cases cited thereunder.

CHAPTER XVI.

Acceptance and Payment of Bills of Exchange for Honor.

§ 160. Acceptance for honor; when and how made.

a. *When bill may be accepted for honor.*— The Negotiable Instruments Law provides that: "Where a bill of exchange has "been protested for dishonor by nonacceptance 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." [67] This provision is in substance the same as a provision of the English Bills of Exchange Act.[68] Its object is to enable any party who is liable on the bill to induce his friends to intervene for the protection of his credit and to permit a ready negotiation of the bill. The English act does not contain a provision for the acceptance for honor of the bill by another party where it is already accepted for honor by one party. The holder of a bill is not required to take an acceptance for honor. And before he takes such an acceptance he should first cause the bill to be protested and then to be accepted in the manner hereinafter described.[69] Any person who is not already liable as a party to the bill may accept it for honor; and the drawee himself, though he may refuse to accept the bill, generally may, nevertheless, accept it for the honor of the drawer or of any one indorser. It is no objection to the intervention for the honor of the indorser or drawer, that it has been done at the request and under the guaranty of the drawees of the bill, who refused to accept or pay the same. An arrangement made by the acceptor for honor, with the drawee, by which he was to be protected from loss, does not affect the liability of the party to the bill, for whose honor it has been paid.[70] Where a bill of exchange is directed to a particular person, another person cannot accept it, but for the honor of one of the parties.[71]

b. *How made.*— The Negotiable Instruments Law provides that: "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." [72] The English Bills of Exchange Act provides that such an acceptance must be written on the bill. The change in this rule made by the Negotiable Instruments Law is evidently for the purpose of permitting such an acceptance to be made by a separate instrument.[73]

67. Neg. Inst. L. (N. Y.), § 280. For the same section in the statutes of other States see Appendix.

68. English Bills of Exchange Act, § 65 (1), (2).

69. Byles on Bills (16th ed.), 275. For the same section in the statutes of other States see Appendix.

70. Konig v. Bayard, 1 Pet. (U. S.) 250, 7 L. Ed. 132.

71. May v. Kelly, 27 Ala. 497.

72. Neg. Inst. L. (N. Y.), § 281. For the same section in the statutes of other States see Appendix.

73. English Bills of Exchange Act, § 65 (3).

c. *When deemed acceptance for honor of drawer.*— The Negotiable Instruments Law provides that: "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."[74] It is important that the acceptance for honor should expressly state for whose honor the acceptance is made, otherwise the acceptance will be deemed under this section for the drawer, and the acceptor will have no right of action against any party subsequently liable.[75]

§ 161. Liability and rights of acceptor for honor.

a. *Liability of acceptor for honor.*— The Negotiable Instruments Law provides that: "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."[76] A similar provision is contained in the English Bills of Exchange Act.[77] An acceptor *supra protest* for the honor of the first indorser may require, as a condition of payment, that the holder shall indorse the bill to him.[78]

b. *Agreement of acceptor for honor.*— The Negotiable Instruments Law provides that: "The acceptor for honor by such ac"ceptance 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."[79] The English Bills of Exchange Act contains a similar provision.[80] The undertaking of the acceptor for honor is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay, if the drawee do not.[81] The result of this rule is to require, as provided in the statute, that the bill be presented to the drawee named therein at its maturity, for payment, and if payment is refused that it be protested and notice of dishonor given to him.[82] And the rule has been stated that the acceptor of

74. Neg. Inst. L. (N. Y.), § 282. For the same section in the statutes of other States see Appendix.

75. Story on Bills, § 266.

76. Neg. Inst. L. (N. Y.), § 283. For the same section in the statutes of other States see Appendix.

77. English Bills of Exchange Act, § 66 (2).

78. Freeman v. Perot, Fed. Cas. No. 5,087, 2 Wash. C. C. (U. S.) 485.

79. Neg. Inst. L. (N. Y.), § 284. For the same section in statutes of other States see Appendix.

80. English Bills of Exchange Act, § 66 (1).

81. Byles on Bills (16th ed.), 277.

82. **Presentment to drawee at maturity.**— Daniel on Negotiable Instruments, § 527. In the case of Hoare v. Cazenove, 16 East (Eng.), 391, Lord Ellenborough said: "It is an

a bill for the honor of the drawer cannot maintain an action thereon against him, without proof of its presentment to the drawee and nonacceptance or nonpayment by him, and notice thereof to the drawer.[83]

§ 162. Maturity of bill payable after sight; protest and dishonor of bill accepted for honor.

a. *Maturity of bill payable after sight.*— The Negotiable Instruments Law provides that: "Where a bill payable after sight "is accepted for honor, its maturity is calculated from the date "of the noting for nonacceptance and not from the date of the "acceptance for honor."[84]

b. *Protest of bill accepted for honor.*— The Negotiable Instruments Law provides that: "Where a dishonored bill has been "accepted for honor *supra protest* or contains a reference in case "of need, it must be protested for nonpayment before it is pre-"sented for payment to the acceptor for honor or referee in case "of need."[85] A similar provision is contained in the English Bills of Exchange Act.[86] As we have seen, the Negotiable Instruments Law authorizes the drawer or indorser to insert therein the name of a person to whom the holder may resort in case of need.[87] And by the same section it is provided that it is in the option of the holder to resort to the referee in case of need or not as he may see fit.

c. *Dishonor of bill by acceptor for honor.*— The Negotiable Instruments Law provides that: "When the bill is dishonored "by the acceptor for honor it must be protested for nonpayment

undertaking to pay if the original drawee upon a presentment to him for payment should persist in dishonoring the bill, and such a dishonor by him be notified, by protest, to the person who has accepted for honor." And also in regard to the necessity for a presentment for payment to the drawee named in the bill, he says: "Indeed, the reason of the thing as well as the strict law of the case seems to render a second resort to the drawee proper, when the unaccepted bill still remains with the holder; for funds often reach the drawee, who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again when the period of payment had arrived, and the drawer is entitled to the chance of benefit to arise from such second demand, or at any rate to the benefit of that evidence which the protest affords, that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort."

83. Baring v. Clark, 19 Pick. (Mass.) 220.

84. Neg. Inst. L. (N. Y.), § 285. For the same section in statutes of other States see Appendix.

85. Neg. Inst. L. (N. Y.), § 286. For the same section in statutes of other States see Appendix.

86. English Bills of Exchange Act, § 67 (1).

87. Neg. Inst. L. (N. Y.), § 215. See *ante*, § 137.

"by him."[88] A similar provision is also contained in the English Bills of Exchange Act.[89]

§ 163. Presentment for payment to acceptor for honor.

a. *How made.*— The Negotiable Instruments Law provides that: "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 "nonpayment 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 175."[90] The English Bills of Exchange Act contains a similar provision.[91] The provision of the English act was a re-enactment of the statute of 6 & 7 Will. IV, chap. 58, which was originally enacted to remove doubts which had arisen as to the day when the bill should be again presented to the acceptor for honor.[92] It is presumed that if the bill be not presented in due time to the acceptor for honor, that any party who would have been discharged if he had paid the bill is discharged by the holder's laches.[93]

b. *Delay in making presentment.*— The Negotiable Instruments Law provides that: "The provisions of section 141 apply "where there is delay in making presentment to the acceptor for "honor or referee in case of need."[94] The provision referred to in this section relates to a delay in making presentment for payment.[95]

88. Neg. Inst. L. (N. Y.), § 289. For the same section in statutes of other States see Appendix.

89. English Bills of Exchange Act, § 67 (4).

90. Neg. Inst. L. (N. Y.), § 287. For the same section in statutes of other States see Appendix.

91. English Bills of Exchange Act, § 67 (2).

92. Byles on Bills (1st ed.), 263.

93. Chalmers on Bills of Exchange, 229. Judge Story says in his work on Bills of Exchange, § 363: "If there has been an acceptance *supra protest*, then (as we have seen) the presentment for payment must first be made to the original acceptor; and, if he refuses payment, then the bill is to be protested, and notice given to the acceptor *supra protest*, who will thereupon be liable to pay the bill; and a presentment for payment may be made to him accordingly at his place of business, or at his dwelling-house, and so in other cases exactly in the same mode and under the same qualifications as if he were the original acceptor. Upon his refusal to pay the bill the same proceedings as to protest and notice are to be had, in order to bind the drawer and indorsers, as if he were the original acceptor."

94. Neg. Inst. L. (N. Y.), § 288. For the same section in statutes of other States see Appendix.

95. See *ante*, § 100, and cases cited thereunder.

§ 164. Payment for honor.

a. *Who may make.*— The Negotiable Instruments Law provides that: "Where a bill has been protested for nonpayment, "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."[96] This provision is the same as that contained in the English Bills of Exchange Act.[97] The payment for honor can only be made *supra protest* for the honor of the drawer or indorser.[98] If a bill has already been accepted for the honor of one of the parties, it can only be paid by the acceptor for the honor of the party for whom he accepted.[99] It is no objection to intervention and payment by a person not a party to the bill, that it has been done at the request and under the guaranty of the drawees of the bill, who had refused to accept or pay the same.[1]

b. *How made.*— The Negotiable Instruments Law provides that: "A 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."[2] This is the same as a provision contained in the English Bills of Exchange Act.[3] It is declaratory of the general rule. It has been said, "The right of a stranger to constitute himself the creditor of another, by paying his debt without his concurrence, is allowed only by the law merchant, for the benefit of trade, and cannot be recognized unless the form of proceeding sanctioned by the custom of merchants be substantially pursued."[4]

c. *Declaration before payment for honor.*— The Negotiable Instruments Law provides that: "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

96. Neg. Inst. L. (N. Y.), § 300. For the same section in statutes of other States see Appendix.

97. English Bills of Exchange Act, § 68 (1).

98. Wood v. Pugh, 7 Ohio, pt. 2, 164.

99. Chalmers on Bills of Exchange, 231.

1. Konig v. Bayard, 1 Pet. (U. S.) 250.

2. Neg. Inst. L. (N. Y.), § 301. For the same section in statutes of other States see Appendix.

3. English Bills of Exchange Act, § 68 (3).

4. *Per* Marshall, J., in Gazzam v. Armstrong Exrs., 3 Dana (Ky.), 554.

"bill for honor and for whose honor he pays."[5] The same provision is also contained in the English Bills of Exchange Act.[6]

§ 165. Rights and liabilities of parties.

a. *Preference of parties offering to pay for honor.*— The Negotiable Instruments Law provides that: "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.[7] This is the same as a provision contained in the English Bills of Exchange Act.[8]

b. *Effect of payment for honor on subsequent parties.*— The Negotiable Instruments Law provides that: "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."[9] The English Bills of Exchange Act contains the same provision.[10] If a stranger pays a bill for the honor of all the parties, he acquires a right of action against all of them, and will be considered as standing in the place of a *bona fide* holder.[11] The payment for honor provided for in the statute is the payment made for the honor of a single party. The statute is declaratory of the general rule where it provides for the succession of the payer to the rights and duties of the holder as regards the party for whose honor he has paid the bill.[12]

c. *Refusal of holder to receive payment supra protest.*— The Negotiable Instruments Law provides that: "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 dis-

5. Neg. Inst. L. (N. Y.), § 302. For the same section in statutes of other States see Appendix.

6. English Bills of Exchange Act, § 68 (4).

7. Neg. Inst. L. (N. Y.), § 303. For the same section in statutes of other States see Appendix.

8. English Bills of Exchange Act, § 68 (2). To the same effect is the French Code, art. 159, and the German Exchange Law, art. 64.

9. Neg. Inst. L. (N. Y.), § 304. For the same section in statutes of other States see Appendix.

10. English Bills of Exchange Act, § 68 (5).

11. Edwards on Bills, 440. See also Fairley v. Roch, Lutw. (Eng.) 891.

12. Mertens v. Withington, 1 Esp. (Eng.) 112; Goodall v. Polhill, 14 L. J. C. P. (Eng.) 146; *Ex parte* Swam, L. R., 6 Eq. (Eng.) 344.

"charged by such payment."[13] The same provision is contained in the English Bills of Exchange Act.[14]

d. *Payer for honor entitled to the bill and the protest.*— The Negotiable Instruments Law provides that: "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 re-"ceive both the bill itself and the protest."[15] A similar provision is contained in the English Bills of Exchange Act.[16]

13. Neg. Inst. L. (N. Y.), § 305. For the same section in statutes of other States see Appendix.

14. English Bills of Exchange Act, § 68 (7). To the same effect is the German Exchange Law, art. 62.

15. Neg. Inst. Law (N. Y.), § 306. For the same section in statutes of other States see Appendix.

16. English Bills of Exchange Act, § 68 (6). It is also provided in this section that, "If the holder do not on demand deliver them up, he shall be liable to the payer for honor in damages.

CHAPTER XVII.

Checks.

