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STANFORD LAW
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IN
MEMORY OF
HENRY VROOMAN

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COMMENTARIES

ON THE LAW OF

BILLS OF EXCHANGE,

FOREIGN AND INLAND,

AS ADMINISTERED IN

ENGLAND AND AMERICA;

WITH

OCCASIONAL ILLUSTRATIONS FROM THE COMMERCIAL LAW OF THE NATIONS OF CONTINENTAL EUROPE.

By JOSEPH STORY, LL. D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY.

"Paullatim ergo et non semel simulque ad eam perfectionem, quam hodie miramur, pervenit Negotiatio ista Cambialis." Heineccius, De Camb., cap. 1, § 8.

"Quamvis vero tot Gentium Civitatumque Leges Cambiales non per omnia conveniant, sunt tamen quædam omnibus communia." Ibid. cap. 1, § 13.

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ADVERTISEMENT TO THE SECOND EDITION.

The present Edition will be found to be considerably enlarged from the last. The Editor has, however, made no other change in the text than to insert the manuscript alterations and additions left by the Author, and to cite in the notes such new cases, as have fallen within his observation.

W. W. STORY.

Boston, December, 1846.

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TO

SIMON GREENLEAF, Esq., LL. D.

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

My dear Sir,

It was my original intention to dedicate to you the entire collection of my Juridical Works, when my labors in the Dane Professorship should be completed. But advancing years admonish me, that the term of my life may not be so far prolonged, as to enable me to reach the full consummation of my purposes. I avail myself, therefore, of the opportunity of dedicating this work to you, as a memorial of our long, uninterrupted, and confidential friendship. We have been coadjutors in the instructions of the Law Department of Harvard University for no brief period of time, and have united, heart and hand, in our endeavours to promote its prosperity and enlarge its usefulness. I can bear full testimony to the eminent ability, the unwearied diligence, the ample learning, and the conscientious fidelity, with which you have performed all your official duties. The general voice of the public has already awarded to you that tribute of praise, which never

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fails, first or last, to attend upon high desert; and to the Royall Professor may be emphatically applied the language of Cicero; "Is et ipse scripsit multa præclare, et docuit alios." * That you may long continue to occupy the Professorial chair with distinguished honor, and add to a reputation, already reposing on the most solid foundations, is the earnest wish of

Your affectionate friend,

JOSEPH STORY.

CAMBRIDGE, Mass., January 2, 1843.

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* Cicero De Clar. Orat. cap. 8.

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PREFACE.

In presenting the present Work to the indulgent consideration of the public, a few explanatory remarks may seem necessary, inasmuch as the plan essentially differs from that, adopted by all the English elementary writers upon the same subject. The subject of Bills of Exchange is here treated entirely distinct from that of Promissory Notes and other Negotiable Securities of a kindred nature. I am aware, that many of the principles of the latter are strictly applicable to the former; and that, therefore, it may, at first view, be thought a superfluous labor, as well as an unnecessary repetition, to discuss them at large in separate volumes. In truth, my attention was first attracted to the great practical inconvenience of uniting and intermixing the doctrines respecting Bills of Exchange and Promissory Notes in one and the same treatise, in the course of my instruction of the Law Students in Harvard University. The excellent Work of Mr. Baron Bayley is used in our Lectures as a Text Book; and, as is well known, the doctrines concerning Bills of Exchange, and those concerning Promissory Notes, are in that work universally intermixed with each other, and the illustrations of those doctrines are constantly and indiscriminately drawn from each source, although they sometimes apply, not only with varied force, but also in an opposite manner; so that it is often found very difficult to make students completely understand the reasons, either for the coincidences, or the diversities.

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Besides; although many of the doctrines belonging to Bills of Exchange are equally applicable to Promissory Notes, with more or less qualifications and limitations; yet there are many doctrines peculiar to each of them, which cannot, without some violence to a just distribution and orderly arrangement of the materials, find any appropriate place and connexion in both. And I cannot but persuade myself, that some of the difficulties, which occasionally present themselves in the arguments at the bar upon these topics, arise from the confusion necessarily incident to the practice of thus blending authorities and doctrines, which, however cogent in themselves, often have but a remote bearing upon, or analogy to, the points directly in controversy in the case before the court.

The plan, therefore, which I have adopted, is, to discuss the whole Law, relating to Bills of Exchange, in the present volume, as a separate and independent treatise; and in another volume to present to the learned reader a full review, in a similar method, of the whole law relating to Promissory Notes, Checks, and other Negotiable Instruments of a kindred character. In executing this plan, I have availed myself freely of all the English Treatises, extant upon the same subject, and especially of the Work of Mr. Baron Bayley, which contains a full collection of the most important cases, and that of Mr. Chitty, which is very valuable from his great practical experience, and familiar knowledge of the authorities; and I have occasionally made extracts from the crowded pages of the latter, to illustrate more fully, than the brevity of my own text would allow, some doctrines and distinctions of an important nature. I have also extended my researches into Foreign Jurisprudence, and I have examined the works of some of the most distinguished Foreign Jurists,

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and especially the writings of Savary, Pothier, Pardessus, and Heineccius. They are highly useful in stating general principles, but rarely extend their discussions into the more minute ramifications of those principles, which enter into the practical details of the daily business of commercial life. They expound the theory, and often discuss the abstract propriety, of particular rules and exceptions; and awaken a spirit of inquiry, although, perhaps, they do not always satisfy our judgment by their results. But it is to the elaborate judgments of the tribunals of England, that we must look for the most copious, exact, and minute instruction upon this important subject, and for thorough practical adaptations of general principles to the varied exigencies of human life, and the due administration of civil justice. America received from the parent country the materials, out of which she has constructed her own system of Commercial Jurisprudence, and her labors have, as we trust, added to the common stock some valuable illustrations and some solid doctrines. If the remark of Scaccia, made more than two hundred years ago, in the comparative infancy of commerce, was then true, it applies with far more force to us in the present age. Quinimo, Cambia adeo sunt Reipublicæ utilia et necessaria, ut si Cambia cessarent, omnia pene mercaturæ officia dissiparentur, ac destituerentur.*

CAMBRIDGE, January 2, 1843.

* Scaccia, Tract. de Comm. § 1, Quest. 6, § 14, p. 130 (edit. 1664).

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COMMENTARIES

ON

BILLS OF EXCHANGE.

CHAPTER I.

ORIGIN AND NATURE OF BILLS OF EXCHANGE.

§ 1. HAVING in other volumes discussed at large the Law of Agency and the Law of Partnership, which enter so largely into all the various branches of commercial jurisprudence, my design in the present work is, to unfold the general principles applicable to Bills of Exchange, Promissory Notes, Bank Checks, and other negotiable instruments for the payment of money. In doing this, it seems to me, if not more philosophical, at least of greater practical convenience and utility to treat each of these topics separately, and thereby to avoid the confusion and embarrassment often arising, in the course of professional studies, from the intermixture of considerations, which, however appropriate in one species, may not apply at all, or may apply only with remote or diminished force to another species of negotiable instruments. It is true, that many of the principles, which belong to one, will, in a general sense, be found embodied in the others; but it is rare that some distinctions do not exist, which

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require caution and discrimination in deducing the proper rules, which are to regulate the rights, the duties, and the obligations of the parties in each. My design is, therefore, in the first place, to examine the doctrines of commercial jurisprudence concerning Bills of Exchange; secondly, those concerning Promissory Notes; thirdly, those concerning Bank Checks; and, lastly, those concerning other negotiable instruments of a kindred but miscellaneous character.

§ 2. A Bill of Exchange derives its name from a phrase, familiar in the language of Continental Europe, and most probably derived from that of France, in which it is called "Billet de Change," or "Lettre de Change."[1] In the Middle Ages, the word *Concambium* was used to express the particular contract, known in our law by the name of exchange, that is to say, a transmutation of property, from one man to another, in consideration of some price or recompense in value, such as a commutation of goods for goods, or of money for money.[2] Hence, among foreign Jurists, the phrase, *Cambium reale vel manuale*, is often used to express the latter contract; whereas the contract by which one man, in consideration of a sum of money received in one place, entered into an engagement to pay him the like sum in another, was

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[1] Chitty on Bills (8th edit.), p. 1; Pardessus, Droit Comm. Tom. 2, ch. 1, § 318; Code de Comm. Franc. art. 110; Jousse, sur L'Ordin. de Comm. 1673, tit. 5, p. 58, 64; Merlin Répert. Lettre et Billet de Change, § 1, p. 153; Id. § 2, p. 157 (edit. 1827); Pardessus, Droit Comm. Tom. 2, art. 318; Pothier de Change, n. 2, 3, 4.

[2] Heinecc. Elem. Jur. Camb. § 1, note; Id. § 2 to 4 (edit. 1769); 2 Black. Comm. 446; Pothier de Change, n. 1; Locré, Esprit de Comm. Tom. 1, Lib. 1, tit. 8, § 1, p. 330; Scaccia, § 1, Quest. 6, De Camb. n. 1 to 8; Id. § 1, Quest. 3, de Camb. n. 1 to n. 14, p. 129, 130 (edit. 1664); Id. Quest. 4, n. 1, p. 104, cap. 2, § 1.

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commonly called by the name of *Cambium locale, mercantile, trajectitium.*[1] Scaccia says, *Litteræ Cambii dicuntur ex eo, quia cambitur pecunia pro literis.*[2]

§ 3. Mr. Justice 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;[3] and this definition is followed by other writers.[4] Huberus gives a definition substantially the same. *Cambium est conventio, quâ ego tibi mando, ut tertio summam pecuniæ pendes, quam alius mihi jam dedit, vel de qua fidem illi habeo.*[5] This definition is certainly accurate, as far as it goes; but it wholly omits that, which, in modern times, is the most general form and structure of Bills of Exchange, its negotiable character, whereby it is made payable to a particular person or his order, or to the Bearer, and thus acquires its most important use as a facility in commercial intercourse by becoming an instrument of general circulation and credit. Mr. Chancellor Kent, following the language of Bayley on Bills,[6] has given a

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[1] Heinecc. Elem. Camb. cap. 1, § 5 (edit. 1769); Pothier de Change, n. 1, 2. — Pothier makes a distinction between a "Lettre de Change," and a "Billet de Change." The Billet de Change, he says, is, when the party, with whom the contract is made, is not at present prepared to give the Bill of Exchange agreed on, and merely gives a Billet, by which he engages hereafter to furnish one on the proper place. And he adds, that a Billet, by which the party, to whom one has furnished a Bill of Exchange, for which he has not paid the value, engages to pay it, is also called a Billet de Change. Pothier de Change, n. 4. See also Heinecc. Elem. Jur. Camb. § 5, 8; 1 Domat, Civ. Law, B. 1, tit. 16, § 4. See also Merlin, Répert. Lettre et Billet de Change, § 4, 8, p. 196, 252 (edit. 1827).

[2] Scaccia de Camb. Quest. 3, n. 13, p. 103.

[3] 2 Black. Comm. 466.

[4] Chitty on Bills (8th edit.), p. 1, 2; 1 Bell, Comm. B. 3, ch. 2, § 5, p. 386 (5th edit.).

[5] Hub. Prelect. Jur. Civ. Lib. 17, tit. 1, § 12.

[6] Bayley on Bills, ch. 1, § 1, p. 1 (5th edit. 1830).

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definition, which is at once concise, clear, and accurate; "A Bill of Exchange is a written order or request by one person to another, for the payment of money, absolutely, and at all events."[1] But here again its peculiar distinguishable quality in modern times, its negotiability, is omitted, which, although not by our law essential to the instrument, is still that, which, practically speaking, among merchants, constitutes its true character. Mr. Kyd has accordingly given the more extended definition, stating it 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.[2]

§ 4. Heineccius gives a definition nearly to the same effect. *Per Cambium intelligimus litteras solemni formula scriptas, quibus quis alterum solvi jubet præsentanti certam pecuniæ summam, sibi jam numeratam, suoque nomine satisfactionem promittit;*[3] or, as he expresses it in another place, *Ut pecunia, a nobis Titio hoc loco numerata, oblatis letteris cambialibus, alio loco a Sempronio solvitur ei, qui hos litteras a Titio, vel a legitimo possessore, justo titulo acceperit.*[4] Stypmannus gives the following definition. *Est autem Cambium contractus in permutatione pecuniæ æquivalentis in diversis locis pro certo pretio facienda consistens.*[5] Pothier adopts similar language. One may define a Bill of Exchange (says he) to be a letter clothed in certain terms, prescribed by the laws, whereby you

[1] 3 Kent. Comm. Lect. 44, p. 74 (4th edit.).
[2] Kyd on Bills, p. 3 (3d edit.).
[3] Heinecc. Elem. Jur. Camb. cap. 1, § 9 (edit. 1769).
[4] Id. cap. 1, § 3.
[5] Stypm. Jus. Marit. ch. 8, § 14.

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order your correspondent, in another place, to pay to me, or to another person having my order, a certain sum of money in exchange for a sum of money, or of the value, of what you have here received of me, either in fact or in account.[1] In this sense a Bill of Exchange is but an execution of a prior contract of exchange; it supposes such prior contract already established, and is the means, by which it is carried into execution, and not the contract itself.[2]

§ 5. The origin and history of Bills of Exchange, like the origin and history of many other commercial contracts, are subjects involved in no small obscurity. The exchange of goods for goods, or what is called barter trade, must have existed in all nations from the earliest period of their formation into communities, from the very necessities of the case.[3] 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 nation, as well as in the intercourse of different nations.[4] 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.[5]

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[1] Pothier de Change, n. 3; Jousse, sur L'Ordin. 1673, tit. 5, p. 58; Locré, Esprit de Comm. Tom. 1, tit. 8, § 1, p. 330.

[2] Pothier de Change, n. 2.

[3] Scaccia de Camb. Quest. 6, n. 1, 2, 3, p. 127; 2 Black. Comm. 446.

[4] Scaccia de Camb. Quest. 6, n. 1, 2, 6, p. 127.

[5] Molloy, B. 2, ch. 10, § 1; Cunningham on Bills, § 2, p. 5; Exodus,

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§ 6. It has been supposed, by some persons, that Bills of Exchange were known to the nations of antiquity, and especially to the Romans.[1] But there is great reason to doubt, whether the use of them, in the form and manner, and for the purposes, to which

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ch. 30, v. 13; Matthew, ch. 25, v. 27; Heinecc. Elem. Camb. cap. 1, § 3, note.

[1] I have not been able to find, in my own imperfect researches, any very distinct traces of the existence or use of Bills of Exchange in Greece. In the elaborate work of Boeckh on the Public Economy of Athens, translated and published in two volumes, by Murray, in 1828, there is no distinct statement of the existence or use of them; and from the silence of the Author, as well as an expression in Vol. I. B. 1, § 9, p. 65, that "Prohibitions to export money were unknown in ancient times, and are only compatible with the use of Bills of Exchange," I should conclude, that he considered the nonexistence and nonuser of them as an admitted fact. If it had been otherwise, it could scarcely be, that the Romans, from their intimate connexion with Greece, as well as the manifest utility of Bills, should not have constantly employed them in their own commerce. The Clazomenians (as Boeckh informs us) at one time coined iron money for use at home, in order to furnish their mercenaries abroad with silver; and thus the iron money stood in the relation of paper money in modern days, and the silver served the purposes of modern exchange. Boeckh on the Pub. Econ. of Athens, Vol. I. p. 381, (ed. 1828.) Mr. Chancellor Kent seems to think, that Bills of Exchange were known in Greece, from a passage in one of the pleadings of Isocrates. His note is, "See the pleading of Isocrates, entitled, *Trapeziticus*. (*Isocratis Scripta omnia*, edit. *H. Wolfius*, *Basle*, 1587.) In that interesting forensic argument, which Isocrates puts into the mouth of a son of Sopæus, the governor of a province of Pontus, in his suit against Pasion, an Athenian banker, for the grossest breach of trust, it is stated, that the son, wishing to receive a large sum of money from his father, applied to Stratocles, who was about to sail from Athens to Pontus, to leave his money, and take a draft upon his father for the amount. This, said the orator, was deemed a great advantage to the young man, for it saved him the risk of remittance from Pontus, over a sea covered with Lacedæmonian pirates. It is added, that Stratocles was so cautious as to take security from Pasion for the money advanced upon the bill, and to whom he might have recourse if the governor of Pontus should not honor the draft, and the young Pontian should fail." 3 Kent. Comm. Lect. 44, p. 71, 72 (4th edit.). But this transaction seems little more than the very case alluded to by Cicero, and put in the Roman Law. See Stypmannus, Jus. Marit. ch. 8, § 1 to 8. Encyclopedia Britannica, art. Exchange, (7th edit.) which cites De Pauw.

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they are now applied, was known to antiquity. The nearest approach seems to be the custom, which prevailed at Rome, where one paid money to another at Rome to be repaid by the other at another place, as, for example, at Athens.[1] This contract is repeatedly alluded to by Cicero.[2] And in the Pandects, the like contract is supposed to be referred to in certain passages; as, for instance; *Si tamen certo loco traditurum se quis stipulatus sit, hac actione utendum erit.*[3] And again; *Is, qui certo loco, dare promittit, nullo alio loco, quam in quo promisit, solvere invito stipulatore potest.*[4] And again; *Qui certo loco sese soluturum pecuniam obligat, si solutioni satis non fecerit, arbitraria actione, et in alio loco potest conveniri.*[5] But it may be doubtful, whether the contract here spoken of is that of our modern Bills of Exchange. It may be said more nearly to resemble a contract for the exchange of moneys in different places, or a mandate to advance money to be repaid in another place.[6] Certain it is, that the peculiar distinguishing quality of Bills of Exchange in modern times, their negotiable character, does not appear to have been known to the ancients, or to have found its way into the general transactions of their commercial intercourse. And this, accordingly, is the opinion maintained by many modern authors, and especially by Pothier, Merlin, and Locré.[7]

[1] Heinecc. Elem. Camb. cap. 1, § 6, 7, et not. (edit. 1769); Huber. Prelect. Jur. Civ. Lib. 17, tit. 1, § 12.

[2] Id. Locré, Esprit du Code de Comm. tit. 8, Tom. 1, p. 326.

[3] Dig. Lib. 13, tit. 4, l. 7, § 1; 1 Domat, B. 1, tit. 16, § 1.

[4] Id. 13, tit. 4, l. 9.

[5] Cod. Lib. 3, tit. 18, l. 1.

[6] Heinecc. Elem. Jur. Camb. cap. 1, § 9 (edit. 1769); Huber. Prelect. Jur. Civ. Lib. 17, tit. 1, § 12.

[7] Pothier de Change, n. 6; Merlin, Répert. Lettre et Billet de Change, § 2, Tom. 18, p. 157 (edit. 1827); Locré, Esprit de Comm. Tom. 1, Liv.

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Pothier is very expressive on the subject, and says, that there is not a vestige of our contract of exchange, or of Bills of Exchange, to be found in the Roman law;[1] and he says, that the suggestions of Cicero amount to no more than a request or mandate to a friend, who had money at Athens, to write to the debtor or depositary to hold that money for his son at Athens.[2] Mr. Bell adopts the same opinion, and says, that as a branch of practical jurisprudence, or as a circulating medium in trade, Bills of Exchange were unknown to the Romans.[3]

§ 7. Mr. Justice Blackstone, in remarking upon the origin of Bills of Exchange, says, that "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."[4] Other persons

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1, tit. 8, § 1, p. 326 (2d edit.); Baldasseroni (P.) Leggi e Costumi del Cambio, Pref. p. 10, 11, (edit. 1784.) Dupuy de La Serra expressly holds that Bills of Exchange were unknown to the Ancients. Dupuy L'Art des Lettres de Change, ch. 2, p. 4, § 1, (edit. 1789.)

[1] Pothier de Change, n. 6; Locré, Esprit de Comm. Tom. 1, tit. 8, p. 326.

[2] Pothier de Change, n. 6; Locré, Esprit de Comm. Tom. 1, tit. 8, p. 326; Savary, Le Parfait Negociant, Tom. 1, Part 3, Liv. 1, ch. 2, p. 804, 805.

[3] 1 Bell, Comm. B. 3, ch. 2, § 4 (5th edit.), p. 386.

[4] 2 Black. Comm. 467; Montesq. Spirit of Laws, B. 21, ch. 20, Vol. 2, p. 75 (edit. 1773); Savary Le Parf. Negociant, Tom. 1, Part 3, Liv. 1, ch. 2, p. 804, 805; Baldasseroni (P.) Leggi e Costumi del Cambio, Pref. p. 11, 12, (edit. 1784); Du Puy de La Serra, L'Art des Lettres de Change, &c. ch. 2, § 1, p. 4; Casaregis Discursus, 218, n. 1; Nouguier Des Lettres

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have attributed the invention to the Gibelins, on their being expelled from Italy by the faction of the Guelphs, in order to withdraw their effects secretly, and to escape the confiscation of them by their enemies.[1] Each of these accounts of the matter has been supported by some, but rejected by other authors, as wholly unsatisfactory and uncertain.[2] Certain it is, that Bills of Exchange were in use in many, if not in all, of the commercial states bordering on the Mediterranean, as early as the 14th century, although it is highly probable, that the forms thereof were different, and had not then settled down into one model or uniform instrument, like that in use in our day.[3] Some uncertainty rests upon

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de Change, Tom. 1, ch. 1, p. 40 to 52. Mr. Nouguier, in his late work on Bills of Exchange, insists that Bills of Exchange were first introduced by the Jews, on their banishment from France, A. D. 1181. Nouguier Des Lettres de Change, Vol. 1, Liv. 1, ch. 1, p. 40 to p. 52.

[1] Beawes in Lex. Mercat. by Chitty (edit. 1813), Vol. 1, p. 559, 560; Merlin, Répert. Lettre et Billet de Change, Tom. 18, § 2, p. 157, 158 (edit. 1827); Savary, ubi supra; Casaregis, Discur. de Comm. 218, n. 1; Anderson's History of Comm. Vol. 1, p. 266, (edit. 1790), 8vo. by Coombe.

[2] Merlin, Répert. Lettre et Billet de Change, Tom. 18, § 2, p. 157, 158 (edit. 1827); Pothier de Change, n. 7; Heinecc. Jur. Camb. cap. 1, § 10 (edit. 1769); Locré, Esprit de Comm. Liv. 1, tit. 8, § 1, Tom. 1, p. 327; Chitty on Bills, p. 12 (8th edit. 1833); Merlin, Répert. Lettre et Billet de Change, § 2, p. 157, 158, (edit 1827); 3 Kent's Comm. Lect. 44, p. 72, note (*a*), (4th edit.); Savary, Le Parf. Negociant, Tom. 1, Pt. 3, ch. 2, p. 805, 806; Baldasseroni (P.) Leggi e Costumi del Cambio, Pref. (edit. 1784); Dupuy de La Serra, L'Art des Lettres de Change, ch. 2, § 1, 2, 3, p. 4, 5, (edit. 1789); Da Silva Lisboa, Princip. de Dereito Merc. Trad. iv. Tom. 4, cap. 1, p. 5, 6, 7.

[3] Mr. Chitty has adopted the very suggestions of Pothier on the subject of Bills of Exchange. He says; "It seems extremely doubtful at what period, or by whom, *Foreign Bills of Exchange* were first invented. The elementary writers differ on the subject. It is said by Pothier, that there is no vestige among the Romans of Bills of Exchange, or of any contract of exchange; for though it appears that Cicero directed one of his friends at Rome, who had money to receive at Athens, to cause it to be paid to his son at that place, and that friend accordingly wrote to one

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the point, when Bills of Exchange were first introduced into England; but there is reason to believe, that they were there known as early as A. D. 1307,

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of his debtors at Athens, and ordered him to pay a sum of money to Cicero's son; yet it is observed, that this mode amounted to nothing more than a mere order, or mandate, and was not that species of pecuniary negotiation, which is carried on through the medium of a Bill of Exchange. Nor does it appear, that the commerce of the Romans was carried on by means of this instrument; for we find by one of their laws, that a person lending money to a merchant, who navigated the seas, was under the necessity of sending one of his slaves to receive of his debtor the sum lent, when the debtor arrived at his destined port, which would certainly have been unnecessary, if commerce, through the medium of Bills of Exchange, had been in use with them. Most of our modern writers have asserted (probably on the authority of Montesquieu), that these instruments were invented and brought into general use by the Jews and Lombards, when banished for their usury, in order, with the secrecy necessary to prevent confiscation, to draw their effects out of France and England, to those countries, in which they had chosen, or had been compelled to reside. Savary, Le Parfait Negociant, Tom. 1, Pt. 1, Liv. 3, ch. 3, p. 129, (edit. 1777). But Mr. Justice Blackstone says, this opinion is erroneous, because the Jews were banished out of Guienne in the year 1287, and out of England in the year 1290, and in the year 1236, the use of paper credit was introduced into the Mogul empire in China. Other authors have attributed the invention to the Florentines, when, being driven out of their country by the faction of the Gibelins, they established themselves at Lyons and other towns. On the whole, however, there is no certainty on the subject, though it seems clear, foreign bills were in use in the fourteenth century, as appears from a Venetian law of that period; and an inference drawn from the statute 5 Rich. 2, *St.* 1, 2, warrants the conclusion, that foreign bills were introduced into this country previously to the year 1381." Chitty on Bills, p. 12, 13 (8th edit. 1833). Mr. Reddie, in his recent Historical View of the Laws of Maritime Commerce (published in 1841), has traced the probable origin of Bills of Exchange to the business of the *Campsores*, or money-changers, in the 12th, 13th, and 14th centuries, and the business of commerce at the then common fairs. He says; "The precise era of that most useful invention does not appear to have been exactly ascertained; but that it originated, in the manner we have just seen, in the usages and customs observed, and in the regulations adopted at fairs, from considerations of general security and convenience, there is every reason to believe. And after it was once established upon a small scale, the utility and convenience of the invention behoved gradually to lead to its more extensive adoption, particularly in foreign and maritime commerce. Indeed, it seems probable, that Bills of Exchange,

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since King Edward I. in that year 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*).[1]

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such, or nearly such, as we have at present, first came into general use in the course of the extended commerce carried on by the maritime cities of Italy, and of the south of France and Spain, under their comparatively free and well administered governments. Weber, in his Ricerche sull' Origine e sulla Natura del Contratto di Cambio, published at Venice in 1810, states positively, that such documents were in use at Venice in 1171; and a law of Venice, of 1272, clearly designates Bills of Exchange. The unpublished statute of Avignon, of 1243, contains a paragraph, entitled De Litteris Cambii. A statute of Marseilles, dated 1253, presents evident traces of them; and a transaction of this description is attested by a document of 1256, relative to England. Farther, in his Collection Diplomatica, Don Antonio Capmany has discovered and recorded, in the middle of a public authentic instrument, the following copy of a Bill of Exchange, dated 28th April, 1404, drawn by a merchant in Bruges upon a mercantile company in Barcelona, which approaches pretty much to the present form, and shows that such negotiable documents were then in frequent use: — 'Al nome di Dio, Amen. A di Aprile XXVIII, 1404. — Pagate per questa prima di camb. à usanza, à Pietro Gilberto e Pietro Olivo, scuti mille, a sold. x. Barcelonesi per scuto: e quali scuti mille sono per cambio che con Giovanni Colombo, a Gressi XXII. de gresso per scuto, et Pon. a nostro conto; et Christo vi. guardi. (Subtus vero erat scriptum.) Antonio quart. Sab. di Brugis.'" See also Savary, Le Parfait Negociant, Tom. 1, P. 1, Liv. 3, ch. 3, p. 129 (edit. 1777). — There is a Law of Venice as early as 1272, which contains a chapter entitled De Literis Cambii, cited by Nouguier from Nei de Parseribus. Nouguier Des Lettres de Change, Tom. 1, ch. 1, p. 42. Anderson, in his History of Commerce, states, that the Emperor Barbarossa granted a charter of Privileges to the city of Hamburg, and among other things, "liberty to negotiate money by exchange." Anders. Hist. of Comm. Vol. 1, p. 221, 222, 8vo. (edit. 1790) by Coombe. The introduction and use of Bills of Exchange in England seems to have been founded upon the mere practice of merchants, and gradually to have acquired the force of a custom. Mr. Chitty says, that the earliest case on the subject to be found in the English Reports, is that of Martin *v.* Boure, Cro. Jac. 6. See also Hussey *v.* Jacob, 1 Ld. Raym. 87, 88; Pinkney *v.* Hall, 1 Ld. Raym. 175. At first it seems to have been confined to foreign bills between foreign merchants and English merchants. It was afterwards extended to domestic bills between traders; and finally to all bills of all persons, whether traders or not. Chitty on Bills, 13 (8th edit. 1833).

[1] Rymer's Fœdera, Vol. 2, p. 1042; 1 Cranch, Rep. App. p. 384;

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§ 8. A much more probable origin may be assigned to Bills of Exchange, from the general necessities of commerce in the widely extended intercourse of the modern commercial nations, which inhabited the shores of the Mediterranean.[1] The transition was natural and easy from the actual exchange of money in one place for money in another, to a contract or mandate, by which the Receiver should promise to pay the money in the latter place, or should order his own Depositary, or Agent, or Debtor, to advance or repay out of his funds there. Scaccia has, therefore, not hesitated to declare, that exchange of money had its introduction or origin from the law of nations, and the necessities of mankind; *Ergo cambium seu commutatio pecuniæ cum pecunia undique procedit a jure gentium. Cambium, id est permutatio pecuniæ cum re, seu rei cum pecunia, fuit inventum ex necessitate. Deinde hoc cambium pecuniæ cum pecunia cœpit fieri etiam per litteras, et retinere proprium nomen cambii, et inservire non solum simplici permutationi ad emenda, quæ domui, et familiæ necessaria sunt, sed etiam pro faciliori mercaturæ et peregrinationis usu.*[2]

Anderson's Hist. of Comm. Vol. 1, p. 361, (8vo. edit. 1790), by Coombe. In A. D. 1381, Bills of Exchange were expressly referred to in an Act of Parliament of Rich. 3, Id. p. 402.

[1] See Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, § 1, p. 327, 328; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 386 (5th edit.); Marquardus, de Jur. Merc. Lib. 2, ch. 12, n. 9. Scaccia says; Hugus cambii pecuniæ cum pecunia origo processit a casu et accedentaliter. Scacc. Tract. de Comm. § 1, Quest. 6, n. 11, p. 194.

[2] Scacc. de Camb. Quest. 6, n. 3, 6, 7, p. 127, 128. — Scaccia gives various forms in use among the commercial nations of the Mediterranean, from a very early period. Scaccia de Camb. Quest. 5, per tot. p. 110 to 127; Id. p. 508 to 514. See also forms in Stypmannus, Jus. Marit. ch. 8, § 56 to 76. See also Casaregis Discurs. de Commer. 218, n. 2, where he refers to a Bull of Pope Pius V. in 1570, in which mention is made of Bills of Exchange. Cambiorum usus quem necessitas et publica utilitas

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§ 9. Heineccius, one of the most learned and accurate of text writers, has taken a similar view of this subject. He insists, that the invention of Bills of Exchange had its origin in the necessities of commerce, and was gradually perfected; and that the merchants of Venice and Lombardy were those, who principally contributed to the use and improvement thereof; and, indeed, that the terms of the instrument betray their true parentage. *Paullatim ergo, et non semel simulque, ad eam perfectionem, quam hodie miramur, pervenit negotiatio cambialis, et quidem opera mercatorum Venetorum et Langobardorum.*[1]

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induxit. — Baldasseroni (Pompeo.) Leggi e Costumi del Cambio. Pref. p. 13, (edit. 1784.)

[1] Heinecc. Jur. Camb. cap. 1, § 6, 7, 8, 10 (edit. 1769); Merlin, Répert. Lettre et Billet de Change, § 2, p. 157 to 159 (edit. 1827). See also Stypmannus, Jus. Marit. ch. 8, § 1 to 8; Grotius, B. 2, ch. 12, § 3, n. 4. — Merlin (Répert. Lettre et Billet de Change, § 2) gives a brief sketch and review of the various opinions and historical facts connected with the subject; and he says, that it is certain, that Bills of Exchange were in use among the Genoese, and Florentines, and other Italians, at the commencement of the 13th century, and they carried on trade by means of them with France. There are abundance of writers, who have written on the subject of Bills of Exchange since the beginning of the 17th century. Dupin, Bib. Chois. de Droit, Tom. 2, n. 2212 to 2232, enumerates many of them, p. 436 to p. 439 (edit. 1832). See also Weichsel, Handbuch des Wechselrechts, p. 34 (edit. 1824). Mr. Chancellor Kent, in his learned Commentaries, has the following note, which I gladly transcribe. "In 1394, the city of Barcelona, by Ordinance, regulated the acceptance of Bills of Exchange; and the use of them is said to have been introduced into western Europe by the Lombard merchants, in the 13th century. Bills of Exchange are mentioned in a passage of the Jurist Baldus, of the date of 1328. Hallam's Introduction to the Literature of Europe, Vol. 1, p. 68. M. Boucher received from M. Legou Deflaix, a native of India, a memoir, showing that Bills of Exchange were known in India from the most high antiquity. But the Ordinance of Barcelona, is, perhaps, the earliest authentic document in the middle ages, of the establishment and general currency of Bills of Exchange. (Consulat de la Mer, par Boucher, Tom. 1, p. 614, 620.) The first bank of exchange and deposit in Europe was established at Barcelona in 1401, and it was made to accommodate foreigners as well as citizens. 1 Prescott's Ferdinand and Isabella, Int. p. 112. M.

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§ 10. In France there is an Ordinance of Louis XI. as early as 1462, which permits all persons of whatsoever estate, nation, or condition they may be, to give, take, and remit their money by Bills of Exchange in the business of merchandise in whatever country it may be, except the nation of England.[1] And the subject was regulated at large by the celebrated Ordinance of Louis XIV. of 1673, which has received a very full and able exposition from Jousse, and continued to be the law of France until the recent introduction of the Code of Commerce.[2]

§ 11. Heineccius has also remarked, with great force and pertinency, that although the laws of all nations upon the subject of Bills of Exchange entirely agree in most things; yet, that there are certain principles common to all nations, which constitute the proper foundation, upon which all the law of exchange rests, as a part of the municipal jurisprudence of each

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Merlin says, that the edict of Louis XI. of 1462, is the earliest French edict on the subject; and he attributes the invention of Bills of Exchange to the Jews, when they retired from France to Lombardy. The Italians, and merchants of Amsterdam, first established the use of them in France. Répertoire de Jurisprudence, tit. Lettre et Billet de Change, sec. 2. In England, reference was made, in the statute of 5 Rich. II. ch. 2, to the drawing of foreign bills. This was in the year 1381." See Hallam's Middle Ages, Vol. 4, Pt. 2, ch. 9, p. 255, and note, Am. edit. 1821. See also Cobbett on Pawns, p. 3, 12. See also Hallam, Introduct. to Literature of Europe, Vol. 1, ch. 1, § 55, note (*a*), p. 40, of Paris edition, where he states, on the authority of Beckman, that the earliest recorded Bills of Exchange are in a passage of the Jurist Baldus, and bear date in 1328. Baldus (as cited in a Dissertation of Mr. Bergson in the Revue Etrangere et Franç. by Fœlix, 1843, p. 203, 204, 206,) gives the forms of Bills of Exchange drawn in A. D. 1381 and 1385. Baldus, Consil. edit. Brixcensis, Pars. 1, Consil. 53; Id. Pars. 3, Consil. 298. See also the forms in Scaccia De Cambio, § 1, Quest. 5, p. 110 to 127; Id. p. 508 to 514; post, § 26, n. 3.

[1] Locré, Esprit du Code de Comm. Tom. 1, Lit. 1, tit. 8, § 1, p. 328; Merlin, Répert. Lettre et Billet de Change, § 2, p. 158, 159 (ed. 1827).

[2] Ibid.; Jousse, sur L'Ordin. 1673, tit. 5, p. 58, and note (edit. 1802).

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nation. These principles, having their origin in the customs and practice of exchanges, are deemed so proper in themselves, that all the just conclusions deducible from them are deemed of universal obligation; and in the absence of any statutable or positive regulations to govern the case, the general deductions of natural law, and the law of nations, as well as those of the Roman Law, are often resorted to in order to expound and enforce them.[1]

§ 12. But not to expend more time in investigations of this sort, let us now proceed to consider the general nature and character of a Bill of Exchange. In common speech, such a Bill is frequently called a Draft; but a Bill of Exchange is the more legal, as well as more accurate mercantile expression.[2] The person, who writes and signs the request or order, is called in law the Drawer, and he to whom it is written or addressed, is called the Drawee; and if he accept to pay the Bill, he is then called the Acceptor.[3] The third person, or negotiator, to whom it is made payable, is called the Payee.[4] If it is made payable to him or his order, and he then assigns it to another person by writing his name on the back thereof, *in dorso*, (which act is called an indorsement,) he is then called the Indorser, and so is every other person, who successively puts his name on the back thereof, — and the person to whom it is then assigned or delivered is called the Indorsee, or Holder.[5] If the Bill is payable to the

[1] Heinecc. Jus. Camb. cap. 1, § 11 to 14 (edit. 1769).

[2] 2 Black. Comm. 467.

[3] Id.; Bayley on Bills, p. 23 (5th edit.); Chitty on Bills (8th edit. 1833), p. 2, 27, 28; 1 Bell, Comm. B. 3, Pt. 1, ch. 2, § 5, p. 386 (5th edit.); Kyd on Bills, p. 4 (3d edit.).

[4] Ib. 2.

[5] 2 Black. Comm. 468 to 470.

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Bearer generally, any person, who has it rightfully in possession from time to time, is called the Bearer or Holder, and of course is clothed with all the rights and authorities over it, which belong to the Payee or Indorsee of a Bill, payable to the Payee or his order.[1]

§ 13. The general theory upon which Bills of Exchange rests, is, that the Drawer has funds in the hands of the Drawee; that he sells or assigns to the Payee, for a valuable consideration, such part thereof as amounts to the sum payable by the Bill; that when the Drawee accepts to pay the amount, it is an appropriation of the funds *pro tanto*, for the service and use of the Payee, or other person holding the Bill under him, so that the amount ceases henceforth to be the money of the Drawer, and becomes that of the Payee, or other holder, in the hands of the Acceptor.[2] Hence

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[1] Chitty on Bills, p. 2 (8th edit. 1833).—In the French law, the Drawer is called *Trahens* or *Tireur;* the Payee is called *Preneur*, and sometimes *Donneur de valeur*, or *Remittens;* the Indorser is called *L'Endorseur;* the Indorsee or Holder, *Le Porteur*, and sometimes *Le Presentans;* the Acceptor is called *L'Accepteur;* but there does not seem to be any distinctive appellation of the Drawer before acceptance. Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, p. 331; Pothier de Change, n. 17, 18.

[2] In discussing the doctrines relative to Bills of Exchange, I have examined many of the old continental writers upon the subject, such as Scaccia (De Comm. § 1, Quest. 2, p. 99, et seq.), Marquardus (De Jure Mar. Lib. 2, ch. 12, p. 313, et seq.), and Strykius, Disputatio de Camb. Liter. Dissert. 18, cap. 1, Tom. 7, p. 348 (edit. 1745). But I cannot say, that I have derived much instruction from them, or that they throw much light on the subject. Jousse, in his Commentary on the Ordinance of Louis XIV. of 1673, contains more information. But Pothier is the first French writer, who seems to have treated the subject with scientific accuracy and fulness; and the modern discussions of Locré, Pardessus, and Delvincourt, and Merlin (in his Répertoire), have afforded me many useful and important suggestions. The old English writers, such as Molloy, and Marius, and Beawes, have become almost obsolete. Even Cunningham and Kyd are now rarely referred to; and Chitty and Bayley on Bills, are now the most full and instructive guides as to all the leading doctrines of English Law on the subject. In truth, the Law of Bills of Exchange,

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it is, that after such acceptance, the Acceptor is treated as the primary or principal debtor of the payee, or other holder, and that the Drawer, and other parties on the Bill, are held to be collaterally liable only to the Holder upon the default of payment by the Acceptor. In point of fact, however, it often happens, that this natural character of the transaction, and relative position of the parties, become entirely changed. The Drawer often draws the bill for the mere private accommodation and use of the Payee, without receiving any value therefor; the Drawee often accepts for the mere accommodation and use of the Drawer or Payee, without having any funds of either in his hands; and, on the other hand, the Drawer or Payee often acts as a mere formal instrument, solely for the benefit and accommodation of the Drawee or Acceptor. In all these cases, the bill is, in the language of the commercial world, an accommodation draft, or acceptance; and yet, as between the parties and a subsequent holder for value, the same general rights, duties, and obligations, exist, as if the transaction were in reality, what it purports in theory to be.[1] Nay; the remedy to be administered, as to the holders, usually remains in each case the same, and is governed by the same considerations. Thus, for example, as the Acceptor is treated in each case as the primary debtor, an action for money had and received will lie in favor of the Holder against him; but it will not lie in his favor

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and Promissory Notes, and other negotiable paper, has mainly grown up since Lord Mansfield came upon the Bench; and we owe more to his labors on this subject, than we probably do to any other single judicial mind, although vast contributions have been made to the subject by the learned and able judges who have succeeded him.

[1] See Pillaus v. Van Mierop, 3 Burr. 1663, 1671, 1672.

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against the Drawer, or an Indorser, from whom he derives his title remotely, and not directly, since they are deemed parties to a collateral engagement only. But this will be more fully seen hereafter.

§ 14. Bills of Exchange in most, if not in all, commercial countries, possess some peculiar advantages and privileges over common contracts. Some of these privileges are connected with the peculiar and summary remedies given to enforce the rights, growing out of them; such, for example, as exist in France and in Scotland.[1] Others are of a nature, giving them a peculiar sanctity and obligation, and freeing them from the equities and cross claims which may exist between the original parties. These latter are allowed in order to give them a ready circulation, and extensive credit; and, indeed, they seem indispensable to protect third persons, who may become holders thereof, from injury and imposition. If, (for example,) the original parties to the instrument were at liberty to set up against a *bonâ fide* holder for a valuable consideration, without notice, any facts which might impeach its original validity, or might show, that it had subsequently become void, or that no consideration whatsoever passed between the original parties, or that the consideration had since utterly failed; it is obvious, that the credit and confidence due to the instrument would be essentially impaired, and it could not be safely relied upon as a means of remittance of money from one country to another, or even between different places in the

[1] See Jousse, Comm. sur L'Ord. of 1673, tit. 5, art. 12, 13, p. 102 to 106; Code de Comm. art. 164 to 168, art. 172; Pothier de Change, n. 124 to 127; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 387, 393, 395 (5th edit. 1826); Bell, Princ. of Law of Scotland, § 343, 344; Bell, Illustr. of Law of Scotland, Vol. 1, § 343, 344.

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same country. On the other hand, by shutting out all such defences against such a holder, the instrument has, for many practical purposes, become an equivalent to, and a representative of, money; and it circulates through the commercial world, as an evidence of valuable property, of which any person, lawfully in possession, may avail himself, to make purchases, to pay debts, and to pledge, as a security or indemnity for advances.

§ 15. Hence, it has become a general rule of the commercial world, to hold Bills of Exchange as in some sort sacred instruments in favor of *bonâ fide* holders for a valuable consideration without notice; and if ever the maxim is to be applied to the concerns of trade and commerce, *Fides servanda est, Simplicitas juris gentium prævaleat*, a case can scarcely be imagined in which its cogency and moral propriety can be applied with more beneficial results.[1]

§ 16. At the Common Law, although a Bill of Exchange is not a specialty, for no contract is by that law a specialty, unless it is matter of record, or under seal;[2] yet, in many respects, a Bill of Exchange enjoys as high an importance, and imports as absolute a verity. Thus, for example, an obligation under seal will bind the party executing it, although there be no consideration whatsoever stated upon the face of it; and none need be established in proof, because, from the solemnity of the instrument, and its deliberate mode of execution, the law presumes, that it is founded upon an adequate consideration. And hence, it is often said, that a sealed obligation or covenant imports of itself a

[1] Pillaus v. Van Mierop, 3 Burr. R. 1671, 1672.
[2] 2 Black. Comm. 465, 466; Id. 340 to 342.

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sufficient consideration to support an action thereon.[1] Whereas, in parol contracts, (under which denomination all written, as well as verbal, unsealed contracts fall,) not only must a sufficient consideration exist, and be averred; but it must also be proved, to entitle the party to recover. In this respect Bills of Exchange constitute an exception, and follow the nature of a specialty.[2] They are presumed to stand upon a valuable consideration, and *primâ facie* import it; nor is it necessary to aver or to prove, what the particular consideration is, for which they are given; and if on their face they do not purport to be given for "value received," an action of debt, as well as an action of assumpsit, will lie thereon by the Payee against the Drawer,[3] and by the Drawer against the Acceptor.[4] *A fortiori*, the rule will apply, where they purport to be "for value received," and the consideration need not be more particularly stated; although it would be otherwise in the case of other common contracts.[5] So that they afford a firm security to the Holder, which, although liable under certain circumstances to be impeached, is, in the absence of all proofs to the contrary, treated as of absolute and conclusive obligation.[6]

[1] Chitty on Bills, p. 2, 10, 11 (8th edit. 1833); 2 Black. Comm. 445, 446; Sharington *v.* Strotten, Plowd. R. 308, 309; Turner *v.* Bincor, Hard. R. 200.

[2] Rann *v.* Hughes, 7 Term R. 350, note; Sharington *v.* Strotten, Plowd. R. 308, 309.

[3] Bishop *v.* Young, 2 Bos. & Pull. 78, 83; Hard's Case, Salk. 23; Hodges *v.* Starvard, Skinn. R. 346.

[4] Bayley on Bills, ch. 1, § 13, p. 40 (5th edit. 1830); Hatch *v.* Trayes, 11 Adolph. & Ellis, 702; Kyd on Bills, p. 47 (3d edit.).

[5] See Trier *v.* Bridgman, 2 East, R. 359; Blankenhagen *v.* Blundell, 2 Barn. & Ald. 417; Carlos *v.* Fancourt, 5 Term R. 482.

[6] Chitty on Bills, p. 10, 11 (8th edit. 1833); 2 Black. Comm. 445, 446; 1 Fonbl. Eq. B. 1, ch. 5, § 1, note (*a*); Kyd on Bills, p. 47 (3d edit.).

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§ 17. Another circumstance, in which a Bill of Exchange materially differs from ordinary contracts at the Common Law, is in its negotiable or assignable quality, when made payable to the order of a party, or to the Bearer. In general, by the strict rule of the old Common Law, a chose in action, that is to say, a right or credit not reduced into possession, (which a Bill of Exchange certainly is) was not assignable at all; and even now it is not assignable, so as to vest a legal title in the Assignee, and to entitle him to maintain a suit at law thereon in his own name.[1] At most, the assignment passes only the equitable title to the Assignee, which may be enforced by a Bill in Equity. But if a suit is brought at law after the assignment, it must be in the name of the Assignor, although the avails thereof may be for the benefit of the Assignee.[2] But Bills of Exchange, made negotiable in their form and character, have been constantly held to be an exception to the rule, founded as well upon the custom of merchants, as upon the necessities of commerce.[3] Whenever, therefore, any negotiable bill is indorsed by the Payee, and assigned or delivered (as the case may require) to the Assignee or Holder, the latter may maintain a suit

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[1] Chitty on Bills, 6, 7 (8th edit.); Lampet's Case, 10 Co. R. 48 *a*; 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*g*); Co. Litt. 214 *a*, 232 *b*, and Butler's note; 2 Black. Comm. 442, 468; Welch *v.* Mandeville, 1 Wheat. R. 233; Greenleaf on Evid. § 173, note (2). In Stewart *v.* Eastwood, 11 Mees. & Wels. R. 197, 201, Mr. Baron Parke said; "A Bill of Exchange is a peculiar chattel, and only passes by indorsement or by delivery of it, when it is payable to Bearer."

[2] Com. Dig. Chancery, 2 H.; 1 Fonbl. Eq. B. 1, ch. 4, § 2, note (*g*); 2 Story, Eq. Jurisp. § 1039, 1040; Butler's note to Co. Litt. 232, b.; 2 Black. Comm. 442, 468; Chitty on Bills, 6 to 9 (8th edit. 1833); Bauerman *v.* Radenius, 7 Term R. 663; Master *v.* Miller, 4 Term R. 320, 342; Johnson *v.* Collins, 1 East, R. 104.

[3] 2 Black. Comm. 468; Chitty on Bills, 9, 10 (8th edit. 1833).

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thereon in his own name against the antecedent parties, whose names are on the bill, to recover the amount, in case of any dishonor or non-payment, according to the exigency thereof.

§ 18. There can be no real question, that this negotiable quality of Bills of Exchange, was adopted into the law of England, from the established practice and principles of the commercial nations of the Continent of Europe, which had been early incorporated into the usage and customs of merchants in England. Indeed, some writers have treated it to have prevailed in England time out of mind.[1]

§ 19. In the Civil Law, and in the jurisprudence of the modern commercial nations of Continental Europe, there does not seem to have been any foundation for such an objection to the assignment of debts; for all debts were, from an early period, allowed to be assigned, if not formally, at least in legal effect; and for the most part, if not in all cases, they may be sued for in the name of the Assignee.[2] The Code of Justinian

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[1] Cunningham on Bills, § 3, p. 8, n. 2.

[2] Pothier has stated the old French Law upon this subject (which does not in substance probably differ from that of the other modern states of Continental Europe), in very explicit terms, in his Treatise on the Contract of Sale, of which an excellent Translation has been made by L. S. Cushing, Esq. The doctrines therein stated are in many respects so nearly coincident with those maintained by our Courts of Equity, that I have ventured to transcribe the following passages from Mr. Cushing's work. "A credit being a personal right of the creditor, a right inherent in his person, it cannot, considered only according to the subtlety of the law, be transferred to another person, nor consequently be sold. It may well pass to the heir of the creditor, because the heir is the successor of the person and of all the personal rights of the deceased. But, in strictness of law, it cannot pass to a third person; for the debtor, being obliged towards a certain person, cannot, by a transfer of the credit, which is not an act of his, become obliged towards another. The jurisconsults have, nevertheless, invented a mode of transferring credits, without either the consent

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says; *Nominis autem venditio* (distinguishing between the sale of a debt, and the delegation or substitution of

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or the intervention of the debtor. As the creditor may exercise against his debtor, by a mandatary, as well as by himself, the action, which results from his credit. When he wishes to transfer his credit to a third person, he makes such person his mandatary, to exercise his right of action against the debtor; and it is agreed between them, that the action shall be exercised by the mandatary, in the name indeed of the mandator, but at the risk and on the account of the mandatary, who shall retain for himself all, that may be exacted of the debtor in consequence of the mandate, without rendering any account thereof to the mandator. Such a mandatary is called, by the jurisconsults, *Procurator in rem suam*, because he exercises the mandate, not on account of the mandator, but on his own. A mandate, made in this manner, is, as to its effect, a real transfer, which the creditor makes of his credit; and if he receives nothing from the mandatary, for his consent, that the latter shall retain to his own use what he may exact of the debtor, it is a donation; if, for this authority, he receives a sum of money of the mandatary, it is a sale of the credit. From which, it is established in practice, that credits may be transferred, and may be given, sold, or disposed of by any other title; and it is not even necessary, that the act, which contains the transfer, should express the mandate, in which, as has been explained, the transfer consists. The transfer of an annuity or other credit, before notice of it is given to the debtor, is what the sale of a corporeal thing is, before the delivery; in the same manner, that the seller of a corporeal thing, until a delivery, remains the possessor and proprietor of it, as has been established in another place. So, until the assignee notifies the debtor of the assignment made to him, the assignor is not divested of the credit, which he assigns. This is the provision of art. 108, of the Custom of Paris; 'A simple transfer does not divest, and it is necessary to notify the party of the transfer, and to furnish him with a copy of it.' From which, it follows, first, that before notice, the debtor may legally pay to the assignor his creditor; and the assignee has no action, in such case, except against the assignor, namely, the action *ex empto, ut præstet ipsi habere licere;* and, consequently, that he should remit to him the sum, which he is no longer able to exact of the debtor, who has legally paid the debt to the assignor. Second, that before notice, the creditors of the assignor may seize and arrest that, which is due from the debtor, whose debt is assigned; and they are preferred to the assignee, who has not, before such seizure and arrest, given notice of the assignment to him; the assignee, in this case, is only entitled to his action against the assignor, namely, the action *ex empto*, in order, that the latter *præstet ipsi habere licere;* and, consequently, that he should report to him a removal of the seizures and arrests, or pay him the sum, which, by reason thereof, he is prevented from obtaining of the debtor.

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one Debtor for another for the same debt) *et ignoranti, vel invito eo, adversus quem actiones mandantur, contrahi solet.*[1] And Heineccius, after remarking, that Bills of Exchange are for the most part drawn, payable to a person or his order, says, that although this form be omitted, yet an indorsement thereof may have full effect, if the laws of the particular country respecting exchange do not specially prohibit it; because an assignment thereof may be made without the knowledge and against the will, of the Debtor; and he refers to the passage in the Code in proof of it.[2] But he adds

Third, that if the assignor, after having transferred a credit to a first assignee, has the bad faith to make a transfer of it to a second, who is more diligent than the first, to give notice of his assignment to the debtor, the second assignee will be preferred to the first, saving to the first his recourse against the assignor. Though the assignee notifies to the debtor the assignment to him, the assignor, in strictness of law, remains the creditor, notwithstanding the transfer and notice; and the credit continues to be in him. This results from the principles established in the preceding article; but, *quoad juris effectus*, the assignor is considered, by the notice of the transfer given to the debtor, to be devested of the credit, which he assigns; and is no longer regarded as the owner of it; the assignee is considered to be so; and, therefore, the debtor cannot afterwards legally pay the assignor; and the creditors of the assignor cannot, from that time, seize and arrest the credit, because it is no longer considered to belong to their debtor. Nevertheless, as the assignee, even after notice of the transfer, is only the mandatary, though *in rem suam*, of the assignor, in whose person, the credit, in truth, resides; the debtor may oppose to the assignee a compensation of what the assignor was indebted to him, before the notice of the assignment; which, however, does not prevent him from opposing also a compensation of what the assignee himself owes him; the assignee being himself, *non quidem ex juris subtilitate, sed juris effectu, creditor.*" Pothier on Sale, by Cushing, n. 550, n. 555 to n. 559. The modern French Law has gotten rid of the subtlety as to the suit being brought in the name of the assignor upon contracts generally; for it may now (whatever might have been the case formerly) be brought in the name of the Assignee, directly against the Debtor. See Troplong des Privil. et Hypoth. Tom. 1, n. 340 to 343; Code Civ. of France, art. 2112; Id. 1689 to 1692; Troplong de la Vente, n. 879 to 882, n. 906, 913.

[1] Cod. Lib. 8, tit. 42, l. 1; 1 Domat, B. 4, tit. 4, § 3, 4.

[2] Heinecc. de Camb. cap. 2, § 8; Id. cap. 3, § 21 to 25. — Heineccius,

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(which is certainly not our law), that if the Bill be drawn payable to the order of Titius, it is not to be paid to Titius, but to his indorsee. *Tunc enim Titio solvi non potest, sed ejus indossatario.*[1] The same general doctrine as to the assignability of Bills of Exchange, payable to a party, but not to his order, is affirmed in the Ordinance of France of 1673 (art. 12), as soon as the transfer is made known to the Drawee or Debtor.[2]

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in a note, says, that in Franconia and Leipsic, no assignment is of any validity, if the formulary of its being payable to order is omitted. The present law of France is the same, so far as the general negotiability of Bills is concerned, and to give them circulation, unaffected by any equities between the Payee and the Debtor, as will be seen in the sequel. Pardessus, Droit Comm. Tom. 2, art. 339, p. 360; Delvincourt, Instit. Droit Comm. Tom. 1, Liv. 1, tit. 7, Pt. 2, p. 114, 115. Delvincourt says, that the right of a simple Bill (not payable to order) is transferrible only by an act of transfer made known to the Debtor. See also Merlin, Répert. Lettre et Billet de Change, § 4, 8, p. 196, 252 (edit. 1827).

[1] Heinecc. de Camb. cap 2, § 8.

[2] Jousse, sur L'Ordin. 1673, art. 30, p. 123. The article, and Jousse's commentary, are as follows; Art. 30, "Les Billets de Change, payables à un particulier y nommé, ne seront réputez appartenir à autre, encore qu'il y eust un transport signifié, s'ils ne sont payables au porteur, ou à ordre. — *Les Billets de Change.* La disposition contenue en cet article ne doit pas s'étendre aux autres billets, parce que suivant le droit commun on peut disposer des billets et promesses par obligation et transport, et que le transport signifié saisit celui au profit de qui il est fait, suivant la disposition de l'article 108 de la Coûtume de Paris. La raison pour laquelle l'Ordonnance déroge ici au droit commun, à l'égard des billets de change, payables à un particulier y nommé, et afin d'abolir l'usage des transports et significations en cette matière, qui est proprement de négoce, et où tout doit être sommaire. Néanmoins en examinant plus particulièrement le sens de cet article, il paraît, que l'esprit de l'Ordon. n'est pas d'abolir l'usage des transports des billets de change, qui ne sont point payables au porteur, ou à ordre: car il semble qu'on ne peut empêcher un particulier propriétaire d'un billet de cette espèce de transférer la propriété de ce billet à celui au profit de qui le transport aurait été consenti. En effet, si l'on fait attention, que l'esprit de l'Ordonnance est de conserver au débiteur, qui a consenti des billets payables à un particulier, les mêmes exceptions contre les cessionnaires de ces billets, que celles que le débiteur lui-même aurait pu opposer au créancier, qui en était originairement propriétaire, sans distinguer, si la cession ou transport a été signifiée ou non, il sera aisé de

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Indeed, the like doctrine prevails now in France, not only in cases of Bills of Exchange, but of contracts generally; so that the Assignee may now sue therefor in his own name after the assignment, subject, however, to all the equities, subsisting between the parties before and at the time, when the Debtor has notice of the assignment.[1]

§ 20. And here it may, in this connexion, be again suggested (what, indeed, has been already alluded to), that the jurisprudence, which regulates Bills of Exchange, can hardly be deemed to consist of the mere municipal regulations of any one country. It may, with far more propriety, be deemed to be founded upon, and to embody, the usages of merchants in different commercial countries, and the general principles,

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se convaincre, que l'Ordonnance n'a jamais eu intention d'abolir l'usage des cessions et transports en matière de billets de change, qui ne sont point payables au porteur ou à ordre, mais qu'elle a seulement entendu marquer en cet article la différence, qu'il y a entre les billets payables à un particulier y nommé, et les billets payables au porteur ou à ordre. Dans les billets payables au porteur ou à ordre, celui, qui en est le porteur, n'a pas à craindre, que le débiteur puisse lui opposer aucune exception du chef de son cédant, le porteur, quel qu'il soit, en étant le véritable propriétaire, ainsi que s'il avait été originairement consenti en sa faveur Mais dans les billets payables à un particulier y nommé, le cessionnaire ne peut jamais avoir plus de droit que ce particulier, et ne peut éviter par conséquent que toutes les exceptions, qui auront pu être opposées à ce particulier, ou cédant, ne puissent lui être opposées à lui-même. C'est dans ce même sens que les articles 18 et 19 de ce titre distinguent au sujet du paiement d'une lettre adhirée, si cette lettre est payable à un particulier y nommé, ou si elle est payable au porteur ou à ordre: le paiement dans le premier cas pouvant être fait sans aucune précaution, en vertu d'une seconde lettre; au lieu que dans le second cas le paiement ne peut être fait que par Ordonnance du Juge, et en donnant caution."

[1] Pardessus, Droit Comm. Tom. 2, art. 313; Troplong de Priv. et Hypoth. Tom. 1; Troplong de la Vente, n. 879 to 913; Code Civil of France, art. 1689 to 1693; Id. art. 2112; Id. art. 1295; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, p. 342; Pothier De Vente, n. 551 to n. 560.

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ex æquo et bono, as to the rights, duties, and obligations, of the parties, deducible from those usages, and from the principles of natural law applicable thereto. Heineccius has truly observed upon this subject; "*Jus illud cambiale pro habitu accipias, id est, pro ipsa jurisprudentia cambiali, erit habitus practicus, leges et consuetudines cambiales, recte intelligendi, interpretandi, adplicandique controversiis ex litteris cambialibus ortis.*"[1] The subject, however, will properly come more fully under our review hereafter.[2]

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[1] Heinecc. De Camb. ch. 1, § 12

[2] Mr. Mittermaier, in the Revue Etrang. et Franç. by Fœlix, for Sept. 1841, and Feb. 1842, has, in a learned dissertation, stated the progress and actual legislation respecting Bills of Exchange in the different countries of Europe. Tom. 7, p. 849, Tom. 8, 109.

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CHAPTER II.

DIFFERENT KINDS OF BILLS OF EXCHANGE.

§ 21. EXCHANGE has been divided into various sorts by foreign jurists, as well as by the early writers upon the English law. Thus, for example, (as has been already stated,) there is what by the foreign jurists is called *Cambium reale vel manuale*, which is merely the exchange of one species of money for another species in the same place, which bears no resemblance to our modern Bills of Exchange; and there is what is called *Cambium locale*, *mercantile*, *trajectitium*, which is properly what we call a Bill of Exchange.[1] And, then, among our own writers Exchange has been divided into *Cambio commune*, *Cambio real*, *Cambio sicco*, and *Cambio fictitio*, the explanations of which are now of no practical importance.[2]

§ 22. But a division of very great practical importance is that of Bills into foreign Bills of Exchange, and into inland Bills of Exchange, as the rights of proceeding and remedies thereon are not exactly coincident, or uniformly governed by the same doctrines and regulations. A Bill of Exchange is properly denominated a foreign Bill (formerly called an outland Bill[3]) when it is drawn in one state or country, upon a foreign state or country; as, for example, when

[1] Heinecc. De Camb. cap. 1, § 5, 6; Pothier de Change, n. 1, 2.

[2] Beawes, Lex Merc. by Chitty, vol. 1, p. 560 (edit. 1813); Molloy, vol. 2, B. 2, ch. 10, § 4; Cunningham on Bills, § 2, p. 6, 7; Marius on Bills, p. 1, 3, 4. — The definitions or explanations of these various kinds of Exchange are given very much at large by all these writers.

[3] Marius on Bills, p. 2.

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drawn by a person in America, upon a person resident in England, and payable by the latter, — or *vice versâ*. And it is properly denominated an inland Bill (which is equivalent to the expression, that it is a domestic or intra-territorial Bill) when both the Drawer and Drawee reside in the same state or country.[1] But what properly constitutes, in the sense of the law, a foreign state or country, has been a matter of some doubt and judicial discussion. Thus, after the union of England and Scotland, and subsequently, after the union of Great Britain and Ireland, it became a question, whether Scotland and Ireland were to be deemed foreign countries within the sense of the rule, as to Bills drawn there upon England, or *vice versâ*. It has been adjudged, that they are to be deemed foreign Bills.[2] Before the union of England and Scotland, it is very certain, that the two kingdoms were deemed foreign to each other, although they were, at the time, under the dominion of the same sovereign; and the union of the two kingdoms into one, still left each of them for some purposes separate and distinct, as, for example, as to its local laws and jurisprudence; and it has not been supposed to have merged the sovereignty of the one entirely in the other. The same considerations are in some measure still applicable to Ireland since the union of the latter with England and Scotland. It still retains its own local laws and

[1] 2 Black. Comm. 467; Chitty on Bills, p. 12 (8th edit. 1833); Kyd on Bills, p. 10, 11 (3d edit.); Bayley on Bills, ch. 1, § 8, p. 26 (5th edit. 1830); Cunningham on Bills, ch. 1, § 4, n. 1, p. 15; Rothschild *v.* Currie, 1 Adolph. & Ell. New R. 43.

[2] See King *v.* Walker, 1 Wm. Black. R. 286; Mahoney *v.* Ashlin, 2 Barn. & Adolph. 478; Bayley on Bills, ch. 1, § 8, p. 26 (5th edit. 1830); Chitty on Bills, p. 12 (edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 419 (5th edit.).

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jurisprudence, and for some purposes is treated as a separate government under the same common sovereignty. It was with much significance said by Lord Tenterden, in a case, where the question was directly before the Court; "It is, indeed, admitted, that Irish and Scotch Bills, drawn upon England, were foreign, before the respective unions between the countries; and it does not follow, because Ireland and Scotland were united into one kingdom with this, that the Bills drawn there, which before were foreign, became inland Bills."[1] Indeed, looking to the true nature and objects of the rule, it would seem to be reasonable to hold, that every Bill should be treated as a foreign Bill, which is drawn in one country upon another country, not governed by the same homogeneous laws; since in its origin and character it is subject to local regulations, local interpretations, and local obligations and restrictions, varying from those, where it is drawn; and it may thus become affected by all the other considerations, arising from the application of the *Lex loci contractus*. It may be truly said, in a just and liberal sense, that a Bill of Exchange is foreign, which is not governed throughout by our own municipal jurisprudence, as an inland Bill exclusively is.

§ 23. Be this as it may, it is now well established, although formerly a subject of some conflict of juridical opinion, that a Bill of Exchange, drawn in one State of the United States of America upon a person, resident in another State, is a foreign Bill.[2] And this

[1] Mahoney *v.* Ashlin, 2 Barn. & Adolph. R. 478, 482.

[2] Miller *v.* Hackley, 5 John. R. 375; Duncan *v.* Course, 1 So. Car. R. 100; Lonsdale *v.* Brown, 4 Wash. Circ. R. 86; Id. 148; The Phœnix Bank *v.* Hussey, 12 Pick. R. 483; Buckner *v.* Finley, 2 Peters, R. 586; Wells *v.* Whitehead, 15 Wend. R. 527; Holliday *v.* McDougal, 12 Wend. R. 264, 272; Warren *v.* Coombs, 2 Appleton, R. 139.

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doctrine is founded upon clear and determinate principles; for not only has each State a separate and distinct municipal jurisprudence, founded upon its customary or common law, or statutable enactments; but each State is absolutely sovereign in its political organization and government and dominion, saving and excepting only so far, as there is a limited supreme sovereignty conferred upon the national government by the constitution of the United States.[1]

§ 24. But questions may still arise upon the circumstances of particular cases, involving considerations of a nice and peculiar character, whether a Bill is to be treated as a foreign Bill of Exchange, or not. Thus, for example, suppose a Bill, purporting upon its face to be drawn in Paris, by a person resident there, upon another person resident in London, and yet, in point of fact, both the parties were then resident in London, and the Bill was drawn there for the very purpose of giving it the appearance of a foreign transaction, and to disguise its domestic origin; the question might then arise, whether, upon proof of the facts, it should be treated as a foreign Bill, or not. The rule upon this subject would seem to be, that as to third persons, who take the Bill without notice of its domestic origin, it ought to be deemed a foreign Bill, but as between the original parties, and others claiming under them with full notice, it ought to be deemed a domestic or inland Bill. But if really drawn in a foreign country, although not drawn at the very place,

[1] Miller v. Hackley, 5 John. R. 375; Duncan v. Course, 1 So. Car. R. 100; Lonsdale v. Brown, 4 Wash. Circ. R. 86; Id. 148; The Phœnix Bank v. Hussey, 12 Pick. R. 483; Buckner v. Finley, 2 Peters, R. 586; Wells v. Whitehead, 15 Wend. R. 527; Holliday v. McDougal, 12 Wend. R. 264, 272.

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where it bears date, as, for example, if really drawn in another place in France, and yet dated at Paris, there would not seem to be any just objection to considering it a foreign Bill.[1]

§ 25. Other cases may easily be suggested, which may give rise to discussions of a similar nature. Thus, suppose a merchant, resident in Ireland, should there *bonâ fide*, and without any intention of fraud, draw a Bill on the proper Irish stamps, as required by law, on a person resident in London, and should sign and indorse the same, leaving blanks for the date, the sum, and the time when payable, or even leaving a blank for the name of the Drawee in London, and then should remit the same to his correspondent in London, to have all the blanks filled up, and they should be accordingly filled up by him, and passed to a *bonâ fide* holder; the question would arise, whether the Bill ought to be deemed an English or inland Bill, or an Irish or foreign Bill. And, upon principle, there would seem to be no doubt, that when so filled up, according to the intent of the original Drawer, it ought to be deemed an Irish or foreign Bill; for from the moment it is so filled up, the instrument becomes, by relation, the Bill of the Drawer in Ireland, as much as if it had been, in all its particulars, drawn and filled up with his own hand.[2] The same rule would apply to the case, where a like Bill was first filled up in England, and then remitted to Ireland, and there signed by the

[1] Biré *v.* Moreau, 2 Carr. & Payne, R. 376.

[2] Snaith *v.* Mingay, 1 Maule & Selw. 87; Russell *v.* Langstaff, Doug. R. 513; Collis *v.* Emett, 1 H. Black. 313; Mitchell *v.* Culver, 7 Cowen, R. 336; Violett *v.* Patton, 5 Cranch, 142; Bayley on Bills, ch. 3, § 3, 4, p. 82 (5th edit. 1830); Story on Conflict of Laws, § 289; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 390 (5th edit.).

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Drawer; for it would be, to all intents and purposes, a Bill drawn in Ireland on England.[1] Nay, in the first case, if the Drawer, after signing and indorsing the Bill, should die before the blanks were filled up, and then they were filled up, a *bonâ fide* holder might recover the amount from the personal representatives of the Drawer, since, by relation, it would be deemed to be a Bill, signed and indorsed by him in his lifetime.[2]

§ 26. The forms of foreign Bills of Exchange, as well as of inland Bills of Exchange, have varied at different periods, and are even at the present time different in different countries.[3] Foreign Bills in England are most commonly drawn upon some place upon the Continent of Europe; and in America, most commonly upon some place in England or France. One of the common forms of a Bill of Exchange drawn in England upon France, would at the present time be substantially as follows: "London, January 1, 1842. Exchange for 10,000 Livres Tournoises (or for 10,000

[1] Snaith *v.* Mingay, 1 Maule & Selw. 87, per Le Blanc, J.; Russell *v.* Langstaff, Doug. R. 513; Collis *v.* Emett, 1 H. Bl. 313; Boehm *v.* Campbell, Gow, R. 56; Bayley on Bills, ch. 3, § 3 (5th edit. 1830), p. 166, 167; Violett *v.* Patton, 5 Cranch, 142.

[2] Snaith *v.* Mingay, 1 Maule & Selw. 87, per Bayley, J.; Perry *v.* Cramond, 1 Wash. Cir. R. 100; Usher *v.* Duncey, 4 Camp. R. 97; S. C. 8 Taunt. R. 679; Bayley on Bills, ch. 5, § 3, p. 168 (5th edit. 1830).

[3] In the early forms of Bills of Exchange, many of which are given by Scaccia, (Scaccia, De Camb. § 1, Quest. 5, p. 110 to 127; Id. p. 508 to 514, edit. 1664, Genevæ), there was often an invocation of the Deity. Heinecc. De Jur. Camb. cap. 4, § 2, 15. Scaccia gives one form in these words, "Al nome de Dio, Amen, a di 1. di Febraro. 1381. — Pagate per quæsta prima litera ad usanza a voi medesimo libo 43 de grossi, sono per cambio de Ducati 440, c'ho ricevuto da Seio —— Sempronio — a Titio." Scaccia, De Comm. § 1, Quest. 5, p. 118. See also Id. p. 508, 509 (edit. 1664). This is apparently in the same form cited by Baldus, Ante, § 9, note (1).

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Francs). At fifteen days after sight (or at fifteen days after date, or at one usance, or two usances, &c. as the case may be) pay this my first Bill of Exchange (second and third of the same tenor and date not paid) to Messrs. —— or order (or to the order of Messrs. ——) ten thousand Livres Tournoises (or ten thousand Francs, as the case may be) value received of them, and place the same to my account, as per advice from James Jones." Addressed to Mr. Henry Kendrick, Banker, in Paris.[1]

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[1] Kyd on Bills, p. 14 (2d edit.); Chitty on Bills, p. 166, 8th edit. London. — Scaccia (Scaccia, De Camb. § 1, Quest. 5, p. 110 to 127; Id. p. 509, to 514, edit. 1664) has given many of the forms of Bills of Exchange, used in different countries, at a very early day. Many forms are given in Savary, Le Parfait Négociant, Tom. 1, Pt. 3, Liv. 1, ch. 4, p. 812 to 816. Mr. Thomson, in his work on Bills of Exchange, gives the forms at present used in Edinburgh. See Thomson on Bills of Exchange, (2d edit. 1836), Appx. 785 to 790. Marius (on Bills, p. 7 to 9) has given various forms of the Bills drawn upon different countries in his own day. Beawes, Lex Mere. by Chitty (edit. 1813, p. 611 to 613), has also given various forms. Mr. Kyd (on Bills, p. 13 to 17) has given the following forms of Bills, drawn in different countries, as modern forms.

"London, Jan. 18th, 1782. Exchange for £ 50 Sterl. At sight (of this my only Bill of Exchange *) pay to Mr. John Rogers, or order, Fifty Pounds sterling, value received of him, and place the same to account, as per advice (or without further advice) from Samuel Skinner. To Mr. James Jenkins, Merchant, in Bristol."

"London, the 18th of January, 1782. Exchange for 10,000 Liv. Tournoises. At fifteen days after date (or at one, two, &c. usances) pay this my first Bill of Exchange, (second and third of the same tenor and date not paid,) to Messrs. John Rogers & Co. or order, Ten Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from Thomas Bencraft. To Mr. Henry Kendrick, Banker, in Paris."

"London, Jan. 18th, 1782. Exchange for 10,000 Liv. Tournoises. At fifteen days after date (or at one, two, &c. usances) pay this my second Bill of Exchange, (the first and third of the same tenor and date not paid,) to Messrs. John Rogers & Co. or order, Ten Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from Thomas Bencraft. To Mr. Henry Kendrick, Banker, in Paris."

"London, Jan. 18th, 1782. Exchange for 10,000 Liv. Tournoises. At

* This is not always inserted.

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§ 27. The common form of an inland Bill, drawn in England, would be as follows: "£100. London, January 1, 1842. One month after sight (or after date, or at sight, or on demand, or ten days after sight, or after date), pay to Mr. —— or order (or to the order of Mr. ——) one hundred pounds for value received. Samuel Skinner. To Mr. ——, Merchant, at Bristol."[1]

fifteen days after date (or at one, two, &c. usances) pay this my third Bill of Exchange, (the first and second of the same tenor and date not paid,) to Messrs. John Rogers & Co. or order, Ten Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from Thomas Bencraft. To Mr. Henry Kendrick, Banker, in Paris."

"London, January 18th, 1782. Exchange for D. 1000. At usance pay this my first of Exchange to Mr. Ignatio Testori, (or to the *procuration of* Mr. Ignatio Testori,) One Thousand Ducats Banco, value received of Mr. Gregory Laman, and place it to account, as per advice from Nicholas Reubens. To Mr. James Robottom, Merchant, in Venice."

"London, January 18th, 1782. Exchange for 1600 perooo R's. At thirty days' sight, (or usance, &c.) pay this my first of Exchange, (second and third as above,) to Samuel Fairfax, Esq. or order, One Thousand Six Hundred Mil-Reas, value received of ditto, and place it to account, as per advice from Jeremiah Tomlinson. To Messrs. Brown & Black, Merchants, at Lisbon."

"London, Jan. 18th, 1782. Exchange for £273. 15s. sterl. at 35 Sh. 7 G. per. £. sterl. At two uso's and a half, pay this my first of Exchange, (second, &c.) to Mr. Joseph Jacobs, or order, Two Hundred and Seventy-three Pounds Fifteen Shillings sterl. at thirty-five shillings and seven groots per pound sterling, value received of Mr. James Merryman, and place it to account, as per advice from John Johnson. To Mr. David Hill, Merchant, at Amsterdam."

"London, 22 September, 1789. For £200 sterl. at 35 Sh. Flemish. Two months after date of this my first of Exchange, (second, &c.) pay to D. E. or order, at his own house, Two Hundred Pounds sterl. at thirty-five shillings Flemish per pound sterling, value received of him, and pass the same to account, as per advice from Yours, &c. A. B. To Mr. Peter Par, Merchant, at Amsterdam."

See in Merlin, Répertoire, Lettre et Billet de Change, § 2, art. 3, p. 183, 184 (edit. 1827), the forms of a modern French Bill of Exchange. Savary (Le Parfait Négociant, Tom. 1, p. 220, 221) has also given many forms in use in France.

[1] Chitty on Bills (8th edit. London), p. 166, 167; Kyd on Bills (3d edit.), p. 13; Beawes, Lex Merc. by Chitty (edit. 1813), p. 611; Com. Dig. Merchant F. 5.

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§ 28. The common form of a foreign Bill of Exchange, drawn in America upon England, would, at the present time, be substantially as follows; "Exchange for £1000 sterling. Boston, 1 January, 1842. At sixty days after sight, pay to A. B. or order (or to the order of A. B.), for value received, this my first of Exchange (second and third of the same tenor and date not paid), one thousand pounds sterling, and charge the same to my account, with or without further advice. (Signed.) C. D. Addressed to Messrs. Baring, Brothers, & Co. London."

§ 29. The common form of an inland Bill in America would be substantially as follows: "Exchange for $1000. Salem, 1 January, 1842. Pay to A. B. or order (or to the order of A. B.), ten days after date (or after sight, or at sight, as the case may be), one thousand dollars, for value received, and charge the same to account of C. D. (Signed by him.) Addressed to E. F., Boston, Merchant."

§ 30. Before proceeding to consider more particularly the nature of Bills of Exchange, and what things are, and what things are not essential to their character and validity, it may be proper to say a few words as to what constitutes, in the sense of the commercial world, the par of Exchange, and what the rate of Exchange. By the par of Exchange (*par pro pari*) is meant, the precise equality or equivalency of any given sum or quantity of money in the coin of one country, and the like sum or quantity of money in the coin of any other foreign country, into which it is to be exchanged, supposing the money of each country to be of the precise weight and purity fixed by the mint standard of the respective countries.[1] In order to ar-

[1] Cunningham on Bills, p. 417, 418 (6th edit.); Beawes, Lex. Merc. by

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rive at this, it is necessary to make assays of the comparative purity of foreign coins, and to ascertain their intrinsic values, as compared with the coin of the other country, into which they are to be exchanged. Thus, for example, if any two countries should happen to have a currency composed of gold coin of the same general denomination and weight, as, for instance, a guinea, a doubloon, or a Louis d'or, of the same weight, it would still be necessary to ascertain, what is the intrinsic value or fineness of each as compared with the other, or, in other words, how much of pure gold each contained, and how much alloy; and, if one contained one tenth less of pure gold than the other, then its intrinsic value would or might be one tenth less; and the par of Exchange, being measured by the intrinsic value, would of course vary in the same proportion. Hence, the guinea, the doubloon, or the Louis d'or, of the one country would, in that country, be worth one tenth more or one tenth less than that of the other. So, for example, if the gold coin of each country were

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Chitty, vol. 1 (edit. 1813), p. 562; Molloy, B. 2, ch. 10, § 8; Marius on Bills, p. 4, 5, 6. — Mr. McCulloch says; "The par of the currency of any two countries means, among merchants, the equivalency of a certain amount of the currency of the one in the currency of the other, supposing the currencies of both to be of the precise weight and purity fixed by their respective mints." McCulloch's Dictionary of Commerce, article, Exchange. I have preferred the expression of the same notion in coin, as the word "currency" is sometimes apt to mislead. Marius says; "Pair (as the French call it) is to equalize, match, or make even, the money of Exchange from one place with that of another place, when I take up so much money for Exchange in one place to pay the just value thereof in other kind of money in another place, without having respect to the current of Exchange for the same, but only to what the moneys are worth." Marius on Bills, 4. Beawes (Lex Merc. by Chitty, vol. 1, p. 562, edit, 1813) says; "By the par of real moneys is to be understood the equality of the intrinsic value of the real species of any country with those of another; and by that of Exchanges, the proportion that the imaginary moneys of any country bear to those of another."

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exchangeable into silver dollars of equal weight, fineness, and purity in each country, if the gold coin of the one country were worth, in that country, ten of such dollars, the other would be worth nine only of such dollars in the same country. The par of the inferior coin would, therefore, in that country, be only nine dollars, although in the country, where it was coined, it might nominally pass for ten dollars. And the same principle will apply to any denomination of currency in one country, which does not represent any specific coin (such as a pound sterling); for still it is compared by the same medium of gold of a certain purity and fineness in that country, and thus its relative value or par is ascertained in another.[1] Thus, for example, according to the mint regulations of England and France, a pound sterling in English currency is equal to twenty-five francs and twenty centimes of French currency;

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[1] Molloy (De Jure Marit. B. 2, ch. 10, § 8, p. 81) says; "The just and true Exchange for moneys, that is at this day used in England, (by Bills,) is par pro pari, according to value for value; so as the English Exchange being grounded on the weight and fineness of our own moneys, and the weight and fineness of the moneys of each other country, according to their several standards proportionable in their valuation, which, being truly and justly made, ascertains and reduces the price of Exchange to a sum certain for the Exchange of moneys to any nation or country whatsoever; as, for instance, if one receives £100 in London to pay £100 in Exeter; this by the par. But if a merchant receives £100 in London to pay £100 at Paris, there the party is to examine and compare the English weight with the weight of France, the fineness of the English sterling standard with the fineness of the French standard. If that at Paris and that at London differ not in proportion, then the Exchange may run at one price, taking the denomination according to the valuation of the moneys of each country. But if they differ, the price accordingly rises or falls. And the same is easily known, by knowing and examining the real fineness of a French 5s. piece and an English 5s. piece, and the difference, which is to be allowed for the want of fineness or weight, which is the Exchange; and so proportionably for any sums of moneys of any other country, the which is called par, or giving value for value."

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and this is accordingly said to be the par of Exchange between London and Paris.[1] And the Exchange between the two countries is said to be at par, when Bills are negotiated upon this footing; that is, for example, when a Bill for £ 100 sterling, drawn in London, is worth 2520 francs in Paris, and conversely, and no more.[2] Hence, when one pound sterling in London will buy a Bill on Paris for more than twenty-five francs, twenty centimes, the Exchange is said to be in favor of London and against Paris; and, on the other hand, when one pound sterling, in London, will not buy a Bill on Paris for twenty-five francs, twenty centimes, the Exchange is said to be against London and in favor of Paris.[3] In America a pound sterling in London is generally more valuable than $4·44, the par of Exchange; and hence it is usually said, that the Exchange is in favor of London; and it varies considerably at different times.

§ 31. By the rate or course of Exchange between

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[1] McCulloch's Dict. of Comm. art. Exchange, p. 559, 560 (edit. 1835).

[2] Ibid. — The Congress of the United States have, at different times, regulated the value of foreign coins, so far as to provide at what rate they shall be deemed a tender. The par of a pound sterling of England is, for all purposes, except the collection of duties, fixed at $4.44; and for the collection of duties on goods imported, it was formerly fixed at $4.80. See Act of 1799, ch. 128, § 61; Act of 14th July, 1832, ch. 225, § 16. But now it is by the Act of 27th of July, 1842, ch. 66, fixed at $4.84, in all payments by and to the treasury of the United States, and in appraising merchandise imported, where the value is by the invoice in pounds sterling. In Cunningham on Bills, p. 418 (6th edit.), will be seen the table of the assays, weights, and value of most of the foreign silver and gold coins, made by Sir Isaac Newton at the mint of England, by order of the Privy Council, in 1717, with notes and explanations, and calculations of the real or intrinsic Par of Exchange, as it stood in 1719, and 1740. See also McCulloch's Dictionary of Commerce, art. Exchange, p. 565, 566 (edit. 1835).

[3] Ibid.

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two countries, is meant, the actual price, at which a Bill, drawn in one country upon another country, can be bought or obtained in the former country at any given time. This rate or course of Exchange is affected or made to differ from par by two classes of circumstances; first, by any discrepancy between the actual weight or fineness of the coins, or of the bullion, for which the substitutes, used in their place, will exchange, and their weight or fineness, as fixed by the mint regulations; and, secondly, by any sudden increase or diminution of the Bills, drawn in one country upon another.[1] The former necessarily arises from the difference of the intrinsic value of the coins or currency of different countries. The latter is materially affected by the course of trade between the two countries, and the varying demand for remittances to the one from the other at different periods. In many cases both circumstances have a combined operation. In other cases the first is unfelt, but the second becomes a most material and important ingredient in commercial operations. Thus, for example, in America, although the coin of the national mint is exactly of the same intrinsic value throughout the Union, yet the rate of Exchange is constantly fluctuating. A Bill drawn in Boston, for $1000, upon New Orleans, will sometimes be worth in Boston one per cent. more than par, and at another time one per cent. less than par, simply in consequence of the course of trade, and there being a scarcity or abundance of such bills in the market, that is, of funds at New

[1] McCulloch's Dictionary of Commerce, art. Exchange, p. 559; Merlin, Répertoire, art. Lettre et Billet de Change, § 1, p. 155 to 157 (edit. 1827).

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Orleans, which are available by the owners thereof at Boston, for such purposes.[1] On the other hand, the currency of different States, known under the same denomination, may be of different intrinsic values, and yet the real par be the same. Thus, in Massachusetts, a silver dollar, at its par value, is equal to six shillings of Massachusetts currency, each of which shillings is equal to sixteen cents and two thirds; and in New York, a silver dollar, at its par value, is equal to eight shillings of New York currency, each shilling being of the value of twelve and a half cents only. The par value of six shillings in Massachusetts currency is then equal to eight shillings in New York currency; and yet the par value of a dollar is the same in each State. But the rate of Exchange between Boston and New York might be a quarter or half per cent. different from the par, by the scarcity or abundance of funds in either place at a particular period, occasioned by the fluctuations of business, and the necessities of trade.[2]

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[1] Ibid.

[2] McCulloch, in his Dictionary of Commerce, art. Exchange, has discussed this subject at some length. As the subject is not always familiar to students, or even to practical lawyers, the following extract from his work is subjoined. "It is but seldom, that the coins of any country correspond exactly with their mint standard; and when they diverge from it, an allowance, corresponding to the difference between the actual value of the coins and their mint value, must be made in determining the real par. Thus if, while the coins of Great Britain correspond with the mint standard in weight and purity, those of France were either 10 per cent. worse or debased below the standard of her mint, the Exchange, it is obvious, would be at real par when it was nominally 10 per cent. against Paris, or when a Bill payable in London for £100 was worth at Paris 2,772 fr. instead of 2,520 fr. In estimating the real course of Exchange between any two or more places, it is always necessary to attend carefully to this circumstance; that is, to examine, whether their currencies be all of the standard weight and purity; and if not, how much they differ from it. When the

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coins circulating in a country are either so worn or rubbed, as to have sunk considerably below their mint standard, or when paper money is depreciated from excess or want of credit, the Exchange is at real par only, when it is against such country to the extent, to which its coins are worn or its paper depreciated. When this circumstance is taken into account, it will be found, that the Exchange during the latter years of the war, though apparently very much against this country, was really in our favor. The depression was nominal only; being occasioned by the great depreciation of the paper currency, in which Bills were paid. Variations in the actual course of Exchange, or in the price of Bills, arising from circumstances affecting the currency of either of two countries trading together, are nominal only; such as are real grow out of circumstances affecting their trade. When two countries trade together, and each buys of the other commodities of precisely the same value, their debts and credits will be equal, and, of course, the real Exchange will be at par. The Bills drawn by the one will be exactly equivalent to those drawn by the other, and their respective claims will be adjusted without requiring the transfer of bullion or any other valuable produce. But it very rarely happens, that the debts reciprocally due by any two countries are equal. There is almost always a balance owing on the one side or the other; and this balance must affect the Exchange. If the debts due by London to Paris exceeded those due by Paris to London, the competition in the London market for Bills on Paris would, because of the comparatively great amount of payments our merchants had to make in Paris, be greater than the competition in Paris for Bills on London; and, consequently, the real Exchange would be in favor of Paris and against London. The cost of conveying bullion from one country to another forms the limit, within which the rise and fall of the real Exchange between them must be confined. If 1 per cent. sufficed to cover the expense and risk attending the transmission of money from London to Paris, it would be indifferent to a London merchant, whether he paid 1 per cent. premium for a Bill of Exchange on Paris, or remitted money direct to that city. If the premium were less than 1 per cent., it would clearly be his interest to make his payments by Bills in preference to remittances; and that it could not exceed 1 per cent. is obvious; for every one would prefer remitting money, to buying a Bill at a greater premium than sufficed to cover the expense of a money remittance. If, owing to the breaking out of hostilities between the two countries, or to any other cause, the cost of remitting money from London to Paris were increased, the fluctuations of the real Exchange between them might also be increased. For the limits, within which such fluctuations may range, correspond in all cases with the cost of making remittances in cash. Fluctuations in the nominal Exchange, that is, in the value of the currencies of countries trading together, have no effect on foreign trade. When the currency is depreciated, the premium, which the exporter of commodities derives from the sale of the Bill drawn on his correspondent abroad, is only equivalent to the increase in the price of the goods exported, occasioned by this depreciation. But when

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the premium on a foreign Bill is a consequence, not of a fall in the value of money, but of a deficiency in the supply of Bills, there is no rise of prices; and in these circumstances the unfavorable Exchange operates as a stimulus to exportation. As soon as the real Exchange diverges from par, the mere inspection of a price-current is no longer sufficient to regulate the operations of the merchant. If it be unfavorable, the premium, which the exporter will receive on the sale of his Bill, must be included in the estimate of the profit he is likely to derive from the transaction. The greater that premium, the less will be the difference of prices necessary to induce him to export. And hence, an unfavorable real Exchange has an effect exactly the same with what would be produced by granting a bounty on exportation equal to the premium on foreign Bills. But, for the same reason that an unfavorable real Exchange increases exportation, it proportionally diminishes importation. When the Exchange is really unfavorable, the price of commodities imported from abroad must be so much lower than their price at home, as not merely to afford, exclusive of expenses, the ordinary profit of stock on their sale, but also to compensate for the premium, which the importer must pay for a foreign Bill, if he remit one to his correspondent, or for the discount, added to the invoice price, if his correspondent draw upon him. A less quantity of foreign goods will, therefore, suit our market, when the real Exchange is unfavorable; and fewer payments having to be made abroad, the competition for foreign Bills will be diminished, and the real Exchange rendered proportionally favorable. In the same way, it is easy to see, that a favorable real Exchange must operate as a duty on exportation, and as a bounty on importation. It is thus, that fluctuations in the real Exchange have a necessary tendency to correct themselves. They can never, for any considerable period, exceed the expense of transmitting bullion from the debtor to the creditor country. But the Exchange cannot continue either permanently favorable or unfavorable to this extent. When favorable, it corrects itself by restricting exportation and facilitating importation; and when unfavorable, it produces the same effect by giving an unusual stimulus to exportation, and by throwing obstacles in the way of importation. The true par forms the centre of these oscillations; and although the thousand circumstances, which are daily and hourly affecting the state of debt and credit, prevent the ordinary course of Exchange from being almost ever precisely at par, its fluctuations, whether on the one side or the other, are confined within certain limits, and have a constant tendency to disappear. — Merlin says; "Le change est une fixation de la valeur actuelle et momentanée des monnaies des divers pays; il faut donc qu'un négociant étudie les variations de cette valeur, afin de ne payer ni d'être payé à son désavantage; il faut aussi qu'il connaisse le pair du change de chaque place, c'est-à-dire, le prix moyen qui ne cause ni profit ni perte; c'est par la science exacte des variations du change, qu'il dispose ses opérations de façon à tourner le cours actuel à son avantage. On entend par cours actuel, le prix auquel sont les Lettres de change pour faire des remises d'une place à une autre. Le pair du change est fondé

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sur une proportion arithmétique du titre, du poids et de la valeur numéraire des espèces réelles d'or et d'argent reçues et données en paiement; on en a partout des tables exactes, qu'on peut consulter au besoin. Mais le cours du change s'éloigne sans cesse de ce pair réel dans toutes les places, suivant les circonstances ou la situation momentanée de leur commerce respectif, et ce sont ces circonstances qui établissent le cours actuel. Remontons au principe. L'argent, comme métal, a une valeur, ainsi que toutes les autres marchandises; l'argent, comme monnaie, a une valeur que le prince peut fixer dans quelques rapports, et qu'il ne saurait fixer dans d'autres." Merlin, Répert. art. Lettre et Billet de Change, § 1, p. 153 (edit. 1827).

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CHAPTER III.

REQUISITES OF BILLS OF EXCHANGE.

§ 32. HAVING thus stated, in a brief manner, the nature, origin, form, and variations in the par or rate of foreign Bills of Exchange, let us now proceed to the consideration of the more immediate objects of our inquiries, namely, what, at the Common Law, are the general qualities which belong to Bills of Exchange, and constitute their essence, as a medium of commerce, and a circulating security; so that, in fact, although they are not, strictly speaking, money, they perform, for the most part, the functions thereof. And the requisites, by our law, may be stated under the following heads. (1.) The form. (2.) The date. (3.) The place where made. (4.) The sum of money to be paid. (5.) The mode of payment. (6.) The place of payment. (7.) The time of payment. (8.) The names and description of the parties to the instrument, whether as Drawer, or Payee, or Drawee. (9.) The negotiability of the instrument. (10.) The statement of the value received. (11.) The statement of advice, and other miscellaneous suggestions as to the form; and (12.) The capacity of the parties to draw, receive, negotiate, and accept Bills.

§ 33. First, then, as to the form of a Bill of Exchange. It must always be in writing;[1] and it should

[1] Chitty on Bills, ch. 5, § 1, p. 146 to 150, 153 (8th ed. 1833). — The French law requires the Bill to be in writing, as indeed the very name (Lettre) imports, and also under the signature of the Drawer. Pardessus, Droit Comm. Tom. 2, art. 330; Code de Comm. art. 110; Jousse, sur

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be signed by the Drawer, or, by some person duly authorized, in his name and on his behalf. The common form has been already given; but it is not essential, that the very language of that formulary should be used. On the contrary, the form and the 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 and 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.[1] Thus, if a person should order another per-

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L'Ord. 1673, tit. 5, p. 58, 59, 67; Pothier de Change, n. 30; Russian Code of 1833; 1 Louis. Law Journal for 1842, p. 64. But although a Bill of Exchange must, in all cases, be in writing, it does not, by our law at least, seem indispensable, that the writing should be written in ink. It may be in pencil. Geary *v.* Physic, 5 Barn. & Cressw. 234; Bayley on Bills, ch. 1, § 4, p. 10 (5th edit.); Chitty on Bills, ch. 5, p. 146 (8th edit. 1833); Id. p. 185, 186. By the law of Scotland, a Bill of Exchange must be subscribed by the party or his authorized agent. The initials of the name of the Drawer, subscribed to the Bill, will not be sufficient to give it the character of a Bill. 1 Bell, Comm. B. 3, ch. 2, p. 390 (5th edit.).