§ 166. Definition and characteristics of a check.

a. *Statutory definition.*— The Negotiable Instruments Law provides that: "A check is a bill of exchange drawn on a bank, "payable on demand." [17] This definition is the same as that contained in the English Bills of Exchange Act.[18] We have considered in another place the characteristics of a check and the features which distinguish it from a bill of exchange.[19] It is generally held that a check payable within a certain specified time after its date is an inland bill of exchange.[20] There are, however, decisions to the effect that such a check is not a bill of

17. Neg. Inst. L. (N. Y.), § 321.
18. English Bills of Exchange Act, § 73.
19. See § 16, *ante*.
20. Minturn v. Fisher, 4 Cal. 35; Henderson v. Pope, 39 Ga. 361; Georgia Nat. Bank v. Henderson, 46 Ga. 487; Culter v. Reynolds, 64 Ill. 321; Harrison v. Nicollet Nat. Bank, 41 Minn. 488, 43 N. W. 336, 16 Am. St. Rep. 718, 5 L. R. A. 746; Pope v. Bank of Albion, 57 N. Y. 126; Bowen v. Newell, 8 N. Y. 190; Morrison v. Bailey, 5 Ohio St. 13, 64 Am. Dec. 632; Champion v. Gordon, 70 Pa. St. 474, 10 Am. Rep. 681.

exchange.[21] In most cases where the question has arisen as to whether an instrument was a check or bill of exchange, it was necessary to determine whether it was entitled to days of grace. The abolishing of days of grace in so many of the States has materially affected the importance of this question.

b. *Rules governing checks.*— The Negotiable Instruments Law provides that: "Except as herein otherwise provided, the pro- "visions of this act applicable to a bill of exchange payable on "demand, apply to a check." [22] This provision is also contained in the English Bills of Exchange Act.[23] A check is a negotiable instrument and is subject to the same defenses,[24] and the rules governing the indorsement and transfer of bills of exchange and other negotiable instruments are also applicable to checks. Upon the nonpayment of a check after due presentment, a demand and notice of dishonor is necessary, in order that the holder may recover of the drawer.[25]

21. **Checks made payable at a future day.**— Way v. Towle, 155 Mass. 374, 29 N. E. 506. In this case the court said: "The question whether a check made payable on a day subsequent to its date should be regarded as a check or as a bill has been decided differently in different jurisdictions. In the present case the instrument appears to be upon one of the ordinary printed blanks of the bank on which it is drawn. It is dated August 31, 1889, and the only difference that is suggested between it and the ordinary check is that it is made payable October 1, 1889. If it had been post-dated as of that date, it would not have been payable until then, but yet would in that case have been a check. It is possessed of the other characteristics of a check, and we cannot believe that it was intended by the parties, or would have been taken by the bank on which it was drawn, as anything else than a check. It is often convenient to make a check payable at a future day, and we see no valid distinction between post-dating it and making it payable at a subsequent date. In the latter case as in the former it is expected that it will be presented on the day when payable, which in the one instance would be the day of its date, and in the other the day fixed for its payment, and that there will be funds to meet it, and that it will then be paid, and neither in the latter case any more than in the former would it be expected that the holder would present the check to the bank on which it was drawn for acceptance before payable, and, on its refusal to accept it, bring suit forthwith against the drawer for the nonacceptance. We think it better accords with the intent and understanding of the parties and of bankers and of business men generally, to treat the instrument in suit as a check rather than as a bill of exchange, and we see no valid objection to doing so." See also Raylor v. Wilson, 11 Metc. (Mass.) 44, 63 Am. Dec. 180; Westminister Bank v. Wheaton, 5 R. I. 30; *In re* Brown, Fed. Cas. No. 1,985, 2 Story (U. S.), 502.

22. Neg. Inst. L. (N. Y.), § 321. For same section in statutes of other States see Appendix.

23. English Bills of Exchange Act, § 73.

24. Bell v. Stewart, 156 Mass. 508, 31 N. E. 386.

25. Herker v. Anderson, 21 Wend. (N. Y.) 372; Dolph v. Rice, 18 Wis. 397; Sherman v. Comstock, Fed. Cas. No. 12,764, 2 McLean (U. S.), 19. In the case of Kelly v. Brown, 5 Gray (Mass.), 108, it was held that a check addressed to the cashier of a bank must be presented to the bank

§ 167. Presentment of check for payment.

a. *In general.*— The provisions of the Negotiable Instruments Law, relating to the presentment of negotiable instruments for payment, are applicable to checks. The several rules relating to such presentment are considered and discussed in the chapter on "Presentment for Payment."[26]

b. *Effect of delay in presentment.*— The Negotiable Instruments Law provides that: "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."[27] This provision is declaratory of the general rule.[28] The want of due presentment of a check does not discharge the drawer, unless he has suffered some loss or injury thereby; this is one point of difference between a check and a bill of exchange.[29] The only way in which the drawer of a check would be liable to be injured by a failure to present it within a reasonable time is where subsequent to its delivery and prior to its presentment the bank upon which it is drawn becomes insolvent. In such a case in respect to the check the drawer will be discharged to the extent of the loss he has sustained thereby.[30]

for payment in order to charge the drawer; and proof that it was intended by the parties as evidence of money alone, and was not intended to be presented to the bank for payment, is inadmissible to support the action against the drawer on the check; and in the case of Commercial Nat. Bank v. First Nat. Bank, 119 N. C. 783, 24 S. E. 524, it was held that the holder of a check cannot sue the drawer thereon until it has been presented to the drawee and payment refused.

26. See *ante*, chap. VIII.

27. Neg. Inst. L. (N. Y.), § 322. For same section in statutes of other States see Appendix.

28. **Delay on presenting check.**— Story on Promissory Notes (p. 493) lays down a rule, that if the payee or holder of a check receives it from the drawer in the same town or city where it is payable, he is bound to present it for payment on the next succeeding day after it is received; but where he receives the check from the drawer in a place distant from the place of payment, it will be sufficient for him to forward it by the post to some person at the latter place on the next day after it is received, and the person to whom it is sent will not be required to present it for payment until the day after it has reached him in the regular course of mail. In the case of Industrial Bank v. Bowes, 165 Ill. 70, 46 N. E. 10, the court says, in speaking of this rule, "that it only applies where, in the intermediate time between the drawing of the check and presentment, there has been a change of circumstances affecting the interests of the drawer, in respect to the banker upon whom the check was drawn. Where there has been a change, the rule is strictly applied."

29. *In re* Brown, Fed. Cas. No. 1,985, 2 Story (U. S.), 502; Morris v. Eufaula Nat. Bank, 106 Ala. 383, 18 South. 11; Heartt v. Rhodes, 66 Ill. 351; Industrial Bank v. Bowes, 165 Ill. 70; First Nat. Bank v. Buckhannon Bank, 80 Md. 475, 31 Atl. 302, 27 L. R. A. 332; Harbeck v. Craft, 4 Duer (N. Y.), 122; Kilpatrick v. Home Building & Loan Assn., 119 Pa. St. 30, 12 Atl. 754.

30. Story on Promissory Notes,

In speaking on this subject, Judge Story says:[31] "If a bank or banker still remains in good credit and is able to pay the check, the drawer will still remain liable to pay the same, notwithstanding many months may have elapsed since the date of the check, and before the presentment for payment and notice of the dishonor. So if the drawer, at the date of the check or at the time of the presentment of it for payment, had no funds in the bank or banker's hands, or if, after drawing the check and before its presentment for payment and dishonor, he had withdrawn his funds, the drawer would remain liable to pay the check, notwithstanding the lapse of time."

c. *Effect of delay as to indorser.*— While as between the drawer and the holder of a bill, delay in presentment does not discharge the liability of the drawer unless loss to him has resulted, a different rule exists as between the holder and the indorser of a check. As between such parties the holder assumes the obligation to present the check to the bank for payment within the time prescribed by the law merchant, that is to say, not later than the next day after its date, and if such presentment is not made, the indorser will be discharged from his obligation.[32] The law

§ 497. In the case of Farwell v. Curtis, Fed. Cas. No. 4,690, it was held that the creditor who receives for his payment the debtor's check on the bank, although it is accepted, not in payment but as a means of payment, impliedly undertakes to present it within a reasonable time, and if, through his delay, the bonds are lost by failure of the bank, he must bear the loss. See also Industrial Trust, Title & Sav. Co. v. Weakley, 103 Ala. 458, 15 South. 854.

31. Story on Promissory Notes, § 498.

32. **Effect of delay as to indorser.**— Carroll v. Sweet, 128 N. Y. 195, 27 N. E. 763, 13 L. R. A. 43. In this case it appeared that the check was dated August 22, 1887, and was drawn on the Asbury Park National Bank, and was, on the same day, indorsed and delivered by the defendant to the plaintiff at the place where the bank was located. It was not presented until the 31st of August, nine days after it was received by the plaintiff. The court said: "The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law merchant, was a condition, upon performance of which the liability of the defendant as indorser depended, and this delay was not excused, although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment."

Check deposited with bank for collection.— A bank, on crediting to the depositor the check of the third party drawn on another bank and indorsed by the depositor, assumes the obligation to present it for payment within a reasonable time; and if it omits so to do, and the check is dishonored, through the failure of the bank on which it was drawn, while if it had been duly presented it would have been paid from funds of the drawer provided to meet it, both the indorser and the drawer are discharged; and if the depositor in ignorance of the facts pays the amount of the check to his bank under his supposed liability as indorser, he has a good cause of action against the bank for the re-merchant and the Negotiable Instruments Law both apply the same rules to the presentment of the check as are applicable to the presentment of a bill of exchange payable on demand.[33]

d. *What constitutes reasonable time.*— The Negotiable Instruments Law lays down the rule that in determining what constitutes reasonable time regard is to be had "to the nature of the instru-"ment, the usage of trade or business (if any), with respect to "such instruments, and the facts of the particular case." [34] In respect to the drawer of a check, unless injury is caused by the delay the question of time is not material, for as we have seen, the drawer will continue liable upon his check until its payment. But in order to charge an indorser it must be shown that the check was presented within a reasonable time. The law merchant has established the rule that where all the parties to the check reside in the same place the holder must present it not later than the next day after date.[35] It is not to be claimed, however, that this rule is definite and absolute in all cases. What is reasonable time will depend upon circumstances, and will, in many cases, depend upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises.[36] What has already been said in regard to the time of

covery of the money so paid by mistake. Martin v. Home Bank, 160 N. Y. 190, 54 N. E. 717.

33. Neg. Inst. L. (N. Y.), § 321.

34. Neg. Inst. L. (N. Y.), § 4.

35. **What constitutes reasonable time.**— The payee, of a check must present it for payment within reasonable time in order to preserve his right of recourse to the drawer or indorser in case of its nonpayment; and where such payee resides and receives the check at the place where the bank is located, such reasonable time does not extend beyond the close of banking hours on the day succeeding the receipt of the check excluding Sundays and holidays. Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130.

Among other cases to the same effect are:

California.— Simpson v. Pacific Mutual Life Ins. Co., 44 Cal. 139; Himmelman v. Hotaling, 40 Cal. 111, 6 Am. Rep. 600.

Illinois.— Rounds v. Smith, 42 Ill. 245; Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436.

Iowa.— Northwestern Coal Co. v. Bowman, 69 Iowa, 150, 28 N. W. 496.

Kentucky.— Cawine v. Browinski, 6 Bush, 457, 99 Am. Dec. 648.

Maine.— Veazie Bank v. Winn, 40 Me. 60.

Missouri.— Wear v. Lee, 87 Mo. 358.

New York.— Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763, 13 L. R. A. 43; Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 696; Syracuse, B. & N. Y. R. R. Co. v. Collins, 57 N. Y. 641; Burkhalter v. Second Nat. Bank, 42 N. Y. 538; Smith v. Miller, 6 Abb. Pr. 234; Kelty v. Second Nat. Bank, 52 Barb. 328; Benton v. Martin, 31 N. Y. 382; Horker v. Anderson, 21 Wend. 372; Smith v. James, 20 Wend. 192; Gough v. Staat, 13 Wend. 549.

North Carolina.— First Nat. Bank v. Alexander, 84 N. C. 30.

Tennessee.— Schoolfield v. Moon, 9 Heisk. 171.

36. United States v. Barker, Fed. Cas. No. 14,519; Bull v. First Nat. Bank, 14 Fed. 612; Knott v. Venable, 42 Ala. 186; Woodruff v. Plant, 41

presentment of a bill of exchange payable on demand is also applicable to the time for presentment of a check.[37]

§ 168. Certification of check.

a. *Equivalent to an acceptance.*— The Negotiable Instruments Law provides that: "Where a check is certified by the bank on "which it is drawn, the certificate is equivalent to an accept-"ance."[38] Certification is not the only mode of accepting a check; it may be accepted in the same manner and under the same circumstances as a bill of exchange. And when so accepted the same rules and principles will apply thereto as in the case of the acceptance of a bill of exchange. Unless it is otherwise provided by statute a check may be accepted orally.[39] A bank is under no legal obligation to the holder to accept or pay a check, whether the funds of the drawer are sufficient to meet it or not. But upon presentation of a check the bank must refuse to pay or accept within a reasonable time, and it has no right to retain the check for an indefinite time, and then refuse payment.[40] An

Conn. 344; Pollard v. Bowen, 57 Ind. 323; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304. In the case of Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756, it was held that any draft payable at sight should be presented for payment within reasonable time; and that the court cannot, as a matter of law, say that any delay is reasonable beyond that which is required in the ordinary course of business without special inconvenience to the holder; or by the special circumstances of the particular case.

37. Neg. Inst. L. (N. Y.), § 131. See § 91, *ante*.

38. Neg. Inst. L. (N. Y.), § 323.

39. **Acceptance implied by statements, etc.**—Farmers' Bank v. Dunbar, 32 Neb. 487; Barnet v. Smith, 31 N. H. 256; Henrietta Nat. Bank v. State Bank, 80 Tex. 648; Espy v. National Bank, 18 Wall. (U. S.) 605. In the case of Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203, it was held that a bank check, being an order on the bank by the drawer to pay his money as therein directed, is irrevocable by him before its presentation for payment, unless the bank on which it is drawn has accepted or certified it, or otherwise become committed to its payment; and while an affirmative answer by the bank to a general inquiry whether checks of a person named for a specified sum are good, is information that such person has on deposit, subject to check, money to that amount, it does not constitute an acceptance or certification of, or otherwise create an obligation on the bank to pay checks which the inquirer may then hold.