[1] Bayley on Bills, ch. 1, § 2, p. 4, 5 (5th edit. 1830); Chitty on Bills, ch. 5, § 1, p. 146 to 150; Id. 175 (8th edit.); Edis *v.* Bury, 6 Barn. & Cressw. 433; Shuttleworth *v.* Stephens, 1 Camp. R. 407; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 388 (5th edit.); 3 Kent, Comm. Lect. 44, p. 75, 76 (4th edit.); Miller *v.* Thomson, 3 Mann. & Grang. 576. — Mr. Chitty (ch. 5, p. 146, 147, 8th edit. 1833) states the general doctrine in this manner. "A Bill of Exchange being an 'open letter of request by one person to another to pay money,' it follows, that each must be in writing, or whilst legible it may be in pencil, and the whole of the contract must be so expressed; and according to the law of Great Britain and of other countries, no part of such contract can be established or supplied by oral testimony. It should seem, however, that the whole of the contract

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son to deliver a particular sum of money to A. B., or to be accountable or responsible for a particular sum of money to A. B., it would constitute a Bill of Exchange.[1] So, if the language be, that the Drawer requests another to pay to A. B. a particular sum, unless, indeed, the language necessarily or naturally imports a request, as a favor, and not as a matter of right; for, in the latter case, it would not be a good Bill.[2] But the language of instruments of this sort is

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need not be in the body of the same instrument, and that a contemporaneous memorandum or indorsement on the Bill, or even on a separate detached paper, may be resorted to, either by the Holder, to supply or explain, or by the Defendant, to show, that the instrument was qualified, or payable on a contingency, or renewable, though evidence of a parol similar stipulation would be clearly inadmissible; and where the bill with the indorsements, cannot all be written on the same paper, effect is given to indorsements on an annexed paper, called 'un alonge.'"

[1] Morris *v.* Lee, 2 Ld. Raym. 1396, 1397; S. C. 1 Str. R. 629; 8 Mod. 362.

[2] Ruff *v.* Webb, 1 Esp. R. 129; Little *v.* Slackford, 1 Mood. & Malk. 371. — Perhaps it will not be found easy to reconcile all the cases on this subject with each other. In Ruff *v.* Webb, 1 Esp. R. 129, the paper was; "Mr. Nelson will much oblige Mr. Webb, by paying I. Ruff or order Twenty Guineas on his account." Lord Kenyon held it to be a Bill of Exchange. But in Little *v.* Slackford (1 Mood. & Malk. 171), the words were; "Mr. Little, please to let the bearer have £7, and place it to my account, and you will oblige your humble servant. J. Slackford." Lord Tenterden held it not to be a Bill of Exchange. Now, certainly, language of mere civility cannot, of itself, change the nature of the instrument; and in order to displace the construction, that the instrument is a Bill, it would seem to be proper to require, that the language necessarily imported to ask a favor, and not to be words of civility. Suppose a man were to draw on his banker, who had money of the Drawer in his hands, an instrument in these words; Please to pay A. B., or, Please to pay the bearer, 100 dollars, would it not be a good Bill or Draft? In France the Bills are said usually to express, "Il vous plaira payer," and it has always been supposed to be a proper formula. Chitty on Bills, p. 150, note (*f*), (8th edit. 1833.) Dict. du Natoriat. art. Lettre de Change, Tom. 4, p. 592, 593 (edit. 1832). Beawes, in his Lex Mercatoria, (Pl. 3, edit. by Chitty, 1813, Vol. 1, p. 563,) states, among the requisites of a Bill, "that the payment thereof be ordered and commanded." Chitty considers

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not to be too nicely scanned; nor is it, because it has the politeness now generally introduced into commercial contracts and transactions, to be presumed to ask a favor, and not demand a right. Heineccius has well remarked upon the propriety of this consideration. *Sequitur mandatum solvendi, quod modo imperative exprimitur, modo verbis precativis. Res eodem redit, quamvis discrimen aliquod in his formulis reperisse* [*est*]. *Eo enim vivimus sæculo, quo cultiores gentium mores loquutiones imperativas respuunt, adeo, ut et mandata verbis precativis concipi soleant.*[1] The true rule would seem, therefore, 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. So, if the word prefixed to the

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it sufficient, if it be requested. Chitty on Bills, p. 150, 151, 175 (8th edit. 1833). See Marius on Bills, 9. In Pothier's time, the common form seems to have been, Vous paierez à Monsieur —— la somme, &c. Pothier de Change, n. 31. Heineccius has well remarked upon this subject, that the courtesy of modern times often conveys an order in words of request. "Sequitur mandatum solvendi, quod modo imperative exprimitur, (der Herr zahle auf diesen meinen Wechsel-Brief,) modo verbis precativis (der Herr beliebe zu bezahlen auf diesen meinen Wechsel-Brief). Res eodem redit, quamvis discrimen aliquod in his formulis reperisse sibi videantur Vogtius de Camb. p. 195, et Stryck. in Diss. de Cambial. Litterar. Acceptat. cap. 4, § 5. Eo enim vivimus sæculo, quo cultiores gentium mores loquutiones imperativas respuunt, adeo, ut et mandata verbis precativis concipi soleant." Heinecc. De Jur. Camb. cap. 4, § 7. — Might not the doctrine maintained by the Court in Edis *v.* Bury, 6 Barn. & Cressw. 433, be well applied in cases of this nature, that, if the language of an instrument be ambiguous, it may be treated as a Bill, by the Holder at his election? See also Shuttleworth *v.* Stephens, 1 Camp. R. 407; Chitty on Bills, ch. 5, p. 150 to 152 (8th edit. 1833).

[1] Heinecc. De Camb. cap. 4, § 7. See note 2, supra, the whole passage.

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name of the Drawee be *at*, instead of *to*, the Holder may, at his election, treat it as a Bill of Exchange,[1] or as a promissory note; for it is susceptible of either interpretation.

§ 34. But, although Bills of Exchange must be in writing, and contain a mandate or order to pay; yet it does not seem indispensable, that the whole of the contract should be written on one and the same paper, or on one and the same side of the same paper. It may be written in part on one paper, and in part on another separate and detached paper, if the memorandum on each be contemporaneous, and both be designed to constitute but one entire contract.[2] Nay, a contemporaneous indorsement on the same paper may constitute a part of the entire contract, and qualify, restrain, or enlarge the same.[3] But whether, in any particular case, the memorandum shall be construed a part of the Bill or not, and what shall be its true effect, is a matter, which must depend upon all the facts and circumstances of each particular case.[4]

§ 35. Bills of Exchange may also vary, as to their form, in respect to the number of parties thereto. In the ordinary form of Bills, there are usually three parties, the Drawer, the Payee, and the Drawee.[5] But a

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[1] Shuttleworth *v.* Stephens, 1 Camp. R. 407; Allen *v.* Mawson, 4 Camp. R. 115; Rex *v.* Hunter, Russ. & Ryan, Cr. Cas. 511; Chitty on Bills, p. 28, 29, 149 to 151 (8th edit. 1833).

[2] Chitty on Bills, p. 146, 147 (8th edit.); Id. p. 160, 161 (8th edit. 1833); Bayley on Bills, ch. 1, § 14, p. 35, 36 (5th edit. 1836); see Hill *v.* Halford, 2 Bos. & Pull. 413; Exon *v.* Russell, 4 M. & Selw. 505; Williams *v.* Waring, 10 Barn. & Cressw. 2; Leeds *v.* Lancashire, 2 Camp. R. 205.

[3] Ibid.

[4] Splitgerber *v.* Kohn, 1 Starkie, R. 125; Stone *v.* Metcalf, 4 Camp. R. 217; Hayward *v.* Perrin, 10 Pick. R. 228.

[5] Marius on Bills, 2, 3; Chitty on Bills, p. 27 to 29 (8th edit. 1833);

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Bill is sometimes drawn payable to the order of the Drawer, and then it may embrace two parties only, himself and the Drawee.[1] But, in such a case, if the Drawer indorses it, the Indorsee becomes in effect the Payee, in lieu of the Drawer. Nay, the Drawer may at once become Drawer, Payee, and Drawee; as, for example, if he should draw a Bill on himself, payable to his own order, at a particular place, naming no Drawee, and then should indorse it over, the Indorsee might sue him as Acceptor of the Bill, or as maker of a Promissory Note, at his election.[2] Or, if,

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Beawes, Lex. Merc. by Chitty, Vol. 1, p. 562 (edit. 1813); Com. Dig. Merchant, F. 4.

[1] Cunningham on Bills, ch. 1, § 1, n. 13, p. 13; Buller *v.* Crisp, 6 Mod. R. 29, 30; Chitty on Bills, p. 27, 28 (8th edit. 1833); see Heinecc. de Jur. Camb. cap. 2, § 2, 3; Marquard, de Jure Merc. Lib. 2, ch. 12, n. 57; Pothier de Change, n. 10, 19, 20; Com. Dig. Merchant, F. 4; Wildes *v.* Savage, 1 Story, Rep. 22; 3 Kent, Comm. Lect. 44, p. 74 (4th edit.).

[2] Shuttleworth *v.* Stephens, 1 Camp. R. 407; Allen *v.* Mawson, 4 Camp. R. 115; Harvey *v.* Kay, 9 Barn. & Cressw. 364, per Bayley, J; Edis *v.* Bury, 6 Barn. & Cressw. 433; Ex Parte Pam, 18 Ves. 69; Starkie *v.* Cheepeman, Carth. R. 509; Dehers *v.* Harriot, 1 Shower, R. 163; Robinson *v.* Bland, 2 Burr. R. 1077; Joselyn *v.* Laserre, Fortesc. R. 282; Roach *v.* Ostler, 1 Mann. & R. 120; Rex *v.* Hunter, Russ. & Ryan, Cr. Cas. 511; Post, § 59; Bayley on Bills (5th edit.), ch. 1, § 2, p. 8, 9 (edit. 1830); see Pardessus, Droit Comm. Tom. 1, § 335; Chitty on Bills, p. 28, 29, 149 to 151 (8th edit. 1833); Marius on Bills, 3; Heinecc. de Jur. Camb. cap. 2, § 2, 3. See Miller *v.* Thomson, 3 Mann. & Grang. 576, where Ld. Ch. Just. 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." In that case the instrument was in the form of a Bill of Exchange, drawn upon a Joint Stock Banking Company in London, by the manager of one of its Branch Banks, at Dorking, and "for the Directors," payable six months after date, without acceptance, to the order of J. C. Francis (who was one of the Directors) for £100. The Plaintiff sued as indorsee of the instrument, and declared upon it as a promissory note. An objection was taken, that the instrument was a Bill of Exchange, and not a promissory note; but the Court overruled the objection. Why might it not also have been declared on as a Bill of Exchange, since it was payable to the order of

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in the like case, no person were named as Drawee, and yet it were accepted by a person as Drawee, at the place stated, he would be answerable as Acceptor; for, it being directed to a particular place, which could only mean to a person, who resided there, the party, by accepting it, acknowledged, that he was the person, to whom it was directed.[1] But a Bill, drawn by the Drawer, upon a third person, requesting the latter to pay to his own order a particular sum for value received, would not be entitled to be deemed a Bill of Exchange; for every Bill of Exchange presupposes a duty of the Drawee to pay the money to some other person than himself.[2] We shall hereafter see, that a person, not originally a party to the Bill, may become liable as an Acceptor, *supra protest*, upon the default of acceptance by the Drawee, and thus the Bill may include the rights and liabilities of four distinct parties.[3]

§ 36. In the French Law, as in ours, ordinarily, there are three parties to a Bill, the Drawer, the Payee, and the Drawee;[4] but the Bill will be good, if it be drawn payable to the order of the Drawer; but then it will not acquire, in the French Law, the veritable character of a Bill, in such a case, until it is indorsed and passed to some other person, who becomes the Holder thereof.[5] But, on the other hand, the

another person, and was indorsed by him? Why was not the indorser a new drawer of the Bill?

[1] Gray *v.* Milner, 8 Taunt. R. 739.

[2] Regina *v.* Bartlett, 2 Mood. & Rob. 362.

[3] Chitty on Bills, p. 30; Id. 374 (8th edit. 1833).

[4] Pothier de Change, n. 17, 18, 30.

[5] Locré, Esprit du Code de Comm. Liv. 1, tit. 8, art. 110, Tom. 1, p. 342 (edit. 1829); Code of Commerce, art. 110; see Pothier de Change, n. 17 to 20.

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Drawer cannot, as he may under our law, be at once the Drawer and the Drawee; for, in such a case, it will not constitute a Bill of Exchange, in the just sense of the term, although it may be obligatory between the parties as a simple contract, or promissory note.[1] The Drawee and the Payee may also be one and the same person; as, if the Drawer draws a Bill on the Drawee, in this form; Pay to yourself, such a sum, value received of such a one.[2]

§ 37. Secondly, in respect to the date of a Bill of Exchange. In general, it may be stated, that there should be a date affixed to every Bill of Exchange. But it is not in all cases indispensable;[3] although in Foreign Bills, probably, the date is rarely, if ever omitted. In all cases of Bills, drawn payable at so many days after date, it would seem to be almost indispensable, that the date should appear upon the face of the instrument, for otherwise it cannot be known to the Drawee at what period it is payable; nor can the Holder know, at what time it should be presented for payment, nor when it is to be deemed overdue; all which circumstances may most materially affect his rights.[4] But when Bills are drawn payable at sight,

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[1] Pardessus, Droit Comm. Tom. 1, n. 335, 339; Id. n. 464, 477 to 479; Pothier de Change, n. 10, 20.

[2] Pothier de Change, n. 19.

[3] See Beawes, Lex. Merc. by Chitty, Vol. 1, p. 563, pl. 3 (edit. 1813); Marius on Bills, p. 14, 19; Bayley on Bills, ch. 1, § 7, p. 25; Id. ch. 7, § 1, p. 237; Id. ch. 9, p. 422, 427; 1 Bell, Comm. B. 3, ch. 2, p. 388, 389 (5th edit. 1830); Chitty on Bills, ch. 5, p. 168 (8th edit. 1833).

[4] 1 Bell, Comm. B. 3, ch. 2, p. 389 (5th edit.); Chitty on Bills, ch. 5, p. 168 to 170 (8th edit. 1833). — In De la Courtier v. Bellamy (2 Shower, R. 42), the action was on a Foreign Bill of Exchange, payable at double usance from the date thereof; and the declaration alleged, that the party drew the Bill on such a day, and that the Bill was accepted by the De-

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or on demand, or at so many days after sight, it does not seem indispensable, that the date should appear on the face of the instrument, especially if it be an inland Bill; for such a Bill may be valid without a date; and if it should become necessary to be inquired into, it may be ascertained by evidence, and the date will be computed from the day it was actually made or issued.[1] It is obvious, however, that every such omission must be attended with some practical inconveniences; and, therefore, it seldom occurs, except from pure mistake. Whether the Drawee might not reasonably refuse to pay the Bill, unless dated, is a question, involving considerations of some nicety, as in many cases it might expose him, in point of remedy and evidence, to serious embarrassments.

§ 38. By the old French Law, the date does not seem to have been positively required to be placed on the Bill;[2] but the modern Code of Commerce expressly

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fendant. An exception was taken (probably after verdict, or judgment upon nil dicit), that the date of the Bill was not set forth. But the Court held it well enough, and that they would intend, that it was dated, when drawn. The like decision was made in Hague *v.* French, in Error (3 Bos. & Pull. 173, 174), where the original judgment was upon nil dicit; and upon error brought, it was insisted, that the date of the Bill was not stated in the declaration. But the Court said, that they would intend, that the date of the Bill was the day of drawing stated in the declaration. The same point was decided in Giles *v.* Bourne (6 M. & Selw. R. 73), upon demurrer to the declaration. Neither of the cases show, what would have been the result, either as to the Drawer or Acceptor, if, at the trial, it had appeared, that there was no date on the Bill.

[1] Chitty on Bills, p. 168, 169, 581 (8th edit. 1833); Bayley on Bills, ch. 1, § 7, p. 25 (5th edit. 1830); Id. ch. 7, § 1, p. 247; Id. ch. 9, p. 379, 383. — In England, by statute, Bills of a certain amount are required to bear date before or at the time of drawing thereof. See Stat. 17 Geo. 3, ch. 30; 27 Geo. 3, ch. 16; 55 Geo. 3, ch. 184, § 18; 7 Geo. 4, ch. 6, § 9; Chitty on Bills, p. 168, 169 (8th edit.); Bayley on Bills, ch. 1, § 5, p. 12 to 14; Id. § 7, p. 25 (5th edit. 1830).

[2] Pothier says, (speaking of the old Law, before the modern Code of Commerce), the want of a date, or an error in the date of the Bill, cannot

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requires the Bill to be dated.[1] And by the date, we are to understand the day, the month, and the year.[2] A compliance with this requisite seems indispensable, under the modern Code, to give it the character of a Bill of Exchange, although it will not otherwise deprive it of being, as between the original parties, considered as a valid simple contract, or promise.[3] The Law of Naples is in precise coincidence with that of France.[4]

§ 39. Heineccius also holds, that the date is indispensable. His language is, and it certainly has no small force in a practical view of the subject; *Sequitur diei, mensis, et anni mentio, quæ necessaria omnino videtur;* (1.) *quia pleræque leges cambiales tempus exprimi jubent, veluti Prussicæ, Brunsuicenses, et Austriacæ;* (2.) *quia sæpe dies solutionis a die scriptarum litterarum computandus est, ab eoque currere incipit, e. gr. vier Wochen à dato beliebe der Herr zu bezahlen;* (3.) *quia de præscriptione debiti cambialis judicari non potest sine die et consule. In aliis scripturis omissum diem et consulem regulariter non vitiare contractum notum est.*[5]

§ 40. Thirdly, as to the place, where a Bill of Ex-

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be objected on the part of the Drawer or Acceptor, any more than the omission of the place, where it was drawn. Pothier de Change, n. 36.

[1] Code de Comm. art. 110, 188; Pardessus, Droit Comm. Tom. 1, art. 331, 333, 457, 458; Delvincourt, Inst. Droit Comm. tit. 7, ch. 1, p. 75; Merlin, Répert. Lettre et Billet de Change, § 1, n. 2, p. 161, 162 (edit. 1827); Jousse, sur L'Ord. 1673, tit. 5, p. 58, 67; Locré, Esprit de Comm. Liv. 1, tit. 8, § 1, p. 332 (edit. 1829); Pothier de Change, n. 36.

[2] Ibid.

[3] Ibid.; Pardessus, Droit Comm. Tom. 1, art. 331, 333, 464, 477, 478; Chitty on Bills, 147, 148 (8th edit. 1833).

[4] Codice por lo Regno delle due Sicilie, De Comm. Tit. 7, cap. 1, § 109; Id. cap. 2, § 187.

[5] Heinecc. De Jur. Camb. cap. 4, § 4 (edit. 1769).

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change is drawn, and on which it is drawn. In order to ascertain, whether a bill be a Foreign Bill, or an Inland Bill, (the rights, duties, and obligations of which are not exactly coincident,) it seems highly proper, that the place, where it is drawn, or made and is to be paid, should, in all cases, be stated upon the face of it. But, in general, it does not seem indispensable, that the place, where drawn, should be stated on the face of the Bill, at least not in respect to Inland Bills, and between the original parties,[1] whatever may be the difficulties as to Foreign Bills, or as between the original parties and third persons.

§ 41. In this respect, our law seems far less peremptory and strict, than the modern French Law; for, by the latter, it seems indispensable to the essence of a Bill of Exchange, that it should contain the place, where drawn, and also the place, upon which it is drawn; for the very definition of a Bill, in that law, is, that it is drawn from one place upon another place;[2] and hence all the writers are agreed, that the place is an indispensable requisite to be stated on the face of the Bill.[3]

§ 42. Fourthly, as to the sum of money to be paid. It seems positively indispensable, that the exact amount to be paid should be inserted; for in no other way can the Drawee know, what he is to pay, or the

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[1] Chitty on Bills, p. 167, 168 (8th edit. 1833).

[2] Code de Comm. art. 110; Pardessus, Droit Comm. Tom. 2, art. 320, 332; Merlin, Répert. Lettre et Billet de Change, § 2, n. 2, p. 159, 160 (edit. 1827).

[3] Locré, Esprit du Code de Comm. Liv. 1, art. 110, n. 1, p. 333, 334; Delvincourt, Instit. de Droit Comm. 70; Merlin, Répert. Lettre et Billet de Change, § 1, n. 2, p. 160 (edit. 1827); Pothier de Change, n. 30; Chitty on Bills, p. 147, 148, 167, 168 (8th edit. 1833). — However, Pothier says, that neither the Drawer, nor the Acceptor, could, under the

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Payee or Holder know, what he is entitled to demand.[1] Hence, if the specific sum to be paid be not expressed at all, or it be uncertain in amount, or be accompanied by other words, that may make it more or less, according to circumstances, the Instrument is void as a Bill of Exchange.[2] Thus, a Bill to pay the Payee a given sum, and whatever else may be due to the Payee, is not a good Bill of Exchange, even for the sum, which it expressly specifies.[3] The sum is sometimes also expressed in figures in the superscription, as well as in the body of the Instrument in letters, for greater caution. But, if the sum in figures, on the superscription, differs from the sum in words in the body of the Instrument, the latter will be deemed the true sum;[4] and parol evidence is inadmissible to establish, that the sum intended was not that, stated in words in the

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old law, object to the want of a date, or of the place, where the Bill was drawn. Pothier de Change, n. 36; Supra, § 38, note (1). Heineccius treats the mention of the place as indispensable for the very purposes of the instrument. His language is; "Magis necessaria est mentio loci, adeo, ut ejus omissio cambium vitiet in ducatu Brunsuicensi. Quamvis enim alibi locum impune omitti posse putet Zipfelius, (De Camb. pag. 118,) idque etiam jure communi recte se habere videatur, (L. 21, de obligat. et act) merito tamen dissentit Strykius (in Dissert. de acceptat. litter. camb. cap. 3, § 3). Quomodo enim scire posset litterarum illarum possessor, quo cum protestatione remittendæ sint litteræ cambiales, si in illis loci nulla fiat mentio?" Heinecc. de Jur. Camb. cap. 4, § 3.

[1] Chitty on Bills, 150, 152, 153, 170, 181 (8th edit. 1833); Bayley on Bills, ch. 1, § 4, p. 10, 11 (5th edit. 1830); Beawes, Lex Merc. by Chitty, Vol. 1, p 563, pl. 3 (edit. 1813).

[2] Ibid.; Bolton v. Dugdale, 4 Barn. & Adolph. 619; Jones v. Simpson, 2 Barn. & Cressw. 318; Chitty on Bills, p. 152 to 154 (8th edit. 1833).

[3] See Smith v. Nightingale, 2 Stark. R. 375; Leeds v. Lancashire, 2 Camp. R. 205; Bolton v. Dugdale, 4 Barn. & Adolph. 619.

[4] Chitty on Bills, 182 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 1, p. 513, pl. 193; Marius on Bills, 33, 34.

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body of the Instrument, but was that stated in figures in the margin.[1]

§ 43. Another indispensable requisite is, that the Bill should be for the payment of money, and of money only; for otherwise the Bill does not acquire the character of Exchange.[2] Thus, a Bill to pay money, and to do some other thing, or a bill to deliver goods, or merchandise, or stock, or East India Bonds, or Bank Notes, or any other paper medium, such as foreign bank bills, or drafts, or current bills, is not a Bill of Exchange in contemplation of law.[3] So, if a Bill be

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[1] Saunderson v. Piper, 5 Bing. New Cases, 425.—In this case the Bill in the margin was in figures, $245, and in the body of the Instrument for "Two Hundred Pounds." Query, if it would have made any difference, if the sum had been £200 in figures in the body of the instrument? Some of the Judges gave intimations, which may lead to a doubt upon this point. Heineccius, speaking on this subject, says; "Denique sollemne etiam est campsoribus, sub finem lemmatis cifris exprimere summam solvendam, addito monetæ genere, quo exactori sit satis faciendum; quamvis hoc requisitum vel ideo essentiale dici nequeat, quod summa in ipsis litteris cambialibus bis exprimi solet." Heinecc. de Jur. Camb. cap. 4, § 5. In some countries, the sum is required to be mentioned both in letters and in figures. Heineccius says; "Hinc porro exprimenda est summa solvenda, quam leges quædam cambiales, veluti Danica (Lib. 5, cap. 14, art. 8,) et Brunsuicensis, art. 1, bis scribi jubent, semel litteris, et iterum cifris. Quamvis vero alibi alterutrum sufficiat; procul dubio tamen consuetudo prior laudatu dignior est, quia quod integris litteris scriptum, difficilius corrumpitur, quam quod solis cifris expressum est. Denique et monetæ genus exprimendum, quod nisi factum sit, monetæ vulgares intelliguntur, quas vocant Current. In cambiis propriis usuræ sorti adnumerantur, ut æque, ac ipsa sors, processu cambiali peti possint." Heinecc. de Jur. Camb. cap. 4, § 12; Id. § 5 (edit. 1769). In France the sum may be expressed in letters or in figures. Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, p. 336, 337; Pothier de Change, n. 35.

[2] Chitty on Bills, p. 152 to 156 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, p. 388, 389 (5th edit.).

[3] Bayley on Bills, ch. 1, § 4, p. 9, 10 to 15 (5th edit. 1830); Chitty on Bills, p. 152 to 154 (8th edit. 1833); Martin v. Chauntry, 2 Str. R. 1271; Buller, Nisi Prius; Kyd on Bills, p. 50 (3d edit.); Smith v. Boehme, Gilb Cas. in Law and Eq. 93, S. C. cited 2 Ld. Raym. 1362, 1396, 3 Ld. Raym. 67; Ex parte Imeson, 2 Rose, Cas. in Bank. 225; Jones v. Fales, 4 Mass.

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to pay money, but a part of it is to go as a set-off against certain claims of other persons, it is not a good Bill of Exchange; for the instrument constitutes one entire contract, and it amounts to an agreement to set off certain claims in lieu of the payment of money.[1] So, a Bill to pay money and "all fines according to rule" would be invalid as a Bill.[2] But, if it be payable in money, it is of no consequence in the currency or money of what country it is payable. It may be payable in the currency or money of England, France, Spain, Holland, Italy, America, or any country. It may be payable in coins, such as guineas, ducats,

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R. 245; 1 Bell, Comm. B. 3, ch. 2, p. 388, 389 (5th edit.).—The American cases are not reconcilable with each other. It is generally agreed, that a Bill payable in merchandise, or goods, or stock, or cotton, is not a good Bill of Exchange; but some of the Courts have decided, that a Bill or note, payable in Bank Bills of the State where it is drawn, is good as a Bill or note, and negotiable; but if payable in Bank Bills of another State, it is not a good Bill or note; others hold, that such a Bill or note is not good, although payable in Bank Bills of the State where drawn; and others again hold, that there is no difference between the Bank Bills of one State and another, and that in each case the Bill or note is good and negotiable. See Digberty *v.* Damell, 5 Yerger, R. 451. As to Bills payable in goods or chattels, see Jerome *v.* Whitney, 7 John. R. 321; Thomas *v.* Roosa, 7 John. R. 461; Pray *v.* Pickett, 1 Nott & McCord, R. 254; Rhodes *v.* Lindley, 1 Hamm. Ch. R. 51; Atkinson *v.* Manks, 1 Cowen, R. 691; Lawrence *v.* Dogherty, 5 Yerger, R. 435. As to Bills and notes payable in Bank Bills of the State, the cases of Keith *v.* Jones, 9 John. R. 120; Judah *v.* Harris, 19 John. R. 144; Leiber *v.* Goodrich, 5 Cowen, R. 136, affirm their validity; and Lange *v.* Kohne, 1 McCord, 115; Jones *v.* Fales, 4 Mass. R. 245; McCormick *v.* Trotter, 10 Serg & Rawle, 94, are against it. Mr. Chancellor Kent has not hesitated, with his accustomed vigor and frankness, to declare, that the weight of argument is against the American cases, which differ from the English rule, and in favor of the latter. 3 Kent, Comm. Lect 44, p. 76 (4th edit.). See also Thompson *v.* Sloane, 23 Wend. R. 71.

[1] Davies *v.* Wilkinson, 10 Adolph. & Ellis, 98. See also Bolton *v.* Dugdale, 4 Barn. & Adolph. 619; Ellis *v.* Ellis, Gow, R. 216; Chitty on Bills, p. 154 to 156 (8th edit. 1833).

[2] Ayrey *v.* Fearnsides, 4 Mees. & Welsb. 168.

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Louis d'ors, doubloons, crowns, or dollars; or in the known currency of a country, as pounds sterling, livres tournoises, francs, florins, &c.; for, in all these 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.[1]

§ 44. The same rule prevails, in both respects, in the French Law. Pardessus has well observed, that, unless the precise sum is stated, the obligation of the Bill is not sufficiently determinate.[2] He adds, that the nature and kind of money should be specified, when the payment is to be made in other money than that of the place of payment.[3] He subjoins, that it is immaterial, that the sum is expressed only in figures, or that the sum is expressed in words, without repeating the same (as the common usage is), at the top or bottom of the Bill.[4]

§ 45. Heineccius has added, that not only the sum of money should be expressed in the Bill, but also the kind of money, otherwise it will be taken to be the common currency, or denomination of currency of the country, on which it is drawn. *Denique et monetæ genus exprimendum, quod nisi factum sit, monetæ vulgares intelliguntur, quas vocant Current.*[5]

§ 46. As to the mode of payment. The sum to be paid, must not only be in money, and certain in

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[1] Chitty on Bills, p. 153 (8th edit. 1833).

[2] Pardessus, Droit Comm. Tom. 2, art. 334; Code de Commerce, art. 110; Merlin, Répert. Lettre et Billet de Change, § 2, n. 2, p. 160, 161 (edit. 1827); Locré, Esprit de Cod. Comm. Liv. 1, tit. 8, § 1, p. 341; Pothier de Change, n. 35.

[3] Pardessus, Droit Comm. Tom. 2, art. 334; Heinecc. de Camb. cap. 4, § 5, 12.

[4] Ibid.; see also Pothier de Change, n. 31.

[5] Heinecc. de Jur. Camb. cap. 4, § 12, cited Ante, § 42, n. (2).

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amount, but it must be payable absolutely, and at all events. If it be payable out of a particular fund only, or upon an event, which is contingent, or if it be otherwise conditional, it is not, in contemplation of law, a Bill of Exchange, or in its essential character negotiable.[1] The reason is (and it is equally applicable to all negotiable instruments), that it would greatly perplex the commercial transactions of mankind, and diminish and narrow their credit, circulation, and negotiability, if paper securities of this kind were issued out into the world, encumbered with conditions and contingencies, and if the persons, to whom they were offered in negotiation, were obliged to inquire, when these uncertain events would probably be reduced to a certainty, and whether the conditions would be performed or not.[2] And hence, the general rule 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.[3] Thus, for example, a Bill, drawn payable "out of the growing subsistence" of the Drawer, has been held bad, because the fund is contingent and uncertain, and

[1] Chitty on Bills, ch. 5, p. 152 to 156, 160, 161 (8th edit. 1833); Carlos v. Fancourt, 5 Term R. 482; Roberts v. Pease, 1 Burr. R. 325; Bayley on Bills, ch. 1, § 6 (5th edit. 1830), p. 16 to 25; Colehan v. Cooke, Willes, R. 393, 396, 397; Kyd on Bills, p. 55 to 57 (3d edit.); Com. Dig. Merchant, F. 5; 3 Kent, Comm. Lect. 44, p. 76, 77 (4th edit.); Metcalf & Perk. Dig. Bills of Exchange, p. 420, pl. 13 to 22.

[2] Carlos v. Fancourt, 5 Term Rep. 482; Chitty on Bills, ch. 5, p. 152 (8th edit 1833); Kyd on Bills, p. 55 to 57 (3d edit.); Bayley on Bills, ch. 1, § 6, p. 16 to 25 (5th edit. 1830).

[3] Dawkes v. Earl of Dolovaine, 2 Wm. Black. 782; Carlos v. Fancourt, 5 Term R. 482.

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it must depend upon future events, whether it is to be paid or not; for, if he should die, or his subsistence should be taken away, it is not to be paid.[1] So a Bill, drawn to pay money, "out of rents," or "out of A.'s money, when you shall receive it," or "on the sale of produce, when sold," or "when certain carriages are sold," or "out of a specified fund, when it shall become due," or "on account of freight," or "when freight becomes due," or "when the Drawer shall come of age," or "at thirty days after the ship A. shall arrive at B.," or "out of the income of the Devonshire moneys," would be bad, because it is uncertain, whether the fund will be sufficient to pay it, or will ever be received.[2] So, a Bill for the payment of money, if it be not paid at a certain day by a third person, will be bad, for the Drawer will be liable only upon a contingency.[3] So, a Bill for the payment of money, when the Drawer shall marry, will be bad, because he may never marry.[4] The same doctrine will apply to every other case, where the payment of the money is conditional, or the amount thereof is uncertain; as, if it is payable, provided a certain act is

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[1] Josselyn *v.* Lacier, 10 Mod. R. 294, 316; S. C. Fortesc. R. 281.

[2] Jenny *v* Earle, 2 Ld. Raym. 1361; Colehan *v.* Cooke, Willes, R. 393, 398; Palmer *v.* Pratt, 2 Bing. R. 185; Goss *v.* Nelson, 1 Burr. R. 226; Haydock *v.* Lynch, 2 Ld. Raym. 1863; Dankes *v.* Earl of Dolovaine, 2 W. Black. 782; Hill *v.* Halford, 2 Bos. & Pull. 413; Banbury *v.* Lisset, 2 Str. R. 1211; De Forest *v.* Frary, 6 Cowen, R. 151; Reeside *v.* Knox, 2 Whart. R. 223.

[3] See Appleby *v.* Biddulph, cited 8 Mod. R. 363, and Willes, R. 398; Ferris *v.* Bond, 4 Barn. & Ald. 679; Bayley on Bills, ch. 1, § 6, p. 15 (5th edit. 1830); Chitty on Bills, ch. 5, p. 154 to 162 (8th edit. 1833).

[4] See Beardsley *v.* Baldwin, 7 Mod. 417; S. C. 2 Str. R. 1151, cited also in Willes, R. 399; Bayley on Bills, ch. 1, § 6, p. 15 (5th edit. 1836); Pearson *v.* Garret, 4 Mod. R. 242; Colehan *v.* Cooke, Willes, R. 393, 397, 398; Kyd on Bills, p. 55 to 57 (3d edit.).

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done, or is not done;[1] or, if the sum stated is payable, or the balance of account between the parties, not exceeding that sum;[2] or, if no dispute about the sum due arises between the parties;[3] or, provided A. B. shall not return to England, or his death be only certified;[4] or, provided my circumstances will admit, without detriment to myself or family;[5] or, provided, at the maturity of the Bill, I am living;[6] or, if the sum payable is to be used merely by way of set-off against a particular claim;[7] or, if the Bill on its face is to be held as collateral security only for other moneys, not realized from other securities.[8]

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[1] Smith *v.* Boehm, 3 Ld. Raym. 67; Appleby *v.* Biddulph, cited 8 Mod. R. 363; Roberts *v.* Peake, 1 Burr. 383; Williamson *v.* Bennett, 2 Camp. R. 417; Chitty on Bills, ch. 5, p. 154 to 156 (8th edit. 1833).

[2] Leeds *v.* Lancashire, 2 Camp. R. 205; Davies *v.* Wilkinson, 10 Adolph. & Ellis, 68; Bolton *v.* Dugdale, 4 B. & Adolph. 619.

[3] Hartley *v.* Wilkinson, 4 Camp. R. 127; 4 M. & Selw. R. 25.

[4] Morgan *v.* Jones, 1 Cromp. & Jerv. 162.

[5] Ex parte Tootle, 4 Ves. 372.

[6] Braham *v.* Bubb, cited Chitty on Bills, ch. 5, p. 155, note (*d*) (8th edit. 1833); Id. 156.

[7] Clarke *v.* Perceval, 2 Barn. & Adolph. 660.

[8] Robbins *v.* May, 3 Perr. & David. 147; S. C. 11 Adolph. & Ellis, 213. —But, although a Bill of Exchange, payable on a contingency, is not strictly negotiable; yet, if the Drawee, upon presentment, accepts it, or promise the Holder, that he will pay the same to him, the latter may maintain an action thereon against the Acceptor or Drawee. Stevens *v.* Hill, 5 Esp. R. 247; De Bernales *v.* Fuller, cited 14 East, 590, 598; Chitty on Bills, ch. 7, p. 350 to 352 (8th edit. 1830). The language of Mr. Chitty is; "Besides the liability to pay a Bill incurred by the act of accepting it, the Drawee, or any other person, may, by express promise, subject himself to liability to pay the amount out of the money then in his hands, or which he may afterwards receive, and this, although the Bill itself may be invalid; as, where it has been drawn on an agent, requesting him to pay a sum of money out of a particular fund. Though we have seen, that such instrument will be wholly void as a Bill of Exchange, because the payment of it depends upon a contingency; yet, if the Drawee promise to pay the amount when he shall receive funds, and the Holder, in consequence, retains the Bill, the amount, when received, will be recoverable

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§ 47. But cases of this sort are carefully to be distinguished from others, where, although, at first blush, the payment would seem to depend upon a contingency, yet, in reality, it is certainly, and at all events, payable; since the event must happen, although the particular time, when it will arrive, is uncertain. Thus, for example, a Bill of Exchange, payable at the death of the Drawer, or of another person, or at a fixed period afterwards, is a good Bill; for, although the time, when he will die, is uncertain, yet it is certain, that he will die; and the distance of time is of no consequence.[1] So, a Bill payable, when a particular person shall come of age, to wit, on such a day, specifying it, would be good; for it is payable on that day, whether the party lives until that day or not.[2]

from the Drawee, as received to his use. So, a draft on the executor ot a debtor, which the executor promised to discharge on his receiving assets, is an equitable assignment of the debt, available against assignees in bankruptcy. But as a chose in action is not assignable, so as to enable the assignee to sue the original debtor merely by virtue of such assignment, it follows, that, unless the third person, who has funds in hand, expressly promises to pay, and such promise be accepted, the Holder of the Bill cannot sue him; and if, before the party offer to pay the Bill, it has been returned for non-acceptance, the Holder has no remedy against such party. So, where the Drawee proposed to pay, and a dispute arose about a charge for a duplicate protest, and the Holder then declined to receive the amount of the Bill, without such charge, it was held, that afterwards he could not compel the Drawee to pay the Bill. Where A. gives B. an order on his bankers, directing them 'to hold over from his private account £400, to the disposal of B.,' and the bankers accept the order, such order is nevertheless revocable, and may be countermanded before payment made to B. or appropriation to his credit. And a promise to give a credit at a future time is not like a promise to pay."

[1] Colehan *v.* Cooke, Willes, R. 393; Braham *v.* Bubb, cited Chitty on Bills, 154, note (*d*) (5th edit. 1833); Id. 156; Braham *v.* Bubb, cited Chitty on Bills, ch. 5, p. 155, note (*d*) (8th edit. 1833); Kyd on Bills, p. 56, 57 (3d edit.).

[2] Gross *v.* Nelson, 1 Burr. R. 226. — There are some cases decided under this head, which appear inconsistent with the principle; or, at least, which can be brought within it only by a very forced and unnatural construc-

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But it would be otherwise, if the Bill was payable upon the contingency of his arrival at age.[1] In like manner, a Bill payable in twelve months after notice is good; for it is payable absolutely, and not upon any contingency; for a contingency means a time, which may or may not arrive; whereas the debt being admitted, we must suppose, that the notice for payment would positively, at some time, arrive.[2] So, a Bill, drawn by a freighter on a third person, payable to a person, entitled to receive the freight, "on account of freight," is good; for it is not payable out of a particular fund, but merely shows to what account it is to be applied, or what is the value, which has been received.[3] It would be otherwise, if the Bill, upon its

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tion. Thus, where a promissory note (and the same rule applies to a Bill) was given, by which A. promised to pay a particular sum within ten months after such a ship is paid off (the ship being a public ship), it was held to be a good note; for the Court said, "The paying off the ship is a thing of a public nature, and this is negotiable as a promissory note." Andrews *v.* Franklin, 1 Str. R. 24. But the question was not, whether the paying off a public ship was of a public nature; but whether it was an absolute certainty, that it would ever be paid off, or whether the Maker of the note would ever receive the money. Have all claims against government been paid, and all contracts on their part fulfilled? See Bayley on Bills, ch. 1, § 6, p. 24, and note (51) (5th edit. 1830); Chitty on Bills, ch. 5, p. 152, 154 to 156 (8th edit. 1833). See also Evans *v.* Underwood, 1 Wils. R. 262, where the Court are reported to have gone one step further. A Bill, payable when a private ship should be paid off, would, in all probability, be held void, as founded on a contingency. See Palmer *v.* Pratt, 2 Bing. R. 185. It seems very doubtful, in fact, whether the case of Andrews *v.* Franklin, 1 Str. R. 74, was ever decided. See Evans *v.* Underwood, 1 Wils. R. 263. At all events it has been greatly doubted, whether either Andrews *v.* Franklin, or Evans *v.* Underwood, would now be held law. See Bayley on Bills, ch. 1, § 6, p. 24, and note (48) (5th edit. 1830); Selwyn, Nisi Prius, p. 367, note (71) (4th edit.); Chitty on Bills, ch. 5, p. 156, 157 (8th edit. 1833).

[1] Chitty on Bills, ch. 5, p. 154 to 156 (8th edit. 1833).

[2] Clayton *v.* Gosling, 5 Barn. & Cresw. 360.

[3] Pierson *v.* Dunlop, Cowper, R. 571; Bayley on Bills, ch. 2, § 6, p.

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face, should appear to be drawn upon the freighter by the owner of the ship, or his agent, "on account of freight" of a particular ship, and to be, if paid, a discharge thereof; for in such a case it would be manifest, that it is payable out of a particular fund; and, moreover, the amount due may be open to litigation.[1] So a Bill, drawn to pay money, "as the Drawer's quarter's half-pay by advance," is good; because it is not payable out of a particular fund, but is to be paid in advance, and will be payable, whether the half-pay ever becomes due or not; and the reference to the half-pay is a mere direction to the Drawee, how to reimburse himself.[2] So, specifying the fund in any other manner, out of which the value was received, for which the Bill is drawn, will not vitiate the Bill; as, for example, stating "value received out of the premises in Rosemary Lane"; or "being a portion of a value, as under, deposited in security of payment hereof"; [3] or "on account of wine had by me" (the Drawer); or "being so much due by me to A. at Lady-day next"; for in all these cases the Bill is not payable out of a particular fund; but it only specifies the value received, and the occasion of the draft.

§ 48. Sixthly. The place of payment. The place of payment is understood to be the place, where the Drawee resides, or where, on the face of the Bill, it is addressed to him, unless some other place is stated

18, 19 (5th edit. 1836); Chitty on Bills, ch. 5, p. 159 (8th edit. 1833); Buller v. Crisps, 6 Mod. R. 29, 30.

[1] Banbury v. Lissat, 2 Str. R. 1211; Bayley on Bills, ch. 2, § 6, p. 18, 19 (5th edit. 1836); Chitty on Bills, ch. 5, p. 159 (8th edit. 1833).

[2] McLeod v. Snee, 2 Ld. Raym. 1481; S. C. 2 Str. R. 762; Bayley on Bills, p. 18, 19 (5th edit. 1836); Chitty on Bills, ch. 5, p. 158, 159 (8th edit. 1833).

[3] Haussoulier v. Hertsinck, 7 Term R. 733.

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upon the face of the Bill. If, therefore, the Bill is meant to be made payable at any other place than that, where the Drawee resides, or where the address to him is, it should be so expressed on the face of the Bill; as, for example, a Bill drawn on Liverpool, if intended to be accepted, payable in London, should be expressly so stated, otherwise it will be payable in Liverpool.[1] But, in general, unless otherwise required by some statute, the place of payment need not be expressly stated; but will be implied, in the absence of all controlling circumstances, to be by law the place of residence of the Drawee, or where his address is on the face of the Bill.[2] Circumstances may, however, control this inference. Thus, if a Bill were drawn upon a merchant, who was abroad, addressed to him "at Paris, or at London," the Bill would be deemed payable at the place, where he accepted it, whether it happened to be Paris, or London. So a Bill, drawn upon a person, who is on his travels abroad, if the address specifies no place, would be payable where he accepts the Bill, or perhaps payable anywhere, where he might be found, when it becomes due.[3]

§ 49. According to the law of France, the Bill should always indicate the place of payment; and this may be in various ways. Sometimes it is put into the body of the Bill, and this is generally done, when the Bill is drawn payable at a specified place, other than the domicil of the Drawee; sometimes the town only is specified; and sometimes the particular place in the

[1] Marius on Bills, p. 26; Mitchell v. Baring, 10 Barn. & Cressw. 4; Chitty on Bills, ch. 5, p. 172 (8th edit. 1833).

[2] See Bayley on Bills, ch. 1, § 9, p. 29, 30 (5th edit. 1830); Chitty on Bills, ch. 5, p. 172 (8th edit. 1833).

[3] See Chitty on Bills, ch. 5, p. 172 (8th edit. 1833).

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town, or residence of the Drawee, such, for example, as at his counting-room, or at a banker's. Where no such special designation of place is mentioned in the Bill, the same rule applies as in our law, that it is, by implication, from the name and address of the Drawee on the Bill, his place of residence.[1]

§ 50. Seventhly, as to the time of payment. It is obvious, that some time must be fixed, either absolutely, or by necessary relation to some fact, or by implication of law, at which every bill is to be payable; for otherwise the rights, duties, and obligations of the parties respectively would be indeterminate, and uncertain.[2] Usually foreign Bills are drawn, payable at a certain number of days, weeks, or months, after date, or after sight, or at sight. Sometimes they are drawn, payable on demand, or, what is the same thing in legal contemplation, without any specification of the time, when payable; for then they are payable on demand. Sometimes they are drawn payable at usance, or at a half usance, or at double or treble usance. By usance is meant, the common period, fixed by the usage or custom or habit of dealing between the country, where the Bill is drawn, and that, where it is payable, for the payment of Bills.[3] In the early history of modern commerce, this was the common mode of expression in drawing Bills in one foreign country upon another, and still continues to be

[1] Pardessus, Droit Comm. Tom. 2, art. 337; Id. art. 186, art. 213; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, p. 343, 344; Id. p. 346, 347.

[2] See, as to promissory notes, Moffat v. Edwards, 1 Carr. & Marsh. 16.

[3] Bayley on Bills, ch. 7, § 1, p. 250, 251 (5th edit. 1830); Chitty on Bills, ch. 9, p. 404 (8th edit. 1833); Pothier de Change, n. 15, 16, 32; Com. Dig. Merchant F. 5; Savary, Le Parfait Négociant, Tom. 1, Pt. 3, ch. 4, p. 816, 817.

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so in many cases; and, as the usage or custom, as to the time of payment, is different in different countries, it follows, of course, that the same phrase imports different periods of time, according to the country, on which the Bill is drawn.[1] Bills may also be made payable at any fixed feast, civil or religious, or at any fixed holyday or fair;[2] or, as we have seen, at any other period, which must certainly happen, although the precise time cannot be now known; as, at the death of the Drawer, or at a certain number of days after his death, or the death of a third person.[3]

§ 51. The French Law positively requires, that every Bill of Exchange shall express the time, when it is to be paid, otherwise it is held not to be valid as

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[1] Bayley on Bills, ch. 7, § 1, p. 250, 251 (5th edit. 1830); Chitty on Bills, ch. 5, p. 171 (8th edit. 1833); Id. ch. 9, p. 404; see Marius on Bills, p. 15, 16; 1 Beawes, Lex Merc. by Chitty, p. 609, pl. 259 (edit. 1813); Kyd on Bills, p. 4, 5 (3d edit.); Jousse, sur l'Ord. 1673, art. 5; Molloy de Jur. Marit. Vol. 2, B. 2, ch. 10, § 10, 11.—Mr. Bayley says; "Instead of an express limitation by years, months, or days, we continually find the time on Bills, drawn or payable at Amsterdam, Rotterdam, Hamburg, Altona, Paris or any place in France, Cadiz, Madrid, Bilboa, Leghorn, Genoa, or Venice, limited by the usance, that is, the usage between those places and this country; because, in the infancy of Bills, all Bills between this country and any of those places, respectively, were usually made payable after the same interval. An usance between this kingdom and Amsterdam, Rotterdam, Hamburg, Altona, or Paris or any place in France, is one calendar month from the date of the Bill; an usance between us and Cadiz, Madrid, or Bilboa, two; an usance between us and Leghorn, Genoa, or Venice, three. A double usance is double the accustomed time; an half usance, half. Where it is necessary to divide a month upon a half usance, which is the case where the usance is either one month or three, the division, notwithstanding the difference in the length of months, contains fifteen days." Bayley on Bills, ch. 7, § 1, p. 250, 251 (5th Lond. edit. 1830). Mr. Chitty has given a very full table of the usances between the principal foreign countries and places and England. Chitty on Bills, ch. 9, p. 404, 405 (8th edit. 1833). See also Molloy, B. 2, ch. 10, § 11; Savary, Le Parf. Négociant, Tom. 1, Part 3. liv. 1, ch. 4, p. 816, 817.