40. **Implied acceptance by retention of check.**— First Nat. Bank v. McMichael, 106 Pa. St. 460. In this case it appeared that a check was sent by mail from one bank whose customer had presented it there for collection, to another bank on which it was drawn with instructions to return it promptly if not paid. It was received on the day following its date, and at that time the drawer's account was sufficient to pay the check. Three days later the drawee received notice from the drawer not to pay the check. The drawee accordingly caused the check to be protested on the day following, and returned to the bank through whom it had been forwarded for collection. The holder of the check having brought suit against the drawee bank for the amount thereof, it was held that it was for the jury to determine whether or not the check had been accepted by the bank on which it was drawn.

officer of a bank cannot certify a check so as to bind the bank unless there is evidence from the character of the duties of such officer and the transaction of the bank's business by him, that it was his custom to certify such checks.[41] A bank cashier, under his general authority, may certify checks drawn on the bank provided the drawer has funds on deposit sufficient to meet them; and a special restriction on his powers does not bind persons dealing with the bank unless they are known to them.[42]

41. **Power of officers to certify checks.**— Mechanics' Bank v. State Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008. In the case of Farmers & Mechanics' Bank v. Butchers & Drovers' Bank, 28 N. Y. 425, 16 Am. Dec. 678, it was held that where the teller or other proper officer of a banking corporation, representing it and doing its business at the counter, certifies the checks of its drawers and depositors drawn upon it in the usual form and under a general power to certify, such banking corporation is responsible to holders in good faith and for value, notwithstanding private directions to such officer not to certify in the absence of funds without special permission. In the case of Mussey v. Eagle Bank, 9 Metc. (Mass.) 306, after describing in detail the official duties of a teller and concluding that the certification of checks is not properly within the scope of such duties, the court said: "Such a power of certifying is, in effect, a power to pledge the credit of the bank to its customers; a power which, by the charter of a bank, can alone be exercised by its president and directors, unless specially delegated by them; and, consequently, it cannot be implied as a resulting duty or authority in any individual officer. Evidence of usage, therefore, can imply no original, inherent, or implied power in tellers thus to certify, however it may bear on the question of binding a bank by the allowance of such a usage.'

42. Clark Nat. Bank v. Albion Bank, 52 Barb. (N. Y.) 592.

Certification by cashier; funds sufficient to meet check.— The certification of a check, if written out, would contain a statement that the drawer had funds sufficient to meet it in the bank applicable to its payment, and an agreement on behalf of the bank that these funds should be retained and paid upon the check whenever it was presented. The cashier has a right, by virtue of his office, to make this certificate when the drawer has funds. He is the custodian of the funds of the bank and the books; he receives money and gives vouchers therefor; and whether upon receiving the check he pays it in money or gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is in either case acting within the line of his duty and within the scope of the authority which necessarily attaches to his office. Whether the bank might not restrict this authority, so as to affect the rights of persons having notice, is not material. It is sufficient that the public have a right to regard his authority as coextensive with these duties, that such authority is inherent in the office. This is substantially conceded by the learned counsel for the appellant, but they insist that the cashier has no power to make the certificate when the drawer has no funds. I agree that he has not, as between him and the bank, and the liability of the bank is not based upon his power to bind them by such a contract without funds, but on the ground that the bank cannot dispute the fact that there are funds, hence the contract is enforced as though there were funds to meet it. It follows that a *bona fide* holder only can enforce the liability against the bank where the certificate is given in the absence of funds." Cooke v. State Nat. Bank, 52 N. Y. 96, 114, 11 Am. Rep. 667, *per* Church, Ch. J.

b. *Effect of certification.*— The Negotiable Instruments Law provides that: "Where the holder of a check procures it to be "accepted or certified the drawer and all indorsers are discharged "from liability thereon." [43] The rule of the statute is declaratory of the common law. The certification not only discharges the drawer and indorsers of the check from liability, but it substitutes as a principal debtor the bank which certifies the check.[44] When the check is certified the funds of the original depositor cease to be under his control and pass to the control of the person in whose favor the certification was made.[45] Upon the certification by the bank the holder is entitled absolutely to payment and his right cannot be defeated by the bank on the ground that the drawer has no funds upon deposit. The contract of the bank is that it will retain and apply the money belonging to the drawer in payment of the check.[46] If the drawer of a check procures it to be certified the relations, duties, and obligations between him and the payee or holder are the same as if such check had not been certified; it is only where the holder of a check procures its certification after its delivery to him that the drawer and indorsers are discharged and the bank itself is substituted as a principal debtor.[47] A bank by certification of a check simply guarantees the

43. Neg. Inst. L. (N. Y.), § 324. For same section in statutes of other States see Appendix.

44. Drovers' Nat. Bank v. Packing Co., 117 Ill. 100; Muth v. St. Louis Trust Co., 88 Mo. App. 596.

45. First Nat. Bank v. Leach, 52 N. Y. 350; Thompson v. Bank of North America, 82 N. Y. 1; Wright v. MacCarty, 92 Ill. App. 120.

46. Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. Rep. 765, 7 L. R. A. 595.

Liability of bank as acceptor.—The certification of a check as good by the authorized officer of a bank is equivalent to the acceptance of a bill of exchange payable on demand, and makes the bank primarily liable to the holder, until discharged by payment, release, or the Statute of Limitations. Meads v. Merchants' Bank, 25 N. Y. 143; Farmers & Mechanics' Bank v. Butchers & Drovers' Bank, 28 N. Y. 425, 16 Am. Dec. 678; Irving Bank v. Wetherald, 36 N. Y. 335; Cooke v. State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667; Bank of British North America v. Merchants' Nat. Bank, 91 N. Y. 106; Nolan v. Bank of New York, 67 Barb. (N. Y.) 24; Willets v. Phœnix Bank, 2 Duer (N. Y.), 121; Drovers' Nat. Bank v. Anglo-American Packing. Co., 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855. In the case of Girard Bank v. Bank of Penn Township, 39 Pa. St. 92, 8 Am. Dec. 507, it was held that the holder of a check marked "good" is in no better position than the original depositor. The demand for the certificate is not a demand for payment. By such certificate the deposit which is represented by the check ceases to stand to the credit of the depositor, and passes to the credit of the holder, who is thereafter a depositor to that amount, with the same, and no greater, rights than those of any other.

47. **Certification procured by drawer of check.**— Cincinnati Oyster & Fish Co. v. Lafayette Nat. Bank, 51 Ohio St. 106, 36 N. E. 833, 46 Am. St. Rep. 560; Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep. 403, 12 L. R. A. 492; Born

genuineness of the signature of the drawer, and that there are funds sufficient to meet the check, and engages that those funds will not be withdrawn from the bank by the drawer; it does not warrant the genuineness of the body of the check either as to the payee or the amount. Therefore, where a certified check has been altered by changing its date, the name of the payee, or by raising the amount, and as so altered has been paid by the bank, the amount paid can be recovered back by the bank as for money paid by mistake.[48] But if the amount of an altered check has been negligently paid by the bank, it cannot recover.[49] If a bank certify a check on which the drawer's name has been forged it must pay the amount thereof.[50]

§ 169. When check operates as an assignment.

a. *Statutory provision.*— The Negotiable Instruments Law provides that: "A check of itself does not operate as an assignment "of any 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

v. Indianapolis First Nat. Bank, 123 Ind. 78, 24 N. E. 123, 18 Am. St. Rep. 312, 7 L. R. A. 442.

In the case of Minot v. Russ, 156 Mass. 458, 31 N. E. 489, 32 Am. St. Rep. 472, 16 L. R. A. 510, the court said: "The bank owed no duty to the drawers to certify checks, although it could certify them if it saw fit, at the request of either the drawers or the holders, and if it certified them, it became bound directly to the holders, or to the persons who should become the holders. In either case the bank would charge to the account of the drawer the amount of the check, because by certification it had become absolutely liable to pay the check when presented. When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated in addition to his own obligation. But when the payee or holder of the check presents it for certification, the bank knows that this is done for the convenience or security by the holder. The holder could demand payment if he chose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the check instead of paying it. * * * So far as the question has been considered it has been decided that the certification of a bank check is not, in all respects, like the making of a certificate of deposit or the acceptance of a bill of exchange, but that it is a thing *sui generis*, and that the effect of it depends upon the person who, in his own behalf or for his own benefit, induces the bank to certify the check. The weight of authority is, that if the drawer, in his own behalf or for his own benefit, gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged."

48. Macine Nat. Bank v. National City Bank, 59 N. Y. 67, 17 Am. Rep. 305.

49. County Nat. Bank v. Tradesmen's Nat. Bank, 36 App. Div. 112, 55 N. Y. Supp. 543.

50. Hagen v. Bowen Nat. Bank, 6 Lans. (N. Y.) 492; Marshall Nat. Bank v. Baltimore First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554.

"accepts or certifies the check." [51] This is undoubtedly declaratory of the rule as it exists in most jurisdictions in this country.

b. *General rule.*— It has been stated as a well-established principle of law that the right of the depositor to funds on deposit in a bank is a chose in action, and the depositor's check does not transfer the debt or give a lien upon it to the third person without assent of the depositor.[52] A check upon a bank in the usual form, not accepted or certified by the bank, does not constitute an equitable assignment of money to the credit of the holder, but is simply an order which may be countermanded and its payment may be forbidden by the drawer at any time before it is actually cashed.[53] This proposition is not universally accepted in a number of the States where it is held that a check drawn on funds in a

51. Neg. Inst. L. (N. Y.), § 325. For same section in statutes of other States see Appendix.

52. National Bank of the Republic v. Millard, 10 Wall. (U. S.) 152.

53. **Check does not operate as an equitable assignment,** see the following cases:

United States.—Florence Mining Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; Strain v. Gourdin, Fed. Cas. No. 13,521, 2 Woods, 380.

Alabama.— Industrial Trust, etc., Co. v. Weakley, 103 Ala. 458, 15 South. 854, 49 Am. St. Rep. 45; National Com. Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 60.

Colorado.— Colorado Nat. Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

Georgia.— Georgia Seed Co. v. Talmadge, 96 Ga. 254, 22 S. E. 1001.

Indiana.— Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805; Rockville Nat. Bank v. Lafayette Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Griffin v. Kemp, 46 Ind. 172.

Maryland.— Exchange Bank of Wheeling v. Sutton Bank, 78 Md. 577, 28 Atl. 563, 23 L. R. A. 173; Moses v. Franklin Bank, 34 Md. 574.

Massachusetts.— Carr v. Nat. Security Bank, 107 Mass. 45, 9 Am. Rep. 6; Dana v. Third Nat. Bank, 13 Allen, 445, 90 Am. Dec. 216; Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 433.

Michigan.— Brennan v. Merchants & Manufacturers' Bank, 62 Mich. 343, 28 N. W. 881; Grammel v. Carmer, 55 Mich. 201, 21 N. W. 418, 54 Am. Rep. 363.

Minnesota.— Northern Trust Co. v. Rogers, 60 Minn. 208, 62 N. W. 273, 51 Am. St. Rep. 526.

Missouri.— Coates v. Doran, 83 Mo. 337; Dickinson v. Coates, 79 Mo. 250, 49 Am. Rep. 228.

New Jersey.— Creveling v. Bloomsburg Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417.

New York.— First Nat. Bank v. Clark, 134 N. Y. 368, 32 N. E. 38; O'Connor v. Mechanics' Bank, 124 N. Y. 324, 26 N. E. 816; Attorney-General v. Connecticut Life Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Tyler v. Gould, 48 N. Y. 682; Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464; Lunt v. Bank of North America, 49 Barb. 221; Harker v. Anderson, 21 Wend. 372; Murray v. Judah, 6 Cow. 484.

North Carolina.— Hawes v. Blackwell, 167 N. C. 196, 5 S. E. 245, 22 Am. St. Rep. 870.

Ohio.— American, etc., R. Co. v. Metropolitan Nat. Bank, 54 Ohio St. 61, 42 N. E. 700, 56 Am. St. Rep. 700, 31 L. R. A. 653.

Pennsylvania.— Rielly v. Daley, 159 Pa. St. 605, 28 Atl. 493; Hemphill v. Yerdes, 132 Pa. St. 545, 19 Atl. 342, 19 Am. St. Rep. 607; Sailor v. Bushong, 100 Pa. St. 23, 45 Am. Rep. 353.

Tennessee.— Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921, 25 L. R. A. 523; Pickle v. Muse, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900.

bank is an appropriation of the amount thereof in favor of the holder,[54] and it follows that the holder of the check, upon the refusal of the bank to pay the same where the amount deposited to the credit of the drawer is sufficient, may bring an action on the check against the bank in his own name.[55] The check in the ordinary form does not, as between the drawer and the payee, constitute an assignment *pro tanto* of the amount deposited in the bank upon which the check is drawn; and the mere giving and receipt of the check does not entitle the holder to priority over general creditors in the fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of his creditors.[56] While a check does not, in the ordinary transaction of business, operate as an equitable assignment of the fund, it is nevertheless competent for the parties to create such an assignment by a clear agreement or understanding, oral or otherwise, in addition to the check, that such shall be the effect of the transaction.[57]

54. Check operates as an assignment.— It has been uniformly held in the State of Illinois that a check operates as an absolute assignment of the fund on which it is drawn, from the time it is delivered as between the drawer and the payee, and the bank is bound as soon as the check is presented, and whatever sum stands upon the books to the credit of the depositor at the time of such presentation is absolutely assigned to the holder of the check. Wyman v. Ft. Dearborn Nat. Bank, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259, 48 L. R. A. 565. See also Duquoin First Nat. Bank v. Keith, 183 Ill. 475, 56 N. E. 179; Gage Hotel Co. v. Union Nat. Bank, 171 Ill. 531, 49 N. E. 420, 63 Am. St. Rep. 270, 39 L. R. A. 479; Neblack v. Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203, 39 L. R. A. 159; Antigo Lank v. Nat. Trust Co., 149 Ill. 343, 36 N. E. 1029, 23 L. R. A. 611; Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 27 N. E. 533, 31 Am. St. Rep. 403, 12 L. R. A. 492; Union Nat. Bank v. Oceana County Bank, 80 Ill. 212, 27 Am. Rep. 185; Munn v. Burch, 25 Ill. 21; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38; Fonner v. Smith, 31 Neb. 107, 47 N. W. 632, 28 Am. St. Rep. 510, 11 L. R. A. 528; Hawes v. Blackwell, 107 N. C. 196, 12 S. E. 245, 22 Am. St. Rep. 870; Simmons Hardware Co. v. Greenwood Bank, 41 S. C. 177, 19 S. E. 502, 44 Am. St. Rep. 700; Dillman v. Carlin, 105 Wis. 14, 80 N. W. 932, 76 Am. St. Rep. 902; Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426; Raesser v. National Exchange Bank, 112 Wis. 591, 88 N. W. 618.

55. Fonner v. Smith, 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528. See also the cases cited in the preceding note.

56. Florence Min. Co. v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424; Bank v. Schuler, 120 U. S. 511, 7 Sup. Ct. 644.

57. Fourth St. Nat. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439. In the case of Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83, 17 N. E. 671, it was held that while the mere delivery of a third person of a check or draft drawn by a creditor upon his debtor does not effect a legal transfer of a debt, where it appears that the intent was to make such a transfer, it is the duty of the court to carry out the intent. See also Coates v. Bank, 91 N. Y. 26; Risley v. Bank, 83 N. Y. 318.

CHAPTER XVIII.

What Law Governs Negotiable Instruments.

§ 170. General principles as to law of place.

It is not feasible within the scope of this work to discuss at length the various principles affecting the conflict of laws in their general application. Each State is supreme in the exercise of its control over the persons and property within its borders. It may exercise such control in the manner which it deems most conformable to its own policy. In regulating the various matters pertaining to such persons and property it may resort to its own laws or may apply the laws of another State.

As a general rule the validity of a contract is to be determined by the law of the place where it is made; if valid there it is valid everywhere; but if invalid there it cannot be enforced in another State.[58] The reason for this rule lies in the fact that the laws of

58. Wilcox v. Kent, 13 Pet. (U. S.) 378, 10 L. Ed. 209; Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245; Swink v. Dechard, 41 Ala. 258; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525; Bond v. Cummings, 70 Me. 125; Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207; Scheferling v. Huffman, 4 Ohio St. 241, 62 Am. Dec. 281.

In the case of Coster v. Merritt, 32

a State are binding upon nonresidents within the State as well as the residents thereof, and the parties in executing a contract within the State may generally be taken to have contemplated the legal rights and obligations which arise from the stipulations contained in such contract under the laws of the State within which the contract was made. It follows, therefore, that the formalities essential to the validity of a contract and the interpretation thereof are to be governed by the laws of the country where it is made.[59] Contracts which are valid where made will be enforced in the State where the action is brought unless they are contrary to the policy or laws of the latter State; this is so by virtue of the rule of comity which exists between the several States.[60] Notwithstanding the general rule that a contract valid under the laws of the State where it is made is valid everywhere, if such a contract is against good morals, or would tend to promote vice and crime, or is against the settled public policy of the State, it will not be enforced, although valid by the law of the place where made.[61] If a contract is made in one State to be performed in another it will be governed by the laws of the State in which it is to be performed.[62] As stated by Harris, J., in a leading New York case:[63] "It is a general rule of international law that the rights of the parties to a contract, as distinguished from the remedies, are to be determined by the law of the place where the contract is to be performed. If the contract be made in one State or country, and it appears upon its face that it is to be performed in another, it will be presumed that the contract was entered into with reference to the laws of the latter, and those laws will be resorted to in ascertaining the validity, obligation, and

Conn. 246, it was held that the rule of *lex loci contractus* applies not only to the construction and validity of a contract, but also to the effect and the conduct of the parties as bearing on its validity, and therefore, where such conduct would be held, in the State where the contract was made, to be only evidence tending to invalidate it, it will be so regarded in Connecticut in determining the validity, although such acts in such State would render the contract void.

59. Byles on Bills (16th ed.), p. 382.

60. Midland County v. Broat, 50 Minn. 562, 52 N. W. 972; Parsons v. Trask, 7 Gray (Mass.), 473, 66 Am. Dec. 502.

61. Swann v. Swann, 21 Fed. 299; Schulze v. The Guildhall, 58 Fed. 796; Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Baltimore & Ohio R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688; Union Locomotive, etc., Co. v. Erie R. Co., 37 N. J. L. 23; Merchants' Bank v. Spalding, 12 Barb. (N. Y.) 302.

62. Pope v. Nickerson, Fed. Cas. No. 11,274, 3 Story, 465; Bliss v. Houghton, 16 N. H. 90; Berrean v. Wright, 26 Barb. (N. Y.) 208; National Mut. Building & Loan Assn. v. Ashworth, 91 Va. 706, 22 S. E. 521.

63. Hyde v. Goodnow, 2 N. Y. 266.

effect of the contract. This general rule, however, has its exceptions; one of which is, that where a contract is declared void by the law of the State or country where it is made, it cannot be enforced as a valid contract in another, though by its terms it was to have been performed there." The law of the place where the contract is made, and not that of the place of performance is the law which determines whether the contract is void for illegality.[64]

§ 171. Law governing validity, interpretation, and effect.

a. *Requisites as to form and execution; law of place.*— The validity of a bill or note as regards requisites in form is determined by the law of the place of its issue. This is the rule as declared in the English Bills of Exchange Act,[65] and the same rule would seem to exist in this country.[66] The rule applies where the instrument specifies no place of payment.[67] Where the essentials of a contract made in a foreign State under and in pursuance of its laws are not hostile to the law and policy of another State, the contract may be enforced in the courts of such other State.[68] Where a bill of exchange was drawn in Michigan upon a party in Illinois, it was held to be governed by the laws of Illinois, in regard to the character of its acceptance, and not by the law of Michigan; therefore, the provision of the statute of the latter State that an acceptance must be written did not apply to such bill.[69] A negotiable instrument is not binding upon the parties until it is delivered. The place of contract is, therefore, the place where the instrument is delivered and not where it is written, dated, and signed.[70] Where the instrument specifies a place of payment in a State other than that within which it was

64. Brown v. American Fin. Co., 31 Fed. 516; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62.

65. English Bills of Exchange Act, § 72 (1).

66. Courtois v. Carpentier, Fed. Cas. No. 3,286, 1 Wash. C. C. (U. S.) 376; Phinney v. Baldwin, 16 Ill. 108, 61 Am. Dec. 62; Mendenhall v. Gately, 18 Ind. 149; Engler v. Ellis, 16 Ind. 475; Stevenson v. Payne, 109 Mass. 378; Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Dow v. Russell, 12 N. H. 49.

67. Stickney v. Jordan, 58 Me. 106, 4 Am. Rep. 251; Bank of Orange County v. Colby, 12 N. H. 520; Chase v. Dow, 47 N. H. 405; Barrett v. Dodge, 16 R. I. 740, 19 Atl. 530; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605.

68. King v. Sarria, 69 N. Y. 24.

69. Mason v. Dousay, 35 Ill. 424. See also Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245.

70. **Place of contract is where instrument is delivered.**— In the case of Johnston v. Gawtry, 83 Mo. 339, it was held that the State in which a note is made payable and in which it is delivered in consummation of the bargain is a place of contract, although the note was executed in another State.

In the case of Campbell v. Nichols, 33 N. J. L. 81, it was held that a note made to the order of the maker signed in New Jersey, and first delivered to executed and delivered it is governed by the laws of the State in which it is made payable. There are a large number of cases maintaining this doctrine, in the most of which the question to be determined was the rate of interest to be paid or whether the instrument was usurious.[71]

b. *Determination of validity.*— The validity of a negotiable instrument is to be determined by the laws of the place where it is executed and made payable.[72] It has been held that a note executed and delivered on Sunday contrary to the statute of a State would be void and not enforceable, although the note was

the possession of the maker in New York, is, in contemplation of the law, made in the latter jurisdiction.

In the case of Orr v. Lacy, Fed. Cas. No. 10,589, 4 McLean (U. S.), 243, it was held that the place where bills for discount are negotiated is the place of contract irrespective of the place where they were signed and indorsed. See also to the same effect, *In re* Conrad, Fed. Cas. No. 3,126; Prov. County Sav. Bank v. Frost, Fed. Cas. No. 11,453, 8 Ben. (U. S.) 293; Bowen v. Bradley, 9 Abb. Pr. (N. S.) (N. Y.) 395; Wayne County Sav. Bank v. Low, 81 N. Y. 566, 37 Am. Rep. 533.

71. **Law of place where payable governs validity and interpretation.** See the following cases:

United States.— Wiseman v. Chiappella, 23 How. 368, 16 L. Ed. 466; Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203; Illinois Bank v. Brady, Fed. Cas. No. 888, 3 McLean, 268; Drake v. Found Treasure Min. Co., 53 Fed. 474.

Alabama.— Todd v. Neal, 49 Ala. 266; Hunt v. Hall, 37 Ala. 702.

Connecticut.— Webster v. Howe Machine Co., 54 Conn. 394, 8 Atl. 482.

Illinois.— Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867; Abt v. American Trust & Sav. Bank, 159 Ill. 467, 42 N. E. 856.

Indiana.— Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Fordyce v. Nelson, 91 Ind. 447; Rose v. Park Bank, 20 Ind. 94, 83 Am. Dec. 306.

Iowa.— Allen v. Harrah, 30 Iowa, 363; Chatham Bank v. Allison, 15 Iowa, 357.

Kentucky.— Brown v. Todd, 29 S. W. 621; Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775.

Massachusetts.— Shoe & Leather Nat. Bank v. Wood, 142 Mass. 563, 8 N. E. 753.

Michigan.—Snow v. Perkins, 2 Mich. 238.

Missouri.— Kentucky Com. Bank v. Barksdale, 36 Mo. 563.

New Hampshire.— Little v. Riley, 43 N. H. 109.

New Jersey.— Friese v. Brownell, 35 N. J. L. 285, 10 Am. Rep. 239; Ball v. Con. Franklinite Co., 32 N. J. L. 102; Healy v. Gorman, 15 N. J. L. 328.

New York.— Hibernia Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671; Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550.

Pennsylvania.— Tenant v. Tenant, 110 Pa. St. 478, 1 Atl. 532.

Tennessee.— Pioneer Sav. & Loan Co. v. Cannon, 96 Tenn. 599, 36 S. W. 386; Thompson v. Commercial Bank, 43 Tenn. 46; Carter v. Union Bank, 7 Humph. 548, 46 Am. Dec. 89; Cooper v. Santford, 4 Yerg. 452.

72. Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 32. In the case of Banchor v. Manser, 47 Me. 58, it was held that the indorsee of a note given by an inhabitant of the State of Maine for spirituous liquors sold and delivered in another State, where the sale was not illegal, who had knowledge of the purchaser's intent to sell the same here in violation of law, and did acts beyond the mere sale which aided the purchaser in his unlawful business, cannot legally enforce the payment of such note in the State of Maine. See also Fuller v. Bean, 30 N. H. 181.

made payable in another State.[73] But the general rule that negotiable instruments executed in one State and made payable in another are governed by the laws of the State in which they are payable, applies in determining the validity of the instrument, and it would seem to follow that if an instrument is not void in the place where payable, because of its execution on Sunday, it will be enforceable.[74] It has been held in an action brought in New York on a promissory note payable in Jamaica, where the defendant set up infancy as a defense, that he must show that such plea would be good defense in Jamaica.[75] The place of payment is not always conclusive in determining the law which is to govern the validity of a negotiable instrument. There may be circumstances connected with the transaction which will show that it was the understanding of the parties that the law of the place of payment was not to control.[76]

c. *As to negotiability.*— The determination of the question of the negotiability of a bill or note is to be determined by the law of the State where it was made payable.[77] A note payable generally, made in North Carolina and negotiable there, and afterward indorsed in Virginia, where it is not negotiable, will, in a suit brought thereon in North Carolina, be governed as to the question of negotiability by the laws of that State.[78] But it has been held, where a note made in Massachusetts is payable in Vir-

73. Arbuckle v. Reaume, 96 Mich. 243, 55 N. W. 808.

74. **Validity, what law governs.**— Murphy v. Collins, 121 Mass. 6. See also as to the general proposition that the validity of a note is to be determined by the laws of the State where it is payable, Coffman v. Kentucky Bank, 41 Miss. 212, 90 Am. Dec. 371; Backman v. Jenks, 55 Barb. (N. Y.) 468. But in Georgia the rule seems to be that the validity of promissory notes is controlled by the law of the place where the notes are executed, and not where they are made payable. Jackson v. American Mortgage Co., 88 Ga. 756, 15 S. E. 812; Stansell v. Georgia Loan & Trust Co., 96 Ga. 227, 22 S. E. 898. And in the case of Joslin v. Miller, 14 Neb. 91, 15 N. W. 214, it was held that the validity of a promissory note made in Nebraska, and payable in New York, is to be determined by the laws of Nebraska.