[2] Chitty on Bills, ch. 5, p. 170, 171 (8th edit. 1833).

[3] Ante, § 47.

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a Bill, but only as a simple contract.[1] But in other respects it does not seem to differ from our law, as to the mode of expressing the time of payment; for it may be at sight, or at a certain number of days after sight, or after the date of the Bill, or at the expiration of a certain number of weeks or months, or on a certain day of a month, or at a fixed feast, fair, or holyday, civil or religious; or at one or more usances.[2] Heineccius also takes notice of the like doctrine generally prevailing on the subject of the time of payment of Bills. *Cambia platearum sunt, vel a Vista, vel a Dato, quando acceptans solvere jubetur intra certum tempus a datis litteris cambialibus; vel denique a Uso, quando tempore consueto solvere tenetur acceptans.*[3] Usance, he afterwards remarks, differs in different places in Germany, the usance being at Leipsic, Brandenburg, Frankfort, Dantzic, fourteen days, and, in some other places, fifteen days.[4] But, in whatever mode or way the time of payment is to be ascertained, whether it be payable at or after sight or date, or at a feast, or usance, or otherwise, Heineccius held it of primary importance, that every Bill should clearly express the time of payment. *In ipsis litteris primo omnium exprimendus est dies solutionis.*[5]

§ 52. Eighthly. The name and description of the parties to the Bill. These are the Drawer, the Payee,

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[1] Code de Comm. art. 110; Pardessus, Droit Comm. Tom. 2, art 336; Jousse, sur l'Ord. 1673, art. 1, p. 67, 68; Pothier de Change, n. 12 to 16, n. 32; Delvincourt, Droit Comm. Tom. 1, Liv. 1, tit. 7, p. 76, 77, 2d edit.

[2] Pardessus, Droit Comm. Tom. 2, art. 336; Id. art. 183; Code de Comm. art. 129 to 131; Pothier de Change, n. 15, 16, 32; Jousse, sur L'Ord. 1673, art. 1, p. 67 to 69.

[3] Heinecc. de Camb. cap. 2, § 13; Id. cap. 4, § 6.

[4] Ibid.

[5] Ibid. cap. 4, § 6.

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and the Drawee. All these should appear upon the face of the Bill, either expressly, or by necessary intendment of law. The subject may be conveniently divided into three heads. (1.) The consideration of the name and description of the Drawer; (2.) of the Payee; and (3.) of the Drawee.

§ 53. And, in the first place, as to the name and description of the person, by whom the Bill is drawn. It is obvious, that every Bill must contain, upon its face, the name of the party, by whom it is drawn; for, otherwise, it will be impossible for the Drawee to know, whether he ought to accept it or not, or for any Holder, subsequent to the Payee, to know, to whom he is to give notice, or of whom he is entitled to recover, in case of a dishonor of the Bill.[1] 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, that will be sufficient.[2] Neither is it indispensable, that the name of the Drawer should be written by himself; for it may be written by

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[1] Bayley on Bills, ch. 1, § 11, p 31 (5th edit. 1836); Chitty on Bills, ch. 5, p. 185, 186 (8th edit. 1832); Pardessus, Droit Comm. Tom. 2, art. 330.

[2] Bayley on Bills, ch. 1, § 11, p. 37, 38 (5th edit. 1836); Taylor v. Dobbins, 1 Str. R. 399; Elliott v. Cowper, 1 Str. R. 609; S. C. 2 Ld. Raym. 1376; 8 Mod. 307; Chitty on Bills, p. 185, 186 (8th edit. 1833). Heineccius on this subject says; "Ad subscriptionem quod attinet, a dextra solum prænomen et nomen trassantis, vel tabernæ, immo et aliquando fidejussoris poni solet, additurque nonnumquam epitheton, des Herrn bereitwilliger, dienstwilliger. Aliquando et ipsum solvendi mandatum repetitur, si forte trassans litteras sua manu non scripserit." Heinecc. de Jur. Camb. cap. 4, § 17; Beawes, Lex Merc. by Chitty, Vol. 1, p. 563 (edit. 1813); 3 Kent, Comm. Lect. 44, p. 78 (4th edit.).

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his agent, duly authorized, in his name.[1] It may be written in ink, or in pencil;[2] nay, it may be a printed signature of the party, if found to be adopted and used by him.[3] If drawn by, or in behalf of, a firm, it should be drawn in the name and with the signature of the firm, and either partner is at liberty to affix the name of the firm thereto.[4] If drawn by persons, who are not partners, the name of each person should be affixed thereto, otherwise he will not be deemed a Drawer.[5] It is usual for the name of the Drawer or Drawers to be affixed after the Bill is filled up; but this is an immaterial circumstance; for, if the Bill be signed in blank, and be afterwards filled up by a person, who is authorized to do so, it will be obligatory upon the party or parties, as Drawer or Drawers.[6]

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[1] Ibid.

[2] Ibid.; Chitty on Bills, ch. 5, p. 146 (8th edit. 1833).

[3] Ibid.; Schneider *v.* Norris, 2 Maule & Selw. 286.

[4] Chitty on Bills, p. 67 to 69, 186 (8th edit. 1833); Smith *v.* Jarves, 2 Ld. Raym. 1484; Pardessus, Droit Comm. Tom. 2, art. 330.

[5] Bayley on Bills, ch. 2, § 5, p. 50 to 52 (5th edit. 1830).

[6] Ante, § 25; Chitty on Bills, p. 33, 186, 215 (8th edit. 1833); Ex parte Hunter, 2 Rose, R. 363; Collis *v.* Emmett, 1 H. Black. 313, Russell *v.* Langstaffe, Doug. R. 496, 514; Bayley on Bills, ch. 1, § 12, p. 32 (5th edit. 1836); Violett *v.* Patton, 5 Cranch, 142; Putnam *v.* Sullivan, 4 Mass. R. 45; Usher *v.* Dauncey, 4 Camp. R. 97; Snaith *v.* Mingay, 1 Maule & Selw. 87; Cruchley *v.* Clarance, 2 Maule & Selw. 90; Cruchley *v.* Mann, 5 Taunt. R. 529; 1 Bell, Comm. B. 3, ch. 2, p. 390, 391 (5th edit.). — On the subject of subscription, Mr. Bell has remarked; "Bills and notes can be effectually drawn, accepted, or indorsed, only by the subscription of the name of the person so drawing, accepting, or indorsing, or by the subscription of a procurator, authorized by him. But sometimes illiterate persons become parties to such instruments; and it is necessary to observe, how they may effectually bind themselves. In strict law, no Bill ever ought to have been sanctioned under any other than the full legal subscription. But considerations of hardship, grounded on a prevailing usage with illite rate persons to sign Bills and notes by the initials of their names, and even by marks, and the want of a due discrimination between the admission of such writings as documentary evidence, and the sustaining of them as Bills,

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§ 54. In the second place, as to the name and description of the Payee. Every Bill of Exchange ought to specify, to whom the same is payable; for in no other way can the Drawee, if he accepts it, know, to whom he may properly pay it, so as to discharge himself from all further liability.[1] Indeed, it would be void upon a more general ground, applicable to all contracts, and that is, the utter uncertainty of the person, with whom the contract is made, and to whom it is payable.[2] Heineccius states the same doctrine in strong terms. *Nec prætermittendum Exactoris prænomen et nomen; vel ideo quippe necessarium, quod nemo ex litteris agere potest, cujus in illis nulla fit mentio.*[3] It is not, however, by our law, indispensable, that the name of the Payee should be inserted in the Bill at the time, when it is made and delivered to the person, for whose benefit it is intended, but a blank may be left for the name; and although it is not then a perfect Bill, yet the blank may be filled afterwards by

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have led to great confusion in this matter. The subscription of the initials of the parties is not effectual to constitute a Bill; but, if it appear from the instrument, that it was signed before witnesses, an action, or, on bankruptcy, a claim of debt, will be sustained, on evidence, 1st, Of this being the customary mode of subscribing used by the party; and, 2dly, That the initials actually were subscribed by him. Such instruments, however, are properly to be considered as evidence only of simple contracts or obligations, not as Bills. They cannot authorize summary execution, because they require extrinsic proof of their authenticity; differing in this respect from forged Bills, as showing their defect ex facie. Neither will a Bill, signed by a mark, be sustained as a ground of diligence, though it may be received as an adminicle of documentary proof in an action." 1 Bell, Comm. B. 3, ch. 1, p. 389, 390 (5th edit.).

[1] Chitty on Bills, ch. 5, p. 177 (8th edit. 1833); Id. p. 159; Bayley on Bills, ch. 1, § 10, p. 34 (5th edit. 1830).

[2] Chitty on Bills, ch. 5, p. 159 (8th edit. 1833); Id. 177; Champion *v.* Plummer, 4 Bos. & Pull. 252; Brown *v* Gilman, 13 Mass R. 158; Douglas *v.* Wilkeson, 6 Wend. R. 637.

[3] Heinecc. de Camb. cap. 4, § 11.

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any *bonâ fide* Holder, in his own name as Payee, and thenceforth it will be deemed a Bill payable to such Holder, as Payee, *ab initio*.[1] It should also be stated in every Bill to whom, absolutely, and certainly, and not alternatively, the Bill is to be paid; for, if it is payable to A., or to B., it is not properly a Bill of Exchange, since it is payable to one, only upon the contingency, that it is not paid to the other; the promise to pay, therefore, is conditional.[2]

§ 55. It is not essential, however, that the name of the party, who is the Payee, should be given in express words. It is sufficient, if it can be clearly made out upon the true construction of the instrument by the general intendment of law.[3] And even a misdescription or misspelling of the name of the Payee in the instrument, if it can be ascertained, from the terms of it, who is the party really intended, will not vitiate it.[4] Pothier has put a case in illustration of these suggestions. "If (says he) the Drawer should omit the name of the Payee, but should draw the Bill in this form; 'Pay a thousand livres at sight, value received of A. B.,' it appears to me reasonable to presume, that the Drawer intended, that the Bill should be payable to the person, from whom the value had

[1] Bayley on Bills, ch. 1, § 10, p. 36, 37 (5th edit. 1830); Chitty on Bills, ch. 5, p. 177, 178 (8th edit. 1833); Cruchley *v.* Clarance, 2 M. & Selw. 90; Cruchley *v.* Mann, 5 Taunt. R. 529; Atwood *v.* Griffin, 1 Ryan & Mood. 425; Rex *v.* Randall, Russ. & Ryan, Cr. Cases. 195; Ante, § 53; Post, § 56.

[2] Chitty on Bills, ch. 5, p. 160 (8th edit. 1833); Id. p. 177; Blankenhagen *v* Blundell, 2 Barn. & Ald. 417; Bayley on Bills, ch. 1, § 10, p. 34, 35 (5th edit. 1830).

[3] Chitty on Bills, ch. 5, p. 178 (8th edit. 1833); Id. p. 159, 160; Rex *v.* Randall, Russ. & Ryan, Cr. Cas. 195; Rex *v.* Box, 6 Taunt. 325.

[4] Ibid; Willis *v.* Barrett, 2 Stark. R. 29; Bayley on Bills, ch. 11, p. 389 (5th edit. 1830).

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been received, as no other person is named, to whom it ought to be paid."[1] He adds, however, that he has learned from an experienced merchant, that bankers would make a difficulty as to paying such a Bill.[2] Pothier's opinion seems indirectly confirmed by a case, furnishing a strong analogy, where a promissory note was; "Received of A. £100, which I promise to pay on demand;" and the Court held, that A. must be deemed to be the Payee by intendment of law, and need not be more specially designated.[3] Pardessus, however, expresses a decided opposite opinion to that of Pothier, insisting, that it is indispensable, that the name of the Payee should be expressed, and that it cannot be supplied by a presumption from the value being stated to be received from a particular person; since it often happens, that the price of a Bill of Exchange is furnished by another person than him, for whose benefit the Bill is drawn.[4] The correctness of this latter statement may be admitted, without in the slightest degree impairing the reasoning of Pothier; for the natural presumption, in the absence of all circumstances to repel it, would seem to be, that the person, who gave the value and had possession of the Bill, intended it for his own benefit, or at all events intended to receive the money from the Drawee; and was so understood by the Drawer. Indeed, the Drawer could have no reason to suppose, that any third person was interested in, or was to receive, the money, unless that fact was positively communicated to him;

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[1] Pothier de Change, n. 31.

[2] Ibid.

[3] Green v. Davis, 4 Barn. & Cressw. 235; Chadwick v. Allen, 2 Str. R. 706.

[4] Pardessus, Droit Comm. Tom. 2, art. 338.

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and, therefore, in giving the Bill to the person, who paid the value, he must be deemed impliedly to authorize him to receive the amount from the Drawee, even although it might ultimately be intended to be applied to the benefit of another person. The strong sense of the whole transaction would seem to be precisely that maintained by Pothier and the English Courts.

§ 56. Upon grounds somewhat similar, if a Bill be drawn, payable to the order of A., it is deemed to be payable to A. or to his order, by our law;[1] although (as we have seen) Heineccius holds, that in such a case it is not payable to A., but only to his indorsee; and such also is the French law.[2] And not only need not the name of the Payee be expressly stated, but the Bill itself may, by our law, be made payable to the Bearer, or to A. B. or Bearer, or to the Ship Fortune or Bearer; and in all these cases, the Bill will be valid, and be deemed payable to the Bearer, whoever he may be; for, *Id certum est, quod certum reddi potest.*[3] And a Bill, made payable to a fictitious person, or his order, and indorsed in the name of such fictitious Payee, in favor of a *bonâ fide* Holder, without notice of the fiction, will be deemed payable to the Bearer, and may be declared on as such against all the parties, who knew the fictitious character of the transaction.[4]

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[1] Chitty on Bills, ch. 11, p. 582 (8th edit. 1833); Bayley on Bills, ch. 9, p. 388, 389 (5th edit. 1830); Frederick *v.* Cotton, 2 Shower, R. 8; Fisher *v.* Pomfret, Carth. R. 403; S. C. 12 Mod. R. 125; Smith *v.* McClure, 5 East, R. 476; Anon. Comb. R. 401.

[2] Ante, § 19. — But, when indorsed by the Payee, it becomes a good Bill of Exchange in favor of the Holder, since it is then payable to the order of the Payee. Heinecc. de Camb. cap. 2, § 8; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, p. 242; Pardessus, Droit Comm. Tom. 2, art. 313.

[3] 3 Kent, Comm Lect. 44, p. 76, 77 (4th edit.); Kyd on Bills, p. 36 to 40 (3d edit.); Post, § 60.

[4] Chitty on Bills, ch. 5, p. 178, 179, and note (*k*) (8th ed. 1833); Vere

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If the Bill be drawn, payable to —— or order, any *bonâ fide* Holder may fill up the blank with his own name, and he will be deemed to have been such from the origin of the Bill.[1]

§ 57. The law of France, upon this subject, is somewhat different. Originally, Bills of Exchange, drawn with a blank, for the name of the Payee, might be filled up (as in our law), in the name of any *bonâ fide* Holder, and thereby the other parties to the Bill would be bound to him, in the same manner as if his name had been originally inserted therein.[2] But, this having been found to be a cover for fraud and usury, the practice was afterwards disallowed.[3] Soon afterwards, Bills, payable to the Bearer, came into use; but, being found productive of the like ill consequences, they also were declared illegal.[4] Their validity seems afterwards to have been reëstablished;[5] but, according to Pardessus, by the present law of France, a Bill, payable to the Bearer, is not valid.[6] If a Bill of Exchange contains any fiction or falsity in the names, or quality, or domicil, or place, where drawn, or where payable, it loses its distinctive character as a Bill, and becomes only a simple promise.[7]

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v. Lewis, 3 Term R. 182; Menet *v.* Gibson, 3 Term R. 81; Collis *v.* Emmett, 1 H. Black. R. 313; S. C. 1 H. Black. R. 569; Gibson *v.* Hunter, 2 H. Black. R. 187, 288; Bayley on Bills, ch. 1, § 10, p. 31, 32 (5th edit. 1830), and note (72); 3 Kent, Comm. Lect. 44, p. 77, 78 (4th edit.); Plets *v.* Johnson, 3 Hill, R. 112.

[1] Chitty on Bills, ch. 5, p. 177 (8th edit. 1833); Bayley on Bills, ch. 1, § 11, p. 36 (5th edit. 1830); 3 Kent, Comm. Lect. 44, p. 77 (4th edit.); Cruchley *v.* Clarance, 2 M. & Selw. 90; Ante, § 53, 54.

[2] Pothier de Change, n. 223.

[3] Ibid.; Savary, Parfait Négociant, Tom. 1, Pt. 1, Liv. 3, ch. 7, p. 201.

[4] Ibid.; Dupuy de la Serra, ch. 19, p. 196, 197.

[5] Ibid.

[6] Pardessus, Droit Comm. Tom. 2, art. 338.

[7] Code de Comm. art. 112.

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§ 58. In the third place, as to the name and description of the Drawee. A Bill of Exchange, being an open letter of request from the Drawer to a third person, should regularly be addressed to that person by his Christian name and surname, and also by a designation of his place of residence; and, if it is addressed to a firm, the name of the firm should be expressed in the address.[1] This seems indispensable to the rights, and duties, and obligations of all the parties; for the Payee cannot otherwise know, upon whom he is to call, to accept and pay the Bill; nor can any other person know, whether it is addressed to him, or not, and whether he would be justified in accepting and paying the Bill, on account of the Drawer. But, according to our law, the want of an address to any particular person, as Drawee, may, if the Bill be drawn payable at a particular place or house, be well deemed a good Bill of Exchange in favor of an Indorsee; and, if accepted by another person, at the place or house designated, it will bind him as Acceptor.[2] A Bill addressed to A., or, in his absence,

[1] Chitty on Bills, ch. 5, p. 187 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 1, p. 563, pl. 3 (edit. 1813); Com. Dig. Merchant, F. 5. — The address of the Bill to the Drawee is (as it is said) usually made, by the Italians and Dutch, on the back of the Bill; but by the French and English uniformly on the face of the Bill, at the bottom thereof, on the left-hand side. Chitty on Bills, ch. 11, p. 187 (8th edit. 1833); Marius on Bills, p. 8, 9, 11; Scaccia de Camb. § 1, Quest. 5, p. 110 to 127 (edit. 1664); Com. Dig. Merchant, F. 5; Pardessus, Droit Comm. Tom. 2, art. 335; Heinecc. de Camb. cap. 4, § 19.

[2] Gray *v.* Milner, 8 Taunt. R. 739; Shuttleworth *v.* Stephens, 1 Camp. R. 407; Allan *v.* Mawson, 4 Camp. R. 115; Bayley on Bills, ch. 1, § 2, p. 8 (5th edit 1830); Id. ch. 9, p. 385. In Gray *v.* Milner, 8 Taunt. R. 739, the Bill was as follows: "May 20, 1813. Two months after date, pay to me, or my order, the sum of thirty pounds two shillings. W. Sustanance. Payable at No. 1, Wilmot Street, opposite the Lamb, Bethnal Green, London." It was accepted by Milner. But there does not seem

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to B., is valid; and will, if accepted by either, bind him.[1] If a Bill is intended to be accepted by two persons, it should be addressed to both; otherwise, although accepted by both, it will bind only the person, to whom it is addressed, as Acceptor; for there cannot be a succession of Acceptors.[2] If a Bill is drawn upon A., B., & C., it may be accepted by A. & B. only; and if so, it will bind them, as Acceptors; and it will be no variance to state, in the declaration, that it was drawn on them, without referring to C.[3]

§ 59. The French law, in like manner, requires, that the name of the Drawee, to whom the Bill is addressed, should be stated in the Bill.[4] But there are some diversities between our law and that. Thus, a Bill is sometimes drawn by a person on himself, as

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to have been any proof, that he resided at the house. Dallas, Chief Justice, in delivering the opinion of the Court, said; "That the opinion of the Court was, that the instrument, upon which this action was brought, was clearly a Bill of Exchange, and could be declared upon as such; that it was not necessary, that the name of the party, who afterwards accepted the Bill, should have been inserted, it being directed to a particular place, which could only mean to the person, who resided there; and that the defendant, by accepting it, acknowledged, that he was the person, to whom it was directed; and that the plaintiff, therefore, was entitled to retain his verdict." Quære, how it would have been, if the Bill had been payable at London, or Liverpool, without any other designation of place, and had been accepted by a person residing there, on account of the Drawer?

[1] Chitty on Bills, ch. 5, p. 187 (8th edit. 1833); Anon. 12 Mod. R. 447. — Quære, whether a direction to A. or to B., to pay a Bill in the alternative, would be a good Bill, if both were at the same place, at the same time? Marius seems to deem it good. Marius on Bills, p. 16.

[2] Chitty on Bills, ch. 5, p. 187 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 177 (5th edit. 1830); Jackson v. Hudson, 2 Camp. R. 447; Marius on Bills, p. 16.

[3] Mountstephen v. Brooks, 1 Barn. & Ald. 224; Bayley on Bills, ch. 9, p. 384, note (105), (5th edit. 1830); Evans v. Lewis, cited 1 Saund. R. 291, d. Williams's note; Chitty on Bills, ch. 11, p. 580, 581 (8th edit. 1833). See Grant v. Naylor, 4 Cranch, 224.

[4] Pothier de Change, n. 35.

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Drawee; and in that case it may, in our law, at the election of the Payee, or other Holder, be treated, from its formal character, as a Bill of Exchange, or, according to its real character, as a promissory note.[1] In the French law, such an instrument would be treated as a simple promise, or promissory note, and not as a Bill of Exchange.[2] So, by our law, a principal may draw on his agent, as agent, or even upon his wife, whom he has authorized to receipt the Bill for him, and it will be a good Bill of Exchange; but, in the French law, such a Bill would be deemed to be drawn upon himself, and be but a simple promise.[3] Yet, in France, a Bill, drawn by one firm upon another firm, composed in whole, or in part, of the same persons, would be deemed a valid Bill; for the firms are treated as distinct artificial persons.[4]

§ 60. Ninthly. The negotiability of the Instrument. It was, formerly, a matter of doubt, whether, by our law, it was not essential to the character of a Bill of Exchange, that it should be negotiable, that is to say, that it should be payable, either to A., or his order, or to the Bearer; for, otherwise, it was thought, that it might be deemed to have no greater effect, than being evidence of a contract. It was, also, formerly held, that a Bill, payable to A., or Bearer, was not negotia-

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[1] Ante, § 35; Chitty on Bills, ch. 2, p. 28 (8th edit. 1833); Id. ch. 5, p. 151, 152; Id. p. 187; Harvey *v.* Kay, 9 Barn. & Cressw. 364, per Bayley, J.; Roach *v.* Ostler, 1 Mann. & Ryl. R. 120; Ex parte Parr, 18 Ves. 69; Starke *v.* Cheeseman, Carth. R. 509; Dehers *v.* Harriot, 1 Shower, R. 163; Robinson *v.* Bland, 2 Burr. R. 1077; Joselyn *v.* La Serre, Fortesc. R. 282; Bayley on Bills, ch. 1, § 2, p. 8 (5th edit. 1830).

[2] Pardessus, Droit Comm. Tom. 2, art. 335.

[3] Pardessus, Droit Comm. Tom. 2, art. 335.

[4] Ibid.

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ble.[1] But that has been subsequently overruled, and the contrary doctrine established.[2] And it is now well settled, that it is not essential to the character of a Bill of Exchange, or a Promissory Note, that it should be negotiable.[3] It is essential, however, to the negotiability of a Bill, between all persons, except the King or Government,[4] that it should be payable to order, or to Bearer, or that some other equivalent words should be used, authorizing the Payee to assign or transfer the same to third persons; such, for example, as payable "to A., or his assigns."[5] Still, however, although not transferable by indorsement, without such words, so as to give an action to the Indorsee against other parties to the Bill; yet, the indorsement will give an action against the Payee himself; because, in legal effect, it amounts to the drawing of a Bill in favor of the Indorsee against the Drawee.[6] Where a Bill, payable to order, is indorsed

[1] Hodges v. Steward, 1 Salk. 125; see Hinton's case, 2 Shower, R. 235; Crawley v. Crowther, 2 Freem. 257.

[2] Grant v Vaughan, 3 Burr. 1516; Chitty on Bills, ch. 5, p. 181 (8th edit. 1833); Anon. 1 Salk. 126; Hinton's case, 2 Shower, R. 235; Crawley v. Crowther, 2 Freem. 257; Ante, § 56.

[3] Bayley on Bills, ch. 1, § 10, p. 33, 34 (5th edit. 1830); Chadwick v. Allen, Str. R. 706; Smith v. Kendall, 6 Term Rep. 123; Rex v. Box, 6 Taunt. 325; Burchall v. Slocock, 2 Ld. Raym. 1545; Chitty on Bills, ch. 5, p. 181; Id. ch. 6, p. 219 (8th edit. 1833); Cunningham on Bills, 113.

[4] Lambert v. Taylor, 4 Barn. & Cressw. 139; United States v. Buford, 3 Peters, R. 30; United States v White, 2 Hill, N. Y. R. 259; Post, § 199; United States v. Buford, 3 Peters, R. 12, 30.

[5] Chitty on Bills, ch 5, p. 180, ch. 6, p. 219 (8th edit. 1833); Hill v. Lewis, 1 Salk. 132; Com. Dig. Merchant, F. 5; 3 Kent, Comm. Lect. 44, p. 77 (4th edit.); Douglas v. Wilkeson, 6 Wend. R 637; S. P. United States v. White, 2 Hill, N. Y. R. 59; Ante, § 60.

[6] Chitty on Bills, ch. 6, p. 218, 219 (8th edit. 1833); Hill v. Lewis, 1 Salk. 132; Smallwood v. Vernon, 1 Str. R. 478; Ballingalls v. Gloster, 3 East, R. 482; Hodges v. Steward, 1 Salk. 125; Bayley on Bills, ch. 5, § 1, p. 120, note 1 (5th edit. 1830).

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in blank by the Payee, it is transferable, by mere delivery, in the same manner, as if it were payable to the Bearer.[1]

§ 61. The law of France is more restrictive than ours upon this subject. No instrument, which is not, on its face, negotiable, is entitled to the character and privileges of a Bill of Exchange; and, to make an instrument negotiable, it is indispensable, that it should be payable to the Payee or his order, or that some other equivalent words should be used.[2] A Bill, pay-

[1] Peacock *v.* Rhodes, 2 Doug. R. 611.

[2] Pardessus, Droit Comm. Tom. 2, art. 339; Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 110, p. 342; Chitty on Bills, ch. 6, p. 218, 219 (8th edit.). Mr. Nouguier thinks that he has discovered the precise time when Bills of Exchange, in France, were made payable to order. He says; "Estienne Cleirac, lequel, comme on sait, écrivait en 1569, est le premier auteur qui parle *de l'ordre*, comme moyen de transférer la propriété d'une lettre de change. Dans son chap. 5, n° 4, page 62, il donne un modèle de lettre contenant l'ordre; puis, au même chapitre, n° 12, page 66, il explique la valeur de cette expression. Plus tard, Savary, *parère* 82, t. 2, page 602, prétend que l'usage de cette clause a pris naissance en 1620; tandis que Mareschal, dans son ouvrage sur les changes et rechanges, publié en 1625, ne dit rien qui confirme cette opinion. Son silence ne la détruit pas, car son traité succinct est principalement destiné à rechercher la nature des diverses espèces de changes, et la constatation faite par Cleirac trente-quatre ans après, semble lui donner une certaine force. J'ai même retrouvé dans l'*Instruction sur les lettres de change*, chap. 1^er^, p. 4, un renseignement précieux, qui déterminerait l'époque précise de l'invention de l'ordre. Suivant l'auteur de cette instruction, avant le ministère du cardinal de Richelieu on ne se servait pas du mot *ordre;* mais l'embarras des procurations qu'il fallait passer, donna lieu à ce terme, pour faciliter le commerce des lettres de change, dont ce ministre faisait un très-grand usage. Or, on sait que le ministère du cardinal a duré de 1624 à 1642, époque de sa mort. Ce serait donc vers cette époque et pendant cet espace de dix-huit ans, que l'ordre, inventé en 1620, aurait pris son développement. Quoiqu'il en soit, le commerce accueillit cette innovation avec une faveur marquée: il comprit à merveille combien ses ressources s'augmentaient par la facilité de régler ses opérations immédiatement, sans frais, et d'assurer un rapide paiement. Aussi le transport des lettres par un simple ordre devint d'un usage presque général. Cependant, vers la fin du dix-septième siècle, et après l'ordonnance de 1673, quelques places de commerce, tenant

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able to the Bearer, is not within the reach of the rule; for (as we have seen) such a Bill is deemed invalid.[1] It may, however, be payable to the order of the Holder, or of a third person, or of the Drawer himself; and it will be good, if made payable to A., or "at his disposal"; but not, if made payable to A., or "in his favor"; for the latter words are equivocal, and do not necessarily import a right to transfer the property, but rather a mandate to A., to receive the money.[2] So, if the Bill be made payable to A., "or to the lawful Bearer," these latter words will be held equivalent to order, since no person can be deemed the lawful Bearer, but by this order, or indorsement of A.[3] In our law, such a Bill would be treated as payable to Bearer, whether it were a real, or a fictitious person.[4] Indeed, bank notes are usually, in England and America, made payable in this way, and are always deemed payable to the Bearer.[5] In Scotland, a Bill of Exchange is not only good, as such,

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par tradition à leurs anciennes formalités, ne purent se résoudre à autoriser les transports par endossement, et Du Puys de la Serra (ch. 13, nº 12, p 467, et 468; Id. ch. 13, § 12, p. 92, edit. 1789), cite quelques pays où il y avait défense d'agir ainsi: 'Dans quelques villes particulières, dit-il, comme Venise, Florence, Novi, Bolzan, par des réglemens qui ont force de lois, il est défendu de payer les lettres de change en vertu des ordres: mais il faut qu'elles soient payables *à droiture* à ceux qui les doivent exiger, ou bien ceux à qui elles sont payables envoient une procuration conçue en certaine forme précise, sans quoi on ne saurait en exiger le paiement, ni faire un protêt valable, parce qu'il ne serait pas fait par la faute du tireur ni de l'acceptant.'" Nouguier, Des Lettres de Change, Tom 1, p. 273, 274.

[1] Ante, § 57; Pothier de Change, n. 223; Pardessus, Droit Comm. Tom. 2, art. 338; Chitty on Bills, ch. 6, p. 218, 219 (8th edit.).

[2] Pardessus, Droit Comm. Tom. 2, art. 339.

[3] Ibid.

[4] Bayley on Bills, ch. 1, § 10, p. 31 (5th edit. 1830); Grant v. Vaughan, 3 Burr. 1516.

[5] Grant v. Vaughan, 3 Burr. 1516; Miller v. Race, 1 Burr. 452.

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which does not contain any words, making it payable to order, or to Bearer, but it is negotiable, and assignable, by indorsement, without these words.[1]

§ 62. But, it seems, that a Bill of Exchange, under seal, would not, by our law, be negotiable, although it should contain the usual words, which make it payable to the Payee, or his order; for it has been supposed, that the negotiability is confined to unsealed instruments only, and is not, by the general commercial law, extended to those under seal.[2] Heineccius considers the affixing of a seal as a mere superfluity, and as having no effect whatever upon the validity or transferability of the Instrument. He says; *Sigilli plane nullus est usus in hisce litteris, et hinc si addatur, quod aliquando fieri videmus in cambiis propriis, id merito pro superfluo habetur.*[3]

§ 63. Tenthly, as to the statement, that the Bill is for value received. It was formerly a matter of controversy, in our law, whether it was necessary, that a Bill of Exchange should import, on its face, to be for value received.[4] It is now, however, fully established, that it is not necessary.[5] The words, "value received," are, indeed, susceptible of two interpretations, if they stand on the face of the Bill, without further explana-

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[1] 1 Bell, Comm. B. 3, ch. 2, § 4, p. 401 (5th edit.).

[2] Clarke *v.* Benton Manufacturing Company, 15 Wend. R. 250.

[3] Heinecc. De Camb. cap. 4, § 18.

[4] Cunningham on Bills, 24, 25; Banbury *v.* Lisset, 2 Str. R. 1211; Pierce *v.* Wheatly, cited in Cunningham on Bills, 25. See 2 Black. Comm. 468.

[5] Bayley on Bills, ch. 1, § 13, p. 40 (5th edit. 1830); Chitty on Bills, ch. 5, p. 182, 183 (8th edit. 1833); Grant *v.* Da Costa, 3 M. & Selw. 352; White *v.* Ledwick, 4 Doug. R. 247, cited Bayley on Bills, ch. 1, § 13, note (83), p. 40 (5th edit.); Chitty on Bills, ch. 5, p. 182, 183 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 77, 78 (4th edit.); Hatch *v.* Trayes, 11 Adolph. & Ellis, 702.

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tion; that is, as value received by the Drawer of the Payee, or as value received by the Drawee for the Drawer. The former is the more natural interpretation of the words, as it would seem unnecessary to inform the Drawee of a fact, which he must necessarily already know.[1] Moreover, it was formerly thought, that these words established a consideration as between the Drawer and Payee, which would enable the latter to recover over against him, if the Drawee refused to accept or pay the Bill.[2] However, this nicety is now disregarded; and the same recourse may be had against the Drawer, whether the words, value received, be on the Bill, or not; for the law, in cases of negotiable instruments of this sort, presumes them to be founded on a valuable consideration.[3] Nay, the declaration, in an action thereon, need not state, that any value has been received, although it is stated on the face of the Bill.[4] In many cases, however, it may still be highly important, that the Bill should, on its face, contain the words "value received," as proof of a consideration, which may entitle the Payee or Holder to certain remedies, or serve

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[1] Grant *v.* Da Costa, 3 M. & Selw. 352; Highmore *v.* Primrose, 5 M. & Selw. 65; Clayton *v.* Gosling, 5 Barn. & Cressw. 361.

[2] 2 Black. Comm. 468; Banbury *v.* Lisset, 2 Str. R. 1211, 1212.

[3] White *v.* Ledwick, cited Bayley on Bills, ch. 1, § 13, p. 40 (5th edit. 1830); McLeod *v.* Snee, 2 Ld. Raym. 1481; S. C. 1 Str. R 762; Popplewell *v.* Wilson, 1 Str. R. 264; Chitty on Bills, ch. 3, p. 78, 79 (8th edit. 1833); Id. ch. 5, p. 182, 183; Cramlington *v.* Evans, 1 Show. R. 5; Wilson *v.* Codman's Ex'or., 3 Cranch, R. 193, 207; Phillis *v.* Pluckwell, 2 M. & Selw. 395; Hatch *v.* Trayes, 11 Adolph. & Ellis, 702; Jones *v.* Jones, 6 Mees. & Welsb. 84.

[4] Grant *v.* Da Costa, 3 M. & Selw. 351, 352; Bayley on Bills, ch. 9, p. 390 (5th edit. 1830); Coombe *v.* Ingram, 4 Dowl. & Ryl. 211; White *v.* Ledwick, 4 Doug. R. 247, 250, note (*m*), by Frere & Roscoe; Hatch *v.* Trayes, 11 Adolph. & Ellis, 702.

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him by way of evidence.[1] Still, however, the omission of the words will not always be fatal, even upon common written contracts, if the Court can gather, from the words, that there is a presumption of value between the parties.[2] It would seem, from Heineccius,[3] that the foreign law, is, generally, on this subject, coincident with that of England and America, except in places where peculiar regulations exist on the subject. Such regulations do exist in the laws of Bills of Exchange in Prussia, Denmark, and Brunswick, where the omission to express the value will vitiate the Bill; but, if the Bill is accepted, notwithstanding the omission, the Drawee is bound to pay it.[4]

§ 64. The French Law, in respect to the expression of the value, is widely different from our law. From an early period, it seems to have been the policy of that law, to require, not only that the value should be expressed, but that it should also be stated from whom received, and whether it was in money, or in account, or in merchandise, or in other effects. This was expressly provided by the Ordinance of 1673;[5] and the present Code of Commerce has positively affirmed the

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[1] See Highmore v. Primrose, 5 M. & Selw. 65; White v. Ledwick, 4 Doug. R. 247, and note (*m*), by Frere & Roscoe; Priddy v. Henbrey, 1 Barn. & Cressw. 679; Bishop v. Young, 2 Bos. & Pull. 78. But see Hatch v. Trayes, 11 Adolph. & Ellis, 702, where it was held, that the omission of the words, "value received," was unimportant as to the acceptor, as the law presumed, that the bill was for value received, and debt would lie by the payee thereof against the acceptor, although the words were omitted.

[2] Davies v. Wilkinson, 10 Barn. & Adolph. 98.

[3] Heinecc. de Camb. cap. 4, § 13, 14.

[4] Ibid.

[5] Jousse, sur L'Ord. 1673, art. 1, p. 67; Id. p. 70; Pothier de Change, n. 33, 34; Id. n. 8 to 11.

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same rule.[1] Pothier treats it as a new regulation, first established by the Ordinance of 1673, for the purpose of preventing frauds by bankrupts, who, having in their possession Bills of Exchange, which purported to be simply "for value received," and for which they had furnished no other value than their own note, were in the habit of negotiating these Bills, upon the eve of their bankruptcy, to persons, who were inclined to receive them in their name, and thus would bring the entire loss upon the Drawers, who had furnished them.[2] In short, the policy was aimed at the common vice of our own day, which tends so much to holding out false credits, the making and circulation of accommodation paper, as it is called. On failure to comply with this requisite, and expressing the Bill to be for value received, the instrument becomes a mere mandate to pay the amount to the party, to whom the Bill is given; and, if the latter fails, the Drawer, upon giving up the note, which has been given to him for the amount, is entitled to receive back the Bill itself.[3] In like manner, if it is not expressed, in what the value is received, it is, as against the creditors of the Drawer, to be treated as a mere fiction; and they may arrest the amount in the hands of the Drawee, as having always belonged to their Debtor, (the Drawer,) notwithstanding the Bill may have been negotiated; and the Holder cannot otherwise entitle himself to receive payment, than by proving, that the Drawer, either in money, or otherwise,

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[1] Code de Comm. art. 110; Pardessus, Droit Comm. Tom. 2, art. 340.

[2] Pothier de Change, n. 34.

[3] Pothier de Change, n. 34; Jousse, sur L'Ord. 1673, art. 1, p. 67, 70; Pardessus, Droit Comm. Tom 2, art. 340.

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actually received the value.[1] The Drawer himself, however, inasmuch as he has confessed, that the Bill is for value received, although he does not say, in what received, is not at liberty to deny it, unless he justifies it by producing the note of the Payee; and he will, in the absence of such evidence, be held to guaranty the payment thereof to the Holder.[2] But, even where the value received is properly expressed in the Bill, according to the French law, Pardessus is of opinion, that it is not conclusive between the parties; but that it is only *primâ facie* evidence of the fact, and may be rebutted by contrary proofs, and the real consideration shown.[3]

§ 65. Eleventhly, as to the statement of advice, and other miscellaneous matters, in the form of the Instrument. The common form of Bills of Exchange, states the account, to which the Bill is to be charged, and whether with or without advice. If the amount is to be put to the account of the Drawer, the language usually is, "and put it to my account;" if the Drawee is indebted to the Drawer, the language is, "and put it to your account;" if it is a bill drawn on account of a third person, the language is, "and put it to the account of A. B." (the third person);[4] and sometimes the language is, "and put it to account as per advice."[5]

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[1] Pothier de Change, n. 34.

[2] Ibid.

[3] Pardessus, Droit Comm. Tom. 2, art. 340. Mr. Professor Mittermaier, in a very learned and able dissertation in the Revue Etrangere et Francaise of Mr. Fœlix, Tom. 8, 1841, p. 112, 113, 114, has censured the limitations of the French Law on this point, and has vindicated the more liberal provisions of England, America, and Austria.

[4] Chitty on Bills, ch. 5, p. 184, 185 (8th edit. 1833); Marius on Bills, p. 7. See also Pardessus, Droit Comm. Tom. 1, art. 341.

[5] Com. Dig. Merchant, F.; Marius on Bills, p. 7; Heinecc. de Jur. Camb. cap. 2, § 19.

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But, although this is the usual language, it is not at all essential to the validity or operation of the Bill, but is a mere matter of mercantile convenience.[1] In respect to the other statement, that of advice, the propriety of inserting the words, "as per advice," or "without advice," must depend upon the rights of the parties, and the expectation, which the Drawee has a right to entertain, of receiving further directions, independent of the Bill. If the Bill is, "as per advice," then the Drawee is not obliged to accept or pay without such advice; and, if he does, it is at his own peril.[2] If the Bill is, "with or without advice," or "without advice," then he may, and, indeed, ought to accept and pay without such advice.[3] But, in neither case, is the validity of the Bill at all dependent upon the fact, whether it states the Bill to be payable with advice, or without advice, or whether the words are altogether omitted. And this seems also to be the general doctrine of the French Law,[4] and of other foreign nations.[5] Sometimes, in Bills of Exchange, drawn upon one Drawee, provision is made, that, in case of need, the Holder is at liberty to apply to, and require acceptance of, another person as a substituted Drawee.[6] This is a more common practice in the commercial negotiations of France, than in those of England or America. But there is no doubt, that a Bill so drawn, would be equally valid under the law of each country.

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[1] Chitty on Bills, ch. 5, p. 184 (8th edit. 1833). See also Laing v. Barclay, 1 Barn. & Cressw. 398.

[2] Chitty on Bills, ch. 5, p. 185 (8th edit. 1833); Id. p. 189.

[3] Ibid.

[4] Pothier de Change, n. 36; Pardessus, Droit Comm. Tom. 2, art. 323, n. 341, 357.

[5] Heinecc. de Camb. cap. 4, § 16.

[6] Pardessus, Droit Comm. Tom. 2, art. 341.

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The usual formulary is, "In case of need, apply to Messrs. —— at ——" (*au besoin chez Messrs.* —— *à* ——).[1] Such a direction of a Bill, in effect, points out one, or more persons, who, in case of a refusal, or failure of the Drawee, are to be applied to, that they may honor and pay the Bill, in the nature of Acceptors for honor, *supra protest*, of whom we shall presently speak; and, under such circumstances, the Holder is bound to apply to the party or parties so addressed; and they may accept and pay (as it should seem, according to the foreign law, without any previous protest); and the Drawer will be responsible to the party or parties, so paying the Bill, for the full amount.[2]

§ 66. It is common, and the practice has prevailed from a very early period, for the Drawer to draw and deliver to the Payee several parts, commonly called a set, of the same Bill of Exchange, any one part of which set being paid, the others are to be void. This is done in order to avoid delays and inconveniences, which might otherwise arise, from the loss, or mislaying, or miscarriage of the Bill, and also to enable the Holder to transmit the same, by different conveyances, to the Drawee, so as to ensure the most prompt and speedy presentment for acceptance and payment.[3] The general usage in England and America is, for the Drawer to deliver a set of three parts of the Bill to the Payee, or Holder.[4] And it seems, that, if any

[1] Chitty on Bills, ch. 5, p. 187, 188 (8th edit. 1833); Id. 262.

[2] Chitty on Bills, ch. 5, p. 188 (8th edit. 1833); Pardessus, Droit Comm. Tom. 2, art. 341, 384, 385.

[3] Chitty on Bills, ch. 5, p. 175, 176 (8th edit. 1833); Bayley on Bills, ch. 1, § 8, p. 28 (5th edit. 1830); Pothier de Change, n. 37; Scaccia de Comm. § 2, Gloss. 6, n. 3; Heinecc. de Camb. cap. 4, § 10; Id. cap. 2, § 17, 18; Pardessus, Droit Comm. Tom. 2, art. 342.

[4] Ibid.

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person undertakes to draw or deliver a Foreign Bill to another person, he is bound to deliver to him the usual set or number of parts;[1] and some of the foreign Jurists are said to hold, that the Promisee may, in such a case, demand as many parts, as he chooses. Of this, however, there may be a reasonable doubt entertained.[2]

§ 67. Where a set, consisting of several parts, is given, each part ought to contain a condition, that it shall be payable only so long, as all the others remain unpaid; in other respects, all are of the same tenor. This condition should be inserted in each part, and should, in each, mention every other part of the set; for, if a man, with an intention to make a set of three parts, should omit the condition in the first, and make the second with a condition, mentioning the first only, and in the third alone take notice of the other two (which, by the way, is the mode pointed out by Mol-

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[1] Chitty on Bills, ch. 5, p. 175 (8th edit. 1833); Scaccia de Comm. § 2, Gloss. 6, n. 2; Pothier de Change, n. 37, 130.

[2] Mr. Chitty states this to be the opinion of Pardessus. I do not find any such opinion stated in his work on Commercial Law, although he there speaks on the subject of sets of Exchange. Pardessus, Droit Comm. Tom. 2, art. 342. See Pothier de Change, n. 37. Upon the subject of sets of Exchange, Heineccius says; "Porro cambia vel sola, vel plura simul dari posse, jam supra animadvertimus. Posterius fit commodo præsentantis, ut, uno alterove exemplari deperdito, reliquis adhuc uti possit. Tunc vero observandum est campsoribus; (1.) eas litteras omnes pro unicis haberi; (2.) easdem per omnia sibi similes esse debere, præterquam quod secundis et sequentibus inseri solet clausula, Wenn Prima noch nicht bezahlet, vel, der Herr bezahle auf diesen meinen Secunda Wechsel-Brief, Prima unbezalt; (3.) recte et adcurate illas esse numerandas, ne binæ secundæ, vel tertiæ, exstent. Qui plures ejus generis tesseras collybisticas habet, primam statim potest præsentare ad acceptandum, dum reliquæ per alia loca gerentur. Acceptantis enim æque, ac trassantis, non interest, si vel maxime reliquæ per cessionem in alienas manus perveniant, quia non nisi ex una soluit, ex reliquis vero tum demum solutio exigi potest, si illa ex prioribus nondum sit præstita." Heinecc. de Camb. cap. 2, § 17, 18.

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loy,[1] Malynes,[2] and Marius),[3] he might, perhaps, in some cases, be obliged to pay twcie; for, it might be questionable, if it would be any defence to an action on the second, that he had paid the third, or to an action on the first, that he had paid either of the others.[4] But an omission is not, perhaps, material, which, upon the face of the condition, must necessarily have arisen from a mistake; as, if, in the enumeration of the several parts, one of the intermediate ones were to be omitted; for instance, "Pay this my first of Exchange, second and *fourth* not paid." Where a Bill consists of several parts, each ought to be delivered to the person, in whose favor it is made, (unless one is forwarded to the Drawee for acceptance,) otherwise, there may be difficulties in negotiating the Bill, or in obtaining payment.[5]

§ 68. Other reservations are sometimes made, and other directions given in Bills of Exchange, especially on the Continent of Europe; such as, that, in cases of dishonor, the Bill is to be returned without protest, or without expense (*retour sans protêt, ou sans frais*) to the Drawer; or, that, if protested, a certain sum only shall be allowed, and no more, for reëxchange

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[1] Book 2, ch. 10, § 14.

[2] Book 3, ch. 5, p. 261, 262.

[3] P. 7.

[4] Chitty on Bills, ch. 5, p. 176 (8th edit. 1833).