75. Thompson v. Ketcham, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332.

76. In the case of Sheldon v. Hextum, 91 N. Y. 124, the defendant who resided in Illinois, having collected certain moneys belonging to S., a resident of the State of New York, by an agreement with the latter, sent to him by mail, in place of the money, his (the defendant's) notes for the amounts, dated at his place of residence in Illinois, payable with 10 per cent. interest, which rate of interest was lawful in that State. The defense of usury was pleaded in the action. It was held that the validity of the notes was to be determined by the law of Illinois, and as they were valid there they were also valid in New York; and this although one of the notes was made payable in New York.

77. Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775; Cope v. Daniel, 9 Dana (Ky.), 415; Warren v. Coplin, 4 Metc. (Mass.) 594.

78. Keddick v. Jones, 6 Ired. (N. C.) 107, 44 Am. Dec. 68; Woods v. Ridley, 11 Humph. (Tenn.) 194.

ginia, that it will be governed, for the purpose of determining its negotiability, by the law of Virginia.[79]

§ 172. Liabilities of parties.

a. *The drawer and indorser.*— The contract of the drawer of a bill of exchange is governed by the law of the place where the bill is drawn, in regard to the rights of the payee and any subsequent holder, and not by the law of the place of payment by the acceptor.[80] This is so since the contract of the drawer is to pay the bill in the place where it is drawn, in case of the failure of the drawee to accept it, and not to pay it at the place where the drawee resides.[81]

An indorsement is to be considered as a separate contract and the obligations to it are to be determined according to the law of the State or country where it was made.[82]

79. Freeman's Bank v. Rucklan, 16 Gratt. (Va.) 126.

80. Story on Bills of Exchange, § 131; Crawford v. Branch Bank, 6 Ala. 12, 41 Am. Dec. 33; Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79; Wood v. Gibbs, 35 Miss. 559.

81. Wood v. Gibbs, 35 Miss. 559.

As to liability of drawer.— In the case of Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137, the court said: "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, has been adjudged both here and in England."

And in the case of Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79, the court after citing the authorities upon the subject said: "These and numerous other authorities that might be cited, were it necessary, clearly establish the proposition that the contract of the drawer of a bill is, as to its construction and legal effect, to be governed by the law of the place where the bill is drawn, and not that of the place where it is payable. Indeed, it cannot be held otherwise consistently with legal principles which are thoroughly established. A contract to be performed at the place where it is executed or generally, without naming another place for performance, is undoubtedly to be governed by the law of the place where made. Such is the character of the contract of the drawer of the bill or the indorser of the note. The indorser of a bill here, payable in New York, promises that upon the dishonor of the bill and notice to him, he will pay it, not at New York, but here or generally. His contract is to be performed here."

82. As to contract of indorsement.— The following passage is quoted from Story on Conflict of Laws. "Negotiable instruments often present questions of a like mixed nature. Thus suppose the negotiable bill of exchange was drawn in Massachusetts on England, is indorsed in New York, and again by the first indorsee in Pennsylvania, and by the second in Maryland, and the bill is dishonored. What damages will the holder be entitled to? The law as to damages in these States is different. In Massachusetts it is 10 per cent., in New York and Pennsylvania 20 per cent., and in Maryland 15 per cent. What rule then is to govern? The answer is that in each case, the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn; and the successive indorsers are liable on the bill according to the law of the place of their indorsement, their indorsement being treated as a new and substantive contract."

In the case of Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79, the court

b. *The acceptor.*— The liability of an acceptor of a bill is to be governed by the law of the place of his acceptance, as to the drawer, payee, and each subsequent holder, unless he accepts in one place for payment in another, in which case the law of the place where the bill is payable will govern his liability.[83] The question of the validity of a verbal promise to accept a bill of exchange has frequently arisen, because of the fact that by the statutes of some of the States it is required that a promise to accept should be in writing, while the common-law rule recognizes the validity of a verbal promise. As a general rule the validity of a verbal promise to accept a bill of exchange made in one State and payable in another will be governed by the law of the State where the promise was made.[84] But where it appears by the circumstances of a case that an acceptance and payment of a bill was to be governed by the law of the place of performance of the contract, the law of such place must govern the validity of the acceptance. So where a verbal agreement was made in the State of Missouri to accept and pay a bill upon its presentation to the

said: "The authorities establishing the proposition that the contract of indorsement in such case is governed by the law of the place where made, and not by that of the place where the note is payable, are clear, and to our minds satisfactory."

In the case of Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137, the bill of exchange was drawn at St. Pierre, Martinique, on a person at Bordeaux, in France, by the payees at the city of New York. It was held that the contract of indorsement was governed by the law of New York, where the indorsement was made, and not by that of France, where the bill was payable. See also Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 239, 34 Am. Dec. 289; Everett v. Vandryes, 19 N. Y. 436.

83. Story on Bills of Exchange, § 131; Hunt v. Standart, 50 Ind. 33, 77 Am. Dec. 79; Kelly v. Smith, 1 Metc. (Ky.) 313; Lizardi v. Cohen, 3 Gill (Md.), 430; Frazier v. Warfield, 17 Miss. 220; Bright v. Judson, 47 Barb. (N. Y.) 29.

84. **Validity of verbal acceptance.**— Hubbard v. Exchange Bank, 72 Fed. 234, 18 C. C. A. 525; Scott v. Pilkington, 15 Abb. Pr. (N. Y.) 280. In the case of Scudder v. Union Nat. Bank, 91 U. S. 406, 413, 23 L. Ed. 245, a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by the member of the firm then present in Chicago. It was held that the validity of such acceptance was to be determined by the law of Illinois. The court in this case said: "There is no statute in the State of Illinois that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange; on the contrary, a parol acceptance and a parol promise to accept are valid in that State, and the decisions of its highest court held that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arise. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was indeed to be performed in Missouri; but that was a different contract from that of acceptance."

drawee at his place of business in Illinois, it was held that the law of Illinois would control the validity of such agreement.[85]

c. *Rights and liabilities of bona fide holders.*— Where a note is executed in one State and payable in another the extent of the maker's obligation and the character of the defense he may interpose in a suit thereon is governed by the law of the State where the note is payable.[86] As an example, under the laws of Mississippi a statute provided that, "The defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payment, and set-offs made, had, or possessed against the same, previous to notice of the assignment;" it was held in a case where an indorsee sued in Mississippi the maker of a note executed in Louisiana, but payable in Mississippi, that this statute could be pleaded by the defendant.[87] The defenses which exist in the State where a bill or note is made payable are controlling as against the holder of such bill or note in any State where he seeks to enforce his remedies against the persons liable thereon.[88]

§ 173. Transfer by indorsement or assignment.

a. *By indorsement.*— The indorsement of a note is a distinct contract, and is governed by the law of the State in which the

85. Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; Coghlan v. S. C. R. Co., 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951.

86. Sturtevant v. Memphis Nat. Bank, 60 Fed. 730, 9 C. C. A. 256.

87. Brabston v. Gibson, 9 How. (U. S.) 263, 13 L. Ed. 131; Tilden v. Blair, 21 Wall. (U. S.) 241, 22 L. Ed. 632.

In the case of Webster v. Howe Machine Co., 54 Conn. 394, 8 Atl. 482, which was an action upon acceptance in New York of a bill of exchange drawn in England upon a corporation having its place of business in New York and made payable in New York, it was held that the law of New York governs the question as to whether the plaintiff is a *bona fide* holder.

88. Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775. This was an action brought in the State of Kentucky upon a promissory note payable in Ohio. Under the statutes of Ohio, the note sued upon was placed upon the same footing as a bill of exchange, and is not subject, in the hands of an innocent holder, to the set-off which existed in favor of the payer against antecedent parties. It was held that this statute controlled the rights of the parties in the suit in Kentucky. The court said: "Where a contract is made with reference to the common or general law, such contract is subject to any remedy by the State in which it is attempted to enforce it, though such remedy might be unknown to the State in which the contract was made; but, as we have attempted to show, if the contract is to be executed in a particular State, then its statutory law fixing the character of such contract, and denying the right to make certain defenses to it, becomes a part of the contract, and the comity existing between the States forbids the allowing of such defenses in any other State to which the party may be compelled to resort for remedy for a breach of the contract. See also Barrett v. Walker, 14 La. 303; Emanuel v. White, 34 Miss. 56, 69 Am. Dec. 385.

indorsement is made, and not by the law of the place where the note was executed.[89] In discussing this question, Worden, J., said: "It does not follow, however, because the contract of a maker would be governed by the law of the place of payment, that the contract of the indorser would be governed by the same law. The maker binds himself to pay at the place named in the note for payment, and there his contract is to be performed. The indorser promises upon certain conditions, which are not expressed in the contract of indorsement but which are implied by law, that he will pay the note; but not that he will pay it at the place named in the note for payment. This promise is general for the payment of the note upon the implied conditions; and such general promise, not specially to be performed elsewhere, is governed by the *lex loci contractus*, which must determine the conditions upon which he is to be held liable."[90] Where an instrument is indorsed by several indorsers in different States the liabilities of the indorsers, in case of the dishonor of the instrument, will be governed by the law of the State where each indorsement was made.[91]

It has been held that, although the law of the place where an indorsement was made will ordinarily govern the rights of the parties thereunder, and control the effect thereof, yet when the question arises under the common law or law merchant, not modi-

89. *United States.*—Mott v. Wright, Fed. Cas. No. 9,883, 4 Biss. 53; Bank of Illinois v. Brady, Fed. Cas. No. 888, 3 McLean, 268.

Alabama.— Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498.

Connecticut.— Downer v. Chesbrough, 36 Conn. 39, 4 Am. Rep. 29.

Illinois.— Dinnigan v. Stevens, 122 Ill. 396, 13 N. E. 651; Crouch v. Hall, 15 Ill. 263.

Indiana.— Patterson v. Carroll, 60 Ind. 128; Rose v. Park Bank, 20 Ind. 94, 83 Am. Dec. 306; Mendenhall v. Gately, 18 Ind. 149; Hunter v. Standart, 15 Ind. 33, 77 Am. Dec. 79.

Iowa.— National Bank v. Greene, 33 Iowa, 140.

New Jersey.—Freese v. Brownell, 35 N. J. L. 285, 10 Am. Rep. 239.

New York.— Hodges v. Shuler, 23 Barb. 68, affd. in 22 N. Y. 114; Artisans' Bank v. Park Bank, 41 Barb. 599; Cook v. Litchfield, 5 Sandf. 330; Aymar v. Sheldon, 12 Wend. 439, 27 Am. Dec. 137.

North Carolina.— Hatcher v. McMorine, 15 N. C. 122.

West Virginia.— Nichols v. Porter, 2 W. Va. 13, 94 Am. Dec. 500.

Tennessee.— Douglas v. Bank of Commerce, 97 Tenn. 133, 36 S. W. 874.

90. Hunt v. Standart, 15 Ind. 33, 77 Am. Dec. 79. In the case of Everett v. Vandryes, 19 N. Y. 436, a bill had been drawn in New Granada, payable in New York to one Jimines, who had indorsed it in New Granada. The suit was by the holder against the drawer. The court said, that "The indorsement is considered to be a separate contract, and the obligations of the parties to it are to be determined according to the law of the country where it was made, so that if this was a question between the indorser and the indorsee we should have to resort to the laws of New Granada to determine what obligation Jimines assumed by indorsing the bill to the plaintiff."

91. Dundas v. Bowler, Fed. Cas. No. 4,141, 3 McLean (U. S.), 397.

fied by local custom or statute, the courts of a particular State will declare for themselves what rule shall control such question, and are not concluded by the decisions of the courts of a State where the contract was made, in respect to such question.[92] The parties effected by the indorsement may expressly agree among themselves that it shall be governed by the laws of a particular State and such agreement will be binding.[93] The contract of indorsement is not complete until the instrument is indorsed and delivered to the indorsee; so where a person indorses a note in one State and sends it by mail to the indorsee in another State, the laws of the latter State will govern the contract.[94] In case of the indorsement of the note before delivery to the payee, the contract of indorsement is not consummated until the delivery of the instrument to the payee; and, therefore, when the note is executed and indorsed in one State and delivered to the payee in another State the law of the latter State will control the contract and determine the rights and obligations of the parties thereunder.[95]

92. Franklin v. Twogood, 25 Iowa, 520, 96 Am. Dec. 73.

93. Watson v. Lane, 52 N. J. L. 550, 20 Atl. 894, 10 L. R. A. 784. In the case of Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137, it was held that the indorsee incurs no other obligations than those imposed by the law of the place where the indorsement is made unless a special indorsement shall subject him to the *lex loci* where the bill is drawn or made payable.

94. Mott v. Wright, Fed. Cas. No. 9,883, 4 Biss. (U. S.) 53; Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76; Briggs v. Latham, 36 Kan. 255, 13 Pac. 393, 59 Am. Rep. 546.

95. **Indorsement governed by law of state where instrument is delivered.**— In the case of First Nat. Bank v. Lockstitch Fence Co., 24 Fed. 221, it appeared that a third party had placed his name upon the back of a negotiable promissory note at the time of its execution and before its delivery to the payee. It was held that the question of his liability is one of general commercial law and that the decisions of the courts of the State in which the note was executed and made payable are not necessarily controlling in the decisions thereof by the United States court; but in the case of Stubbs v. Colt, 30 Fed. 417, the maker of an accommodation note in Georgia sent it to the payee in Connecticut, who indorsed it for the accommodation of the maker and returned it to him in Georgia and it was negotiated by the maker in that State. The question to be decided was whether the indorsement was to be governed by the laws of the State where the name was written or the State where the note was negotiated. The court said: "The place where the liability upon the indorsement commenced is the place where the indorsement was made." This statement of the law is given in various modes of expression in the decisions which have been cited. The turning point is the fact that the accommodation paper only becomes valid to pay money, and binding upon the indorser, when it is delivered to the person who gives a valuable consideration for it, and that, consequently, the place where the indorsement becomes effective is the place where, legally speaking, it was made. See also Stanford v. Pruet, 27 Ga. 243, 73 Am. Dec. 734; Young v. Harris, 14 B. Mon. (Ky.) 556, 61 Am. Dec. 170; Cook v. Litchfield, 9 N. Y. 279; Lee v. Selleck, 33 N. Y. 615; Weil v. Lange, 6 Daly (N. Y.), 549.

b. *Assignment or sale.*—An assignment of a negotiable instrument is, like an indorsement, a new contract and is governed by the law of the place where it is made.[96] If the law of the State in which an assignment of a note is made recognizes its validity, such assignment will be recognized and enforced in another State.[97]

§ 174. Demand, protest, and notice of dishonor.

As a general rule the demand, protest, and notice of nonpayment of a negotiable instrument are governed by the law of the place where it is made payable, in the absence of an agreement of the parties to the contrary.[98] The notice and protest are not controlled by the law of the place of indorsement nor by the law of the indorser's domicile.[99] The protest for the nonacceptance of a bill must be made in accordance with the laws of the State where the bill was presented for acceptance; and if the bill is protested for nonpayment the protest must conform with the laws of the State where the payment was demanded.[1] Although the protest must be made according to the law of the place of acceptance yet the notice to the drawer must be according to the law of the place where the bill was drawn, and to the indorsers according to the law of the place where their indorsements were made.[2]

96. Dundas v. Bowler, Fed. Cas. No. 4,141, 3 McLean (U. S.), 397; Humphreys v. Collier, 1 Ill. 297; Lodge v. Phelps, 2 Cai. Cas. (N. Y.) 321.

97. Barrett v. Gillard, 10 Tex. 69.

98. Wiseman v. Chiappella, 23 How. (U. S.) 368, 16 L. Ed. 466; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254; Todd v. Neal, 49 Ala. 266; Webster v. Howe Machine Co., 54 Conn. 394, 482; Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227; Allen v. Harrah, 30 Iowa, 363; Chatham Bank v. Allison, 15 Iowa, 357; Shoe & Leather Nat. Bank v. Wood, 142 Mass. 563, 8 N. E. 753; Kentucky Commercial Bank v. Barksdale, 36 Mo. 563; Bowen v. Newell, 5 Sandf. (N. Y.) 326; Aymar v. Sheldon, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137; Spearman v. Ward, 114 Pa. St. 634, 8 Atl. 430; Thompson v. Commercial Bank, 3 Coldw. (Tenn.) 46; Carter v. Union Bank, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89.

99. Wooley v. Lyon, 117 Ill. 244, 6 N. E. 885, 57 Am. Rep. 867.

1. Neederer v. Barber, Fed. Cas. No. 10,079; Tickner v. Roberts, 11 La. 14, 30 Am. Dec. 706; Carter v. Burley, 9 N. H. 558; Williams v. Putnam, 14 N. H. 540, 40 Am. Dec. 204; Ross v. Bedell, 5 Duer (N. Y.), 462; Raymond v. Holmes, 11 Tex. 54.

2. Story on Bills of Exchange, § 285; Williams v. Putnam, 14 N. H. 540, 40 Am. Dec. 204. In the case of Snow v. Perkins, 2 Mich. 238, it was held that the law of the place where a note is made payable determines the time and mode of presentment and of proceedings on nonpayment; but the notice to the indorser must be according to the law of the place where the indorsement was made. See also Thorp v. Craig, 10 La. 461; Williams v. Wade, 1 Metc. (Mass.) 82; Leavenworth v. Brockway, 2 Hill (N. Y.), 201.

APPENDIX.

APPENDIX A.

NEGOTIABLE INSTRUMENTS LAW.

STATES WHICH HAVE ADOPTED LAW.

The following States and Territories have adopted the Negotiable Instruments Law:

Arizona.— Civil Code, §§ 3304–3491. (Taking effect September 1, 1901.)

Colorado.— L. 1897, chap. 64. (Approved April 20, 1897.)

Connecticut.— L. 1897, chap. 74. (Approved April 5, 1897.)

District of Columbia.— Code, §§ 1304–1493. (In effect and applicable to instruments made and delivered after January 12, 1899.)

Florida.— L. 1897, chap. 4524. (Approved June 1, 1897.)

Iowa.— L. 1902, chap. 130. (Code Supp., §§ 3060*a*1–3060*a*198. In effect May 15, 1902.)

Maryland.— L. 1898, chap. 119. (Approved March 29, 1898.)

Massachusetts.— L. 1898, chap. 533. (Rev. Stat., chap. 73, §§ 18–212. In effect January 1, 1899.)

New Jersey.— L. 1902, chap. 184. (Approved April 4, 1902.)

New York.— L. 1897, chap. 612. (In effect October 1, 1897.)

North Carolina.— L. 1899, chap. 733. (In effect March 8, 1899.)

North Dakota.— L. 1899, chap. 113. (Approved March 7, 1899.)

Ohio.— L. 1902, p. 162. (Rev. Stat. 3171–3178*g*. In effect January 1, 1903.)

Oregon.— L. 1899, p. 18. (Approved February 16, 1899.)

Pennsylvania.— L. 1901, chap. 162. (In effect first Monday of September, 1901.)

Rhode Island.— L. 1899, chap. 674. (In effect July 1, 1899.)

Tennessee.— L. 1899, chap. 94. (In effect May 13, 1899.)

Utah.— L. 1899, chap. 83. (In effect July 1, 1899.)

Virginia.— L. 1898, chap. 866. (Approved March 3, 1898.)

Washington.— L. 1899, chap. 149. (In effect March 22, 1899.)

Wisconsin.— L. 1899, chap. 356. (In effect May 15, 1899.)

THE NEGOTIABLE INSTRUMENTS LAW.

(Laws of New York, 1897, chap. 612.)

ARTICLE I.

General Provisions.

Note.— This article appears as §§ 190-196 in the acts of Colorado, Iowa, New Jersey, North Carolina, North Dakota, Pennsylvania, Utah, Virginia, and Washington; as §§ 190-192 in Oregon; as §§ 1-7 in Rhode Island; as §§ 13-19 in Maryland; as §§ 3487-3491 of R. S. of Arizona; as § 1304 in the Code of District of Columbia; as §§ 207-212 of chap. 73 of the R. L. of Massachusetts; as §§ 3178-3178c of the R. S. of Ohio; as § 1675 of Wisconsin statutes; and under heading, "General Provisions" in Connecticut, Florida, and Tennessee.

[Whole act construed as to its effect, Camming v. Broderick, 28 App. Div. 268, 50 N. Y. Supp. 1058; Hoag v. Wright, 34 App. Div. 260, 54 N. Y. Supp. 658; Deyo v. Thompson, 53 App. Div. 9, 65 N. Y. Supp. 459; Strickland v. Henry, 66 App. Div. 24, 73 N. Y. Supp. 12.]

§ 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 counter-claim 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.

§ 5. Time, how computed; when last day falls on holiday.— Where the day, or the last day, for doing any act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

§ 6. Application of chapter.— The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

§ 7. Law merchant; when governs.— In any case not provided for in this act the rules of the law merchant shall govern.

ARTICLE II.

Form and Interpretation.

Note.— This article appears as §§ 1-23, in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3304-3326 of R. S. of Arizona; as §§ 1305-1327 in the Code of District of Columbia; as §§ 20-42 in the Maryland statute; as §§ 18-40 of chap. 73 of the R. L. of Massachusetts; as §§ 3171a-3171v of the R. S. of Ohio; as §§ 9-13 in the Rhode Island act; and as §§ 1675-1 to 1675-23 of Wisconsin statute.

Section 20. Form of negotiable instrument.
21. Certainty as to sum; what constitutes.
22. When promise is unconditional.
23. Determinable future time; what constitutes.
24. Additional provisions not affecting negotiability.

§ 20. Form of negotiable instrument.— An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to order or to bearer; and
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

[See ante, p. 161.]
Construed in National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428.

§ 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.

[See ante, p. 199.]

§ 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.

[See ante, p. 192.]
Construed in National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428.

§ 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.

[See ante, p. 213.]

§ 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.

[See ante, p. 234.]

§ 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.

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.

[See ante, p. 241.]

§ 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.

[See ante, p. 209.]

§ 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.

[See ante, p. 223.]

§ 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.

[See ante, p. 231.]

§ 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.

[See ante, p. 223.]

§ 30. Date, presumption as to.— Where the instrument or an acceptance of 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.

[See ante, p. 246.]

§ 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.

[See ante, p. 246.]

§ 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.

[See ante, p. 248.]

§ 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.

[See ante, p. 253.]

§ 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.

[See ante, p. 253.]

§ 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.

[See ante, p. 254.]

§ 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;

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.

[See ante, p. 223.]

§ 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.

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[See ante, p. 253.]

§ 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.

[See ante, p. 253.]

§ 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.

[See ante, p. 254.]

§ 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.

[See ante, pp. 262, 264-267.]

§ 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 signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

[See ante, p. 268.]

§ 38. Signature by agent; authority; how shown.— The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

[See ante, p. 82.]

§ 39. Liability of person signing as agent, etc.— Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

[See ante, p. 83.]

§ 40. Signature by procuration; effect of.— A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

[See ante, p. 98.]

§ 41. Effect of indorsement by infant or corporation.— The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

[See ante, p. 51.]

§ 42. Forged signature; effect of.— Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

[See ante, p. 82.]

ARTICLE III.

Consideration of Negotiable Instruments.

Note.— This article appears as §§ 24-29 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3327-3332 of R. S. of Arizona; as §§ 1328-1333 in the Code of the District of Columbia; as §§ 43-48 in the Maryland statute; as §§ 41-46 of chap. 73 of the R. L. of Massachusetts; as §§ 3171w-3171a of the R. S. of Ohio; as §§ 32-37 in the Rhode Island act; and as §§ 1675-50 to 1675-55 of Wisconsin statute.

§ 50. Presumption of consideration.— Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

[See ante, p. 301.]
Section construed, Bringman v. Von Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845.

§ 51. Consideration, what constitutes.— Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

[See ante, p. 287.]
Section construed, Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822.

§ 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.

[See ante, p. 305.]
Section construed, Petrie v. Miller, 57 App. Div. 17, 67 N. Y. Supp. 1042; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822.

§ 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.

[See ante, p. 307.]
Section construed, Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822.

§ 54. Effect of want of consideration.— Absence or 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.

[See ante, p. 275.]

§ 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.

[See ante, p. 369.]

ARTICLE IV.

Negotiation.

Note.— This article appears as §§ 30-50 in the acts of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3333-3353 of R. S. of Arizona; as §§ 1364-1373 in the Code of the District of Columbia; as §§ 79-88 in the Maryland statute; as §§ 47-67 of chap. 73 of the R. L. of Massachusetts; as §§ 3172b-3172v of the R. S. of Ohio; as §§ 38-58 in the Rhode Island act; and as §§ 1676 to 1676-20 of Wisconsin statute.

§ 60. What constitutes negotiation.—An instrument is negotiated when it is transferred from one person to another in such manner as 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.

[See ante, p. 316.]

§ 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.

[See ante, p. 320.]

§ 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 indorsees 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.

[See ante, p. 323.]

Section construed, King v. King, 73 App. Div. 548, 77 N. Y. Supp. 40.

§ 63. Kinds of indorsement.— An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

[See ante, p. 324.]

§ 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.

[See ante, p. 326.]

§ 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.

[See ante, p. 326.]

§ 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.

[See ante, p. 328.]

§ 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.

[See ante, p. 332.]

§ 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.

[See ante, p. 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 nego-

tiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

[See ante, p. 337.]

§ 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.

[See ante, p. 338.]

§ 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.

[See ante, p. 338.]

§ 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.

[See ante, p. 339.]

§ 73. Indorsement where name is misspelled, et cetera.— Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

[See ante, p. 341.]

§ 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.

[See ante, p. 341.]

§ 75. Time of indorsement; presumption.— Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue.

[See ante, p. 342.]

§ 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.

[See ante, p. 343.]

§ 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.

[See ante, p. 343.]

§ 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.

[See ante, p. 346.]

§ 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.

[See ante, p. 347.]

§ 80. When prior party may negotiate instrument.— Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

[See ante, p. 352.]

ARTICLE V.

Rights of Holder.