[5] Bayley on Bills, ch. 1, § 8, p. 28, 29 (5th edit. 1830); Chitty on Bills, ch. 5, p. 176 (8th edit. 1833). — Heineccius, and Pothier, and Pardessus, (Heinecc. de Camb. cap. 2, § 17, cap. 4, § 10; Pothier de Change, n. 37; Pardessus, Droit Comm. Tom. 2, art. 342,) give, in effect, similar directions and admonitions. The usual form is, "Pay this my first of Exchange, second and third not paid," or "Pay this my second of Exchange, first and third not paid," &c. &c. Chitty on Bills, ch. 5, p. 170 (8th edit. 1833); Bayley on Bills, p. 28, 29 (5th edit. 1830); Id. p. 375, 387. We shall hereafter see, how the Acceptor should accept the Bill, when there are

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and expenses.[1] But these, in England and America, are of very rare occurrence, and when they are intended by the parties, they are more commonly placed in a separate and distinct Instrument, in writing.

§ 69. There are also some other requisites to the validity of Bills of Exchange, which arise from the positive Ordinances, Laws, and Regulations of particular countries. But they are so various, and so numerous, and depend so much upon local and municipal policy, that they scarcely require to be treated of, in a work of so elementary a nature, as the present. Among these, the regulations as to stamps, and stamp duties, are the most general in their character and operation. But even the statement of these, in these pages, would occupy a place wholly disproportionate to their relative importance as illustrative of principles.[2]

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several parts; and the rights of the different Holders, when they hold, in distinct rights, the different parts. See, also, Chitty on Bills, ch. 5, p. 176, 177 (8th edit. 1833); Holdsworth v. Hunter, 10 Barn. & Cressw. 449.

[1] Chitty on Bills, ch. 5, p. 188 (8th edit. 1833).

[2] Mr. Chitty, and Mr. Bayley, have each devoted a chapter to the English Laws and decisions in England on this subject. See Chitty on Bills, ch. 4, p. 122 to 144 (8th edit. 1833); Bayley on Bills, ch. 3, p 77 to 110 (5th edit. 1830). In America, there are, at present, no stamp duties. As to guaranties on Bills, whether negotiable also, see Seabury v. Hungerford, 2 Hill, N. Y. R. 80; Miller v. Gaston, 2 Hill, N. Y. R. 188; Post, § 215.

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CHAPTER IV.

COMPETENCY AND CAPACITY OF PARTIES TO BILLS.

§ 70. THE foregoing chapter contains an enumeration of the most important requisites and considerations, which are applicable to the character and form of the Instrument itself. But an inquiry of a more extensive nature, and not less vital, is, as to the legal capacity and competency of the respective parties to a Bill of Exchange, either as a Drawer, or a Payee, or a Holder, or a Drawee; for, although the Instrument, upon its face, may possess all the other legal requisites, to give it entire validity; yet, if any party thereto is incompetent, and incapable by law, to give, or to acquire, or to transfer, any right or title under the same, or to be bound by any obligations arising therefrom, then, so far as it respects such party, the Bill is to be treated as a mere nullity; and, if so, then various consequences will, or may follow therefrom, which will presently come under our notice.

§ 71. Let us, then, proceed to the consideration of the capacity and competency of the respective parties to a Bill; and these parties are, ordinarily, the Drawer, the Payee, or other Holder, and the Drawee. And, let us inquire, in the first place, who are generally competent to draw, to hold, to indorse, or to accept Bills; and, in the next place, who are generally incompetent for any of these purposes. As to the first; who are generally competent to draw, hold, indorse, or accept, a Bill of Exchange; or, in other words, who, in contemplation of law, have a capacity to do

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such acts. Originally (as has been already suggested), the right to draw, hold, indorse, or accept such an Instrument, seems to have been confined to merchants, and other persons, engaged in trade generally, or in the traffic in Bills.[1] But this is now totally disregarded; and all persons having general capacity in other respects, whether engaged in trade or not, are capable of doing all, or any, of these acts.[2] The old rule was formerly prevalent on the Continent of Europe, founded, in some measure, upon the peculiar remedies, which existed in such cases, in favor of merchants, and gave credit to the Bills. But, gradually, even there, the custom was disregarded; and Heineccius has laid it down, as without doubt, that now any person may draw a Bill, or deal in Exchange, unless specially prohibited by law. *Nullum est dubium, quin cambiare possint, quicumque possunt contrahere, nisi id leges cambiales speciatim prohibeant.*[3]

§ 72. Hence, as being generally competent, all persons of age, and of sound mind and understanding (or *compotes mentis*), Females as well as Males, Alien Friends, Trustees, Agents, Guardians, Executors and Administrators, and other persons, acting *en autre Droit*, Partners, acting within the scope of the business of the Partnership, and Corporations, acting through the instrumentality of an Agent, for purposes and objects authorized by, and within the scope of, their charters, and *a fortiori*, if express authority is given to them,

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[1] Ante, § 7, note (1), sub finem; Chitty on Bills, p. 13, 16, 17 (8th edit. 1833); Kyd on Bills, ch. 2, p. 28 (3d edit.).

[2] Ante, § 7, note (1); Chitty on Bills, p. 13, 14, 16, 17 (8th edit. 1833).

[3] Heinecc. de Jur. Camb. cap. 5, § 1, 2; Id. § 13, 14.

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may become Drawers, or other parties, to Bills of Exchange.[1]

§ 73. The same doctrine is fully recognized in the French law. Pothier lays it down, as incontrovertible, that all sorts of persons, who are of capacity to contract, whether they are merchants, or bankers, or not (unless otherwise prohibited), may become parties to, and intervene in, the negotiation of Bills of Exchange, and contract the obligations resulting therefrom.[2] But women, whether married or single, are by the French law, disabled from making themselves parties as Drawers, or Indorsers, or Acceptors, of Bills of Exchange, unless they are regular merchants or traders; but all such engagements, on their part, amount but to simple contracts, which import very different obligations as well as remedies, in the French law, from those created by being parties to Bills of Exchange.[3] However, this is an immunity in their favor; and, as to all other parties, a Bill drawn by a woman, not a merchant, retains all its ordinary characteristics and obligations, as we shall presently more fully see.[4]

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[1] Chitty on Bills, ch. 2, p. 31 to 36 (8th edit. 1833; Bayley on Bills, ch. 2, § 7, p. 69 to 73 (5th edit. 1830); Id. § 8, p. 74; Id. ch. 2, § 5, 6, p. 50 to 68.

[2] Pothier de Change, n. 27; Merlin, Répert. Lettre et Billet de Change, § 3, p. 192 (edit. 1827); 1 Pardessus, Droit Comm. Pt. 1, tit. 2, art. 55; Cod. Civil de France, art. 1183.

[3] Code de Commerce, art. 113; Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 113, p. 351 to 356; Sautayra, Code de Comm. art. 113, Comment.

[4] Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, p. 354, 355. — The distinction between Bills of Exchange, and mere simple contracts, under the French Law, is very important, as well in respect to the rights, and duties, and obligations, of the parties, as to the Courts having jurisdiction thereof, and to the nature and extent of the remedies given, against the person and effects of the delinquent party or parties. See Pothier de

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§ 74. As to Trustees, Guardians, Executors, and Administrators, and other persons, acting *en autre Droit*, they are, by our law, generally, held personally liable on such Bills, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate, they act; and hence, to give any validity to the draft, they must be deemed personally bound as Drawers.[1] It is true, that they may exempt themselves from personal responsibility, by using clear and explicit words, to show that intention; but, in the absence of such words, the law will hold them bound.[2] Thus, if an Executor, or Administrator, should draw, or indorse, or accept, a Bill, in his own name, adding thereto the words, "as Executor," or "as Administrator," he would be personally responsible thereon. If he means to limit his responsibility, he should confine his stipulation to pay out of the estate.[3]

§ 75. In treating of Trustees, and Guardians, and other persons, acting *en autre Droit*, who become parties to Bills, as personally responsible on such Bills, or on contracts generally, which they make in that quality or character, our law differs from the French law; for that law treats all such contracts as strictly the contracts of the principal, through the instrumentality of the Trustee, Guardian, or other person, acting

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Change, n. 124 to 127. See, also, Jousse, sur l'Ord. 1673, tit. 5, art. 12, p. 102 to 104; Id. art. 13, p. 105, 106.

[1] Story on Agency, § 280 to 287; Thacher *v.* Dinsmore, 5 Mass. R. 299; Foster *v.* Fuller, 6 Mass. R. 58; Hills *v.* Bannister, 8 Cowen, R. 31; Bayley on Bills, ch. 2, § 7, 8, p. 68 to 74 (5th edit. 1830).

[2] Bayley on Bills, ch. 2, § 7, 8, p 69 to 74 (5th edit. 1830); Eaton *v.* Bell, 5 B. & Ald. 34.

[3] Childs *v.* Monins, 2 Brod. & Bing. R. 460; King *v.* Thom, 1 Term R. 487; Bayley on Bills, ch. 2, § 8, p. 74 (5th edit. 1830).

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en autre Droit. Thus, a Tutor, when he contracts in that quality, may stipulate and promise for his minor; for it is the minor, who is deemed to contract, stipulate, and promise for himself by the ministry of his Tutor; the law giving a character to the Tutor, which makes his acts to be considered as those of his minor, in all contracts relating to the administration of the tutelage. It is the same, with respect to a Curator, and every other legitimate Administrator. It is the same with an Attorney (*procureur*); for the procuration (or power of attorney), which gives him the right to use the name of the person, for whom he contracts, makes the person giving it be considered as contracting, himself, through the ministry of the Attorney.[1] But each law proceeds upon the same general principle; for, if the Principal is incapable of contracting in the particular case, or is not bound by the contract, then the Agent, contracting *en autre Droit*, is bound by each law. Thus, for example, if the Tutor of a minor, not being a merchant, were to draw a Bill of Exchange for the minor, the latter would not be bound as Drawer, and, therefore, the Tutor would be.[2]

§ 76. As to Agents, if they draw, or indorse, or accept Bills in their own names, although on account, and for the benefit, of their principals, they are held personally liable, because they alone can be treated, on the face of the Bills, as parties.[3] If they would

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[1] Pothier on Obligations, n. 74, 448.

[2] Code de Comm. art. 114; Locré, Esprit du Code de Comm. Liv. 1, tit. 8, § 1, Tom. 1, p. 356. The law of Scotland coincides with that of France. 1 Bell, Comm. B. 3, ch. 2, § 4, p. 396 (5th edit.).

[3] Bayley on Bills, ch. 2, § 7, p. 69 to 74 (5th edit. 1830); Thomas *v.* Bishop, 2 Str. R. 955; Goupy *v.* Harden, 7 Taunt. R. 159. But see Sharp *v* Emmet, 5 Whart. R. 288.

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bind their principals, they must draw, indorse, or accept the Bills in the name of their principals, and sign for them and in their names.[1]

§ 77. Similar principles pervade the foreign law. Agents may draw Bills (and the same rule will apply to the indorsement and acceptance of Bills in the name of their principals. But, then, in order to avoid personal responsibility, Agents must there, also, draw Bills in an appropriate manner; otherwise, they may become personally responsible to the Payee. Thus, Heineccius says; *Quid si institor cambium trassarit*

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[1] Story on Agency, § 147 to 156, § 275 to 278; Bayley on Bills, ch. 2, § 7, p. 69 to 74 (5th edit. 1830); Chitty on Bills, ch. 5, p. 186 (8th edit. 1833); Kyd on Bills, p. 33, 34 (3d edit.).—Cases of Agency often involve very nice and embarrassing considerations, from the peculiar language of the Instrument, to decide whether the Agent is personally bound or not. In order to bind the principal, and exonerate himself, the Agent should regularly sign thus, "A. B. (the principal) by C. D. his Agent" (or Attorney, as the case may be); or, what is less exact, but may suffice, "C. D. for A. B." Story on Agency, § 153; Chitty on Bills, ch. 2, p. 37, 38 (8th edit. 1833). But, in practice, there are innumerable deviations from this simple and appropriate form; and the decisions, upon the various cases, which have arisen in courts of justice, involve much conflict of doctrine and opinion, and do not seem, always, to have proceeded upon any uniform principle of interpretation. Many of the cases, on this subject, will be found collected in Story on Agency, § 147 to 155; Id. § 269 to 280; Bayley on Bills, ch. 2, § 7, p. 69 to 76 (5th edit. 1830); Chitty on Bills, ch. 2, p. 37 to 39 (8th edit. 1833). Even if an Agent draws, in his own name, on his Principal, for the account of the latter, the Payee will be entitled to hold him personally bound as Drawer. Bayley on Bills, ch. 2, § 7, p. 69 to 73 (5th edit. 1830); Story on Agency, § 156, § 269. So, an Agent, who should draw a Bill in favor of his Principal, on the purchaser of goods, sold on account of his Principal, would be personally liable to the latter, as Drawer of the Bill, upon its dishonor. Lefevre *v.* Lloyd, 5 Taunt. R. 749; Story on Agency, § 156, 269. However, an exception is generally made in favor of a known public Agent, who, if he draws on account of the public, is generally held not personally responsible on the Bill, unless under special circumstances. Chitty on Bills, ch. 2, p. 37 to 39 (8th edit. 1833); Story on Agency, § 302 to 307; see, also, Eaton *v.* Bell, 5 Barn. & Ald. 37. See Fox *v.* Frith, 10 Mees. & Wels. 135, 136.

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ad dominum, hic vero bonis labatur? Tunc distinguitur, dominine fidem sequutus sit remittens, an institoris. Hoc enim casu adversus institorem regressum habet, aliquando etiam finito officio: illo casu ipse damnum sentire tenetur. Quum vero parum plerumque constet, utrius fidem sequutus sit remittens: ejus jurejurando rem ad liquidum perducendam esse, censet Stryckius.[1] Perhaps the true rule of the foreign law may be, (for some uncertainty seems to rest upon it,) that the question is one, which resolves itself into the simple consideration, not of the form of the instrument, but of the fact, to whom the credit, under all the circumstances, is given, whether to the Principal, or to the Agent.[2]

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[1] Heinecc. de Jure, Camb. cap. 4, § 25, 26 (edit. 1769); Id. cap. 5, § 12; Pothier on Oblig. n. 74, 448.

[2] I have not found, in the foreign writers, the question treated at large, when, and in what cases, and under what particular circumstances, the Agent will be personally bound, or not, as Drawer of a Bill, drawn on account of his Principal, with the practical fulness, or distinctness, with which it has been treated by the English and American Courts. It is not improbable, that the doctrine of Heineccius, stated in the text, contains the general principles adopted in the foreign law, without any very exact consideration of the form, which the contract assumes in the written Instrument. So that the question then turns, or, at least, may turn, simply upon this; To whom, taking all the facts, was the credit actually given, and intended to be given? to the Agent, or to the Principal? See Pothier de Change, n. 28. Pothier, in his Treatise on Obligations, (n. 74, 448,) has pointed out, distinctly, the difference between cases, where the Agent contracts in his own name, and the cases, where he contracts in the name of his Principal. Thus, he says, n. 74; "What has been hitherto said, as to our only being able to stipulate or promise for ourselves, and not for another, is to be understood as applying to contracts, which we make in our own name; but we may lend our ministry to another person, for whom we may contract, stipulate, or promise; and, in this case, it is not we, properly speaking, who contract, but the other person, who contracts by our ministry." And again he says, n. 448; "In order to raise the accessary obligation of employers, the manager must have contracted in his own name, although he was acting for the employer; but, when he contracts in his quality of Agent, he does not enter into any contract himself, it is his employer, who

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§ 78. As to partners, the signature of the firm is, in general, indispensable to create a liability of the partnership, as Drawers, Indorsers, or Acceptors;[1] and each partner has complete authority to use it; and, when so used, the Bill will be deemed to be on the partnership account, and bind it accordingly, unless, upon the face of the Bill, or upon collateral proof, it is clearly established, that the party, taking it, had full notice, that the Bill was drawn, indorsed, or accepted, for purposes and objects, not within the partnership business.[2] And this seems equally true in the law of France and Scotland.[3]

§ 79. As to corporations, according to the old law, they could, generally, (for there always were some admitted exceptions,) contract only under their corporate seal. But the rule has been gradually relaxed, and the exceptions enlarged, until, in our day, it may be taken to be a firmly established rule in America, and admitted, to a great extent, in England, that corporations may contract and bind themselves by contracts not under seal, made through the instrumentality of their agents, and within the proper scope of the objects and purposes of their charter.[4] But the question is

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contracts by his ministry. Supra, n. 74. In this case, the manager does not oblige himself; it is the employer, alone, who contracts a principal obligation, by the ministry of his manager. When the manager contracts in his own name, the contract, to oblige his employer, must concern the affair to which he is appointed, and the manager must not have exceeded the limits of his commission. Dig. L. 1 (*a*), § 7 & 12, de Exerc. Act."

[1] Chitty on Bills, p. 67 to 69 (8th edit. 1833); Id. p. 186; Story on Partnership, § 102, 128, 129, 134, 136.

[2] Story on Partnership, § 126 to § 132.

[3] Story on Partn. § 129; Pothier on Oblig. n. 83; Pothier de Société, n. 101; 2 Bell, Comm. B. 7, p. 616 (5th edit.).

[4] Bank of Columbia *v.* Patterson's Admin. 7 Cranch, R. 299; Bank of

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more nice, as to the right of a corporation to become Drawers, or Indorsers, or Acceptors of Bills of Exchange, or to become parties to any other negotiable paper. That an express authority is not indispensable to confer such a right, is admitted.[1] It is sufficient, if it be implied, as a usual and appropriate means to accomplish the objects and purposes of the charter.[2] Corporations are expressly mentioned in the statute of 3 & 4 Ann. ch. 9, respecting promissory notes, as persons, who make and indorse negotiable notes, and to whom such notes may be made payable; and, as the statute gives the like remedy to and for corporations and others, as upon inland Bills of Exchange, it implies, that, by the custom of merchants, they may, in some cases, at least, draw, indorse, accept, or sue upon Bills of Exchange.[3] But where drawing, indorsing, or accepting such Bills is obviously foreign to the purposes of the charter, or repugnant thereto, there the act becomes a nullity, and not binding upon the corporation.[4]

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the U. States *v.* Dandridge, 12 Wheaton, R. 64, 67 to 75; Beverley *v.* The Lincoln Gas Light & Coke Company, 6 Adolph. & Ellis, 829; Church *v.* The Imperial Gas Light & Coke Company, 6 Adolph. & Ellis, 846; Story on Agency, § 16, 52, 53; Kyd on Bills, p. 32 (3d edit.); Arnold *v.* The Mayor &c. of Poole, 4 Mann. & Granger, R. 860. — Upon this point, it does not seem necessary, here, to cite the authorities at large. Many of them will be found collected in Story on Agency, § 52, 53; and Bayley on Bills, ch. 2, § 6, p. 53 to 68 (5th edit. 1830); Chitty on Bills, ch. 2, p. 45 to 72.

[1] Chitty on Bills, p. 17 to 21 (5th edit. 1833); Bayley on Bills, ch. 2, § 7, p. 69, 70 (5th edit. 1830).

[2] See Broughton *v.* The Manchester Water Works Company, 3 Barn. & Ald. 1, 7 to 11; Munn *v.* Commission Company, 15 John. R. 44.

[3] Bayley on Bills, ch. 2, § 6, p. 60, 68 (5th edit. 1830); Chitty on Bills, (8th edit. 1833); Kyd on Bills, p. 19, 20 (3d edit.).

[4] Broughton *v.* Manchester Water Works Company, 3 Barn. & Ald. 1 to 12; Chitty on Bills, p. 17 (8th edit. 1833). — Heineccius, speaking

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§ 80. As, then, all persons in general, of sound mind and understanding, are, in law, capable of becoming Drawers, Indorsers, and Acceptors of Bills of Exchange, unless some disability or incompetency specially attaches to them, let us, in the next place, proceed to inquire, what persons are affected by any such disability or incompetency. It is no objection, therefore, to the drawing, or indorsing, or accepting a Bill, that the party is a Trustee, and draws, indorses, or accepts the Bill on account of the *cestui que trust*, or beneficiary; for the act binds him personally, in point of law; and the beneficiary has only an equitable interest.[1] The same doctrine applies to the case of partners, where a Bill is drawn, indorsed, or accepted in the name of the partnership; for each partner is clothed with full authority, for purposes within the scope of the partnership, to draw, indorse, or accept a Bill in behalf of the firm.[2]

§ 81. The cases of disability or incompetency, in our law, may, perhaps, be reduced to four classes. (1.) First; Minors. (2.) Secondly; Married Women.

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upon the subject of Partnerships (Societates), probably meant to include, what we should call quasi corporations, or joint-stock companies, also. He says; "Itaque ne societates quidem, tamquam personæ morales, negotiationem collybisticam exercere prohibentur. Immo illam exercent quotidie, quamvis alicubi legibus cautum sit, ut omnes et singuli socii nomina sua separatim subscribere cogantur." Heinecc. de Camb. cap. v. § 15, p. 49 (edit. 1769). In the foreign law, at least, in some countries, partnerships, using the name of the firm, may sue and be sued in the firm's name. See Story on Partn. § 221, note (1); Id. § 235, note (5); see, also, 2 Bell, Comm. B. 7, p. 619, 620 (5th edit).

[1] Chitty on Bills, ch. 6, p. 226 (8th edit. 1833); Bayley on Bills, ch. 2, § 7, p. 69; Id. ch. 5, p. 134 (5th edit. 1830).

[2] Chitty on Bills, ch. 6, p. 226 (8th edit. 1833); Story on Partn. § 101, § 102; Bayley on Bills, ch. 2, § 6, p. 62 to 69 (5th edit. 1830).

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(3.) Thirdly; Alien Enemies. (4.) And, Fourthly; Persons insane, or imbecile in mind.[1]

§ 82. Some other cases of disability and incompetency exist in other countries. Thus, for example, ecclesiactical persons, or the clergy, are, by the statute law of England, prohibited, under penalties, from engaging in trade, or farming, for lucre or profit.[2] But this prohibition extends only to engaging in the traffic

[1] The case of bankruptcy is sometimes deemed to create an incapacity or disability. But it is not a general incapacity or disability. By bankruptcy, the Bankrupt is divested of all right and power to transfer any of the property, then owned or possessed by him, with certain exceptions in favor of *bonâ fide* purchasers, without notice; and the property passes to his Assignee for the benefit of his Creditors; and the Assignee may sue upon Bills, and Notes, and other choses in action, to recover the same. By the Bankrupt Acts of England (see, among others, Stat. 6 Geo. 4, ch. 16), the Assignee is also entitled to all the property, which may accrue to the Bankrupt, in any way after his bankruptcy, before he obtains his certificate of discharge. But, in neither case, is there any general personal incapacity or disability created in the Bankrupt; for he may still sue, in his own name, where he is a Trustee for a third person, as where he has assigned a Bond, or other chose in action, for a valuable consideration, before his bankruptcy; for, then, he may sue for the benefit of the Assignee. Chitty on Bills, ch. 6, p. 228 to 230 (8th edit. 1833); Pease *v.* Hush, 10 Barn. & Cressw. 122; Carpenter *v.* Marnell, 3 Bos. & Pull. 40; Kitchen *v.* Bartsch, 7 East, R. 53. Nor is the Bankrupt restrained from suing, upon any contract, made with him after his bankruptcy, unless he is prohibited by the Assignee to sue; for he may, otherwise, sue as Trustee, for their benefit. Ibid.; Webb *v.* Fox, 7 T. Rep. 391; Drayton *v.* Dale, 2 Barn. & Cressw. 293; Ashley *v.* Bell, 2 Str. 1207; Bayley on Bills, ch. 2, § 4, p. 49, 50 (5th edit. 1830); Chitty on Bills, ch. 6, p. 227 to 238 (8th edit. 1833). Upon other grounds, it seems improper to treat the case of bankruptcy, as creating a personal incapacity, or disability, to be a party to a Bill of Exchange; for he may bind himself thereby, although he cannot, if uncertificated, bind his estate. Thus, if he draws a Bill, or accepts a Bill, in favor of a third person, he makes himself liable, personally, therefor. The law does not disable him from contracting with others; but gives the Assignee the benefit of contracts, made by him, if he is uncertificated, and the contracts are beneficial to the estate. But the Bankrupt, by his own acts, cannot bind the Assignee.

[2] Stat. 21 Hen. 8, ch. 13, § 5; 43 Geo. 3, ch. 84, § 5; Chitty on Bills, ch. 2, § 1, p. 16 (8th edit. 1833); Ex parte Meymot, 1 Atk. 196.

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of Bills of Exchange for a livelihood, or in the business of merchandise or commerce; and not to a clergyman's merely becoming a party to a Bill, by drawing it for purposes connected solely with his own profession or clerical employment, or for the improvement of his own estate, or the payment of his own debts.[1] And, even in cases, where a clergyman shall draw Bills of Exchange by way of trade and merchandise, it may be very doubtful, whether the contract is not, in favor of all persons but himself, obligatory, so that they may recover against him; but he, not against them.[2] Similar prohibitions, as to the clergy and other ecclesiastical persons, exist, under the Canon Law, in France, which, on account of the sanctity of their profession, requires them to abstain from carrying on commerce.[3] But, then, the contract is not treated as absolutely void; but, if given for money received by a clergyman, the contract, although drawn in the form of a Bill of Exchange on a third person, who owes the Drawer, is presumed to have been designed, by the parties, as an order (rescription), rather than a Bill of Exchange.[4]

§ 83. Heineccius, also, asserts, that, although Bills of Exchange were originally in use only by merchants; yet, that there can be no doubt, that princes, and counts, and other illustrious and noble persons, may freely contract, and become parties thereto, unless

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[1] Ibid.; Hankey v. Jones, Cowp. R. 745; see, also, Ex parte Meymot, 1 Atk. 196.

[2] Ex parte Meymot, 1 Atk. 196.

[3] See, also, as to the law of England, Hall v. Franklin, 3 Mees. & Welsb. 259.

[4] Pothier de Change, n. 27.

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specially prohibited.[1] And, he adds, in another place, that the clergy are competent to bind themselves by Bills of Exchange, and, also, ministers of princes, and noblemen, and military officers, and academical pofessors, although they may be generally prohibited from engaging in trade or commerce; but, that, frequently, they are specially exempted from arrest on such Bills, upon the grounds of public policy.[2]

§ 84. Passing, however, to the consideration of the disabilities and incapacities, created by our law, let us, in the first place, consider the disability of Minors, or, as they are, in our law, significantly called, Infants, meaning all persons, under twenty-one years of age. In general, contracts, made by Infants, are treated, (1.) as void, (2.) or as voidable, (3.) or as valid. They are void, when they are clearly not for the benefit of the Infant; they are voidable, when they may, or may not, be for his benefit, according to circumstances; they are valid, when they are such as the law allows and justifies.[3] Within the latter predicament, fall all contracts of Infants for necessaries, suitable to their age, rank, and condition in life.[4] But, by our law, an Infant has no capacity to draw, indorse, or accept, a Bill of Exchange, so as to bind himself personally, in the course of trade; for he is not at liberty to engage

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[1] Heinecc. de Camb. cap. 5, § 2, 8, 14, 17.

[2] Ibid. — Formerly, according to Heineccius, Jews were prohibited from dealing with Christians in Bills of Exchange; at least, by way of assigning their right of action to them. Heinecc. de Camb. cap. 2, § 8.

[3] Keane v. Boycott, 2 H. Black. R. 511, 514, 515; Com. Dig. Enfant, B. 5, 6, C. 1 to 4, 9; Holmes v. Blogg, 8 Taunt. R. 35; Id. 508; 2 Kent, Comm. Lect. 31, p. 232 to 244 (4th edit.); 1 Story on Eq. Jurisp. § 240 to 243; 1 Black. Comm. 463 to 467; Wood v. Fenwick, 10 Mees. & Wels. 195.

[4] Ibid.; Burghart v. Hall, 4 Mees. & Welsb. 727.

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in trade.[1] And even a Bill of Exchange, given for necessaries, would seem, upon principle, 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;[2] and, *à fortiori*, he is not liable, on a Bill of Exchange, given for necessaries, which is negotiable; for that might involve him in liability to third persons.[3] However, Bills of Exchange, drawn by Infants, are not deemed so utterly without possible benefit to them, that they are void; but they are deemed merely voidable, by them at their election.[4] Hence it is, that, if, upon coming of age, an Infant should ratify and confirm a Bill of Exchange, given by him during his infancy for a valuable consideration, it would be binding upon him.[5]

§ 85. The doctrine above stated is strictly applicable to every case, where an Infant is either the Drawer, or the Drawee, of a Bill of Exchange.[6] It seems equally applicable to the case, where an Infant is Indorser of a Bill payable to himself, or his order.[7] Such

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[1] Chitty on Bills, ch. 2, p. 21, 22 (8th edit. 1833); Bayley on Bills, ch. 2, § 2, p. 44, 45 (5th edit. 1830); Williams *v.* Harrison, Carth. R. 160; S. C. 3 Salk. 197; Williamson *v.* Watts, 1 Camp. R. 552; Jones *v.* Darch, 4 Price, R. 300.

[2] Williamson *v.* Watts, 1 Camp. R. 552; Taylor *v.* Croker, 4 Esp. R. 187; Gibbs *v.* Merrill, 3 Taunt. R. 307; Trueman *v.* Hurst, 1 Term R. 40; Swasey *v.* Vanderheyden, 10 John. R. 33. But see Chitty on Bills, ch. 2, p. 21, 22, and note (*c*) (8th edit. 1833).

[3] Swasey *v.* Vanderheyden, 10 John. R. 33.

[4] Gibbs *v.* Merrill, 3 Taunt. R. 307; Bayley on Bills, ch. 2, § 2, p. 44 to 46 (5th edit. 1830).

[5] Chitty on Bills, ch. 2, p. 23 (8th edit. 1833); Bayley on Bills, ch. 2, § 2, p. 45, 46 (5th edit. 1830).

[6] Bayley on Bills, ch. 2, § 2, p. 44 (5th edit. 1830); Williams *v.* Harrison, 3 Salk. 197; Williamson *v.* Watts, 1 Camp. R. 552; Taylor *v.* Croker, 4 Esp. R. 187.

[7] Chitty on Bills, ch. 6, p. 224 (8th edit. 1833).

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a Bill is undoubtedly good, in his own favor, as Payee; for a third person may, for a valuable consideration, undertake to pay money to an Infant, and be bound thereby.[1] It is equally certain, that he cannot, in consequence of his general incapacity, make himself personally liable to pay the debt, in virtue of the contract created, by law, by his indorsement.[2] But another point remains for consideration; and that is, whether, by his indorsement, he can transfer a title to an Indorsee, so that the latter may be entitled to receive payment thereof, or to sue any of the other parties to the bill. It has been held, that he can, since the indorsement is voidable only, and not void; and, therefore, until avoided by the Infant, the indorsement will be good, as to the other parties to the Bill.[3]

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[1] Bayley on Bills, ch. 2, § 2, p. 45, 46 (5th edit. 1830); Warwick *v.* Brull, 2 M. & Selw. 205; S. C. 6 Taunt. R. 118; Nightingale *v.* Withington, 15 Mass. R. 272; Holmes *v.* Blogg, 8 Taunt. R. 35.

[2] Ibid.

[3] Grey *v.* Cooper, 3 Doug. R. 65; Taylor *v.* Croker, 4 Esp. R. 187; Jones *v.* Darch, 4 Price, R. 300; Nightingale *v.* Withington, 15 Mass. R. 272; Bayley on Bills, ch. 2, § 2, p. 45, 46 (5th edit. 1830); Chitty on Bills, ch. 2, p. 23 (8th edit. 1833); Id. ch. 6, p. 224. — Lord Ellenborough seems to have thought, in the case of Taylor *v.* Croker, (4 Esp. R. 187,) that, even after notice by the Infant to the Acceptor not to pay, the Indorsee might recover against the Acceptor. But there seems great reason to doubt the correctness of that decision; at least, as applied to an indorsement made after the acceptance. Where the indorsement made is before the acceptance, or the Bill is drawn by an Infant, and afterwards accepted, with the knowledge, that the Drawer or Indorser is an Infant, there may be more room for doubt; since the acceptance, under such circumstances, may, in favor of the Indorsee, be properly held to be an affirmance of the competency and capacity of the Drawer or Indorser to do the act. See Chitty on Bills, ch. 2, p. 23 (8th edit. 1833); Drayton *v.* Dale, 2 B. & Cressw. 293, 299. In this last case, Mr. Justice Bayley said; "It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse an instrument, when he asserts, by the instrument, which he issues to the world, that the other has such power." In Pitt *v.* Chappelaw, (8 Mees. & Welsb. 616),

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§ 86. In some respects the foreign law differs from ours, as to the disabilities of persons, who are Minors or Infants. Minors are not, by the foreign law, positively incapable of making contracts, provided the contracts are beneficial to them. But all contracts, made by them, are liable to be rescinded; and the Minors are entitled to be reinstated in their original rights, if their contracts are injurious to them.[1] Contracts, by way of Bills of Exchange, or promissory notes, are generally deemed injurious to them. And, hence, it should seem, that Minors incur no absolute responsibility, and are incapable of binding themselves, either as Drawers or Indorsers of promissory notes, or Drawers, or Drawees, or Indorsers, of Bills of Exchange. But, in favor of commerce, inasmuch as Minors are permitted to engage in it, an exception is made of Minors, who are merchants, and they may become parties to, and bind themselves by, Bills of Exchange, and promissory notes, in their business and character, as merchants. Thus, Heineccius says; *Contra non obscurum est, rigori cambiali locum non esse adversus impuberes, et minorennes; illorum enim cambia plane nullius momenti sunt; his vero læsis competit beneficium restitutionis in integrum. Excepti tamen sunt minorennes, qui mercaturam exercent, quippe, qui in rebus ad mercaturam pertinentibus ne jure quidem communi in integrum restituuntur.*[2]

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where a Bill was drawn, payable to the order of a person, who was then a Bankrupt, which Bill was indorsed by the Bankrupt to an Indorsee, and accepted by the Drawee, it was held, that the Acceptor was, as between himself and the Indorsee, estopped to deny the competency of the Bankrupt to indorse the Bill.

[1] Pothier on Oblig. n. 52.

[2] Heinecc. de Camb. cap. 5, § 3 4, 6.

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§ 87. The same rule, with similar exceptions, has prevailed in France, from a very early period. It is expressly recognized in the Ordinance of 1673 (tit. 1, art. 6)[1]; and it has been since incorporated into the modern Codes of France.[2] The Civil Code declares, that Minors are incapable of contracting; but that they cannot, on account of their incapacity, impeach their contracts, except in cases provided for by law; and among these cases are those, where the contract is to their injury.[3] But, under certain limitations, Minors are permitted to engage in commerce; and, when they are so engaged, their contracts, made in the course of their business, bind them;[4] and, in an especial manner, Bills of Exchange drawn, indorsed, or accepted by them, in their commercial negotiations, will be obligatory upon them.[5] But Promissory Notes and Bills of Exchange drawn, indorsed, or accepted by Minors, who are not merchants or bankers, are, by the Code of Commerce, declared to be void, in respect to them; and, therefore, the remedial justice thereon is not now confined to cases, where the contract, created by the Bill or note, is injurious to them. There is a positive and absolute prohibition of their binding obligation in all cases.[6] This prohibition, however, does not extend

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[1] Jousse, sur L'Ord. 1673, tit. 1, art. 6, p. 10 (edit. 1802); Pothier de Change, n. 28; Pothier on Oblig. n. 49, 52.

[2] Code Civil of France, art. 1124, 1125, art. 1312; Code of Commerce, art. 114; Pothier de Change, n. 28; Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, art. 114, p. 356.

[3] Code Civil of France, art. 1124, 1125, 1312; Id. art. 483 to 487; Pardessus, Droit Comm. Tom. 1, art. 56 to 62.

[4] Code Civil of France, art. 487; Pardessus, Droit Comm. Tom. 1, art. 56 to 62.

[5] Ibid.

[6] Code of Comm. art. 112; Locré, Esprit de Comm. Tom. 1, Liv. 1, tit.

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beyond the protection of the Minor himself; and, therefore, the Bill or note, will bind all the other parties to it, not only in favor of the Minor, but also in respect to each other.[1]

§ 88. Within the like predicament, as Minors, persons fall, who, by the foreign or civil law, are interdicted, and rendered incapable of contracting by reason of prodigality; for, although such persons know, what they do, yet their consent is not deemed valid; and they are treated as persons, not *sui juris*, and, as having no reasonable discretion.[2] In some of the American States a similar rule prevails, as to persons, who are put under guardianship, by reason of their being addicted to habitual drunkenness; and, while that guardianship continues, they are incapable of making any valid contract, so as absolutely to bind themselves thereby.

§ 89. But although persons, who are interdicted, by the foreign and civil law, from managing their affairs, by reason of prodigality, are thus incapable of binding themselves by a contract; yet they are not, absolutely, incapable of contracting; for they may, like Minors, by contracting without the authority of their tutor, curator, or guardian, oblige others to them, although not oblige themselves to others. And this is, accordingly, laid down in the Institutes and Digest. *Namque placuit meliorem conditionem licere eis facere, etiam sine tutoris auctoritate.*[3] *Is, cui bonis interdictum est,*

8, § 1, art. 114, p. 356 to 366; Pardessus, Droit Comm. Tom. 1, art. 56 to 62.

[1] Locré, Esprit de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 112, p. 360; Pothier on Oblig. n. 52.

[2] Pothier on Oblig. n. 50 to 52.

[3] Inst. Lib. 1, tit. 21.

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stipulando sibi acquirit.[1] The reason is, that the power of tutors, curators, and guardians is established in favor of Minors and interdicted persons, and their assistance is necessary only for the interest of the persons under their charge, and from the apprehension of their being deceived; and, consequently, such assistance becomes superfluous, when, in fact, they make their condition better.[2]

§ 90. Secondly, as to married women. By the law of England and America a married woman is incapable, in any case, of becoming a party to a Bill of Exchange, so as to charge herself with any obligation whatsoever, ordinarily arising therefrom.[3] This results from her general disability to enter into any contract, under the Common Law; for, during the marriage, her very being or legal existence, as a distinct person, is suspended, or, at least, is incorporated and consolidated, into that of her husband.[4] There are certain exceptions, recognised by Courts of Equity, and by the custom of London, which it is unnecessary to advert to, since they have no manner of application, to the ordinary doctrines respecting Bills of Exchange.[5]

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[1] Dig. Lib. 45, tit. 1, l. 6.

[2] Ibid.; Pothier on Oblig. n. 52.

[3] Bayley on Bills, ch. 2, § 3, p. 47, 48 (5th edit. 1830); Chitty on Bills, ch. 2, p. 24 (8th edit. 1833); Id. ch. 6, p. 225; Edwards *v.* Davis, 16 John. R. 281; Com. Dig. Baron & Feme. Q.

[4] 1 Black. Comm. 442; 2 Story, Eq. Jurisp. § 1367; Bayley on Bills, ch. 2, § 3, p. 47, 48 (5th edit. 1830); Caudell *v.* Shaw, 4 Term R. 361; Co. Litt. 132, *b.* 133, *a;* Com. Dig. Baron & Feme. D. Q.

[5] See 2 Story on Eq. Jurisp. § 1367 to 1403; Chitty on Bills, ch. 2, § 1, p. 24, 25 (8th edit. 1833); Caudell *v.* Shaw, 4 Term R. 361; Beard *v.* Webb, 2 Bos. & Pull. 93; Stewart *v.* Lord Kirkwall, 3 Madd. R. 387. — In Equity, a married woman may contract with reference to her own property, secured to her separate use; and, therefore, she may accept a Bill of Exchange; and the same may become payable out of her separate property, although she cannot, otherwise, bind herself, personally, for the debt.

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It will, generally, make no difference, as to this disability of a married woman, at the Common Law, to bind herself by any obligation, as a party to a Bill of Exchange, that she is, at the time, living separate and apart from her husband;[1] or, that she has a separate maintenance secured to her;[2] or, that she has eloped, and is living, notoriously, in a state of adultery;[3] or, even, that she is separated from her husband by a decree of divorce, *a mensâ et thoro;* for nothing, but a divorce, *a vinculo matrimonii*, will restore her ability.[4]

Stewart *v.* Lord Kirkwall, 3 Madd. R. 387; 2 Story, Eq. Jurisp. § 1397; Francis *v.* Wigswell, 1 Madd. R. 258; Aylett *v.* Aston, 1 Mylne & Craig, 105, 111; Owens *v.* Dickinson, 1 Craig & Phillips, R. 48; Gardner *v.* Gardner, 22 Wend. R. 526.

[1] Marshall *v.* Rutton, 8 Term R. 545; Bayley on Bills, ch. 2, § 3, p. 48 (5th edit. 1830); Chitty on Bills, ch. 2, § 1, p. 24, 25 (8th edit. 1833); Hatchett *v.* Baddeley, 2 W. Black. R. 1079; Lean *v.* Shute, 2 W. Black. 1195, 1196; Hyde *v.* Price, 3 Ves. jr. 443.

[2] Ibid.

[3] Ibid.

[4] Ibid.; Co. Litt. 133, *a;* Lewis *v.* Lee, 3 Barn. & Cressw. 291; Faithorne *v.* Blaquire, 6 M. & Selw. 73. — In Massachusetts, a different rule prevails; for there, under the statutes, allowing a divorce, a mensâ et thoro, it has been held, that, although, after a decree of such a divorce, the husband's right to reduce into possession choses in action, which belonged to his wife, during the coverture, and prior to the divorce, remains; yet, after such divorce, she is to be treated as a feme sole, in respect to property, subsequently acquired on debts contracted by her. Dean *v.* Richmond (5 Pick. R. 461). Upon that occasion it was admitted, that the statute did not directly apply to the case. But Mr. Chief Justice Parker, in delivering the opinion of the Court, said; "But the question, which alone affects the present action, in regard to the capacity of the plaintiff to sue, appears not to have been settled, and that is, the effect of a divorce, a mensâ et thoro. Such a divorce does not dissolve the marriage, though it separates the parties, and establishes separate interests between them. By our statute, the wife, after such a divorce, is not only free from the control of the husband, but all her interest in real estate is restored to her; alimony is allowed her, out of the estate of her husband; and she is left to procure her own maintenance by her own labor, where the husband is unable to afford any alimony; which is the case in most instances of divorce of this nature. In addition to these burthens, she frequently has to support young

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§ 91. There are, indeed, some exceptions to the general rule, created by the Common Law, which stand upon peculiar grounds, and are quite consistent

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children, without any means but her own industry. Shall she not maintain an action, even against her husband, for alimony, which, though able, he may refuse to pay? May she not sue those who trespass upon her lands, or the tenants, who may withhold the rent, or for the earnings of her labor, or the specific articles of property she may have purchased with the savings of her alimony, her rents, or the rewards of her labor? If not, the law, instead of protecting her from the oppression, and abuse of power, of the husband, has merely released him from an inconvenient connexion, reserving to him the right to deprive her of all comfort and support. If she must join him in any action, he may release it; he may receive her rents, and discharge her tenants; he may seize all her necessary articles of furniture, and appropriate them to himself; and he may intercept the little fruits of her industry, which are absolutely necessary for her support. If the Common Law allows all this, and there is no relief, except by application to a Court of Equity, the Common Law is, indeed, most impotent; and, where there is no Court of Equity, as there is not, with us, to these purposes, the system is most iniquitous. But it is not so. The Common Law only prohibits actions by women, who have husbands alive, whose rights are not impaired by law, but by compact between them, the law recognising no authority to make such compacts. Where the law itself has separated them, and established separate interests, and separate property, it acknowledges no such absurdity, as to continue the power of the husband over every thing but the person of the wife. No case appears in the English books, and, without doubt, because the interests of the wife, so situated, may be taken care of in Chancery. In Bac. Abr. Baron & Feme. M., the editor, in the margin, puts the quære, whether a woman, divorced, a mensâ et thoro, may not be sued, without her husband; which is enough to show, that, until his time, there had been no decision to the contrary, and I do not find, that there has been any since. In a recently published book, which I trust, from the eminence of its author, and the merits of the work, will soon become of common reference in our Courts, (Kent's Commentaries, Vol. II. p. 136,) the learned author, after tracing the English authorities, upon the subject of liability of married women, living separate, and having maintenance, says; 'I should apprehend, that the wife could sue, and be sued, without her husband, when the separation between the husband and wife was by the act of the law, and that takes place not only in the case of a divorce, a mensâ et thoro, but also in the case of imprisonment of the husband, as a punishment for crimes. Such a separation may, in this respect, be equivalent to transportation for a limited time; and the sentence, which suspended the marital power, suspends the disability of

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with its application to ordinary cases. Thus, for example, if the husband has abjured the realm, or if he is deemed, in contemplation of law, to be civilly (although not naturally) dead, as, if he is, by a judicial sentence, or otherwise, banished, or transported for life, or for a term of years, or if he has, by a religious profession, renounced civil life, the disability of the wife is suspended, during that period, and her capacity to contract is restored.[1] So, a married woman, resident in any country, whose husband is an alien, and never has been in that country, has been held to be restored to the like capacity;[2] and *à fortiori*, the rule will apply, if he is an alien enemy.[3]

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the wife to act for herself, because she cannot have the authority of her husband, and is necessarily deprived of his protection.' So far as this opinion relates to the case of divorce, we fully concur with him, and are satisfied, that, although the marriage is not, to all purposes, dissolved by a divorce, a mensâ et thoro, it is so far suspended, that the wife may maintain her rights by suit, whether for injuries done to her person or property, or in regard to contracts, express or implied, arising after the divorce, and that she shall not be obliged to join her husband in such suit; and, to the same extent, she is liable to be sued alone, she being, to all legal intents, a feme sole, in regard to subjects of this nature. Such, however, is not the law of England, it having been recently decided, that coverture is a good plea, notwithstanding a divorce, a mensâ et thoro. Lewis *v.* Lee, 3 Barn. & Cressw. 291. But the difference in the administration of their law of divorce and ours, and the power of the Court of Chancery there, to protect the suffering party, will sufficiently account for the seeming rigor of their Common Law on this subject. If the husband is not liable for the debts of the wife, after a divorce, a mensâ, the chief reason for denying her the right to sue alone, fails." 5 Pick. R. p. 465 to 467.

[1] Hatchett *v.* Baddeley, 2 Wm. Black. 1079; Marshall *v.* Rutton, 8 Term R. 545; Bayley on Bills, ch. 2, § 3, p. 47, 48 (5th edit. 1830); Chitty on Bills, ch. 2, § 1, p. 24, 25 (8th edit. 1833); Bayley on Bills, ch. 2, § 3, p. 47, (5th edit.); Sparrow *v.* Carruthers, cited 1 Term R. 6; Co. Litt. 133 *a*, and Harg. note (3); Story on Partn. § 10; Carroll *v.* Blencow, 4 Esp. R. 27; Newson *v.* Bowen, 3 P. Will. 37.

[2] Kay *v.* Duchess de Pienne, 3 Camp. R. 123; Gregory *v.* Paul, 15 Mass. R. 31. See Gaillon *v.* L'Aigle, 1 Bos. & Pull. 357; Abbot *v.* Bayley, 6 Pick. R. 89.

[3] Derry *v.* Duchess of Mazarine, 1 Ld. Raym. 147.

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§ 92. With these exceptions, and others, which stand, or may stand, upon analogous grounds, the general rule prevails, that married women cannot bind themselves, personally, by contracts, to third persons; and consequently, they cannot bind themselves, as parties to any Bill of Exchange, either as Drawers, or as Indorsers, or as Acceptors. But, it by no means follows, that other parties may not be bound to them by, and under, such instruments, and that they may not, *sub modo*, possess or pass a title thereto, which shall be effectual between other persons and parties. They may certainly act as Agents of third persons, in drawing, indorsing, and accepting Bills of Exchange;[1] and they may bind their own husbands, as Drawers, or Indorsers, or Acceptors, if they act by their express authority, or with their implied consent and approbation. Thus, for example, the wife may draw, or indorse, or accept a Bill, in the name of her husband, with his express or implied consent.[2] On the other hand, if a note be made payable, or indorsed, to a married woman, or her order, whose husband is under no civil incapacity, it becomes immediately, by operation of law, payable to the husband, or his order;[3] and he may, at his election, indorse it, or negotiate it, or sue upon it, in his own name;[4] or, he may sue upon it in

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[1] Story on Agency, § 7, and the authorities there cited.

[2] Bayley on Bills, ch. 2, § 3, p. 48, 49 (5th edit. 1830); Smith *v.* Pedley, cited ibid.

[3] Bayley on Bills, ch. 2, § 3, p. 48, 49 (5th edit. 1830); Arnould *v.* Revoult, 1 Brod. & Bing. R. 443; Philliskirk *v.* Pluckwell, 2 M. & Selw. 393; Draper *v.* Jackson, 16 Mass. R. 480; Commonwealth *v.* Manley, 12 Pick. R. 173; Russell *v.* Brooks, 7 Pick. R. 65; Richards *v.* Richards, 2 Barn. & Adolph. 447.

[4] Ibid.; Burrough *v.* Moss, 10 B. & Cressw. 558; Mason *v.* Morgan, 2 Adolph. & Ellis, 30.

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the joint names of himself, and his wife;[1] or he may allow her to indorse, or negotiate it, in her own name. And, in this last case, it may be declared upon, either, as indorsed by her husband, or in her own name with his consent; and thus a good title may be acquired by the Indorsee against the husband, as well as against the other parties to the Bill.[2]

§ 93. Bills of Exchange, drawn or accepted by the wife before marriage, are binding upon her after the marriage, and both the husband and wife may be sued therefor by the Holder. Bills of Exchange, made before marriage, and payable to the wife, or her order, become, like other choses in action, the property of the husband, if he reduces them into possession during the coverture.[3] But, if they are not so reduced into possession, and the wife survives him, she will be entitled to them, in right of her survivorship.[4] On the other hand, if he survives her, and they are not reduced into possession before her death, then her personal representatives will be entitled to sue for them; but the husband will be entitled to the proceeds, when recov-

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[1] Ibid.; Richards *v.* Richards, 2 Barn. & Adolph. 447.

[2] Bayley on Bills, ch. 2, § 3, p. 47, 48 (5th edit. 1830); Chitty on Bills, ch. 2, § 1, p. 25 to 27 (8th edit. 1833); Id. ch. 6, p. 225; Barlow *v.* Bishop, 1 East, R. 432; Cotes *v.* Davis, 1 Camp. R. 485; Prestwick *v.* Marshall, 4 Carr. & Payne, 594; S. C. 7 Bingh. R. 565; Burrough *v.* Moss, 10 B. & Cresw. 558; Mason *v.* Morgan, 2 Adolph. & Ellis, 30.

[3] Richards *v.* Richards, 2 Barn. & Adolph. 447; Co. Litt. 351 *b*; Garforth *v.* Bradley, 2 Ves. 675; Betts *v.* Kimpton, 2 Barn. & Adolph. 273; Com. Dig. Baron & Feme, E. 3; McNeilage *v.* Holloway, 1 Barn. & Ald. 218; Legg *v.* Legg, 8 Mass. R. 99; Howes *v.* Bigelow, 13 Mass. R. 384; Dean *v.* Richmond, 5 Pick. R. 461; Chitty on Bills, ch. 6, p. 225 (8th edit. 1833); Id. ch. 2, § 1, p. 26, 27.

[4] Ibid.; Com. Dig. Baron & Feme, F. 1, 2; Draper *v.* Jackson, 16 Mass. R. 480; Stanwood *v.* Stanwood, 17 Mass. R. 57.

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ered, in right of his survivorship.[1] The same doctrine will apply throughout as to Bills of Exchange, and other choses in action, made and given to the wife after the coverture; with this distinction, applicable to such notes, and other choses in action, after the coverture, that the husband does not, by some overt act, such as bringing an action in his own name, or indorsing or assigning them, which are deemed equivalent to reducing them into possession, elect to hold them exclusively for his own use, and thus disagree to the interest of his wife therein.[2]

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[1] Betts *v.* Kimpton, 2 Barn. & Adolph. 273; Co. Litt. 351 *a*, and Mr. Butler's note; Cart *v.* Rees, 1 P. Will. R. 381.

[2] Richards *v.* Richards, 2 Barn. & Adolph. 273; Garforth *v.* Bradley, 2 Ves. 675; Dean *v.* Richmond, 5 Pick. R. 461; Galers *v.* Maderley, 6 Mees. & Welsb. 423; Chitty on Bills, ch. 6, p. 225 (8th edit. 1833); Id. ch. 2, § 1, p. 26, 27. — In McNeilage *v.* Holloway (1 Barn. & Ald. 218), it was held, that where a Bill of Exchange was made payable to a feme sole, or her order, before marriage, and she intermarried before the note became due, her husband might sue thereon in his own name, without joining his wife, although the latter had not indorsed the Bill. Upon that occasion, Mr. Justice Bayley said; "This being a negotiable security, the right of action shifts with the possession. Chattels personal, vest absolutely in the husband by marriage. Choses in action do not; for, in order to reduce them into possession, it is necessary to join the wife. The case of a negotiable security, is a middle case; whoever has the Instrument in his possession, and the legal right to it, may sue upon it in his own name. It differs, in this respect, from a Bond, and other securities not negotiable. By assigning a Bond, a right of suing only in the name of the Obligee is conferred. The Bill is payable to the wife, and the effect of the marriage is not to destroy the negotiability of the Instrument. In whom, then, will the power of indorsing vest? Certainly, not in the wife, for her power to do so is superseded by the marriage; then it must be in the husband. It may be said, that he could not indorse to himself: perhaps not; because, in that case, there would be no transfer; but, that must be on the ground of his having the entire interest in the Bill without indorsement. We break in upon no principle, therefore, by saying, that this is a species of property, in the possession of the wife, at the time of the marriage, which, by the act of marriage itself, vested in the husband." But this decision is open to much observation; and, indeed, it is plain, from the subsequent case of

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§ 94. We have already had occasion to state, that women are, generally, by the French law, disabled from binding themselves to absolute obligations, as Makers, or Indorsers, of Promissory Notes, or as Drawers, Indorsers, or Acceptors, of Bills of Exchange,

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Richards *v.* Richards, (2 Barn. & Adolph. 447, 453), that the Court were not entirely satisfied with that case as an authority. It may, indeed, as to the point, that a Bill is a personal chattel, and not a chose in action, be deemed entirely overruled by the late case of Galers *v.* Maderley, 6 Mees. & Welsb R. 423, where Mr. Baron Parke said; "A Promissory Note, is not a personal chattel in possession, but a chose in action of a peculiar nature; but which has, indeed, been made, by statute, assignable, and transferable, according to the custom of merchants, like a Bill of Exchange; yet, still, it is a chose in action, and nothing more. 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, if he thinks proper, he may take it himself; and, if, in this case, the husband had, in his lifetime, brought an action upon this note, in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part, to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is, and, in that case, the remedy on it survives to the wife, or, he may, according to the decision in Philliskirk *v.* Pluckwell, adopt another course, and join her name with his own; and, in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her. The only doubt in this case, arose from the observation of Lord Ellenborough, in McNeilage *v.* Holloway, that a Promissory Note may be treated as a personal chattel in possession. Now, in that respect, I think there was a mistake, and an incorrect expression used; but it was unnecessary for his Lordship to lay down such a doctrine, in order to decide the case then before him. In fact, the decision in the subsequent case of Richards *v.* Richards, has qualified that position. In that case, the Court of King's Bench, said, that a Promissory Note was, in the ordinary course of things, a chose in action, and that there was nothing to take it out of the common rule, that choses in action, given to the wife, survive to her after the death of her husband, unless he has reduced them into possession. The case of Nash *v.* Nash, is also an authority in favor of the position, that it survives to the wife; and, although that case was decided before McNeilage *v.* Holloway, it does not appear to have been cited in the latter case. I am of opinion, that the note must be considered as having survived to the wife, and her executor was, therefore, the proper person to sue." See, also, Com. Dig. Baron & Feme. V. W. X.; Moore *v.* Earle, 13 Wend. R. 271.

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unless they are regular merchants, and carry on trade, as such.[1] And this disability equally applies, whether they are married or unmarried, whether they are maidens, or widows. A married woman, therefore, who is not a regular merchant, is equally within the interdiction, whether she is authorized by her husband to do the act, or not;[2] for this interdiction is designed for her protection and safety against the ordinary and summary remedies against the person, and the property, which Bills of Exchange or Promissory Notes generally carry with them, under the French law.[3]

§ 95. We are not, however, to understand (as has been already suggested) from this statement, that, if an unmarried woman, or a married woman, with the authority and consent of her husband, not being a merchant, should sign, or indorse, or accept a Bill of Exchange, or Promissory Note, it would, by the French law, be an absolute nullity. But we are only to understand, that it will be reduced to the case of a simple promise on her part, which, in that law, imports, or may import, very different rights, remedies, and obligations.[4] For unmarried women, and married women, with the consent of their husbands, may enter, under ordinary circumstances, into a valid contract. The interdiction only applies, to prevent women, whether married or unmarried, from incurring the ordinary responsibilities of Drawers, Indorsers, or Acceptors, and from being subjected to the ordinary remedies, to en-

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[1] Ante, § 73; Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 113, p. 351 to 355; Code de Comm. art. 113.

[2] Ibid.

[3] Ibid. But see Pothier de Change, n. 28; Sautayra, Code de Comm. art. 113, p. 78, 79.

[4] Ante, § 73, note (3).

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force the rights of the Holder, against persons in that predicament. But this interdiction does not render a married woman incompetent to make Promissory Notes, or to draw, indorse, or accept Bills of Exchange, in the name of her husband, with his authority and consent; for, then, she is not personally bound; for such a Bill or note is treated as his personal contract, through the instrumentality of his agent.[1]

§ 96. But married women, who, with the consent of their husbands, carry on trade separately, as regular merchants, may bind themselves, as parties to Promissory Notes and Bills of Exchange, in the course of their business; but, as they cannot so engage in business, without such consent, it follows, that they cannot contract any valid engagements, even as merchants, where the consent of the husband is withheld, or he interdicts the engagement in trade.[2]

§ 97. But, although a Bill of Exchange, or promissory note, drawn under the circumstances above stated, may not be binding personally upon the woman herself, either as Drawer, or Indorser, or Acceptor; yet, as between the other parties to it, it may be of full force and obligation. Thus, if a Bill be drawn or indorsed by a woman, under circumstances of interdiction, still, if accepted, it may be binding between the Indorsee, or other Holder, and the Acceptor.[3] And, in like manner, a Promissory Note drawn or indorsed

[1] Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 113, p. 354; Pothier de Change, n. 28.

[2] Pardessus, Droit Comm. Tom. 1, art. 63, p. 311, 312; Code de Comm. art. 45; Code Civil of France, art. 220; Merlin, Répert. Lettre et Billet de Change, § 3, art. 6, p. 194, 195 (edit. 1827).

[3] Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 113, p. 355.

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by a woman under interdiction, will be binding between the other parties thereto.

§ 97. *a.* There seems to be another difference between our law and that of France, in respect to married women; and that is, that, as married women, by the French law, are incapable of contracting with other persons, without the consent and authority of their husbands, they cannot oblige other persons thereby to them, any more than they can oblige themselves to other persons; for they cannot, without the authority and consent of their husbands, contract in any manner, whether the contract be for their detriment, or for their benefit.[1] And, therefore, a Bill of Exchange, or Promissory Note, made payable to them, would not be obligatory in their favor; in which respect, the case differs from that of minors, and prodigals, under the French law.[2] But, in our law, such a Bill or Note would clearly be good in favor of the husband, who might adopt the act, and sue upon the Bill or Note in his own name.[3]

§ 98. Heineccius informs us, that, in the territories of Brunswick, women are strictly bound by the laws of Exchange; and in the other German provinces they are also only bound then, when they exercise the business of merchandise.[4] But, if authority is granted to women to carry on the business of money brokerage, regularly, they are not at liberty to engage in Exchange, unless under the guidance of a Curator, or other Administrator. And there is no doubt whatso-

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[1] Pothier on Obligations, n. 52.
[2] Ibid.
[3] Ante, § 86 to 89.
[4] Heinecc. de Jure Camb. cap. 5, § 5 to 7.

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ever, that, if a woman enters into a contract of Exchange for other persons, the contract is invalid.[1] Even when a woman is a merchant, she is not bound, as a party, except to Bills of Exchange, drawn in the course of her business, as such; which, however, will be presumed, unless the contrary is shown.[2] The same rules would probably apply to Promissory Notes made or indorsed by women under the like circumstances.

§ 99. Thirdly, as to Alien Enemies. The doctrine is now very clearly established, that a state of war between two countries interposes an absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing, between the subjects or citizens of the two countries.[3] It would be utterly incompatible with all the known rights and duties of the parties, to suffer individuals to carry on friendly and commercial intercourse with each other, while the governments, to which they respectively belonged, were in open hostility with each other; or, in other words, that the subjects or citizens should be at peace,

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[1] Ibid.

[2] Ibid.

[3] 1 Kent, Comm. Lect. 3, p. 66 to 69 (4th edit.); Potts *v.* Bell, 8 Term R. 548; Willison *v.* Patteson, 7 Taunt. R. 439; The Indian Chief, 3 Rob. R. 22; The Jonge Picter, 4 Rob. R. 49; The Franklin, 6 Rob. R. 127; The Venus, 4 Rob. R. 355; The Caroline, 6 Rob. R. 336; Griswold *v.* Waddington, 15 John R. 57; S. C. 16 John. R. 438; The Rapid, 8 Cranch, R. 155; The Julia, 8 Cranch, R. 181; Scholefield *v.* Eichelberger, 7 Peters, R. 580; Ex parte Boussmaker, 13 Ves. 71; Antoine *v.* Morshead, 6 Taunt. R. 237. — The masterly judgment of Mr. Chancellor Kent, in the Court of Errors, in the case of Griswold *v.* Waddington, 16 Johns. R. 438, examines, and exhausts, the whole learning upon this subject. There cannot, perhaps, be found, in the judicial annals of our country, any case, in which the resources of a great mind, acting upon the most comprehensive researches, have been more eminently, or successfully, displayed.

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while the nations were at war.[1] Upon this ground, the rule is now generally, if not universally, recognized, that all contracts made between the subjects or citizens of different countries, which are at war with each other, are utterly void; or, as the rule is often briefly expressed, Contracts made with an enemy are void.[2] They are not mere voidable; but they are, *ab origine*, void, and incapable of being enforced, or confirmed.[3] In this respect, they differ essentially from contracts made between the subjects of different countries in a time of peace; for a subsequent war between the countries does not avoid or extinguish those contracts; but only suspends the right to enforce them in the belligerent countries, by reason of the personal disability of alien enemies to sue or be sued. As soon, however, as peace is restored, the right revives, and these contracts retain, or reacquire all their original obligation, and may be enforced in the judicial tribunals of either country, as the parties then possess, what is technically called, a *persona standi in judicio*.[4]

§ 100. Hence, an alien enemy cannot, *flagrante bello*, draw a Bill upon a subject, belonging to the adverse country, or indorse a Bill to such a subject, or accept a Bill drawn by such a subject; for, in each case, as between the alien enemies, the contract is treated as utterly void, and founded in illegal commu-

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[1] Ibid.

[2] Ibid.

[3] Ibid.

[4] 1 Kent, Comm. Lect. 3, p. 67 to 69 (4th edit.); Griswold *v.* Waddington, 15 John R. 57; S. C. 16 John. R. 438; Potts *v.* Bell, 8 Term R. 548; Willison *v.* Patteson, 7 Taunt. R. 439; Scholefield *v.* Eichelberger, 7 Peters, R. 580; Antoine *v.* Morshead, 6 Taunt. R. 237; Flindt *v.* Waters, 15 East, R. 265; Ex parte Boussmaker, 13 Ves. 71.

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nication, intercourse, or trade.[1] The same rule applies to the purchase of Bills drawn on the enemy's country, and the remittance or deposit of funds there; and the buying or selling of Exchange there.[2] The same rule also applies to Promissory Notes made or indorsed to or by an alien enemy.

§ 101. But certain exceptions have been allowed, either as compatible with the principles, or as resulting from the very necessities and accidents, of war itself. Thus, a Bill of Exchange, or Promissory Note, drawn or negotiated in favor of any person, competent to sue, would, doubtless, be upheld, if it was given for the ransom of a captured ship; for such a ransom is upheld by the Law of Nations, as a sacred and inviolable contract, and, if not prohibited by some statute, would be deemed in a Court of Admiralty, acting under the Law of Nations, as entitled to be enforced.[3] So, if a person who is a prisoner of war, should draw or indorse a Bill, drawn upon a fellow subject, resident in his own country, or should make or indorse a Promissory Note, that Bill, or Note, whether made payable to an alien enemy, or indorsed to him, will be held valid, if it be made or indorsed to the alien enemy, for the purpose of obtaining necessaries and subsistence for the prisoner.[4] The ground of this exception must be, that

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[1] Ibid.

[2] Ibid.

[3] See Cornu v Blackburne, 2 Doug. R. 641; Anthon v. Fisher, 2 Doug. R. 649, note; Yates v. Hall, 1 Term R. 73; Maisonnaire v. Keating, 2 Gallis. R. 325; Ricord v. Bettingham, 3 Burr. R. 1734; Brandon v. Nesbill, 6 Term R. 1823; Puffendorf, de Jure Nat. et Gent. Lib. 8, cap. 7, § 14, and Barbeyrac's note; Vattel, B. 3, ch. 16, § 264.

[4] See Antoine v. Morshead, 9 Taunt. R. 237; Daubuz v. Morshead, 6 Taunt. R. 332. See, also, Duhammel v. Pickering, 2 Stark. R. 90; Bayley on Bills, ch. 2, § 9, p. 75, 76 (5th edit. 1830).

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it is in furtherance of the ordinary duty of every nation, not to suffer its own subjects to be deprived of the means of support and maintenance, by the strict application of principles, intended to guard against other public mischiefs; and that the allowance of such Bills or Notes for such objects can have no tendency to promote the interests of the enemy, or to foster any illegal or injurious commerce with the enemy.

§ 102. Another exception may fairly be deemed to exist in cases of cartel ships, where Bills or Notes are drawn and negotiated in the enemy's country, for purposes connected with the objects of the voyage; such as for necessary repairs, provisions, and other supplies. This class of laws may be presumed to stand upon the general ground of an implied license from both governments; and it does not differ, in its principles, from another class of cases, where there is an express license for the trade with the enemy, which exempts the party and the transactions from the taint of illegality, at least so far as concerns his own country, where the contract is to be enforced.[1]

§ 103. But there is no necessary incompatibility of duties, or obligations, arising from a state of war, to prevent a subject of a neutral country, being in the enemy's country, making or indorsing a Promissory Note, or from there drawing, or indorsing, or accepting, a Bill of Exchange, in favor of one of his fellow subjects, or of another neutral; for, in such a case, if the transaction is *bonâ fide*, and for neutral or legal objects, there is no principle upon which it ought to be held invalid.[2] A state of war does not suspend the

[1] Potts *v.* Bell, 8 Term R. 548.

[2] Houriet *v.* Morris, 3 Camp. R. 303; The Hoffnung, 2 Rob. R. 162; The Cosmopolite, 4 Rob. R. 8; The Clio, 6 Rob. R. 67.

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rights of commerce between neutrals, or the general obligations of contracts between persons, who are, in no just sense whatever, parties to the war, or acting in violation of the duties growing out of it.

§ 104. And here, again, the principle would seem to apply, that, although a Promissory Note or a Bill of Exchange, drawn, indorsed, or accepted, in favor of an alien enemy, may not be valid between them; yet, as between other parties to the Bill, or Note, it may have complete force and obligation; at least, if they are not parties to any original, intended, illegal, use of it, or have not participated in such illegal use. Thus, for example, if a Bill be drawn by an alien enemy upon the subject or citizen of the adverse country, in favor of a neutral, it will, subject to the limitation above stated, be good, in favor of the neutral, against the Drawer, and also against the Drawee, if he becomes the Acceptor. The same doctrine will apply to an indorsement of such a Bill by an alien enemy, in favor of a neutral, although it might be invalid between the original parties, or between them and the Acceptor; for there is nothing in the character of the neutral, which prevents him from receiving such a Bill, in the course of his own negotiations, or which deprives him of his ordinary character, or of his *persona standi in judicio*, to enforce the obligations created thereby, between him, and the other persons, with whom he is dealing. Similar considerations will apply to cases of Promissory Notes, *mutatis mutandis*.

§ 105. It need scarcely be added, that the disability of alien enemies to contract with each other during the war, is not a doctrine, founded in the peculiar municipal jurisprudence of England and America; but

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that it has its origin and confirmation in the Laws of Nations, and is approved by the most eminent Publicists, such as Grotius, and Puffendorf, and Vattel, and Bynkershoek.[1] The same exceptions of cases of positive moral necessity, such as cases of ransom, are also recognised, as belonging to the general doctrine, upon the ground stated by Vattel, that, when, by the accidents of war, a subject is placed in the hands of his enemy, so that he can neither receive his own sovereign's orders, nor enjoy his protection, he resumes his natural rights, and is to provide for his own safety by any just and honorable means. And hence, he adds, if that subject has promised a sum for his ransom, the sovereign, so far from having a power to discharge him from his promise, should oblige him to perform it.[2]

§ 106. Fourthly. As to persons insane, or imbecile in mind. A few words will suffice upon the disability of all persons, in this predicament, to bind themselves as Drawers, Indorsers, or Acceptors of Bills of Exchange.[3] This disability flows from the most obvious principles of natural justice. Every contract presupposes, that it is founded in the free and voluntary consent of each of the parties, upon a valuable consideration, and after a deliberate knowledge of its character and obligation. Neither of these predicaments can

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[1] Grotius, de Jure Bell. et. Pac. Lib. 3, ch. 23, § 5; Puffendorf, de Jure Nat. & Gent. Lib. 8, ch. 7; 14 Vattel, B 3, ch. 16, § 264; Bynk. Ques. Pub. Jur. B. 1, ch. 3; Heinecc. Exerc. 30, De Jur. Princ. circa Commerc. § 12, Tom. 2, Pars 2, p. 98 (edit. Genev. 1766).

[2] Vattel, B. 3, ch. 16, § 264; Griswold v. Waddington, 16 John. R. 451.

[3] See Baxter v. Ld. Portsmouth, 5 B. & Cressw. 170; 2 Black. Comm. 291, 292; Pitt v. Smith, 3 Camp. R. 33, 34; Chitty on Bills, ch. 2, § 1, p. 21 (8th edit. 1830); Brown v. Joddrell, 3 Carr. & Payne, 30; Sentance v. Poole, 3 Carr. & Payne, 1; Peaslee v. Robbins, 3 Metc. R. 164.

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properly belong to a lunatic, an idiot, or other person, *non compos mentis*, from age, or imbecility, or personal infirmity. Hence, it is a rule, not merely of municipal law, but of universal law, that the contracts of all such persons are utterly void.[1] The Roman law, in expressive terms, adopted this doctrine. *Furiosus nullum negotium gerere potest, quia non intelligit, quod agit.*[2]

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[1] Puffendorf, Law of Nat. & Nat. B. 3, ch. 6, § 3, and Barbeyrac's note; Grotius, de Jure Bell. et Pac. Lib. 2, ch. 11, § 4, 5; 1 Fonbl Eq. B. 1, ch. 2, § 1, and note (*a*); Id. § 3; 1 Story, Eq. Jurisp. § 222; Ersk. Inst. B. 3, tit. 1, § 16; 1 Bell, Comm. B. 2, Pt. 2, ch. 8, p. 132; Id. B. 3, Pt. 1, ch. 1, p. 294, 295 (5th edit.).

[2] Inst. Lib. 3, tit. 20, § 8; Dig. Lib. 50, tit. 17, l. 5, 40, 124.

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CHAPTER V.

RIGHTS, DUTIES, AND OBLIGATIONS OF PARTIES TO BILLS OF EXCHANGE.

§ 107. We come, in the next place, in the order of our subject, to the consideration of the rights, duties, and obligations of the parties to Bills of Exchange. And, first, the rights, duties, and obligations of the Drawer. The drawing of a Bill of Exchange implies, on the part of the Drawer, an undertaking to the Payee, and to every other person, to whom the Bill may afterwards be transferred, that the Drawee is a person capable of making himself responsible for the due payment thereof; that he shall, upon due presentment, if applied to for the purpose, express, in writing, upon the face of the Bill, an acceptance, or undertaking to pay the same, when it shall become payable; that he, the Acceptor, shall pay the same, when it becomes payable, upon due presentment thereof for that purpose; and that, if the Drawee shall not accept it, when so presented, or shall not so pay it, when it becomes payable, and the Payee, or other Holder, shall give him, the Drawer, due notice thereof, then he will pay the sum or amount, stated in the Bill, to the Payee, or other Holder, together with such damages, as the law prescribes or allows in such cases, as an indemnity.[1] Where a Bill is drawn, payable to the Bearer, similar obligations arise, on the part of the

[1] See Bayley on Bills, ch. 1, § 15, p. 43 (5th edit. 1830). See Pothier de Change, n. 58 to 71; Heinecc. de Camb. cap. 4, § 23 to 25.

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Drawer, as if it were payable to order; for the Bearer, if he is the original party, to whom it is delivered, is to be treated as a Payee; and if he is a subsequent Holder, he succeeds to all the rights of a Holder under the Payee.

§ 108. Secondly. As to the rights, duties, and obligations of the Payee and Indorser. So long as the Bill remains in the ownership and possession of the Payee, his undertaking is limited to the mere duty of presenting the Bill for acceptance and payment within the proper time, and of giving notice of the refusal of the Drawee to accept, or to pay the Bill, to the Drawer within the time prescribed by law; on failure of either of which, the Drawer is exonerated from all liability on the Bill.[1] But, as soon as the Payee indorses the Bill, his undertaking assumes a much broader character and extent. The indorsement of a Bill by the Payee, or by any subsequent Holder, implies an undertaking from the Payee or other Indorser, to the person, in whose favor it is made, and to every other person, to whom the Bill may afterwards be transferred, exactly similar to that, which is implied on the part of the Drawer, by drawing the Bill.[2] Precisely the same doctrine is laid down by Pothier, as recognised in the French law.[3] In respect to the obligations of the Indorser to the person, to whom he transfers the Bill, it

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[1] See Bayley on Bills, ch. 7, § 1, p. 217 (5th edit. 1830); Id. ch 9, p. 363 to 370; Chitty on Bills, ch. 5, p. 200 to 204 (8th edit. 1833); Id. ch. 6, p. 266, 267; Camidge v. Allenby, 6 Barn. & Cressw. 373, 382, 383; Bolton v. Richard, 6 Term R. 139.

[2] Bayley on Bills, ch. 5, § 3, p. 169; Chitty on Bills, ch. 6, p. 264 to 267 (8th edit. 1833); Ballingalls v. Gloster, 3 East, 483; Van Staphorst v. Pearce, 4 Mass. R. 258.

[3] Pothier de Change, n. 79.

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makes no difference, whether the Bill be originally negotiable, or not.[1]

§ 109. Where a Bill is payable to the Bearer, or, being payable to the Payee or order, it is indorsed in blank, and afterwards is transferred by the Holder by mere delivery thereof, without any indorsement, such Holder is not responsible thereon to the immediate party, to whom he delivers the same, or to any subsequent Holder, upon the dishonor thereof; for no person, whose name is not on the Bill, as a party thereto, is liable on the Bill, and he cannot be deemed to undertake any of the obligations of a Drawer or Indorser.[2] By not indorsing it, he is generally understood to mean, that he will not be responsible upon it.[3] If, indeed, he undertakes to guaranty the payment of the Bill upon such delivery or transfer, he may be liable upon such special contract;[4] but that is collateral to the obligations created by the Bill, and is ordinarily limited to the immediate parties thereto.[5] In like manner, if the Bill, in such a case, is received by the party, to whom it is delivered, as conditional payment of a precedent debt due to him, or as a conditional satisfaction for any other valuable consideration, then paid by him, the Holder, who delivered it, will, if the Bill be duly presented and dishonored, and due notice

[1] Chitty on Bills, ch. 6, p. 267 (8th edit. 1833); Hill v. Lewis, 1 Salk. 132.

[2] See Bayley on Bills, ch. 9, p. 368, 369 (5th edit. 1830); Chitty on Bills, ch. 5, p. 197, 200, 201 (8th edit. 1833); Id. ch. 6, p. 262, 269 to 273.

[3] Fenn v. Harrison, 3 Term R. 750.

[4] Chitty on Bills, ch. 16, p. 269, 270, 272 (8th edit. 1833); Morris v. Stacey, Holt, N. P. R. 153.

[5] Chitty on Bills, ch. 6, p. 268 to 271 (8th edit. 1833); In the matter of Barrington and Barton, 2 Sch. & Lefr. 112.

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thereof be given to him, be responsible to pay back the full amount of the precedent debt, or valuable consideration, although not directly sueable as a party to the Bill.[1] On the other hand, the party, receiving the same, is bound, under such circumstances, to make due presentment of the Bill, and to give due notice of the dishonor; otherwise, by his laches, he makes the Bill his own, and discharges the party, from whom he received it, from all liability for any loss sustained thereby.[2] But this we shall presently have occasion to state in more general terms.

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[1] Chitty on Bills, ch. 5, p. 200 to 202 (8th edit. 1833); Id. p. 268 to 271; Bayley on Bills, ch. 9, p. 363 to 368 (5th edit. 1830); Ex parte Blackburn, 10 Ves. 209; Owenson v. Morse, 7 Term R. 64; Brown v. Kewley, 2 Bos. & Pull. 518; Ward v. Evans, 2 Ld. Raym. 928; Puckford v. Maxwell, 6 Term R. 52; Tapley v. Martens, 8 Term R. 451; Robinson v. Read, 9 Barn. & Cressw. 449; Emly v. Lye, 15 East, R. 13; Ex parte Dickson, cited 6 Term R. 142.

[2] Ibid. — In Bayley on Bills, ch. 5, § 3, p. 169 (5th edit. 1830), it is said; "And a transfer, by delivery only, if made on account of an antecedent debt, implies a similar undertaking, from the party making it, to the person, in whose favor it is made." That is, an undertaking similar to that of an Indorser, or Drawer, of a Bill. But this is manifestly incorrect. Mr. Chitty, in his 8th edit. 1833, quite as inaccurately stated the same position; but afterward immediately corrected it in his text; and stated, what is now the well considered and established doctrine. In his 9th edit. 1810, he says; "It has been said, that a transfer by mere delivery, without any indorsement, when made on account of a preëxisting debt, or for a valuable consideration, passing to the Assignor, at the time of the assignment, (and not merely by way of sale or exchange of paper,) as where goods are sold to him, imposes an obligation on the person making it to the immediate person, in whose favor it is made, equivalent to that of a transfer by formal indorsement. But this expression seems incorrect; for the party, transferring only by delivery, can never be sued upon the Instrument, either as if he were an Indorser, or as having guaranteed its payment, unless he expressly did so. The expression should be, 'that, if the instrument should be dishonored, the transferrer, in such case, is liable to pay the debt, in respect of which he transferred it, provided it has been presented for payment in due time, and that due notice be given to him, of the dishonor' A distinction was once taken between the transfer of a Bill, or Check, for a precedent

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§ 110. Another engagement, implied in every indorsement, on the part of the Indorser, is, that all the antecedent parties upon the Bill, whether Drawers or Indorsers, are persons having competent authority to draw and indorse the same; that the Indorser has, in virtue thereof, a good title to the Bill; and that he has a right to convey the same by his indorsement, and according to the tenor thereof. If any of the antecedent parties have acted by an agent by procuration, the indorsement imports, that such agent has due authority so to act, at least, unless the other circumstances of the case repel that conclusion.[1]

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debt, and for a debt, arising at the time of the transfer; and it was held, that, if A. bought goods of B., and, at the same time, gave him a draft on a Banker, which B. took, without any objection, it would amount to payment by A., and B. could not resort to him, in the event of a failure of the Banker. But it is now settled, that, in such case, unless it was expressly agreed, at the time of the transfer, that the Assignee should take the instrument assigned, as payment, and run the risk of its being paid, he may, in case of default of payment by the Drawee, maintain an action against the Assignor, on the consideration of the transfer. And, where a debtor, in payment of goods, gives an order to pay the Bearer the amount in Bills on London, and the party takes Bills for the amount, he will not, unless guilty of laches, discharge the original debtor." Chitty on Bills, ch. 6, p. 268, 269 (8th edit. 1833); Id. p. 1, ch. 6, § 244 (9th edit.); Camidge *v.* Allenby, 6 Barn. & Cressw. 373.

[1] Mr. Chitty seems to think otherwise; but I think, that the authorities, cited by him, do not support him. His language is; "It has been contended, that an indorsement is equivalent to a warranty, that the prior indorsements were made by persons having competent authority. But the Court seemed to deny that doctrine; and, though an indorsement admits all prior indorsements to have been, in fact, duly made, yet an Indorser, by his indorsement, merely engages, that the Drawee will pay, or, that he, the Indorser, will, on his default, and due notice thereof, pay the same, and which is the extent and limit of his implied contract." Chitty on Bills, ch. 6, p. 266 (8th edit. 1833). He cites East India Company *v.* Tritton, 3 Barn. & Cressw. 280, and the opinion of Chambre, J., in Smith *v* Mercer, 6 Taunt. R. 83. The former case was decided upon an independent ground, that the party accepted the Bill, with a knowledge of what the agent's authority was, and mistook its legal effect. The

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§ 111. There is yet another engagement, which is implied in every indorsement, on the part of the Indorser. It is, that the Instrument, which he indorses, is a genuine Instrument, and not forged; that the signature of the Drawer, and, also, of the antecedent Indorsers, are genuine; and that he, the Indorser, has a good right to transfer the same to the immediate Indorsee.[1] The same doctrine, as to the genuineness of the Bill, equally applies, where a Bill is payable to Bearer, and is passed by delivery to a third person, for a valuable consideration; for, in such a case, there is an implied undertaking of the party, passing the same, to the immediate Holder under him, that the Bill is genuine.[2] In each case, however, the presumption

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latter turned upon the point, that the Bill was paid by the plaintiff, as agent of the supposed Acceptor, whose acceptance was forged; and both parties were equally innocent; and the plaintiff's name was not on the Bill. In Bayley on Bills, ch. 5, p. 170 (5th edit. 1833), it is laid down, that "An indorsement is no warranty, that the prior indorsements are genuine." But, for this position, the sole reliance is on the case of East India Company *v.* Tritton. In the case of Jones *v.* Ryde, 5 Taunt. R. 488, there was a forgery, by altering the Bill from £800 to £1800. The Court held, that the plaintiff, who had sold the Bill as one for £1800, and who had paid the amount of the difference to his Vendee (£1000), was entitled to recover, from his own Vendor, the like amount. In Lambert *v.* Pack, 1 Salk. 127; Critchlow *v.* Parry, 2 Camp. 185; Free *v.* Hawkings, Holt, N. P. R 550, it was decided, that an indorsement admitted the signatures of the Drawer and other Indorsers. If so, does it not necessarily admit the genuineness thereof? See Chitty on Bills, Pt. 2, ch. 5, p. 635, 636 (8th edit. 1833). In the French law, Pardessus says, that the Indorser warrants, with the other persons, whose names are on the Bill, the genuineness of the Bill (la vérité de la Lettre). Pardessus, Droit Comm. Tom. 2, art. 347.

[1] Bayley on Bills, ch. 5, § 3, p. 170 (5th edit. 1830); Chitty on Bills, ch. 6, p. 269, 270 (8th edit. 1833); Jones *v.* Ryde, 5 Taunt. R. 488; Bruce *v.* Bruce, 1 Marsh. R. 165. But see what is said by Bayley and Littledale, Js., in East India Company *v.* Tritton, 3 Barn. & Cressw. 289 to 291; Post, § 225, 262.

[2] Bayley on Bills, ch. 5, § 3, p. 170 (5th edit. 1830); Chitty on Bills,

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may be repelled by circumstances; as, by showing, that the Bill was taken under an express or implied agreement, that the Holder should take it at his own risk.[1]

§ 112. Thirdly. As to the rights, duties, and obligations of the Indorsee, Receiver, or other Holder, of a Bill of Exchange. The receipt of a Bill implies an undertaking, on the part of the Indorsee, Receiver, or other Holder, to every other party to the Bill, who would be bound to pay it, and would be entitled to bring an action on paying it, to present it in proper time, when necessary, for acceptance, and, at maturity, for payment; to allow no extra time, and grant no indulgence, for payment; to give notice, without delay, to every such party, of a failure in the attempt to procure acceptance, or payment; and to take all the proper steps, (such as making a protest,) and do all the proper acts, required by law, upon such dis-

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ch. 6, p. 269 to 271 (8th edit. 1833); Markle *v.* Hatfield, 2 Johns. R. 255; Eagle Bank of New Haven *v.* Smith, 5 Conn. R. 71; Young *v.* Adams, 6 Mass. R. 182; Jones *v.* Ryde, 5 Taunt. R. 488; Bruce *v.* Bruce, 1 Marsh. R. 165; Wilkinson *v.* Johnson, 3 Barn. & Cressw. 428.

[1] Ibid.; Bayley on Bills, ch. 9, p. 364 to 366; Id. ch. 9, p. 396 to 410 (2d Amer. edit. 1836), and Notes of the Editors. — If a Bill be passed, by delivery merely, by a person, who knows, that the parties thereto are insolvent, and he conceals the fact from the person, to whom he passes it, it will be treated as a fraud upon the latter; and the consideration may be recovered back again. Chitty on Bills, ch. 6, p. 271 (8th edit. 1833); Camidge *v.* Allenby, 6 Barn. & Cressw. 373, 382. But, if both the person, who passes, and the person, who receives, the Bill, are equally ignorant, that the parties are, at the time, insolvent, and equally innocent, the question may then arise, as to which is to bear the loss. Mr. Chitty inclines to think, that the loss must be borne by the person, who passes the Bill, if it has been passed by way of discount, and not by way of sale. But he puts a quære to the statement. Chitty, ubi supra, p. 271. This point does not appear to have been directly decided. But see Beeching *v.* Gower, Holt's N. P. R. 313, and Camidge *v.* Allenby, 6 Barn. & Cressw. 372, 383, 384; Post, § 225, 425.

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honor, to verify and establish the same.[1] A default, in any of these respects, will discharge the party, in respect to whom there has been any such default, and who, otherwise, would be bound to pay the same, from all responsibility on account of the non-acceptance, or non-payment, of the Bill, and will operate as a satisfaction of any debt or demand, for which it was given.[2] The French law includes obligations of nearly a similar import, although not, in all respects, identical.[3]

§ 113. Fourthly. As to the rights, duties, and obligations of an Acceptor. An acceptance admits the genuineness of the signature, and the competence of the Drawer of the Bill.[4] It imports an engagement, upon the part of the Acceptor, to the Payee, or other lawful Holder thereof, to pay the Bill according to the tenor of the acceptance, when it becomes due, upon due presentment thereof.[5] In some cases, also, the Drawee, or Acceptor, may incur obligations to the Drawer, not only to accept the Bill, but, also, to pay it at maturity. Thus, if he has agreed to accept the Bill, whether he has funds or not, and it is drawn on the faith thereof, and, afterwards, he refuses to accept it, or if, having accepted, he refuses, at its maturity, to pay it, he will be bound to indemnify the Drawer,

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[1] Bayley on Bills, ch. 7, § 1, p. 217 (5th edit. 1830); Id. § 2, p. 252 to 313; Heinecc. de Camb. cap. 4, § 26.

[2] Ibid.

[3] Pothier de Change, n. 72 to 75; Post, § 118, 119.

[4] Price *v.* Neale, 2 Burr. 1354; Bayley on Bills, ch. 8, p. 318, 319 (5th edit. 1830); Heinecc. de Camb. ch. 4, § 26 to 29; S. P. Bank of U. S. *v.* Bank of Georgia, 10 Wheat. R. 333; Post, § 262; Saunderson *v.* Coleman, 4 Scott, R. 638; Belknap *v.* Davis, 1 Appleton, R. 435.

[5] Bayley on Bills, ch. 6, p. 171, 172 (5th edit. 1830); Chitty on Bills, ch. 7, § 2, p. 307, 308 (8th edit. 1833).

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for all losses and expenses, which he may have incurred thereby. But, if the Bill be drawn without funds in the hands of the Drawee, and without any such agreement to accept, then the Drawer must bear all the losses and expenses, incurred as well by reason of the non-acceptance, as the non-payment.

§ 114. In all these cases, Heineccius has deduced nearly similar obligations, as belonging to the general foreign law of Exchange. Thus, he says, that the Drawer (*Trassans*) incurs an obligation to the Payee (*Remittens*), and his Indorsee (*Indossatarius*), to pay the amount, and indemnify the party, if the Bill is either not accepted, or not paid, if the proper protest is made. *Deinde ipse etiam trassans obligatur tum remittenti, tum præsentanti, vel ejusdem indossatario, ad restituendam pecuniam, præstandamque indemnitatem, si cambium vel acceptatum non sit, vel non solutum; quamvis utroque casu interposita protestatione opus sit, qua neglecta, obligatio ista omnino exspirat.*[1]

§ 115. In like manner, the Drawee (Trassatus), by his acceptance, engages to pay to the Holder, whether the Payee or Indorsee, the full amount of the Bill at maturity; and, if he does not, the Holder has a right of action against him, as well as against the Drawer. *Trassati obligatio ex acceptatione demum nascitur, et tunc dubium non est, illum tum a præsentante, tum ab indossatario conveniri posse. Et quamvis in utriusque arbitrio sit, adversus trassatum agere malit, an adversus trassantem; posterius tamen vel ideo plerumque fieri solet, quia denegata cambii acceptati solutio argumentum*

[1] Heinecc. de Camb. cap. 6, § 4; Id. cap. 3, § 6.

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plerumque evidentissimum est, trassatum foro cessurum, et jam tum non amplius solvendo esse.[1]

§ 116. So, the Payee, by his indorsement of the Bill, incurs the same obligations to his Indorsee, as the Drawer does. *Is, qui cambium alicui ita cessit, ut valutam a cessionario receperit, huic omnino semper obligatus est, adeoque cessionarius vel indossatarius actionem habet adversus indossantem ad recuperandam sortem, proxeneticum, damna, et impensas, modo protestationem rite interposuerit.*[2]

§ 117. Ordinarily, between the Drawer and the Drawee no direct obligation arises, unless under special circumstances, as where the Drawee has engaged to honor the Bill. *Id quæritur, num trassatus etiam a trassante conveniri possit, si is cambium non acceptarit, ac proinde illud una cum interposita protestatione redierit? Id quod regulariter negatur, quia acceptatio, ceu supra diximus, est res meri arbitrii. Pauci tamen sunt casus, quibus et trassatus ob cambium non honoratum potest conveniri.*[3]

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[1] Heinecc. de Camb. cap. 6, § 5.

[2] Heinecc. de Camb. cap. 6, § 7; Id cap. 3, § 15 to 17.

[3] Heinecc. de Camb. cap. 6, § 6.—In a preceding page, Heineccius has enumerated several obligations, arising between the Drawer and Drawee. "Alter initur inter trassantem et eum, cui solutio injungitur. Hic vero contractus vere in mandato consistit, quia acceptans, suscepto illo mandato, ad solvendum, adeoque ad negotium alienum explicandum, obligatur. Ex quo sequitur, (1.) Ut tertius, cui solutio injungitur, cambium acceptare invitus non teneatur; (2.) Ut semel illo acceptato obstrictus sit ad solutionem; (3.) Ut hoc, tamquam mandatario, solutionem denegante, et interposita protestatione, regressus adversus mandantem pateat; (4.) Ut acceptans, tamquam mandatarius, fines mandati non egredi, adeoque nec ante tempus, nec ante conditionem litteris expressam, nec alia moneta, quam ipsi præscriptum, solvere possit. Quandoquidem vero et mandans mandatarium indemnem præstare tenetur; ita facile patet; (5.) Acceptantem, tamquam mandatarium, soluta pecunia, refusionem ejus cum usuris a trassante recte exigere, et, (6.) Ab ignotis cambia acceptare non solere,

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§ 118. By the old French law, similar obligations, with some not very important distinctions, subsist between all the parties.[1] Pothier says, that the Drawer contracts an obligation with the Payee, and every subsequent Indorsee, to pay him damages and interest, in case of default of payment of the Bill, at maturity and due protest, or, at the election of the Payee or Indorsee, to restore the amount given for the Bill; and this he founds upon the rule of the Roman law: *Id veniet, non ut reddas, quod acceperis, sed ut dammeris mihi quanti interest mea illud, de quo convenit accipere; vel si meum recipere velim, repetatur, quod datum est, quasi ob rem datum, re non secutâ.*[2] He adds, also, that the Drawer is, in many cases, bound to furnish reëxchange, of which we shall hereafter speak.[3] In like manner, the Payee or Indorsee contracts an obligation on his part, to the Drawer, to present the Bill for payment at maturity, and, if payment is refused, to protest the Bill, and give due notice thereof to the Drawer; in default of which, the Payee is bound to indemnify the Drawer, for all losses, which he may have sustained, of the funds drawn for.[4] But it seems, that the Payee is not bound to present the Bill for acceptance, but only for payment, at the time

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nisi in antecessum sciat, quomodo sibi sine ambagibus satis facturus sit trassans. Quo comparatæ sunt litteræ, quas mercatores *advisorias* adpellare solent." Heinecc. de Camb. cap. 3, § 11 to 13.

[1] Pothier de Change, n. 61 to 63, 67, 69.

[2] Pothier de Change, n. 60, 62, 63, 68; Dig. Lib. 19, art. 5, l. 5, § 1; Pothier, Pand. Lib. 19, art. 5, n. 5; Pardessus, Droit Comm. Tom. 1, art. 375.

[3] Pothier de Change, n. 64.

[4] Pothier de Change, n. 74.

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it becomes due, if the time of payment is fixed;[1] otherwise, he ought to present it for acceptance.[2]

§ 119. As between the Payee and the Indorsee, the indorsement creates the like obligation, as exists between the Drawer and Payee; and, indeed, in such a case, the Payee, and every subsequent Indorser, becomes a Drawer.[3] As between the Drawer and the Drawee, the Bill creates only the obligation of a mandate to pay money,—*mandatum solvendæ pecuniæ*,—which may arise, either from an express contract to accept, or from one implied by law, as where the Drawee is the Banker of the Drawer, and has funds in his hands. Under such circumstances, he is bound to accept and pay the Bill; otherwise, he will be compellable to indemnify the Drawer for any loss sustained by his refusal.[4] And, on the other hand, the Drawer is bound to indemnify the Drawee, for his acceptance and payment of the Bill, if he has not funds in his hands, or the Drawer has failed to furnish them, at the maturity of the Bill.[5] As between the Payee and every subsequent Indorsee or Holder, the Acceptor contracts an obligation, by his acceptance, to pay the Bill, at maturity, according to the tenor thereof; and this obligation he incurs conjointly and *in solido* with the Drawer.[6]

§ 120. Such are some of the principal obligations

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[1] Pothier de Change, n. 75.

[2] Pardessus, Droit Comm. Tom. 2, art. 358.

[3] Pothier de Change, n. 79.

[4] Pothier de Change, n. 91, 93 to 95; Pardessus, Droit Comm. Tom. 2, art. 361, 379.

[5] Pothier de Change, n. 97, 98; Pardessus, Droit Comm. Tom. 2, art. 379, 380.

[6] Pothier de Change, n. 115 to 117; Pardessus, Droit Comm. Tom. 2, art. 376.