Note.— This article appears as §§ 51-59 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3354-3362 of R. S. of Arizona; as §§ 1355-1363 in the Code of the District of Columbia; as §§ 70-78 in the Maryland statute; as §§ 68-76 of chap. 73 of the R. L. of Massachusetts; as §§ 3172w-3173d of the R. S. of Ohio; as §§ 59-67 in the Rhode Island act; and as §§ 1676-21 to 1676-29 of Wisconsin statute.

§ 90. Right of holder to sue; payment.—The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument.

[See ante, p. 358.]

§ 91. What constitutes a holder in due course.—A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;

2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such were the fact;

3. That he took it in good faith and for value;

4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

[See ante, p. 359.]

§ 92. When person not deemed holder in due course.— Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

[See ante, p. 367.]

§ 93. Notice before full amount paid.— Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

[See ante, p. 373.]

§ 94. When title defective.— The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

[See ante, p. 374.]

§ 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.

[See ante, p. 367.]

§ 96. Rights of holder in due course.— A holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

[See ante, p. 381.]

§ 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.

[See ante, p. 387.]
Section construed, Andrews v. Robertson, 111 Wis. 337, 87 N. W. 190.

§ 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.

[See ante, p. 391.]

ARTICLE VI.

Liabilities of Parties.

Note.— This article appears as §§ 60-69 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3363-3372 of R. S. of Arizona; as §§ 1364-1373 in the Code of the District of Columbia; as §§ 79-88 in the Maryland statute; as §§ 77-86 of chap. 73 of the R. L. of Massachusetts; as §§ 3173e-3173w of the R. S. of Ohio; as §§ 68-77 in the Rhode Island act; and as §§ 1677-1677-9 of Wisconsin statute.

§ 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.

[See ante, p. 399.]

§ 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 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.

[See ante, p. 403.]

§ 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.

[See ante, p. 406.]

§ 113. When person deemed indorser.— A person placing his signature upon an instrument otherwise than as 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.

[See ante, p. 412.]

§ 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.

[See ante, p. 412.]
Section construed, McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000; Subd. 1 construed, Metropolitan Bank v. Engel, 66 App. Div. 273, 72 N. Y. Supp. 691.]

§ 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 prior 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.

[See ante, p. 418.]
Section construed, Gabay v. Doane, 66 App. Div. 512, 73 N. Y. Supp. 381. No warranty where transfer is by order of court; Oldfield v. Vassar College, 68 App. Div. 272, 73 N. Y. Supp. 1112.]

§ 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.

[See ante, p. 424.]

§ 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.

[See ante, p. 429.]

§ 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.

[See ante, p. 430.]

§ 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.

[See ante, p. 432.]

ARTICLE VII.

Presentment for Payment.

Note.— This article appears as §§ 70-88 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3373-3391 of R. S. of Arizona; as §§ 1374-1392 in the Code of the District of Columbia; as §§ 89-107 in the Maryland statute; as §§ 87-105 of chap. 73 of the R. L. of Massachusetts; as §§ 3173o-3174f of R. S. of Ohio; as §§ 78-96 in the Rhode Island act; and as §§ 1678 to 1678-18 of Wisconsin statute.

§ 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 and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

[See ante, p. 439.]

§ 131. Presentment where instrument is not payable on demand.— Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

[See ante, p. 435.]
Section cited, Metropolitan Bank v. Engel, 66 App. Div. 276, 72 N. Y. Supp. 691.

§ 132. What constitutes a sufficient presentment.— Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf;
2. At a reasonable hour on a business day;
3. At a proper place as herein defined;
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

[See ante, p. 448.]

§ 133. Place of presentment.— Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

[See ante, p. 453.]

§ 134. Instrument must be exhibited.— The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

[See ante, p. 457.]

§ 135. Presentment where instrument payable at bank.— Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

[See ante, p. 459.]
Section construed, Metropolitan Bank v. Engel, 66 App. Div. 276, 72 N. Y. Supp. 691.

§ 136. Presentment where principal debtor is dead.— Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence, he can be found.

[See ante, p. 461.]

§ 137. Presentment to persons liable as partners.— Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

[See ante, p. 461.]

§ 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.

[See ante, p. 463.]

§ 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.

[See ante, p. 464.]

§ 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.

[See ante, p. 466.]

§ 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.

[See ante, p. 467.]

§ 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.

[See ante, p. 468.]

§ 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.

[See ante, p. 472.]

§ 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.

[See ante, p. 473.]

§ 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.

[See ante, p. 474.]

§ 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.

[See ante, p. 479.]

§ 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.

[See ante, p. 480.]

§ 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.

[See ante, p. 483.]

ARTICLE VIII.

Notice of Dishonor.

Note.— This article appears as §§ 89-118 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3392-3421 of R. S. of Arizona; as §§ 1393-1422 in the Code of the District of Columbia; as §§ 108-137 in the Maryland statute; as §§ 106-135 of chap. 73 of the R. L. of Massachusetts; as §§ 3174g-3175i of R. S. of Ohio; as §§ 97-126 in the Rhode Island act; and as §§ 1678-19 to 1678-48 of Wisconsin statute.

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.

§ 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.

[See ante, p. 485.]

§ 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 up, would have a right to reimbursement from the party to whom the notice is given.

[See ante, p. 493.]

§ 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.

[See ante, p. 495.]

§ 163. Effect of notice given on behalf of holder.— Where notice is given by or on behalf of the holder, it enures 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.

[See ante, p. 497.]

§ 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 enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

[See ante, p. 498.]

§ 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.

[See ante, p. 497.]

§ 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.

[See ante, p. 498.]

§ 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.

[See ante, p. 500.]

§ 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.

[See ante, p. 489.]

§ 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.

[See ante, p. 490.]

§ 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.

[See ante, p. 491.]

§ 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.

[See ante, p. 492.]

§ 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.

[See ante, p. 493.]

§ 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.

[See ante, p. 502.]

§ 174. Where parties reside in same place.— Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following;
2. If given at his residence, it must be given before the usual hours of rest on the day following;
3. If sent by mail, it must be deposited in the post-office in time to reach him in usual course on the day following.

[See ante, p. 505.]
See Kelly v. Theiss, 65 App. Div. 146, 72 N. Y. Supp. 467.

§ 175. Where parties reside in different places.— Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision.

[See ante, p. 506.]

§ 176. When sender deemed to have given due notice.— Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

[See ante, p. 515.]

§ 177. Deposit in post-office; what constitutes.— Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter-box under the control of the Post-Office Department.

[See ante, p. 516.]

§ 178. Notice to subsequent party; time of.— Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

[See ante, p. 511.]

§ 179. Where notice must be sent.— Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or
2. If he live in one place, and have his place of business in another, notice may be sent to either place; or
3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

[See ante, p. 517.]

§ 180. Waiver of notice.— Notice of dishonor may be waived, either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be express or implied.

[See ante, p. 518.]

§ 181. Whom affected by waiver.— Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

[See ante, p. 524.]

§ 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.

[See ante, p. 525.]

§ 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.

[See ante, p. 526.]

§ 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.

[See ante, p. 504.]

§ 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.

[See ante, p. 528.]

§ 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.

[See ante, p. 529.]

§ 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.

[See ante, p. 530.]

§ 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.

[See ante, p. 530.]

§ 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.

[See ante, p. 530.]

ARTICLE IX.

Discharge of Negotiable Instruments.

Note.— This article appears as §§ 119-125 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3422-3428 of R. S. of Arizona; as §§ 1423-1429 in the Code of District of Columbia; as §§ 138-144 in the Maryland statute; as §§ 136-142 of chap. 73 of the R. L. of Massachusetts; as §§ 3175j-3175p of R. S. of Ohio; as §§ 127-133 in the Rhode Island act; and as §§ 1679-1679-6 of Wisconsin statute.

§ 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.

[See ante, p. 532.]

§ 201. When persons 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.

[See ante, p. 544.]
See Schwartz v. Wilmer, 90 Md. 141, 44 Atl. 1059.

§ 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

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

[See ante, p. 552.]
Section construed, Twelfth Ward Bank v. Brooks, 63 App. Div. 220, 71 N. Y. Supp. 388.

§ 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.

[See ante, p. 542.]

§ 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.

[See ante, p. 541.]

§ 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.

[See ante, p. 556.]
Section construed and applied, Schwartz v. Wilmer, 90 Md. 141, 44 Atl. 1059; Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134; Jeffrey v. Rosenfeld, 179 Mass. 508, 61 N. E. 49.

§ 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.

[See ante, p. 561.]
Section construed and applied, Jeffry v. Rosenfeld, 179 Mass. 508, 61 N. E. 49; Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134.

ARTICLE X.

Bills of Exchange; Form and Interpretation.

Note.— This article appears as §§ 126-131 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3429-3434 of R. S. of Arizona; as §§ 1430-1435 in the Code of the District of Columbia; as §§ 145-150 in the Maryland statute; as §§ 143-148 of chap. 73 of the R. L. of Massachusetts; as §§ 3175q-3175v of R. S. of Ohio; as §§ 134-139 in the Rhode Island act; and as §§ 1680-1680e of Wisconsin statute.

§ 210. Bill of exchange defined.— A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

[See ante, p. 577.]

§ 211. Bill not an assignment of funds in hands of drawee.— A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

[See ante, p. 578.]

§ 212. Bill addressed to more than one drawee.—A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

[See ante, p. 580.]

§ 213. Inland and foreign bills of exchange.— An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within the State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

[See ante, p. 581.]

§ 214. When bill may be treated as promissory note.— Where in a bill the drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

[See ante, p. 581.]

§ 215. Referee in case of need.— The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.

[See ante, p. 581.]

ARTICLE XII.

Presentment of Bills of Exchange for Acceptance.

Note.— This article appears as §§ 143-151 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3446-3454 of R. S. of Arizona; as §§ 1447-1455 in the Code of District of Columbia; as §§ 162-170 in the Maryland statute; as §§ 150-158 of chap. 73 of the R. L. of Massachusetts; as §§ 3176g-3176o of R. S. of Ohio; as §§ 151-159 in the Rhode Island act; and as §§ 1681-1681-8 of Wisconsin statute.

§ 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.

[See ante, p. 585.]

§ 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.

[See ante, p. 587.]

§ 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 authority 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.

[See ante, p. 588.]

§ 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 holdiday, presentment for acceptance may be made before twelve o'clock noon on that day.

[See ante, p. 590.]

§ 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.

[See ante, p. 590.]

§ 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.

[See ante, p. 591.]

§ 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.

[See ante, p. 591.]

§ 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.

[See ante, p. 592.]

§ 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.

[See ante, p. 592.]

ARTICLE XIII.

Protest of Bills of Exchange.

Note.— This article appears in §§ 152-160 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3455-3463 of R. S. of Arizona; as §§ 1456-1464 in the Code of District of Columbia; as §§ 171-179 in the Maryland statute; as §§ 169-177 of chap. 73 of the R. L. of Massachusetts; as §§ 3176p-3176x of R. S. of Ohio; as §§ 160-168 in the Rhode Island act; and as §§ 1681-9 to 1681-17 of Wisconsin statute.

§ 260. In what cases protest necessary.— Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

[See ante, p. 609.]

§ 261. Protest; how made.— The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment;
2. The fact that presentment was made and the manner thereof;
3. The cause or reason for protesting the bill;
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

[See ante, p. 611.]

§ 262. Protest; by whom made.—Protest may be made by:

1. A notary public; or
2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

[See ante, p. 615.]

§ 263. Protest; when to be made.—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

[See ante, p. 616.]

§ 264. Protest; where made.— A bill must be protested at the place where it is dishonored, except that when a bill, drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

[See ante, p. 617.]

§ 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.

[See ante, p. 618.]

§ 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.

[See ante, p. 618.]

§ 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.

[See ante, p. 619.]

§ 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.

[See ante, p. 619.]

ARTICLE XIV.

Acceptance of Bills of Exchange for Honor.

Note.— This article appears as §§ 161-170 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3464-3473 of R. S. of Arizona; as §§ 1465-1474 in the Code of District of Columbia; as §§ 180-189 in the Maryland statute; as §§ 178-187 of chap. 73 of the R. L. of Massachusetts; as §§ 3176y-3177g of R. S. of Ohio; as §§ 169-178 in the Rhode Island act; and as §§ 1681-18 to 1681-27 of Wisconsin statute.

§ 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.

[See ante, p. 620.]

§ 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.

[See ante, p. 621.]

§ 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.

[See ante, p. 622.]

§ 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.

[See ante, p. 622.]

§ 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.

[See ante, p. 622.]

§ 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.

[See ante, p. 623.]

§ 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.

[See ante, p. 623.]

§ 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.

[See ante, p. 624.]

§ 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.

[See ante, p. 623.]

§ 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.

[See ante, p. 624.]

ARTICLE XV.

Payment of Bills of Exchange for Honor.

Note.— This article appears as §§ 171-177 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah. Virginia, and Washington; as §§ 3474-3480 of R. S. of Arizona; as §§ 1475-1481 in the Code of the District of Columbia; as §§ 190-196 in the Maryland statute; as §§ 188-194 of chap. 73 of the R. L. of Massachusetts; as §§ 3177h-3177n of R. S. of Ohio; as §§ 179-185 in the Rhode Island act; and as §§ 1681-28 to 1681-34 of Wisconsin statute.

§ 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.

[See ante, p. 625.]

§ 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.

[See ante, p. 625.]

§ 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.

[See ante, p. 626.]

§ 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.

[See ante, p. 626.]

§ 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 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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§ 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.

[See ante, p. 622.]

§ 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.

[See ante, p. 622.]

§ 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.

[See ante, p. 623.]