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created by the old French law, between the various parties to a Bill. The modern Code of Commerce has expressed all these obligations in a few words. It declares; "All those, who have signed, accepted, or indorsed a Bill of Exchange, are jointly and severally bound, as sureties, to the Holder."[1] "The Drawer and Indorsers of a Bill of Exchange are joint and several sureties for the acceptance and payment of the Bill at maturity."[2]

§ 121. Such are the ordinary engagements between the various parties to a Bill of Exchange, according to our law, and to the general foreign Commercial law. But, in certain cases, according to the custom of merchants, adopted into Commercial law, third persons, who are mere strangers, may sometimes intervene, and make themselves parties to the Bill, and incur responsibilities, as well as acquire rights, thereby. This takes place in the ordinary case of what is called an acceptance for the honor of one, or more, or all the parties to a Bill. An acceptance is seldom made, until after the Bill is drawn; and, if, when it is presented for acceptance, the Drawee refuses to accept the same, or has absconded, or cannot be found, or is incapable of making himself responsible, and the Bill is, thereupon, (as it should be,)[3] protested by the Holder, any stranger may, by the Law Merchant, intervene, and accept the Bill, for the honor of the

[1] Code de Comm. art. 140; Locré, Esprit de Comm. art. 140, Tom. 1, p. 444.

[2] Code de Comm. art. 118; Locré, Esprit de Comm. Tom. 1, art. 118, p. 385.

[3] Beawes, Lex Merc. by Chitty, Vol. 1, p. 568, § 38 (edit. 1813); Kyd on Bills, p. 153 (3d edit.); Bayley on Bills, ch. 6, § 1, p. 177, 180 (5th edit. 1830); 3 Kent, Comm. Lect. 44, p. 87, 88 (4th edit.); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 424 (5th edit.).

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Drawer, or of the Indorsers, or of the Drawee, or of any, or all of them; and this is called an acceptance *supra protest*, for the honor of the party, or parties. The like proceeding may take place, where the Drawee is insolvent, and the Holder protests the Bill for better security;[2] or, where the Bill, after acceptance, is not paid at maturity, and is protested for non-payment.[3]

§ 122. The policy of the rule, granting these privileges to the Acceptor *supra protest*, is, to induce the friends of the Drawer or Indorser to render them this service, for the benefit of commerce, and the credit of the trader; and a third person interposes, only, when the Drawee will not accept. There can be no other Acceptor, after a general acceptance by the Drawee. A third person may become liable on his collateral undertaking, as guarantying the credit of the Drawee; but he will not be liable in the character of Acceptor. It is said, however, that, when the Bill has been accepted *supra protest*, for the honor of one party to the Bill, it may, by another individual, be accepted *supra protest*, for the honor of another. The Holder is not bound to take an acceptance *supra protest;* but he would be bound to accept an offer to pay *supra protest.* The protest is necessary, and should precede the col-

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[1] Kyd on Bills, p. 152 to 155 (3d edit.); Bayley on Bills, ch. 6, § 1, p. 177 to 180 (5th edit 1830); Chitty on Bills, ch. 2, p. 30 (8th edit. 1833); Id. ch. 8, § 2, 3, p. 374 to 383; Beawes, Lex Merc. by Chitty, Vol. 1, p. 568 to 570, § 34 to 60 (edit. 1813); Molloy, B. 2, ch. 10, § 33; 3 Kent, Comm. Lect. 44, p. 87 (4th edit.); Heinecc. de Camb. cap. 2, § 10.

[2] Ibid.; Ex parte Wackerbarth, 5 Ves. 574; Ex parte Lambert, 13 Ves. 179; Molloy, B. 2, ch. 10, § 32.

[3] Ibid.; Brunetti *v.* Lewin, 1 Lutw. R. 896, 899, a.; Hoare *v.* Cazenove, 16 East, R. 391; Maligne, Lex Merc. 273; Molloy, B. 2, ch. 10, § 24; Bayley on Bills, ch. 6, § 1, p. 179 (5th edit. 1830).

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lateral acceptance, or payment; and, if the Bill, on its face, directs a resort to a third person, in case of refusal by the Drawee, such direction becomes part of the contract.[1]

§ 123. The acceptance of a Bill *supra protest*, for non-acceptance, imports an obligation, on the part of the Acceptor, that, if the Bill is not paid by the Drawee, upon due presentment, at its maturity, and it is then duly protested for non-payment, and due notice thereof is given to the Acceptor *supra protest*, he will pay the same. Such presentment, protest, and notice are, therefore, indispensable requisites, to make the liability of such an Acceptor absolute.[2] An acceptance *supra protest* enures for the benefit of all the parties on the Bill, subsequent to the person, for whose honor it is accepted.[3] Thus, if the acceptance be for the honor of the Drawer, it enures to the benefit of the Payee, and all subsequent Indorsers and Holders under him.[4] If accepted for the honor of the first, second, or third Indorser, it enures for the benefit of all subsequent Indorsers or Holders under them, accordingly; but not for the benefit of antecedent Indorsers or Holders. If accepted for the honor of the

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[1] 3 Kent, Comm. Lect. 44, p. 87 (4th edit.), and the authorities there cited; Mitford *v.* Walcot, 12 Mod. R. 410; Beawes, Lex Merc. by Chitty, p. 568, 569, Pl. 40 to 42 (edit. 1813); Jackson *v.* Hudson, 1 Camp. R. 447; Pothier de Change, n. 170, 171

[2] Bayley on Bills, ch. 6, § 1, p. 176 to 179 (5th edit. 1830); Chitty on Bills, ch. 8, § 3, p. 375, 382 (8th edit. 1833); Hoare *v.* Cazenove, 16 East, 391; Williams *v.* Germaine, 7 Barn. & Cressw. 468; 3 Kent, Comm. Lect. 44, p. 87 (4th edit.); Mitford *v.* Walcot, 1 Ld. Raym. 574; Post, § 261.

[3] Ibid.

[4] Bayley on Bills, ch. 6, § 1, p. 176 to 178 (5th edit. 1830); Chitty on Bills, ch. 8, § 3, p. 374, 382 (8th edit. 1833); Kyd on Bills, p. 152 to 155 (3d edit.).

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Bill, that is, of all the parties on the Bill, (as it may be,) then, of course, it enures to the benefit of all the parties, except the Drawer.[1] If accepted for the honor of the Drawee, then it enures, or, at least, it may enure, for the benefit of the Drawer, as well as of the Payee and subsequent Holders, if the Drawer was entitled to have the Bill accepted by the Drawee.

§ 124. On the other hand, the Acceptor *supra protest*, upon giving proper notice thereof, and a due payment of the Bill, has his own rights and recourse over against the person or persons, for whose honor he accepted the same, and against all other parties to the Bill, who are liable to the same person or persons.[2] But he has no recourse over against any other parties to the Bill. Hence, if he accepts for the honor of the Drawer, he has no remedy against the Payee, or any subsequent Indorser; nor, if he accepts for the honor of the Payee, will he have any against the subsequent Indorsers.[3] If he accepts for the honor of the Bill, generally, (that is, of all the parties thereto,) he has a remedy against all of them, except the Holder at the time of the acceptance.[4] It follows, also, from what

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[1] Chitty on Bills, ch. 8, § 3, p. 382 (8th edit. 1833).

[2] Bayley on Bills, ch. 6, § 1, p. 179, 180 (5th edit. 1830); Chitty on Bills, ch. 8, p. 382, 383 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 1, p. 569, § 44 (edit. 1813); 3 Kent, Comm. Lect. 44, p. 87 (4th edit.); Konig *v.* Bayard, 1 Peters, R. 250; Mertens *v.* Winnington, 1 Esp. R. 113. — In Mertens *v.* Winnington (1 Esp. R. 113), Lord Kenyon said, that an Acceptor, *supra protest*, "is to be considered as an Indorsee, paying a full value for the Bill, and, as such, entitled to all the remedies, to which an Indorsee would be entitled, that is, to sue all the parties to the Bill." This is too loosely and generally said; for the Acceptor has no remedy against the Holder, from whom he received it, nor against any Indorser upon the Bill, whose name is subsequent to that of the person, for whom he accepts it.

[3] Ibid.

[4] Ibid.

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has been said, that an acceptance for the honor of the Drawer only, will, or at least may, under particular circumstances, entitle the Acceptor to the same remedy against the Drawee, which the Drawer himself would have.[1]

§ 125. Similar principles are recognized in the foreign Commercial law, as to the rights and remedies growing out of acceptances *supra protest.*[2] In the French law, it is called an *Intervention*, on the part of the stranger, who accepts for the honor of any of the antecedent parties; and he thus performs the functions, and contracts the engagements, and acquires the rights, of the *negotiorum gestor* of the Civil Law.[3] Heineccius affirms the like doctrine. *Qui in honorem trassantis litteras cambiales ad se non directas acceptavit, perinde, ac ipse trassatus, tenetur. Hinc integrum est præsentanti, adversus eum, si constituto die non solverit, actione cambiali experiri. Contra ea et hic, præstita solutione, agit adversus trassantem ad recuperandam summam solutam, una cum provisione, damnis, et impensis. Quum in finem hæc acceptatio non aliter fieri solet, quam* SOPRA PROTESTO.[4] The rights of the Acceptor, *supra protest*, upon his intervention, stand upon the general maxim; *Qui alterius jure utitur eodum jure*

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[1] Ibid.; Ex parte Wackerbarth, 5 Ves. 574; Ex parte Lambert, 13 Ves. 174.

[2] See Straccha de Mercat. Decis. Genuæ. p. 132.

[3] Pothier de Change, n. 113, 114, 170, 171; Story on Agency, § 142; Dig. Lib. 3, tit 5, l. 10, § 1; Id l. 45; Pothier, Pand. Lib 3, tit. 5, n. 1 to 14; Pothier, Traité de Quasi Contr Negot. Gest. passim; L'Ord. 1673, tit 5, art. 3; Jousse, sur L'Ord. 1673, p. 75; Pardessus, Droit Comm. Tom. 2, art. 383 to 388; Code de Comm. art. 126 to 129; Hoare v. Cazenove, 16 East, R. 391.

[4] Heinecc. de Camb. cap. 6, § 9, p. 54; Id. cap. 2, § 10; Id. cap. 3, § 10.

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uti debet—He stands subrogated to the rights of the Holder.[1]

§ 126. A Bill is, in the technical phrase, said to be honored, when it is duly accepted; when it becomes payable, by lapse of time, it is said to have arrived at maturity; and, when acceptance or payment thereof is refused, it is said to be dishonored. These general considerations may suffice, in the present place. We shall, hereafter, have occasion to examine, in what manner, and by whom, a Bill may be transferred; when, and in what manner, a Bill should be presented for acceptance; what is a good and proper acceptance thereof; at what time a Bill becomes due and payable, and in what manner, and at what time and place, it is to be presented for payment; what will amount to a dishonor thereof, and the proceedings thereon; when, and in what manner, notice of the dishonor is to be given to the Drawee; and what conduct or agreement of the parties will amount to a waiver, or dispensation, with a strict compliance with any of these requisites, or vary or limit the ordinary obligations deducible from the contract, as well as many other incidental topics. At present, we shall confine our attention to some particulars, which seem proper to be introduced in this connexion.

§ 127. In the first place, from what has been already stated, we see the reason, why the Drawer, upon a Bill made payable to an infant, or his order, is held liable, by our law, to pay the same to any person, to whom the infant may indorse the same, notwithstanding his infancy; for the Drawer has, in effect, by making it payable to the infant, or his order, affirmed, that

[1] Pothier de Change, n. 114.

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the infant is competent to indorse the Bill, and that he himself will pay it to the Holder, if dishonored, upon due notice thereof; and, therefore, he will be estopped, in law, to escape from his engagement, by attempting to interpose the infancy of the Payee, in bar of the rights of the Holder.[1] Besides; infancy is a personal privilege, belonging to the infant himself; and he alone can avail himself of it as a defence.[2] His indorsement is not void, but voidable only.[3] The same rule, for the same reason, applies to the case of an acceptance, by the Drawee, of the Bill of an infant, who is the Drawer.[4]

§ 128. The same doctrine has not, however, been supposed in our law to apply to the case of a Bill of Exchange, made payable to a married woman, or her order; for, in such a case, the interest in the Bill vests in her husband, and he may indorse it; and the indorsement of the wife, at least, if done without his consent, is inoperative, and void.[5] The reason for this distinction seems to be, that the Drawer cannot, by his act, clothe the wife with a capacity to indorse, which the law prohibits; for it would operate as a fraud upon the marital rights of the husband; and, in

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[1] Chitty on Bills, ch. 2, § 1, p. 27 (8th edit. 1833); Grey v. Cooper, 3 Doug. R. 65. See, also, Pardessus, Droit Comm. Tom. 2, art. 413.

[2] Ibid.; Bruce v. Warwick, 6 Taunt. R. 119.

[3] Ibid.; Bayley on Bills, ch. 2, § 2, p. 45, 46 (5th edit 1830).

[4] Taylor v. Croker, 4 Esp. R. 187; Jones v. Darch, 4 Price, R. 300.

[5] Ante, § 90, 92; Barlow v. Bishop, 1 East, R. 432; Prestwick v. Marshall, 4 Carr. & Payne, 594; Arnould v. Revoult, 1 Brod. & Bing. 446, per Richardson, J.; Cotes v. Davis, 1 Camp. R. 485; Haley v. Lane, 2 Atk. 181; Chitty on Bills, ch. 2, § 1, p. 26, 27; Id. ch. 6, p. 225 (8th edit. 1833); Kyd on Bills, p. 31 (3d edit.); Phillipskirk v. Pluckwell, 2 M. & Selw. 393; McNeilage v. Holloway, 2 B. & Ald. 28; Burrough v. Moss, 10 B. & Cressw. 558; Nightingale v. Withington, 15 Mass. R. 272.

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the case of an infant, the indorsement is voidable, and not, like that of a married woman, utterly void.[1] We have already seen, that, by the foreign law, infants and married women, when they are merchants, may become parties to, and be bound by, Bills of Exchange, under certain circumstances; and, therefore, the like principles may not apply in that law, as do in ours.[2]

§ 129. But, passing from these incidental topics, let us proceed, in the next place, to the consideration of the operation of the *Lex Loci* upon contracts of Exchange. It is well known, that the laws of different countries vary, as to the rights, obligations, and duties, arising from Bills of Exchange; and, therefore, it is highly important to inquire, by what laws, in particular cases, those rights, obligations, and duties are to be ascertained and governed. And here, it may be laid down as a general rule, that every contract is, as to its validity, nature, interpretation, and effect, governed by the law of the state, or country, where it is made, and is to be executed.[3] If it is made in one place, to be executed in another country or territory, then it is governed by the law of the country or territory, where it is to be executed; for the parties are presumed to look to that for its validity, interpretation, and effect.[4]

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[1] Bayley on Bills, ch. 2, § 2, p. 45, 46 (5th edit.); Barlow *v.* Bishop, 1 East, R. 432; Cotes *v.* Davis, 1 Camp. R. 485; Nightingale *v.* Withington, 15 Mass. R. 272; Mason *v.* Morgan, 2 Adolph. & Ellis, 30.

[2] Ante, § 73, 94.

[3] Story on Conflict of Laws, § 242 to 244, 266 to 270; Bayley on Bills, by Phillips & Sewall, chap. A. (edit. 1836), p. 78.

[4] Story on Conflict of Laws, § 242 to 244, 266, 270; Robinson *v.* Bland, 2 Burr. 1077. — This subject is examined at large, in Story on the Conflict of Laws, ch. 8, from § 231 to 373, and in Burge, Comm. on Col. and Foreign Law, Vol. 1, Pt. 1, ch. 1, p. 23, 24, 29; Id. Vol. 3, Pt. 3, ch. 22, p. 749 to 780; and Fœlix, Conflict des Lois, Revue Etr. & Franc. Tom. 7 (1840), § 39 to 51, p. 344 to 365.

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Both rules are fairly deducible from the Civil Law; where it is said, in one passage, *Si fundus venierit, ex consuetudine ejus regionis, in qua negotium gestum est, pro evictione caveri oportet*;[1] and, in another passage; *Contraxisse unusquisque in eo loco intelligitur, in quo, ut solveret, se obligavit*;[2] and, again, in another passage; *Contractum autem non utique eo loco intelligitur, quo negotium gestum sit, sed quo solvenda est pecunia.*[3] Paul Voet, has, accordingly, expounded this as the general doctrine. *Quid si de litteris cambii incidat quæstio, Quis locus erit spectandus? Is spectandus est locus, ad quem sunt destinatæ, et ibidem acceptatæ.*[4]

§ 130. Without going into a particular examination of the grounds, upon which this doctrine is founded, it might seem sufficient, in this place, to explain it by a reference to the common cases of contracts, growing out of negotiable instruments. Where a Bill of Exchange is an inland Bill, drawn, indorsed, and accepted, in the same country, it is sufficiently obvious, that it is of course governed, as to all the parties, by the *Lex Loci contractus*. But, where the Bill is a foreign Bill, drawn in one state or country, payable to a particular person, living in the same state or country, or his order, upon a Drawee, who resides in a foreign state or country, and it is afterwards indorsed by the Payee, to a third person, in another state or country, very different considerations may arise.

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[1] Dig. Lib. 21, tit. 2, l. 6; Pothier, Pand. Lib. 21, tit. 2, n. 7; Story, Conflict of Laws, § 233.

[2] Dig. Lib. 44, tit. 7, l. 21.; Pothier, Pand. Lib. 5, tit. 1, n. 36; Story, Conflict of Laws, § 233.

[3] Dig. Lib. 42, tit. 5, l. 3; Pothier, Pand. Lib. 42, tit. 5, n. 24; Story on Conflict of Laws, § 233, n. 2.

[4] P. Voet de Stat. § 9, cap. 2, § 14; Story on Conflict of Laws, § 286.

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§ 131. In respect to foreign Bills of Exchange, they are, generally, as to their validity, nature, interpretation, and effects, governed by the laws of the state, or country, where the contract between the particular parties has its origin. The contract of the Drawer is, as to the form, the nature, the obligation, and the effect thereof, governed by the law of the place, where the Bill is drawn, in regard to the Payee, and any subsequent Holder. The contract of the Indorser is governed by the law of the place, where the indorsement is made, as to his Indorsee, and every subsequent Holder. The contract of the Acceptor is governed by the law of the place of his acceptance, as to the Drawer, the Payee, and every subsequent Holder,[1] unless he accepts in one place, payable in another place; for, in the latter case, the law of the place, where the Bill is payable, will govern, in regard to the same parties.[2] So that very different contracts, of very different natures and of various obligations, may arise between different parties, under one and the same Bill of Exchange, according to the place, where the particular transaction takes place.

§ 132. But, as this subject is becoming of more importance, every day, in the commercial world, it may be well to expound, somewhat at large, the leading principles, applicable to this subject, and to illustrate some of their practical bearings, in cases of negotiable instruments.[3] In the first place, then, as to the

[1] Story on Conflict of Laws, § 286.

[2] Cooper *v.* Earl of Waldegrave, 2 Beavan, R. 283.

[3] I have drawn these illustrations, almost literally, from Story on the Conflict of Laws, in the sections cited at the bottom of the page. The passages, thus introduced, seemed to me indispensable to a complete review of the doctrines applicable to negotiable instruments; and I was unwilling, that the reader should be required to read another work, before he could possess himself of the main elements, belonging to this in-

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validity of contracts. Generally speaking, the validity of a contract is to be decided by the law of the place, where it is made. If valid there, it is, by the general law of nations, *jure gentium*, held valid everywhere, by the tacit or implied consent of the parties.[1] The rule is founded, not merely in the convenience, but in the necessities, of nations; for, otherwise, it would be impracticable for them to carry on an extensive intercourse and commerce with each other. The whole system of agencies, of purchases and sales, of mutual credits, and of transfers of negotiable instruments, rests on this foundation; and the nation, which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state like that, in which it now exists among savage tribes, among the barbarous nations of Sumatra, and

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teresting branch of commercial law, especially as the passages are to be found scattered in different parts of the above work. My aim has been, at the expense of some repetition, to make each of my works as complete as practicable in itself. I have been induced the more readily to do this, since Mr. Baron Bayley's work on Bills contains no examination whatever of the subject, and Mr. Chitty has treated it in a very brief and summary manner. Chitty on Bills, ch. 5, p. 143, 147, 148, 191 to 194, 339, 372, 506, 613.

[1] Story on Conflict of Laws, § 242; Pearsall *v.* Dwight, 2 Mass. R. 88, 89. See Casaregis, Disc. 179, § 1, 2; Willing *v.* Consequa, 1 Peters, R. 317; 2 Kent, Comm. Lect. 39, p. 457, 458 (3d edit.); De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 221, 228; Smith *v.* Mead, 3 Connect. R. 253; Medbury *v.* Hopkins, 3 Connect. R. 472; Houghton *v.* Page, 2 N. Hamp. R. 42; Dyer *v.* Hunt, 5 N. Hamp. R. 401; Erskine's Inst. B. 3, tit. 2, § 39, 40, 41, p. 514 to p. 516; Trimbey *v.* Vignier, 1 Bing. New Cas. 151, 159; S. C. 4 Moore & Scott, 695; Andrews *v.* Pond, 13 Peters, R. 65; Andrews *v.* His Creditors, 11 Louis. R. 465; Story on Conflict of Laws, § 316 *a*; Bayley on Bills, ch. (A) (5th edit.), by F. Bayley, p. 78; Id. Amer. Edit. by Phillips & Sewall, 1836, p. 78 to 86; 1 Burge, Comment. on Col. and For. Law, Pt. 1, ch. 1, p. 29, 30; Whister *v* Stodder, 8 Martin, R. 95; Bank of U. States *v.* Donally, 8 Peters, R. 361, 372; Wilcox *v.* Hunt, 13 Peters, R. 378, 379.

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among other portions of Asia, washed by the Pacific. *Jus autem gentium* (says the Institute of Justinian) *omni humano generi commune est; nam, usu exigente, et humanis necessitatibus, gentes humanæ jura quædem sibi constituerunt. Et ex hoc jure gentium, omnes pene contractus introducti sunt, ut emptio et venditio, locatio et conductio, societas, depositum, mutuum, et alii innumerabiles.*[1] No more forcible application can be propounded of this imperial doctrine, than to the subject of international private contracts.[2] In this, as a general principle, there seems a universal consent of all courts and all jurists, foreign and domestic.[3]

§ 133. Illustrations of this general doctrine may be derived from cases, which have actually occurred in judgment. Thus, for example, where a Bill of Exchange was made and indorsed in blank, in France,

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[1] 1 Inst. Lib. 1, tit. 2, § 2.

[2] 2 Kent, Comm. Lect. 39, p. 454, 455, and note (3d edit.); 10 Toullier, art. 80, note; Pardessus, Droit Comm. Vol. 5, art. 1482; Charters *v.* Cairnes, 16 Martin, R. 1.

[3] The cases, which support this doctrine, are so numerous, that it would be a tedious task to enumerate them. They may, generally, be found collected in the Digests of the English and American Reports, under the head of Foreign Law, or Lex Loci. The principal part of them are collected in 4 Cowen, R. 510, note; and in 2 Kent, Comm. Lect. 39, p. 457, et seq. in the notes. See, also, Fonblanque on Eq. B. 5, ch. 1, § 6, note (*t*) p. 443; Bracket *v.* Norton, 4 Connect. R. 517; Medbury *v.* Hopkins, 3 Connect. R. 472; Smith *v.* Mead, 3 Connect. R. 253; De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 221, 228; Trasher *v.* Everhart, 3 Gill & John. R. 234. The foreign jurists are equally full, as any one will find, upon examining the most celebrated of every nation. They all follow the doctrine of Dumoulin. "In concernentibus contractibus, et emergentibus tempore contractûs, inspici debet locus, in quo contrahitur." Molin. Comment. ad Consuet. Paris, tit. 1, § 12, Gloss. 7, n. 37, Tom. 1, p. 224; Story on Conflict of Laws, § 260, 300 *d*. See Bouhier, ch. 21, § 190; 2 Boullenois, Observ. 46, p. 458. Lord Brougham, in Warrender *v.* Warrender, 9 Bligh, R. 110, made some striking remarks on this subject, cited in Story on Conflict of Laws, § 226 *b*, note.

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and the Holder afterwards sued the Maker, in England, a question arose, whether, upon such an indorsement, in blank, without following the formalities prescribed by the Civil Code of France, the indorsement passed the right of property to the Holder; and it being found, that it did not, by the law of France, the Court held, that no recovery could be had, by the Holder, upon the note, in an English Court. The Court on that occasion said, that the question, as to the transfer, was a question of the true interpretation of the contract, and was, therefore, to be governed by the law of France, where the contract and indorsement were made.[1]

§ 134. The same rule applies, *vice versâ*, to the invalidity of contracts; if void, or illegal by the law of the place of the contract, they are, generally, held void and illegal everywhere.[2] This would seem to be a principle derived from the very elements of natural justice. The Code has expounded it in strong terms. *Nullum enim pactum, nullam conventionem, nullum contractum, inter eos videri volumus subsecutum, qui contrahunt, lege contrahere prohibente.*[3] If void in its origin, it seems difficult to find any principle, upon which any subsequent validity can be given to it in any other country.

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[1] Story on Conflict of Laws, § 242 *a*; Trimbey *v.* Vignier, 1 Bing. New Cases, 151, 159; Story on Conflict of Laws, § 267, 270.

[2] Story on Conflict of Laws, § 243; Huberus, Lib. 1, tit 3, De Confl. Leg. § 3, 5; Van Reimsdyk *v.* Kane, 1 Gallis. R. 375; Pearsall *v.* Dwight, 2 Mass. R 88, 89; Touro *v.* Cassin, 1 Nott & McCord, R. 173; De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 221, 225; Houghton *v.* Page, 2 N. Hamp. R. 42; Dyer *v.* Hunt, 5 N. Hamp. R. 401; Van Schaick *v.* Edwards, 2 John. Cas. 335; Robinson *v.* Bland, 2 Burr. R. 1077; Burrows *v.* Jemino, 2 Str. 732; Alves *v.* Hodgson, 7 T. R. 237; 2 Kent, Comm. Lect. 39, p. 457, 458 (3d edit.); La Jeune Eugenie, 2 Mason, R. 459; Andrews *v.* Pond, 13 Peters, R. 65, 78.

[3] Cod. Lib. 1, tit. 14, l. 5.

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§ 135. But there is an exception to the rule, as to the universal validity of contracts, which is, that no nation is bound to recognize or enforce any contracts, which are injurious to its own interests, or to those of its own subjects.[1] Huberus has expressed it in the following terms; *Quatenus nihil potestati aut juri alterius Imperantis ejusque civium præjudicetur;*[2] and Mr. Justice Martin, still more clearly expresses it, in saying, that the exception applies to cases, in which the contract is immoral or unjust, or in which the enforcing it in a state would be injurious to the rights, the interests, or the convenience, of such state, or its citizens.[3] This exception results from the consideration, that the authority of the acts and contracts done in other states, as well as the laws, by which they are regulated, are not, *proprio vigore*, of any efficacy beyond the territories of that state; and whatever effect is attributed to them elsewhere, is from comity, and not of strict right.[4] And every independent community will and ought to judge for itself, how far that comity ought to extend.[5] The reasonable limitation is, that it shall not suffer prejudice by its comity.[6] This

[1] Story on Conflict of Laws, § 244; Greenwood *v.* Curtis, 6 Mass. R. 378, 379; Blanchard *v.* Russell, 13 Mass. R. 1, 6; Whiston *v.* Stodder, 8 Martin, R. 95; De Sobry *v.* De Laistre, 2 Harr. & John. R. 193, 228; Trasher *v.* Everhart, 3 Gill & John. R. 234; 3 Burge, Comm. on Col. & For. Law, Pt. 2, ch. 20, p. 779; Story, Confl. of Laws, § 348 to 351; Andrews *v.* Pond, 13 Peters, R. 65, 78.

[2] Huberus, Lib. 1, tit. 3, De Conflict. Leg. § 2.

[3] Whiston *v.* Stodder, 8 Martin, R. 95, 97.

[4] Story, Confl. of Laws, § 7, 8, 18, 20, 22, 23, 36.

[5] Ibid.

[6] Story, Confl. of Laws, § 25, 27, 29; Huberus, Lib. 1, tit. 3, De Conflict. Leg. § 2, 3, 5; Trasher *v.* Everhart, 3 Gill & John. R. 234; Greenwood *v.* Curtis, 6 Mass. R. 378; 2 Kent, Comm. Lect. 39, p. 457 (4th edit.); Pearsall *v.* Dwight, 2 Mass. R. 88, 89; Eunomus, Dial. 3, § 67.

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doctrine has been, on many occasions, recognized by the Supreme Court of Louisiana. On a resent occasion, it was said by the Court; "By the comity of nations, a practice has been adopted, by which courts of justice examine into, and enforce, contracts made in other states, and carry them into effect, according to the laws of the place, where the transaction took its rise. This practice has become so general in modern times, that it may be almost stated to be now a rule of international law, and it is subject only to the exception, that the contract, to which aid is required, should not, either in itself, or in the means used to give it effect, work an injury to the inhabitants of the country, where it is attempted to be enforced."[1] Mr. Justice Best (afterwards Lord Wynford), on another occasion, with great force, said, That, in cases turning upon the comity of nations, (*Comitas inter communitates*), it is a maxim, that the comity cannot prevail in cases, where it violates the law of our own country, or the law of nature, or the law of God.[2] Contracts, therefore, which, are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects, contracts against good morals, or against religion, or against public rights, and contracts, opposed to the national policy or national institutions, are deemed nullities in every country, affected by such sonsiderations; although they may be valid by the laws of the place, where they are made.

§ 136. Indeed, a broader principle might be adopted; and it is to be regretted, that it has not been

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[1] Mr. Justice Porter, in Ohio Insur. Company *v.* Edmondson, 5 Louis. R. 295, 299, 300.

[2] Forbes *v.* Cochrane, 2 Barn. & Cressw. R. 448, 471.

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universally adopted by all nations in respect to foreign contracts, as it has been in respect to domestic contracts, that no man ought to be heard in a court of justice, to enforce a contract, founded in, or arising out of, moral or political turpitude, or in fraud of the just rights of any foreign nation whatsoever.[1] The Roman law contains an affirmation of this wholesome doctrine. *Pacta, quæ contra leges constitutionesque, vel contra bonos mores fiunt, nullam vim habere, indubitati juris est.*[2] *Pacta, quæ turpem causam continent, non sunt observanda.*[3] Unfortunately, from a very questionable subserviency to mere commercial gains, it has become an established formulary of the jurisprudence of the Common Law, that no nation will regard or enforce the revenue laws of any other country; and that the contracts of its own subjects, made to evade or defraud the laws or just rights of foreign nations, may be enforced in its own tribunals.[4] Sound morals would seem to point to a very different conclusion. Pothier has (as we shall presently see) reprobated the doctrine in strong terms, as inconsistent with good faith, and the just duties of nations to each other.[5]

§ 137. Another rule, naturally flowing from, or rather illustrative of, that already stated, respecting

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[1] Story on Conflict of Laws, § 245; Armstrong *v.* Toler, 11 Wheat. R. 258, 260; Chitty on Bills (8th edit. 1833), p. 143, note; Boucher *v.* Lawson, Cas. Temp. Hard. 84, 89, 194; Planche *v.* Fletcher, Doug. R. 250; Story, Confl. of Laws, § 255, 257.

[2] 1 Cod. Lib. 2, tit. 3, l. 6.

[3] Dig. Lib. 2, tit 14, l. 27, § 4. See, also, 1 Chitty on Comm. and Manuf. ch. 4, p. 82, 83.

[4] See Boucher *v.* Lawson, Cas. Temp. Hard. 85, 89, 194; Story, Confl. of Laws, § 256, 257.

[5] Story, Confl. of Laws, § 257.

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the validity of contracts, is, that all the formalities, proofs, or authentications of them, which are required by the *Lex loci*, are indispensable to their validity everywhere else.[1] And this is in precise conformity to the rule laid down on the subject by Boullenois.[2] *Il faut, par rapport à la forme intrinsèque et constitutive des actes, suivre encore la loi du contrat. Quand la Loi exige certaines formalités, lesquelles sont attachées aux choses mêmes, il faut suivre la loi de la situation.*[3] Burgundus has expressed the same doctrine in very pointed terms. *Et quidem in scriptura instrumenti, in solemnitatibus, et ceremoniis, et generaliter in omnibus, quæ ad formam ejusque perfectionem pertinent, spectanda est consuetudo regionis, ubi fit negotiatio.*[4] Dumoulin says; *Aut statutum loquitur de his, quæ concernunt nudam ordinationem vel solemnitatem actus; et semper inspicitur statutum vel consuetudinem loci, ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis, aut aliis conficiendis.*[5]

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[1] See Story on Conflict of Laws, § 260; 1 Burge, Comment. on For. and Col. Law, Pt. 1, ch. 1, p. 29, 30; 3 Burge, Comm. Pt. 2, ch. 20, p. 752 to 764; Fœlix, Conflict des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 40 to 51, p. 346 to 360; Warrender *v.* Warrender, 9 Bligh, 111; Story on Conflict of Laws, § 260 *a*.

[2] Erskine, Inst. B. 3, tit. 2, § 39 to 41, p. 514, 515; Boullenois, Quest. Mixt. p. 5; Bouhier, Cout. de Bourg. ch. 21, § 205; 2 Boullenois, Observ. 46, p. 467; Story on Conflict of Laws, § 240; 1 Hertii Op De Collis. Leg. § 4, n. 59 (edit. 1737); Id. p. 209 (edit. 1716). See, also, Voet, ad Pand. Lib. 5, tit. 1, § 51; 1 Boullenois, Observ. 23, p. 523; Id. p. 446 to 466; Henry on Foreign Law, 37, 38; Id. 224; 5 Pardessus, Droit Comm. art. 1485; Mr. Justice Martin, in Depau *v.* Humphreys, 20 Martin, R. 1, 22; Story on Conflict of Laws, § 122, 259 *b*. 299 *a*.

[3] 2 Boullenois, Observ. 46, p. 467; Story on Conflict of Laws, § 240; 1 Boullenois, Observ. 23, p. 491, 492.

[4] Burgundus, Tract. 4, n. 7, 29; Story on Conflict of Laws, § 300 *a*; 2 Boullenois, Observ. 46, p. 450, 451.

[5] Molin. Opera, Comment. Cod. Lib. 1, tit. 4, l. 1; Conclus. de Statut. Tom. 3, p. 554 (edit. 1681); Story on Conflict of Laws, § 441, 479 *k*.

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And again; *In concernentibus contractum, et emergentibus, spectatur locus, in quo contrahitur; et in concernentibus meram solemnitatem cujuscunque actus, locus, in quo ille celebratur.*[1] Casaregis says; *Communissima enim est distinctio, quod aut disseritur de modo procedendi in judicio, aut de juribus contractus, cui robur et specialis forma tributa est a statuto, vel a contrahentibus. Et in primo casu attendendum sit statutum loci, in quo judicium agitatur; in secundo, vero, casu attendatur statutum loci, in quo fuit celebratus contractus.*[2] Hertius is still more direct. *Si Lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei sitæ; id est, si de solemnibus quæratur, si de loco, de tempore, de modo actus, ejus loci habenda est ratio, ubi actus sive negotium celebratur.*[3] Christinæus, Everhardus, and other distinguished jurists, adopt the same doctrine.[4] And this rule seems fully established in the Common Law.

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[1] Molin. Opera, tit. 1, De Fiefs, § 12, Gloss. 7, n. 37, Tom. 1, p. 224 (edit. 1681).

[2] Casaregis, Disc. Comm. 179, n. 59.

[3] Hertii Opera, Collis. Leg. § 4, n. 10, p. 126; Id. n. 59, p. 148 (edit. 1737); Id. p. 179, 209 (edit. 1716); Story on Conflict of Laws, § 3, 8, 10, 11. See, also, Cochin, Œuvres, Tom. 1, p. 72 (4to edit.); Id. Tom. 3, p. 26; Id. Tom. 5, p. 697; D'Aguesseau, Œuvres, Tom. 4, p. 637, 722 (4to edit.).

[4] Everhard. Consil. 72, n. 11, p. 206; Id. n. 18, p. 207; Id. n. 27, p. 209; Story on Conflict of Laws, § 300 *b*; Christin. Decis. 283, Vol. 1, p. 355, n. 1, 4, 5, 8 to 11; Story on Conflict of Laws, § 300 *c*; Molin. Comment. ad Consuet. Paris, tit. 1, § 12, Gloss. 7, n. 37, Tom. 1, p. 224; Story on Conflict of Laws, § 300 *d*; 2 Boullenois, Observ. 46, p. 460, 461; Story on Conflict of Laws, § 122. — Dumoulin pushes the doctrine further, and says; "Et est omnium Doctorum sententia, ubicumque consuetudo, vel statutum locale, disponit de solemnitate, vel forma actus, ligari etiam exteros ibi actum illum gerentes, et gestum esse validum, et efficacem ubique, etiam super bonis solis extra territorium consuetudinis." Molin. Consil. 53, § 9; Molin. Oper. Tom. 2, p. 965 (edit. 1681); 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 865, 866; Story on Conflict of Laws, § 441.

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Thus, if, by the laws of a country, a contract is void, unless it is written on stamped paper, it ought to be held void everywhere; for, unless it be good there, it can have no obligation in any other country.[1] It

[1] Alves *v.* Hodgson, 7 T. R. 237; Clegg *v.* Levy, 3 Camp. R. 166. But see Chitty on Bills (8th edit.), p. 143, note; and Wynne *v.* Jackson, 2 Russell, R. 351; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 762. — The case of Wynne *v.* Jackson, 2 Russell, R. 351, is certainly at variance with this doctrine. It was a bill, brought to stay proceedings at law on a suit, brought in England by the Holder, against the Acceptor of Bills of Exchange, made and accepted in France, and which, in an action brought in the French courts, had been held invalid, for want of a proper French stamp. The Vice-Chancellor held, "that the circumstance of the Bills being drawn in France, in such a form, that the Holder could not recover on them in France, was no objection to his recovering on them in an English court." This doctrine is wholly irreconcilable with that in Alves *v.* Hodgson, 7 T. R. 241, and Clegg *v.* Levy, 3 Camp. R. 166; and if by the laws of France such contracts were void, if not on stamped paper, it is equally unsupportable upon acknowledged principles. In the case of James *v.* Catherwood, 3 Dowl. & Ryl. 190, where assumpsit was brought for money lent in France, and unstamped paper receipts were produced in proof of the loan, evidence was offered to show, that, by the laws of France, such receipts required a stamp to render them valid; but it was rejected by the Court, and the receipts were admitted in evidence, upon the ground, that the courts of England could not take notice of the revenue laws of a foreign country. But this is a very insufficient ground, if the loan required such receipt and stamp to make it valid as a contract. And, if the loan was good *per se*, but the stamp was requisite to make the receipt good as evidence, then another question might arise, whether other proof, than that required by the law of France, was admissible of a written contract. This case also is inconsistent with the case in 3 Camp. R. 166. Can a contract be good in any country, which is void by the law of the place, where it is made, because it wants the solemnities required by that law? Would a parol contract, made in England, respecting an interest in lands, against the Statute of Frauds, be held valid elsewhere? Would any court dispense with the written evidence required upon such a contract? On a motion for a new trial, the Court refused it, Lord Chief Justice Abbott saying; "The point is too plain for argument. It has been settled, or, at least, considered as settled, ever since the time of Lord Hardwicke, that in a British court we cannot take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience, if, in every case, in which an instrument was executed in a foreign country, we were to receive in evidence, what the law of that country

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might be different, if the contract had been made payable in another country; or, if the objection were, not to the validity of the contract, but merely to the admissibility of other proof of the contract in the foreign court,[1] where a suit was brought to enforce it; or, if the contract concerned real or immovable property, situate in another country, whose laws are different, respecting which, as we shall presently see, there is a difference of opinion among foreign jurists, although, in England and America, the rule seems firmly established, that the law *rei sitæ*, and not that of the place of the contract, is to prevail.[2]

§ 138. So, where the forms of public instruments

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was, in order to ascertain, whether the instrument was, or was not, valid." With great submission to his Lordship, this reasoning is wholly inadmissible. The law is as clearly settled, as any thing can be, that a contract, void by the law of the place, where it is made, is void everywhere. Yet, in every such case, whatever may be the inconvenience, courts of law are bound to ascertain, what the foreign law is. And it would be a perfect novelty in jurisprudence to hold, that an instrument, which, for want of due solemnities in the place, where it was executed, was void, should yet be valid in other countries. We can arrive at such a conclusion only by overturning well established principles. The case alluded to, before Lord Hardwicke, was probably Boucher *v.* Lawson (Cases T. Hard. 85; Id. 194), which was the case of a contract between Englishmen, to be executed in England, to carry on a smuggling trade against the laws of Portugal. Lord Hardwicke said, that such a trade was not only a lawful trade in England, but very much encouraged. The case is wholly distinguishable from the present case; and from that of any contract, made in a country and to be executed there, which is invalid by its laws. A contract, made in Portugal by persons domiciled there, to carry on smuggling against its laws, would, or ought to be, held void everywhere. See, also, 3 Chitty on Comm. and Manuf. ch. 2, p. 166.

[1] Ludlow *v.* Van Rensselaer, 1 Johns. R. 93; James *v.* Catherwood, 3 Dowl. & Ryl. 190. See Clarke *v.* Cochran, 3 Martin, R. 358, 360, 361; Brown *v.* Thornton, 6 Adolph. & Ellis, R. 185; Yates *v.* Thomson, 3 Clark & Fin. R. 544.

[2] Story on Conflict of Laws, § 363 to 373, 435 to 445; Fœlix, Confl. des Lois, Revue Etrang. et Franç. Tom. 7, 1840, § 40 to 50, p. 346 to 359.

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are regulated by the laws of a country, they must be strictly followed, to entitle them to be held valid elsewhere. As, for example, if the protest of a Bill of Exchange, made in another state, is required by the laws of that state to be under seal, a protest, not under seal, will not be regarded as evidence of the dishonor of the Bill.[1]

§ 139. Another rule, illustrative of the same general principle, is, that the law of the place of the contract is to govern, as to the nature, the obligation, and the interpretation of the contract; *Locus contractus regit actum.*[2] Again; *Quod si de ipso contractu quæratur* (says Paul Voet), *seu de natura ipsius, seu de iis, quæ ex natura contractus veniunt, puta, fidejussione, etc., etiam spectandum est loci statutum, ubi contractus celebratur; quod ei contrahentes semet accommodare præsumantur.*[3] First, as to the nature of the

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[1] Story on Conflict of Laws, § 260 *a*; Ticknor *v.* Roberts, 11 Louis. R. 14; Bank of Rochester *v.* Gray, 2 Hill, N. Y. R. 227; Savary, Le Parfait Négociant, Tom. 1, Part 3, Liv. 1, ch. 14, p. 851; 2 Hill, N. Y. R. 227.

[2] Story on Conflict of Laws, § 263; 1 Emér. Assur. ch. 4, § 8, p. 122, 125, 128. See Casaregis, Disc. 179, § 60; Erskine, Inst. B. 3, tit. 2, § 39, 40, p. 514, 515; Delvalle *v.* Plomer, 3 Camp. R. 444; Harrison *v.* Sterry, 5 Cranch, 289; Le Roy *v.* Crowninshield, 2 Mason, R. 15; Van Reimsdyk *v.* Kane, 1 Gallis. R. 371: 2 Kent, Comm. Lect. 37, p. 394, Lect. 39, p. 458 to 460 (3d edit.).

[3] P. Voet, De Stat. § 9, ch. 2, § 10, p. 269 (edit. 1737); Id. p. 325 (edit. 1661). J. Voet is still more full on the same point. Voet, ad Pand. Lib. 4, tit. 1, § 29, p. 240, 241. Si adversus contractum (says he) aliudve negotium gestum factumve restitutio desideretur, dum quis aut metu, aut dolo, aut errore lapsus, damnum sensit contrahendo, transigendo, solvendo, fidejubendo, hereditatem adeundo, aliove simili modo; recte interpretes statuisse arbitror, leges regionis in qua contractum gestumve est id, contra quod restitutio petitur, locum sibi debere vindicare in terminandâ ipsâ restitutionis controversiâ, sive res illæ, de quibus contractum est, et in quibus læsio contigit, eodem in loco, sive alibi sitæ sint. Nec intererit, utrum læsio circa res ipsas contigerit, veluti pluris minorisve quam æquum est, errore justo distractas, an vero propter neglecta solennia in loco contractus

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contract; by which is meant those qualities, which properly belong to it, and by law of custom always

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desiderata. Si tamen contractus implementum non in ipso contractus loco fieri debeat, sed ad locum alium sit destinatum, non loci contractus, sed implementi leges spectandas esse ratio suadet: ut ita, secundum cujus loci jura implementum accipere debuit contractus, juxta ejus etiam leges resolvatur. Boullenois says, that Jurists distinguish four things in contracts. (1.) Substantialia contractuum; (2.) Naturalia contractuum; (3.) Accidentalia contractuum; (4.) Solemnia contractuum. He says; "Ils appellent substantialia contractuum, tout ce qui sert à la composition intérieure des contrats; c'est-à-dire, tout ce qui est de l'essence déterminant la nature de chaque acte, et sans quoi il ne seroit pas un tel acte." Substantialia sunt, quæ ita formam et essentiam uniuscujusque actus constituunt, ut sine iis talis actus esse non possit, cùm forma dat unicuique esse id, quod est. Suivant cette définition, le consentement des Parties dans tous les contrats, la chose, et le prix de la chose dans un contrat de vente, pertinent ad substantialia contractuum et ad speciem contractus constituendam; et elles sont tellement nécessaires, intrinseques, et constitutives d'un contrat, que sine iis actus qui geritur, non valeat. Naturalia contractuum, ce sont les suites et les engagements qui fluent et dérivent de la nature et de l'espece des contrats, dont il s'agit. Naturalia contractuum dicuntur ea, quæ pendent et manant a natura et potestate cujusque actus; sed ejus formam non constituunt. Telle est la garantie dans la vente. Mais par rapport à ces engagements qui dérivent des contrats, on en distingue de deux sortes. Il y en a, quæ sunt interna, intrinseca et inseparabilia; c'est-à-dire, qui sont liés et attachés à chaque espece de contrats, et qui sont propres à chacun de ces contrats, suivant la différente nature, dont ils sont. Quæ naturæ contractus cohærent, et sunt veluti propriæ possessiones, propriæ affectiones ab essentialibus cujusque contractus principiis enatæ. Telle est, dans un contrat de vente, la nécessité que le domaine de la chose vendue soit transféré à l'acquéreur; et à cet égard on ne peut se soustraire à ces choses; on ne pourroit pas en effet stipuler, que le domaine de la chose vendue ne passeroit pas à l'acquéreur; et il y en a qui ne naissent que de l'usage ordinaire où on est d'en convenir, et qui, à raison de ce, sont toujours présumés être convenus par les Parties. Quæ ex consuetudine etiam insunt contractibus, quæ consuetudo in naturam quasi contractus transiit; et on les appelle, externa et separabilia. Telle est la garantie de fait dans une cession, et à cet égard on peut y déroges, les Parties peuvent stipuler qu'il n'y aura d'autre garantie que celle que l'on appelle garantie de droit. Accidentalia contractus, ce sont les choses, que ne sont point de la substance constitutive de l'acte, qui ne fluent et ne dérivent point de sa nature et de son espece, et ne tombent point en convention ordinaire; mais qui ne se rencontrent dans les contrats que parce que les parties en conviennent.