§ 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.

[See ante, p. 623.]

§ 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.

[See ante, p. 624.]

§ 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.

[See ante, p. 623.]

§ 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.

[See ante, p. 624.]

ARTICLE XV.

Payment of Bills of Exchange for Honor.

Note.— This article appears as §§ 171-177 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah. Virginia, and Washington; as §§ 3474-3480 of R. S. of Arizona; as §§ 1475-1481 in the Code of the District of Columbia; as §§ 190-196 in the Maryland statute; as §§ 188-194 of chap. 73 of the R. L. of Massachusetts; as §§ 3177h-3177n of R. S. of Ohio; as §§ 179-185 in the Rhode Island act; and as §§ 1681-28 to 1681-34 of Wisconsin statute.

§ 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.

[See ante, p. 625.]

§ 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.

[See ante, p. 625.]

§ 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.

[See ante, p. 626.]

§ 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.

[See ante, p. 626.]

§ 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.

[See ante, p. 626.]

§ 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.

[See ante, p. 626.]

§ 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.

[See ante, p. 627.]

ARTICLE XVI.

Bills in a Set.

Note.—This article appears as §§ 178-183 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3481-3486 of R. S. of Arizona; as §§ 1482-1487 in the Code of District of Columbia; as §§ 197-202 in the Maryland statute; as §§ 195-200 of chap. 73 of the R. L. of Massachusetts; as §§ 3177o-3177t of R. S. of Ohio; as §§ 186-191 in the Rhode Island act; and as §§ 1681-35 to 1681-40 of Wisconsin statute.

§ 310. Bills in sets constitute one bill.—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill.

[See ante, p. 582.]

§ 311. Rights of holders where different parts are negotiated.—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

[See ante, p. 583.]

§ 312. Liability of holder who indorses two or more parts of a set to different persons.— Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

[See ante, p. 583.]

§ 313. Acceptance of bills drawn in sets.—The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

[See ante, p. 583.]

§ 314. Payment by acceptor of bills drawn in sets.—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

[See ante, p. 584.]

§ 315. Effect of discharging one of a set.— Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

[See ante, p. 584.]

ARTICLE XVII.

Promissory Notes and Checks.

Note.— This article appears as §§ 184-189 in the act of Colorado, Connecticut, Florida, Iowa, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington; as §§ 3487-3491 of R. S. of Arizona; as §§ 1488-1493 in the Code of District of Columbia; as §§ 203-208 in the Maryland statute; as §§ 201-206 of chap. 73 of the R. L. of Massachusetts; as §§ 3177u-3177z of R. S. of Ohio; as §§ 192-197 in the Rhode Island act; and §§ 1684 to 1684-5 of Wisconsin statute.

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.

[See ante, p. 17.]
Section cited, Hickok v. Bunting, 67 App. Div. 569, 73 N. Y. Supp. 967.

§ 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.

[See ante, p. 628.]

§ 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.

[See ante, p. 630.]

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§ 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.

[See ante, p. 633.]

§ 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.

[See ante, p. 635.]

§ 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.

[See ante, p. 636.]

ARTICLE XVIII.

Notes Given for a Patent Right and for a Speculative Consideration.

Note.— This article is peculiar to the New York act, except as to the provision concerning patent rights, which also appears in the Ohio statute as § 3178g.

§ 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.

ARTICLE XIX.

Laws Repealed; 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.

APPENDIX B.

ENGLISH BILLS OF EXCHANGE ACT, 1882.

[Note.—The subheadings of the sections are not part of the law.]

An Act to Codify the Law Relating to Bills of Exchange, Cheques and Promissory Notes.

[45 and 46 Vict. Ch. 61; 18th August, 1882.]

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

PART I.

Preliminary.

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

2. **Interpretation of terms.**—In this act, unless the context otherwise requires —

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

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

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

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

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

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

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

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

"Indorsement" means an indorsement completed by delivery.

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

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

"Value" means valuable consideration.

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

PART II.

Bills of Exchange.

FORM AND INTERPRETATION.

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

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

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

(4) A bill is not invalid by reason—

(*a*) That it is not dated;

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

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

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

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

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

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

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

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

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

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

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

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

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

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

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

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

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

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

(*a*) With interest.

(*b*) By stated instalments.

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

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

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

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

10. **Bill payable on demand.**— (1) A bill is payable on demand —

(*a*) Which is expressed to be payable on demand, or at sight, or on presentation; or

(*b*) In which no time for payment is expressed.

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

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

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

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

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

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

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

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

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

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

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

Provided that —

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

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

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

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

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

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

16. Optional stipulations.—The drawer of a bill, and any indorser, may insert therein an express stipulation —

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

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

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

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

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

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

18. Time for acceptance.— A bill may be accepted —

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

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

(3) 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 first presentment to the drawee for acceptance.

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

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

In particular an acceptance is qualified which is —

(*a*) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated:

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

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

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

(*d*) Qualified as to time:

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

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

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

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

21. Delivery.— (1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

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

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

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

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

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

(3) Where a bill is not longer in the possession of a party who signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

CAPACITY AND AUTHORITY OF PARTIES.

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

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

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

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

Provided that

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

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

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

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

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

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

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

THE CONSIDERATION FOR A BILL.

27. **What is value; holder for value.**— (1) Valuable consideration for a bill may be constituted by,—

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

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

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

(3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

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

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

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

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

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

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

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

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

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

NEGOTIATION OF BILLS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes, of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

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

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

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

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

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

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

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

GENERAL DUTIES OF THE HOLDER.

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

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or

place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

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

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

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

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

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

41. Rules governing presentment.— (1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(*a*) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

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

(*c*) Where the drawee is dead presentment may be made to his personal representative:

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

(*e*) Where authorized by agreement or usage, a presentment through the post office is sufficient.

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

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

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

(*c*) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonored does not excuse presentment.

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

43. Dishonor for non-acceptance; effect thereof.— (1) A bill is dishonored by non-acceptance —

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

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

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

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

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

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

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

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

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

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

(2) Where the bill is payable on demand, then, subject to the provisions of this act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

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

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

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

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

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

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

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

(6) Where a bill is drawn upon or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

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

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

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

(2) Presentment for payment is dispensed with,—

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

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

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

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

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

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

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

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

48. Notice of dishonor.—Subject to the provisions of this act, when a bill has been dishonored by non-acceptance or by non-payment, notice of dishonor must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged;

Provided that —

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

(2) Where a bill is dishonored by non-acceptance and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonor by non-payment unless the bill shall in the meantime have been accepted.

49. Notice of dishonor; rules controlling validity.— Notice of dishonor in order to be valid and effectual must be given in accordance with the following rules:—

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of 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.

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonored by non-acceptance or non-payment.

(6) The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonor.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonor is required to be given to any person it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonored, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless —

(a) Where the person giving and the person to receive notice reside in the same place, and notice is given or sent off in time to reach the latter on the day after the dishonor of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonor of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13) Where a bill when dishonored is in the hands of an agent, he may either himself give notices to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonor, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonor.

(15) Where a notice of dishonor is duly addressed and posted, the sender is deemed to have given due notice of dishonor, notwithstanding any miscarriage by the post office.

50. Delay in giving notice; when notice dispensed with.— (1) Delay in giving notice of dishonor is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(2) Notice of dishonor is dispensed with —

(a) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged:

(b) By waiver express or implied. Notice of dishonor may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:

(d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

51. Protest of bills.— (1) Where an inland bill has been dishonored it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonored by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonored by non-acceptance, is dishonored by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonor is unnecessary.

(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonor. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6) A bill must be protested at the place where it is dishonored:

Provided that —

(*a*) When a bill is presented through the post office, and returned by post dishonored, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(*b*) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify —

(*a*) The person at whose request the bill is presented:

(*b*) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonor. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

52. Drawer or acceptor, how bound.— (1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonor should be given to him.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

LIABILITIES OF PARTIES.

53. Bill does not operate as assignment.—(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time when the bill is presented to the drawee.

54. Liability of acceptor.— The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenor of his acceptance:

(2) Is precluded from denying to a holder in due course:

- (*a*) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;
- (*b*) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;
- (*c*) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

55. Liability of drawer or indorser.—(1) The drawer of a bill by drawing it—

- (*a*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;
- (*b*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2) The indorser of a bill by indorsing it—

- (*a*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonored he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonor be duly taken;

(*b*) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(*c*) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

56. Liability of third party.— Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

57. Measure of damage.— Where a bill is dishonored, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser —

(*a*) The amount of the bill:

(*b*) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the matūrity of the bill in any other case:

(*c*) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonored abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

58. Transferor by delivery and transferee.—(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

59. Payment in due course; effect of payment.—(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(a) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill.

(b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

60. Bill drawn on banker; forged or unauthorized indorsement.— Where a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

61. Discharge when bill in hands of acceptor.— When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

62. Waiver of rights against acceptor.—(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

63. Cancellation.— (1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

64. Alteration of bill.—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

ACCEPTANCE AND PAYMENT FOR HONOR.

65. Acceptance for honor supra protest.— (1) 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.

(2) A bill may be accepted for honor for part only of the sum for which it is drawn.

(3) An acceptance for honor supra protest in order to be valid must —

(a) be written on the bill, and indicate that it is an acceptance for honor:

(b) be signed by the acceptor for honor.

(4) 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.

(5) 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.

66. Liability of acceptor for honor.— (1) The acceptor for honor of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

67. Presentment to acceptor for honor.—(1) 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.

(2) Where the address of the acceptor for honor is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the ac-

ceptor for honor is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4) When a bill of exchange is dishonored by the acceptor for honor it must be protested for non-payment by him.

68. Payment for honor supra protest.— (1) Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn.

(2) 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 shall have the preference.

(3) 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 of it.

(4) The notarial act of honor must be founded on a declaration made by the payer for honor, or his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays.

(5) 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 that party.

(6) 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. If the holder do not on demand deliver them up he shall be liable to the payer for honor in damages.

(7) Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment.

LOST INSTRUMENTS.

69. Holder's right to duplicate of lost bill.— Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

70. Effect.— In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

BILL IN A SET.

71. Provisions applicable to bills in a set.— (1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if the said parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

CONFLICT OF LAWS.

72. What law governs.— Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

Provided that —

(*a*) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(*b*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purposes of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer, be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonor, or otherwise, are determined by the law of the place where the act is done or the bill is dishonored.

(4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

PART III.

Cheques on a Banker.

73. Definition of cheque.— A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this part, the provisions of this act applicable to a bill of exchange payable on demand, apply to a cheque.

74. Presentment of cheque for payment.— Subject to the provisions of this act —

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

75. Revocation of authority to pay.— The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by —

(1) Countermand of payment:

(2) Notice of customer's death.

CROSSED CHEQUES.

76. Crossed checks defined.— (1) Where a cheque bears across its face an addition of (*a*) the words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable"; or (*b*) two parallel transverse lines simply, either with or without the words "not negotiable"; that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

77. Crossed by drawer, et cetera.— (1) A cheque may be crossed generally or specially by the drawer.

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

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

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

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

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

78. Crossing material part.— A crossing authorised by this act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

79. Duties of banker as to crossed cheques.— (1) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not, at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorized by this act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

80. Liability of banker and drawer as to crossed cheque.— Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

81. Effect of crossing on holder.— Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

82. Protection to collecting banker.— Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

PART IV.

Promissory Notes.

83. Promissory note defined.— (1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

84. Delivery necessary.— A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

85. Joint and several notes.—(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor.

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

86. Note payable on demand.— (1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

87. Presentment for payment.— (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

88. Liability of maker.— The maker of a promissory note by making it —

(1) Engages that he will pay it according to its tenor;

(2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

89. Application of Act to notes.— (1) Subject to the provisions in this part and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to —

(*a*) Presentment for acceptance;

(*b*) Acceptance;

(*c*) Acceptance supra protest;

(*d*) Bills in a set.

(4) Where a foreign note is dishonored, protest thereof is unnecessary.

PART V.

Supplementary.

90. Good faith.—A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

91. Signature.—(1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

92. Computation of time.—Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this Act mean—

(*a*) Sunday, Good Friday, Christmas Day:

(*b*) A bank holiday under the Bank Holidays Act, 1871, or acts amending it:

(*c*) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

93. When noting equivalent to protest.—For the purposes of this Act where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

94. Protest by persons who are not notaries.—Where a dishonored bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonored, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonor of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

95. Warrants for dividend may be crossed.—The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

96. Repeal.— The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

97. Saving provisions.—(1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3) Nothing in this Act or in any repeal effected thereby shall affect —

(*a*) The provisions of the Stamp Act, 1870, or acts amending it or any law or enactment for the time being in force relating to the revenue:

(*b*) The provisions of the Companies Act, 1862, or acts amending it or any act relating to joint stock banks or companies:

(*c*) The provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

(*d*) The validity of any usage relating to dividend warrants, or the indorsements thereof.

98. Summary diligence in Scotland.— Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

99. Construction with other acts.—Where any act or document refers to any enactment repealed by this Act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

100. Parol evidence in Scotland.— In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parol evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

SCHEDULES.

First Schedule.

Form of protest which may be used when the services of a notary cannot be obtained.

Know all men that I, A. B. (householder), of in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of 188 at demand payment (or acceptance) of the bill of exchange hereunder written, from E. F., to which demand he made answer (state answer, if any). Wherefore I now, in the presence of G. H. and J. K. do protest the said bill of exchange.

(Signed) A. B.

G. H.
J. K. } Witnesses.

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

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