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accompany it, or inhere in it.[1] Foreign jurists are accustomed to call such qualities *Naturalia contractus.*[2]

Accidentalia contractus ea sunt, quæ neque substantiam contractuum constituunt, neque ex natura et potestate contractus dimanant, sed pro voluntate contrahentium, adjici contractibus solent, veluti varia pacta. Je voudrois ajouter, et encore celles, qui ne sont requises que par des dispositions légales, à la vérité, mais pures locales, comme la nécessité de donner caution pour la garantie d'un contrat, laquelle a lieu dans certains endroits. Enfin, il y a, solemnia contractuum; et on en distingue de deux sortes, solemnia intrinseca, et solemnia extrinseca. Solemnia intrinseca sunt ea, quæ insunt in ipsa forma cujusque actus, neque separari ab ea possunt; telles sont les choses qui appartiennent à la preuve et à l'authenticité de l'acte, et qui comme telles sont partie de ce qui constitute l'être et l'existence de cet acte; aussi sont elles appellées par quelques-uns substantialia contractuum. Solemnia extrinseca sunt ea, quæ actui per se formam habenti, et ultra conventionem contrahentium, sed ad ipsam conventionem roborandam, extrinsecus accedunt, et ce sont les choses, qui n'appartenant en rien à la composition intrinseque de l'acte, sont seulement requises, post actum originatum, pour lui procurer son exécution. La solemnité intrinseque est tellement nécessaire, que si on l'omet, l'acte n'est pas acte, il n'a nul être, nulle existence; l'omission vitiat et corrumpit actum; raison pour laquelle on la place volontiers inter substantialia contractuum. Mais à l'égard de la solemnité extrinseque, il n'en est pas toujours de même, aliquando obmissa impedit executionem ex omni parte." 1 Boullenois, Observ. 23, p. 446 to 448. See, also, 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 848 to 850; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 758, 759, 762, 763; Don *v.* Lippman, 5 Clark & Fin. 1, 12, 13.

[1] Pothier, as well as other jurists, distinguish between the essence, the nature, and the accidents of contracts; the former includes whatever is indispensable to the constitution of it; the next, whatever is included in it, without being expressly mentioned by operation of law, but is capable of a severance without destroying it; and the last, those things, which belong to it only by express agreement. Without meaning to contest the propriety of this division, I am content to include the two former in the single word, nature, as quite conformable to our English idiom. Cujas also adopts the same course. See Pothier, Oblig. n. 5. See, also, 2 Boullenois, Observ. 46, p. 460 to 462; Bayou *v.* Vavasseur, 10 Martin, R. 61; Merlin, Répertoire, Convention, § 2, n. 6, p. 357; Rodenburg, De Div. Stat. tit. 2, ch. 5, § 16; 2 Boullenois, Obs. App'x. 50; 1 Boullenois, Obs. 688; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 848 to 851.

[2] 1 Boullenois, Observ. 23, p. 446; 2 Boullenois, Observ. 46, p. 460, 461; Voet, De Stat. § 9, ch. 10, § 10, p. 287; Id. p. 325 (edit. 1661);

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Ea enim, quæ auctoritate legis vel consuetudinis contractum comitantur, eidem adherent, Naturalia a Doctoribus appellantur. Lex enim altera est quasi natura, et in naturam transit. Atque quoad naturalia contractuum etiam forenses statuta loci contractus observare debent.[1] Thus, whether a contract be a personal obligation, or a real obligation; whether it be conditional, or absolute; whether it be the principal, or the accessary; whether it be that of principal, or of surety; whether it be of limited, or of universal operation; these are points properly belonging to the nature of the contract, and are dependent upon the law and custom of the place of the contract, whenever there are no express terms in the contract itself, which otherwise control them. By the law of some countries, there are certain joint contracts, which bind each party for the whole, *in solido;* and there are other joint contracts, where the parties are, under circumstances, bound only for several and distinct portions.[2] In each case, the law of the place of the contract regulates the nature of the contract, in the absence of any express stipulations.[3] These may,

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Hertius, De Collis. Leg. Tom. 1, § 10, p. 127; Id. p. 179, 180 (edit. 1716); Story on Conflict of Laws, § 263, 301 *f.*

[1] Lauterback, Diss. 104, Pt. 3, n. 58, cited 2 Boullenois, Obs. 46, p. 460.

[2] 4 Burge, Comment. Col. and For. Law, Pt. 2, ch. 15, § 4, p. 722 to 735; Story on Conflict of Laws, § 263, 322.

[3] Pothier on Oblig. n. 261 to 268; Van Leeuwen, Comment. B. 4, ch. 4, § 1; Fergusson *v.* Flower, 16 Martin, R. 312; 2 Boullenois, Observ. 46, p. 463; Code Civil of France, art. 1197, 1202, 1220, 1222; Id. Code of Comm. art. 22, 140. — One may see, how strangely learned men will reason on subjects of this nature, by consulting Boullenois. He puts the case of a contract made in a country, where all parties would be bound *in solido*, and, by the law of their own domicil, they would be entitled to the benefit of a division, and *vice versâ;* and asks, What law is to govern? In each case he decides, that the law should govern, which is most

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therefore, be said to constitute the nature of the contract.[1]

§ 140. Another illustration may be borrowed from

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favorable to the debtor. "Ainsi, les obligés solidaires ont contracté sous une loi, qui leur est favorable; j'embrasse cette loi; elle leur est contraire, j'embrasse la loi de leur domicile." 2 Boullenois, Observ. 46, p. 463, 464. See, also, Bouhier, ch. 21, § 198, 199.

[1] See Henry on Foreign Law, 39. — Pothier on Obligations, n. 7, has explained the meaning of the words, the nature of the contract, in the following manner. "Things, which are only of the nature of the contract, are those, which, without being of the essence, form a part of it, though not expressly mentioned; it being of the nature of the contract, that they shall be included and understood. These things have an intermediate place between those, which are of the essence of the contract, and those, which are merely accidental to it, and differ from both of them. They differ from those, which are of the essence of the contract, inasmuch as the contract may subsist without them, and they may be excluded by the express agreement of the parties; and they differ from things, which are merely accidental to it, inasmuch as they form a part of it without being particularly expressed, as may be illustrated by the following examples. In the contract of sale, the obligation of warranty, which the seller contracts with the purchaser, is of the nature of the contract of sale; therefore the seller, by the act of sale, contracts this obligation, though the parties do not express it, and there is not a word respecting it in the contract; but, as the obligation is of the nature, and not of the essence, of the contract of sale, the contract of sale may subsist without it; and, if it is agreed, that the seller shall not be bound to warranty, such agreement will be valid, and the contract will continue a real contract of sale. It is also of the nature of the contract of sale, that, as soon as the contract is completed by the consent of the parties, although before delivery, the thing sold is at the risk of the purchaser: and that, if it happens to perish without the fault of the seller, the loss falls upon the purchaser, who is, notwithstanding the misfortune, liable for the price; but, as that is only of the nature, and not of the essence, of the contract, the contrary may be agreed upon. Where a thing is lent, to be specifically returned [commodatur], it is of the nature of the contract, that the borrower shall be answerable for the slightest negligence in respect of the article lent. He contracts this obligation to the lender by the very nature of the contract, and without any thing being said about it. But, as this obligation is of the nature, and not of the essence of the contract, it may be excluded by an express agreement, that the borrower shall only be bound to act with fidelity, and shall not be responsible for any accidents merely occasioned by his negligence. It is also of the nature of this contract, that

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an actual decision under the Common Law. By the law of England, an acceptance of a Bill of Exchange binds the Acceptor to payment at all events. By the law of Leghorn, if a Bill is accepted, and the Drawer fails, and the Acceptor has not sufficient effects of the Drawer in his hands at the time of acceptance, the acceptance becomes void. An acceptance in Leghorn is governed by this latter law; and, under such circumstances, it has been held void, and not obligatory upon the Acceptor.[1]

§ 141. Secondly, the obligation of the contract, which, though often confounded with, is distinguishable from, its nature.[2] The obligation of a contract is the duty to perform it, whatever may be its nature. It may be a moral obligation, or a legal obligation, or both. But when we speak of obligation generally, we mean legal obligation, that is, the right to performance, which the law confers on one party, and the corresponding duty of performance, to which it binds

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the loss of the thing lent, when it arises from inevitable accident, falls upon the lender. But, as that is of the nature, and not of the essence, of the contract, there may be an agreement to charge the borrower with every loss, that may happen until the thing is restored. A great variety of other instances might be adduced from the different kinds of contracts. Those things which are accidental to a contract, are such as, not being of the nature of the contract, are only included in it by express agreement. For instance, the allowance of a certain time for paying the money due, the liberty of paying it by instalments, that of paying another thing instead of it, of paying some other person than the creditor, and the like, are accidental to the contract; because they are not included in it, without being particularly expressed."

[1] Burrows v. Jemino, 2 Str. R. 733; 2 Eq. Abr. 526; Story on Conflict of Laws, § 265.

[2] Story on Conflict of Laws, § 266; Pardessus, Droit Comm. Tom. 5, art. 1495, p. 269 to 271. See 2 Boullenois, Observ. 46, p. 454, 460, 462 to 464; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 764, 765.

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the other.[1] This is what the French jurists call, *Le lien du contrat* (the legal tie of the contract), *Onus conventionis*, and what the civilians generally call *Vinculum juris*, or *Vinculum obligationis*.[2] The Institutes of Justinian have thus defined it; *Obligatio est juris vinculum, quo necessitate adstringimur alicujus rei solvendæ, secundum nostræ civitatis jura*.[3] A contract may, in its nature, be purely voluntary, and possess no legal obligation. It may be a mere naked pact (*nudum pactum*). It may possess a legal obligation; but the laws may limit the extent and force of that obligation *in personam*, or *in rem*. It may bind the party personally, but not bind his estate; or it may bind his estate, and not bind his person. The obligation may be limited in its operation or duration; or it may be revocable or dissoluble in certain future events, or under peculiar circumstances.[4]

§ 142. It would be easy to multiply illustrations under this head.[5] Suppose a contract, by the law of one country, to involve no personal obligation, (as was supposed to be the law of France in a particular case, which came in judgment,)[6] but merely to confer a right to proceed *in rem*; such a contract would be held everywhere to involve no personal obligation whatsoever. Suppose, by the law of a particular coun-

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[1] See 3 Story, Comm. on Constitution, § 1372 to 1379; Ogden *v.* Saunders, 12 Wheaton, 213; Pothier on Oblig. art. 1, n. 1, p. 173 to 175.

[2] 2 Boullenois, Observ. 46, p. 458 to 460.

[3] Inst. Lib 3, tit. 14; Pothier, Pandect. Lib. 44, tit. 7, P. 1, art. 1, § 1; Pothier, Oblig. n. 173, 174.

[4] See 2 Boullenois, Observ. 46, p. 452, 454; Code Civil of France, art. 1168 to 1196.

[5] Story on Conflict of Laws, § 267.

[6] Melan *v.* Fitz James, 1 Bos. & Pull. 138.

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try, a mortgage, for money borrowed, should, in the absence of any express contract to repay, be limited to a mere repayment thereof out of the land, a foreign court would refuse to entertain a suit giving to it a personal obligation. Suppose a contract for the payment of the debt of a third person in a country, where the law subjected such a contract to the tacit condition, that payment must first be sought against the debtor and his estate; that would limit the obligation to a mere accessorial and secondary character; and it would not be enforced in any foreign country, except after a compliance with the requisitions of the local law. Sureties, indorsers, and guarantors are, therefore, everywhere liable, only according to the law of the place of their contract. Their obligation, if treated by such local law, as an accessorial obligation, will not anywhere else be deemed a principal obligation.[1] So, if, by the law of the place of a contract, its obligation is positively and *ex directo* extinguished after a certain period, by the mere lapse of time, it cannot be revived by a suit in a foreign country, whose laws provide no such rule, or apply it only to the remedy.[2] To use the expressive language of a learned judge, it must be shown, in all such cases, what the laws of the foreign country are, and that they create an obligation, which our laws will enforce.[3]

§ 143. In the next place, the interpretation of con-

[1] See Pothier on Oblig. n. 407; Trimbey *v.* Vignier, 6 Carr. & Payne, 25; S. C. 1 Bing. N. C. 151, 159; 4 Moore & Scott, 695; Story on Conflict of Laws, § 314, 316 *a*; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 764 to 766; Aymar *v.* Sheldon, 12 Wend. R. 439.

[2] See Le Roy *v.* Crowninshield, 2 Mason, R. 151; Pothier, Oblib. n. 636 to 639; Voet, ad Pand. Lib. 4, tit. 1, § 29, ad finem.

[3] Lord Chief J. Eyre, Melan *v.* Duke of Fitz James, 1 Bos. & Pull. 141.

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tracts.[1] Upon this subject, there would scarcely seem to be any room for doubt or disputation. There are certain general rules of interpretation, recognized by all nations, which form the basis of all reasoning on the subject of contracts. The object is to ascertain the real intention of the parties in their stipulations; and, when the latter are silent, or ambiguous, to ascertain, what is the true sense of the words used, and what ought to be implied, in order to give them their true and full effect.[2] The primary rule, in all expositions of this sort, is that of common sense, so well expressed in the Digest. *In conventionibus contrahen-*

[1] Story on Conflict of Laws, § 270.

[2] See Lord Brougham's striking remarks on this subject, cited in Story on Conflict of Laws, § 226 *c*. In Prentiss *v*. Savage, 13 Mass. R. 23, Mr. Chief Justice Parker said; "It seems to be an undisputed doctrine, with respect to personal contracts, that the law of the place, where they are made, shall govern in their construction; except when made with a view to performance in some other country, and then the law of such country is to prevail. This is nothing more than common sense and sound justice, adopting the probable intent of the parties as to the rule of construction. For when a citizen of this country enters into a contract in another, with a citizen or subject thereof, and the contract is intended to be there performed, it is reasonable to presume, that both parties had regard to the law of the place, where they were, and that the contract was shaped accordingly. And it is also to be presumed, when the contract is to be executed in any other country, than that in which it is made, that the parties take into their consideration the law of such foreign country. This latter branch of the rule, if not so obviously founded upon the intention of the parties as the former, is equally well settled, as a principle in the law of contracts." Mr. Chancellor Walworth, in Chapman *v*. Robertson (6 Paige, R. 627, 630), used equally strong language. "It is an established principle," (said he,) "that the construction and validity of personal contracts, which are purely personal, depend upon the laws of the place, where the contract is made, unless it was made with reference to the laws of some other place or country, where such contract, in the contemplation of the parties thereto, was to be carried into effect and performed." 2 Kent, Comm. Lect. 39, p. 457, 458 (3d edit.); 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 752 to 764.

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tium voluntas, potius quam verba, spectari placuit.[1] But, in many cases, the words, used in contracts, have different meanings attached to them in different places, by law, or by custom. And, where the words are, in themselves, obscure, or ambiguous, custom and usage in a particular place may give them an exact and appropriate meaning. Hence, the rule has found admission into almost all, if not into all, systems of jurisprudence, that, if the full and entire intention of the parties does not appear from the words of the contract, and, if it can be interpreted by any custom or usage of the place where it is made, that course is to be adopted. Such is the rule of the Digest. *Semper in stipulationibus et in cæteris contractibus id sequimur, quod actum est. Aut si non appareat, quod actum est, erit consequens, ut id sequamur, quod in regione, in qua actum est, frequentatur.*[2] *Conservanda est consuetudo regionis et civitatis* (says J. Sandè) *ubi contractum est. Omnes enim actiones nostræ (si non aliter fuerit provisum inter contrahentes) interpretationem recipiunt à consuetudine loci, in quo contrahitur.*[3] Usage is, indeed, of so much authority, in the interpretation of contracts, that a contract is understood to contain the customary clauses, although they are not expressed, according to the known rule, *In contractibus tacite*

[1] Dig. Lib. 50, tit. 16, l. 219. — Many rules of interpretation are found in Pothier on Obligations, n. 91 to 102; in Fonblanque on Equity, B. 1, ch. 6, § 11 to 20, and notes; 1 Domat, Civil Law, B. 1, tit. 1, § 2; 1 Powell on Contracts, 370 et seq.; Merlin, Répertoire, Convention, § 7, p. 366.

[2] Dig. Lib. 50, tit. 17, l. 34; 1 Domat, Civil Law, B. 1, tit 1, § 2, n. 9; 2 Boullenois, Observ. 46, p. 490; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 775, 776.

[3] J. Sand. Op. Comm. de Reg. Jur. l. 9, p. 17.

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veniunt ea, quæ sunt moris et consuetudinis.[1] Thus, if a tenant is, by custom, to have the outgoing crop, he will be entitled to it, although not expressed in the lease.[2] And, if a lease is entirely silent, as to the time of the tenant's quitting, the custom of the country will fix it.[3] By the law of England, a month means, ordinarily, in common contracts, as in leases, a lunar month; but, in mercantile contracts, it means a calendar month.[4] A contract, therefore, made in England, for a lease of land for twelve months, would mean a lease for forty-eight weeks only.[5] A Promissory Note, to pay money in twelve months, would mean in one year, or in twelve calendar months.[6] If a contract of either sort were required to be enforced in a foreign country, its true interpretation must be everywhere the same, that it is, according to the usage in the country, where the contract was made.

§ 144. The same word, too, often has different significations in different countries.[7] Thus, the term *usance*, which is common enough in negotiable instruments, means, in some countries, a month, in others, two or more months, and, in others, half a month. A note payable at one usance, must be construed, everywhere, according to the meaning of the word in the

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[1] Pothier, Oblig. n. 95; Merlin, Répertoire, Convention, § 7; 2 Kent, Comm. Lect. 39, p 555 (3d edit.).

[2] Wigglesworth *v.* Dallison, Doug. R. 201, 207.

[3] Webb *v.* Plumer, 2 B. & Ald. 746.

[4] 2 Black. Comm. 141; Catesby's case, 6 Coke, R. 62; Lacon *v.* Hooper, 6 T. R. 224; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 776, 777.

[5] Ibid.

[6] Chitty on Bills, p. 406 (8th edit. 1833); Lang *v.* Gale, 1 M. & Selw. 111; Cockell *v.* Gray, 3 B. & Bing. 187; Leffingwell *v.* White, 1 John. Cas. 99.

[7] Story on Conflict of Laws, § 271.

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country, where the contract is made.[1] There are many other cases illustrative of the same principle. A Note, made in England, for 100 pounds, would mean 100 pounds sterling. A like Note, made in America, would mean 100 pounds in American currency, which is one fourth less in value. It would be monstrous, to contend, that, on the English note, sued in America, the less sum, only, ought to be recovered; and, on the other hand, on the American note, sued in England, that one third more ought to be recovered.[2]

§ 145. The like interpretation would be applied to the case of a Bill of Exchange, drawn in one country, and payable in another country, where the same denomination of currency existed in both countries, but represented different values. Thus, for example, a Bill of Exchange drawn in Boston upon London for one hundred pounds, payable in London, would be construed to be for one hundred pounds sterling; whereas, if a Bill were drawn for the same sum in London upon Boston, and payable there, it would be construed to be for one hundred pounds of the lawful currency of Massachusetts, which, as we have just seen, is one quarter less in value. In each case, the ground of interpretation is the presumed intention of the parties derived from the nature and objects of the instrument.

§ 146. Hence, it is adopted by the Common Law,

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[1] Chitty on Bills, p. 404, 405 (8th edit. 1833). See, also, 2 Boullenois, Observ. 46, p. 447.

[2] See, also, Powell on Contracts, 376; 2 Boullenois, Observ. 46, p. 498, 503; Henry on Foreign Law, Appendix, 233; Pardessus, Droit Comm. art. 1492; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 772, 773; Story on Conflict of Laws, § 272 *a*, 307, 308.

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as a general rule in the interpretation of contracts, that they are to be deemed contracts of the place, where they are made, unless they are positively to be performed or paid elsewhere. Therefore, a Bill or Note made in France, and payable generally, will be treated as a French Note, and governed accordingly by the laws of France, as to its obligation and construction. So, a policy of insurance, executed in England, on a French ship, for the French owner, on a voyage from one French port to another, would be treated as an English contract, and, in case of loss, the debt would be treated as an English debt. Indeed, all the rights and duties, and obligations, growing out of such a policy, would be governed by the law of England, and not by the law of France, if the laws respecting insurance were different in the two countries.[1]

§ 147. But, where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance.[2] This would seem to be a result of natural justice; and the Roman law has (as we have seen) adopted it as a maxim; *Contraxisse unusquisque in eo loco intelligitur*,

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[1] Don *v.* Lippman, 5 Clark & Fin. R. 1, 18 to 20; Story on Conflict of Laws, § 317.

[2] Story on Conflict of Laws, § 280; 2 Kent, Comm. Lect. 37, p. 393, 394, and Lect. 39, p. 459 (4th edit.); Casaregis, Disc. 179; 1 Emérigon, c. 4, § 8; Voet, de Stat. § 9, ch. 2, n. 15, p. 271 (edit. 1715); Id. p. 328 (edit. 1661); Boullenois, Quest. Contr. des Lois, p. 330, &c.; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 771, 772; Don *v.* Lippman, 5 Clark & Fin. R. 1, 13, 19.

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in quo ut solveret, se obligavit;[1] and again, in the law, *Aut ubi quisque contraxerit. Contractum autem non utique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia.*[2] The rule was fully recognized, and acted on, in a recent case, by the Supreme Court of the United States, where the Court said, that the general principle, in relation to contracts made in one place, to be executed in another, was well settled; that they are to be governed by the laws of the place of performance.[3]

§ 148. The like question, also, often arises in cases respecting the payment of interest.[4] The general rule is, that interest is to be paid on contracts according to the law of the place, where they are to be performed, in all cases, where interest is expressly or impliedly to be paid.[5] *Usurarum modus ex more regionis, ubi con-*

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[1] Dig. Lib. 44, tit. 7, l. 21; Story on Conflict of Laws, § 233.

[2] Dig. Lib. 42, tit. 5, l. 3.

[3] Andrews *v.* Pond, 13 Peters, R. 65.

[4] Story on Conflict of Laws, § 281.

[5] Story on Conflict of Laws, § 292, 293, 293 *a*, to 293 *e*, 304; Conner *v.* Bellamont, 2 Vern. R. 382; Cash *v.* Kennion, 11 Vesey, R. 314; Robinson *v.* Bland, 2 Burr. R. 1077; Ekins *v.* East India Company, 1 P. W. 395; Ranelagh *v.* Champant, 2 Vern. R. 395, and note, ibid. by Raithby; 1 Chitty on Comm. & Manuf. ch. 12, p. 650, 651; 3 Chitty, Id. ch. 1, p. 109; Eq. Abridg. *Interest*, E.; Henry on Foreign Law, 43, note; Id. 53; 2 Kaimes, Equity, B. 3, ch. 8, § 1; 2 Fonbl. Eq. B. 5, ch. 1, § 6, and note; Bridgman's Equity Digest, *Interest*, vii.; Fanning *v.* Consequa, 17 John. R. 511; S. C. 3 John. Ch. R. 610; Hosford *v.* Nichols, 1 Paige, R. 220; Houghton *v.* Page, 2 N. Hamp. R. 42; Peacock *v.* Banks, 1 Minor, R. 387; Lapice *v.* Smith, 13 Louis. R. 91, 92; Thomson *v.* Ketchum, 4 John. R. 285: Healy *v.* Gorman, 3 Green, N. J. R. 328; 2 Kent, Comm. Lect. 39, p. 460, 461 (3d edit.). — A case, illustrative of this principle, recently occurred before the House of Lords. A widow, in Scotland, entered into an obligation to pay the whole of her deceased husband's debts. It was held by the Court of Session in Scotland, that the English creditors, on contracts made in England, were entitled to recover interest in all cases, where the law of England gave interest, and not, where it did not. Therefore, on Bonds, and Bills of Exchange, interest was

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tractum est, constituitur, says the Digest.[1] Thus, a Note made in Canada, where interest is six per cent., payable with interest in England, where it is five per cent., bears English interest only.[2] Loans, made in a place, bear the interest of that place, unless they are payable elsewhere.[3] And, if payable in a foreign country, they may bear any rate of interest not ex-

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allowed, and, on simple contracts, not. And this decision was affirmed by the House of Lords. Montgomery v. Budge, 2 Dow & Clark, Rep. 297. The case of Arnott v. Redfern (2 Carr. & Payne, 88), may, at first view, seem inconsistent with the general doctrine. There, the original contract was made in London, between an Englishman and a Scotchman. The latter agreed to go to Scotland, as agent, four times a year, to sell goods and collect debts for the other party, to remit the money, and to guaranty one fourth part of the sales; and he was to receive one per cent. upon the amount of sales, &c. The agent sued, for a balance of his account, in Scotland, and the Scotch Court allowed him interest on it. The judgment was afterwards sued in England; and the question was, whether interest ought to be allowed. Lord Chief Justice Best said; "Is this an English transaction? For, if it is, it will be regulated by the rules of English law. But, if it is a Scotch transaction, then the case will be different." He afterwards added, "This is the case of a Scotchman, who comes into England, and makes a contract. As the contract was made in England, although it was to be executed in Scotland, I think it ought to be regulated according to the rules of the English law. This is my present opinion. These questions of international law do not often occur." And he refused interest, because it was not allowed by the law of England. The Court afterwards ordered interest to be given, upon the ground, that the balance of such an account would carry interest in England. But Lord Chief Justice Best rightly expounded the contract, as an English contract, though there is a slight inaccuracy in his language. So far as the principal was concerned, the contract to pay the commission was to be paid in England. The services of the agent were to be performed in Scotland. But the whole contract was not to be executed exclusively there by both parties. A contract, made to pay money in England, for services performed abroad, is an English contract, and will carry English interest.

[1] Dig. Lib. 22, tit. 1, l. 1; 2 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 9, p. 860 to 862.

[2] Scofield v. Day, 20 Johns. R. 102.

[3] De Wolf v. Johnson, 10 Wheaton, R. 367, 383; Consequa v. Willing, Peters, Cir. R. 225; 2 Boullenois, Observ. 46, p. 477, 478; Andrews v. Pond, 13 Peters, R. 65, 78.

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ceeding that, which is lawful by the laws of that country.[1] And on this account, a contract for a loan, made, and payable in a foreign country, may stipulate for interest higher than that allowed at home.[2] If the contract for interest be illegal there, it will be illegal everywhere.[3] But, if it be legal, where it is made, it will be of universal obligation, even in places, where a lower interest is prescribed by law.[4]

§ 149. The question, therefore, whether a contract is usurious or not, depends, not upon the rate of the interest allowed, but upon the validity of that interest in the country, where the contract is made, and is to be executed.[5] A contract, made in England, for ad-

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[1] Ibid.; 2 Kent, Comm. Lect. 39, p. 460, 461 (3d edit.); Thomson v. Ketchum, 4 Johns. R. 285; Healy v. Gorman, 3 Green, N. J. R. 328.

[2] 2 Kent, Comm. Lect. 39, p. 460, 461 (3d edit.); Hosford v. Nichols, 1 Paige, R. 220; Houghton v. Page, 2 N. Hamp. R. 42; Thompson v. Powles, 2 Simons, R. 194. In this last case, the Vice-Chancellor said; "With respect to the question of usury, in order to hold the contract to be usurious, it must appear, that the contract was made here, and that the consideration for it was to be paid here. It should appear, at least, that the payment was not to be made abroad; for, if it was to be made abroad, it would not be usurious." See, also, Andrews v. Pond, 13 Peters, R. 65, 78; De Wolf v. Johnson, 10 Wheat. R. 383.

[3] 2 Kaimes, Equity, B. 3, ch. 8, § 1; Hosford v. Nichols, 1 Paige, R. 220; 2 Boullenois, Observ. 46, p. 477. — In the case of Thompson v. Powles (2 Simons, R. 194), the Vice-Chancellor said; "In order to have the contract (for stock) usurious, it must appear, that the contract was made here, and that the consideration for it was to be paid here." See, also, Yrisarri v. Clement, 2 Carr. & Payne, R. 223. In Hosford v. Nichols (1 Paige, R. 220), where a contract was made for the sale of lands in New York, by citizens then resident there, and the vendor afterwards removed to Pennsylvania, where the contract was consummated, and a mortgage given to secure the unpaid purchase money, with New York interest (which was higher than that of Pennsylvania), the Court thought the mortgage not usurious, it being only a consummation of the original bargain made in New York.

[4] Ibid.

[5] Story on Conflict of Laws, § 292; Harvey v. Archbold, 1 Ryan &

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vances to be made at Gibraltar, at a rate of interest beyond that of England, would, nevertheless, be valid in England; and so, a contract to allow interest upon credits given in Gibraltar, at such higher rate, would be valid in favor of the English creditor.[1]

§ 150. Where a contract is made in one country, and is payable in the currency of that country, and a suit is afterwards brought in another country, to recover for a breach of the contract, a question often arises, as to the manner, in which the amount of the debt is to be ascertained, whether at the nominal or established par value of the currencies of the two countries, or according to the rate of Exchange at the particular time existing between them. In all cases of this sort, the place where the money is payable, as well as the currency, in which it is promised to be paid, are (as we shall presently see) material ingredients.[2] For instance, a debt of £100 sterling is contracted in England, and is payable there; and afterwards a suit is brought in America for the recovery of the amount. The present par, fixed by law between the two countries is, to estimate the pound sterling at four dollars and forty-four cents.[3] But the rate of Exchange, on Bills drawn in America on England, is generally at from 8 to 10 per cent. advance on the same amount. In a recent case, it was held by the King's Bench, in

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Mood. R. 184; Andrews v. Pond, 13 Peters, R. 65, 78; Story on Conflict of Laws, § 243.

[1] Ibid.

[2] Story on Conflict of Laws, § 308, 310.

[3] This is the par for ordinary commercial purposes. But by the Act of Congress 27th of July, 1842, the par, for the purpose of estimating the value of goods, paying an *ad valorem* duty, and for that purpose only, is declared to be to estimate a pound sterling at four dollars and eighty-four cents. Ante, § 30, note.

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an action for a debt payable in Jamaica, and sued in England, that the amount should be ascertained by adding the rate of Exchange to the par value, if above it; and so *vice versâ*, by deducting it, when the Exchange is below par.[1] Perhaps it is difficult to reconcile this case with the doctrine of some other cases.[2] In a late American case, where the payment was to be in Turkish piastres, (but it does not appear from the Report, where the contract was made, or was payable,) it was held to be the settled rule, "Where money is the object of the suit, to fix the value according to the rate of Exchange at the time of the trial."[3] It is impossible to say, that a rule, laid down in such general terms, ought to be deemed of universal application; and cases may easily be imagined, which may justly form exceptions.

§ 151. The proper rule would seem to be, in all cases, to allow that sum, in the currency of the country, where the suit is brought, which shall approximate most nearly to the amount, to which the party is entitled in the country, where the debt is payable, calculated by the real par, and not by the nominal par, of Exchange.[4] This would seem to be the rule, also,

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[1] Scott *v.* Bevan, 2 Barn. & Adolph. 78. — Lord Tenterden, in delivering the opinion of the Court in favor of the rule, said; "Speaking for myself personally, I must say, that I still hesitate as to the propriety of the conclusion." See Delegal *v.* Naylor, 7 Bing. R. 460; Ekins *v.* East India Company, 1 P. Will. 396.

[2] See Cockerell *v.* Barber, 16 Ves. 461; Story, Confl. of Laws, § 312.

[3] Lee *v.* Wilcocks, 5 Serg. & Rawle, 48. — It is probable, that in this case the money was payable in Turkey.

[4] Story on Conflict of Laws, § 309. In Cash *v.* Kennion, (11 Ves. R. 314,) Lord Eldon held, that, if a man in a foreign country agrees to pay £100 in London, upon a given day, he ought to have that sum there on that day. And, if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much, as he would have

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which is adopted by foreign jurists.[1] In some countries there is an established par of Exchange by law, as in the United States, where the pound sterling of England is now valued at four dollars and forty-four cents, for all purposes, except the estimation of the duties on goods paying an *ad valorem* duty.[2] In other countries, the original par has, by the depreciation of the currency, become merely nominal; and there we should resort to the real par. Where there is no established par from any depreciation of the currency, there, the rate of Exchange may justly furnish a standard, as the nearest approximation of the relative value of the currencies. And where the debt is payable in a particular known coin, as in Sicca rupees, or in Turkish piastres, there the mint value of the coin, and not the mere bullion value in the country, where the coin is issued, would seem to furnish the proper standard, since it is referred to by the parties in their contract, by its descriptive name, as coin.

§ 152. But in all these cases we are to take into consideration the place, where the money is, by the original contract, payable; for, wheresoever the creditor may sue for it, he is entitled to have an amount equal to what he must pay, in order to remit it to that

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had, if the contract had been performed. — J. Voet says, "Si major, alibi minor, eorundem nummorum valor sit, in solutione faciendâ; non tam spectanda potestas pecuniæ, quæ est in loco, in quo contractus celebratus est, quam potius quæ obtinet in regione illâ, in quâ contractûs implementum faciendum est." Voet, ad Pand. Lib. 12, tit. 1, § 25; Henry on Foreign Law, 43, note. See, also, Story on Conflict of Laws, § 281; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p. 771 to 773; Grant v. Healey, 3 Sumner, R. 523.

[1] Story on Conflict of Laws, § 281, 309.

[2] Story on Conflict of Laws, § 308, n. (2); Ante, § 30, note, § 150.

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country.[1] Thus, if a Note were made in England, for £100 sterling, payable in Boston (Mass.), if a suit were brought in Massachusetts, the party would be entitled to recover four hundred and forty-four dollars and forty-four cents, that being the established par of Exchange by our laws. But, if our currency had become depreciated by a debasement of our coinage, then the depreciation ought to be allowed for, so as to bring the sum to the real par, instead of the nominal par.[2] But, if a like Note were given in England, for £100, payable in England, or payable generally (which, in legal effect, would be the same thing); there, in a suit in Massachusetts, the party would be entitled to recover, in addition to the four hundred and forty-four dollars and forty-four cents, the rate of Exchange between Massachusetts and England, which is ordinarily from eight to ten per cent. above par. And, if the Exchange were below par, a proportionate deduction should be made; so that the party would have his money replaced in England, at exactly the same amount, which he would be entitled to recover in a suit there.

§ 153. But, to bring ourselves more closely to the subject before us, let us now proceed to some other

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[1] See 1 Chitty on Comm. and Manufact. ch. 12, p. 650, 651. See Story on Conflict of Laws, § 281, 308, 310; Grant *v.* Healey, 3 Sumner, R. 523.

[2] Paul Voet has expressed an opinion upon this subject in general terms. "Quid, si in specie de nummorum aut redituum solutione difficultas incidat, si forte valor sit immutatus; an spectabitur loci valor, ubi contractus erat celebratus, an loci, in quem destinata erat solutio? Respondeo, ex generali regulâ, spectandum esse loci statutum, in quem destinata erat solutio." P. Voet, de Stat. § 9, ch. 2, § 15, p. 271; Id. p. 328 (edit. 1661). And he applies the same rule, where contracts are for specific articles, the measures whereof are different in different countries. Id. § 16, p. 271; Id. p. 328 (edit. 1661).

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illustrations of these doctrines, in cases of negotiable instruments. Thus, suppose a negotiable Bill of Exchange is drawn in Massachusetts on England, and 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 ten per cent., in New York and Pennsylvania, twenty per cent., and in Maryland, fifteen per cent.[1] 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 respective indorsements, every indorsement being treated as a new and substantive contract.[2] The consequence is, that the Indorser may render himself liable, upon a dishonor of the Bill, for a much higher rate of damages, than he can recover from the Drawer. But this results from his own voluntary contract; and not from any collision of rights, arising from the nature of the original contract.[3]

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[1] Story on Conflict of Laws, § 314; 3 Kent, Comm. Lect. 44, p. 116 to 120 (3d edit.).

[2] Story on Conflict of Laws, § 307, 317; Powers *v.* Lynch, 3 Mass. R. 77; Prentiss *v.* Savage, 13 Mass. R. 20, 23, 24; Slacum *v.* Pomeroy, 6 Cranch, R. 221; Depau *v.* Humphreys, 20 Martin, R. 1, 14, 15; Hicks *v.* Brown, 12 Johns. R. 142; Bayley on Bills, ch. A., p. 18 (Phillips & Sewall's edition); Trimbey *v.* Vignier, 1 Bing. R. 151, 159, 160; Story on Conflict of Laws, § 267, 316 *a*, 353 to 361; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 20, p 771 to 774.

[3] Pardessus has discussed this matter at large. He adopts the general doctrine here stated, that the law of the place of each indorsement is to govern, as each indorsement constitutes a new contract between the immediate parties. And he applies the same rule to damages; and says,

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§ 154. It has sometimes been suggested, that this doctrine is a departure from the rule, that the law of the place of payment is to govern.[1] But, correctly considered, it is entirely in conformity to the rule. The Drawer and Indorsers do not contract to pay the money in the foreign place, on which the Bill is drawn; but only to guarantee its acceptance and payment in that place by the Drawee; and, in default of such payment, they agree, upon due notice, to reimburse the Holder, in principal and damages, at the place, where they respectively entered into the contract.[2]

§ 155. Nor is it any departure from the rule, to hold, that the time, when the payment of such a Bill is to accrue, is to be according to the law of the place, where the Bill is payable; so that the days of grace (if any) are to be allowed, according to the law, or custom, of the place, where the Bill is to be accepted and paid;[3] for such is the appropriate construction of

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that, if the law of the place, where a Bill of Exchange is drawn, admits of the accumulation of costs and charges on account of reëxchanges, (as is the law of some countries,) in such a case, each successive Indorser may become liable to the payment of such successive accumulations, if allowed by the law of the place, where they made their indorsement. He seems, indeed, to press his doctrine farther, and to hold, that, if the law of the place of such indorsement does not allow such accumulation of reëxchanges, but the law of the place, where the Bill is drawn does, the Indorsers will be liable to pay, as the Drawer would. But his reasoning does not seem satisfactory; and it is certainly inconsistent with the acknowledged doctrines of the Common Law. Pardessus, Droit Commerc. Tom. 5, art. 1500. See, also, Henry on Foreign Laws, 53, Appx. 239 to 242; 3 Kent, Comm. Lect. 44, p 115 (4th edit.) See Rothschild *v.* Currie, 1 Adolph. & Ell. New R. 43.

[1] Story on Conflict of Laws, § 315; 2 Kent, Comm. Lect. 39, p. 459, 460 (4th edit); Chitty on Bills, p. 191 to 194 (8th edit. London).

[2] Potter *v.* Brown, 5 East, R. 123, 130; Hicks *v.* Brown, 12 Johns R. 142; Powers *v.* Lynch, 3 Mass. R. 77; Prentiss *v.* Savage, 13 Mass. R. 20, 24; Pardessus, Droit Comm. art. 1497.

[3] Story on Conflict of Laws, § 316, 347, 361. See 2 Kent, Comm.

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the contract, according to the rules of law, and the presumed intention of the parties.[1]

§ 156. Another illustration of the general doctrine may be derived from the case of negotiable paper, as to the binding obligation and effect of a blank indorsement. It seems, that, by the law of France, an indorsement in blank of a Promissory Note does not transfer the property to the Holder, unless certain prescribed formalities are observed in the indorsement, such as the date, the consideration, and the name of the party, to whose order it is passed; otherwise, it is treated as a mere procuration.[2] Now, let us suppose a Note, made at Paris, and payable to the order of the Payee, and he should there indorse the same in blank, without the prescribed formalities, and afterwards the Holder should sue the Maker of the Note in another country, as, for example, in England, where no such formalities are prescribed; the question would arise, Whether the Holder could recover in such a suit, in an English Court, upon such an indorsement? It has been held, that he cannot; and this decision seems to be founded in the true principles of international jurisprudence; for it relates, not to the form of the remedy, but to the interpretation and obligation of the contract, created by the indorsement, which ought to be governed by the law of the place of the indorsement.[3]

Lect. 39, p. 459, 460 (4th edit.); Chitty on Bills, p. 191 (8th edit. Lond.); Pothier, Contrat de Change, n. 15, 155; Pardessus, Droit Comm. Tom. 5, § 1495.

[1] Mr. Justice Martin, in Vidal *v.* Thompson, 11 Martin, R. 23, 24; Post, § 170, 177.

[2] Story on Conflict of Laws, § 316 *a*; Code de Comm. art. 137, 138; Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 158 to 160.

[3] Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 158 to 160; Story on Conflict of Laws, § 272.

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§ 157. Another illustration may be derived from the different obligations, which an indorsement creates in different states.[1] By the general Commercial Law, in order to entitle the Indorsee to recover against any antecedent Indorser upon a negotiable Note, it is only necessary, that due demand should be made upon the Maker of the Note at its maturity, and due notice of the dishonor given to the Indorser. But, by the laws of some of the American States, it is required, in order to charge an antecedent Indorser, not only that due demand should be made, and due notice given, but that a suit shall be previously commenced against the Maker, and prosecuted with effect in the country, where he resides; and, then, if payment cannot be obtained from him under the judgment, the Indorsee may have recourse to the Indorser. In such a case, it is clear, upon principle, that the indorsement, as to its legal effect and obligation, and the duties of the Holder, must be governed by the law of the place, where the indorsement is made. This very point has been recently decided, in a case where a Note was made and indorsed in the State of Illinois. On that occasion, Mr. Chief Justice Shaw, in delivering the opinion of the Court, said; "The Note declared on, being made in Illinois, both parties residing there at the time, and it also being indorsed in Illinois, we think, that the contract, created by that indorsement, must be governed by the law of that State. The law in question does not affect the remedy, but goes to create, limit, and modify the contract effected by the fact of indorsement. In that, which gives force and effect to the contract, and imposes restrictions and

[1] Story on Conflict of Laws, § 316.

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modifications upon it, the law of the place of contract must prevail, when another is not looked to, as a place of performance. Suppose it were shown, that, by the law of Illinois, the indorsement of a note by the Payee, merely transferred the legal interest in the Note to the Indorsee, so as to enable him to sue in his own name, but imposed no conditional obligation on the Indorser to pay; it would hardly be contended, that an action could be brought here upon such an indorsement, if the Indorser should happen to be found here, because, by our law, such an indorsement, if made here, would render the Indorser conditionally liable to pay the Note. By the law of Illinois, the Indorser is liable only after a judgment obtained against the Maker; and as no such judgment appears to have been obtained on this Note, the condition, upon which alone the plaintiff may sue, is not complied with, and, therefore, the action cannot be maintained."[1]

§ 158. But suppose a negotiable Note is made in one country, and is payable there, and it is afterwards indorsed in another country, and, by the law of the former country, equitable defences are let in, in favor of the Maker, and, by the latter, such defences are excluded; What law is to govern, in regard to the Holder, in a suit against the Maker to recover the amount, upon the indorsement to him? The answer is, The law of the place, where the Note was made; for there the Maker undertook to pay; and the subsequent negotiation of the Note did not change his orig-

[1] Story on Conflict of Laws, § 316 *b*; Williams *v.* Wade, 1 Metcalf, R. 82, 83.

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inal obligation, duty, or rights.[1] Acceptances of Bills are governed by the same principles. They are deemed contracts of acceptance in the place, where they are made, and where they are to be performed.[2] So Paul Voet lays down the doctrine. *Quid si de literis cambii incidat quæstio; Quis locus erit spectandas? Is spectandus est locus, ad quem sunt destinatæ, et ibidem acceptatæ.*[3] But, suppose a negotiable acceptance, or a negotiable Note, made payable generally, without any specification of place; What law is to govern, in case of a negotiation of it by one Holder to another in a foreign country, in regard to the Acceptor, or to the Maker? Is it a contract between them to pay in any place, where it is negotiated, so as to be deemed a contract of that particular place, and governed by its laws? The Supreme Court of Massachusetts have held, that it creates a debt payable anywhere, by the very nature of the contract; and it is a promise to whosoever shall be the Holder of the Bill or Note.[4] Assuming this to be true; still it does not follow, that the law of the place of the negotiation is to govern; for the transfer is not, as to the Acceptor, or the Maker, a new contract; but it is under, and a part of, the original contract, and springs up from the law of the place, where that contract was made. A contract to pay generally is governed by the law of the place,

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[1] Story on Conflict of Laws, § 317; Ory *v.* Winter, 16 Martin, R. 277; Story on Conflict of Laws, § 332, 343, 344.

[2] Lewis *v.* Owen, 4 Barn. & Ald. 654; Story on Conflict of Laws, § 307, 333, 344, 345; Cooper *v.* Earl of Waldegrave, 2 Beavan, R. 282.

[3] P. Voet, de Statut. § 9, ch. 2, n. 14, p. 270 (edit. 1713); Id. p. 327 (edit. 1661); Story on Conflict of Laws, § 346, note (4).

[4] Braynard *v.* Marshall, 8 Pick. R. 194; Story on Conflict of Laws, § 341, 343 to 346; Post, § 166.

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where it is made; for the debt is payable there, as well as in every other place.[1] To bring a contract within the general rule of the *Lex loci*, it is not necessary, that it should be payable exclusively in the place of its origin. If payable everywhere, then it is governed by the law of the place, where it is made; for the plain reason, that it cannot be said to have the law of any other place in contemplation, to govern its validity, its obligation, or its interpretation. All debts between the original parties are payable everywhere, unless some special provision to the contrary is made; and, therefore, the rule is, that debts have no *situs*;

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[1] Ante, § 146, 147. See Kearney *v.* King, 2 B. & Ald. 301; Sprowle *v.* Legge, 1 B & Cressw. 16; Story, Confl. of Laws, § 272 *a*, 329; Don *v.* Lippman, 5 Clark & Fin. 1, 12, 13.—In this last case, a Bill of Exchange was drawn and accepted in Paris by a Scotchman domiciled in Scotland, and it was payable generally. It seems, that, by the law of Scotland, an acceptance is deemed payable at the place of the domicil of the Acceptor, at the time, when it becomes due. Lord Brougham, on this occasion, said; "It appears, that in Scotland, — and it is rather singular, that it should be so, — where a Bill is accepted payable generally, without any particular place being named, it shall be deemed payable at the place, at which the Acceptor is domiciled, when it becomes due. It becomes of some importance to know, where the Bills were payable, because this principle, which has been adopted of late years in many of the Scotch decisions, and towards which I admit the great leaning of the Scotch profession is, renders it material to consider, whether this is a Scotch or a foreign debt. Yet sometimes this expression is used in the cases, without affording any accuracy of description; for sometimes the debt is called English, or French, in respect to the place, where the contract was made; sometimes it is the place of the origin, sometimes of the payment, of the contract; and sometimes of the domicil of one of the parties. But, at all events, it becomes important to consider, whether this was a foreign or a Scotch debt. In the present case, it was held, most properly, to be a foreign debt. That is a fact admitted; it is out of all controversy. This, therefore, must now be taken to be a French debt; and then the general law is, that, where the acceptance is general, naming no place of payment, the place of payment shall be taken to be the place of the contracting of the debt. I shall, therefore, deal with this Bill, as if it was accepted, payable in Paris."

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but accompany the creditor everywhere.[1] The Holder, then, takes the contract of the Acceptor, or Maker, as it was originally made, and as it was in the place, where it was made. It is there, that the promise is made to him to pay everywhere.[2]

§ 159. A case a little more difficult in its texture is, when a contract is made in one country, for payment of money in another country, and, by the laws of the latter, a stamp is required, to make the contract valid, and it is not by those of the former; whether it is governed by the *Lex solutionis*, or by the *Lex loci contractus*, as to the stamp. It has been held, that a stamp is not required, in such a case, to give validity to the contract, upon the ground, that an instrument, as to its form and solemnities, is to be governed by the *Lex loci contractus*, and not by the law of the place of payment; and that, therefore, a stamp is not required by the principle.[3] On that occasion the Court said; "An Instrument, as to its form and the formalities attending its execution, must be tested by the laws of the place, where it is made; but the laws and usages of the place, where the obligation, of which it is evidence, is to be fulfilled, must regulate the performance. A Bill, drawn out of London, must be paid at the expiration of the days of grace, which the laws and usages of that place recognize; but need not have

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[1] Blanchard *v.* Russell, 13 Mass. R. 1, 6; Slacum *v.* Pomeroy, 6 Cranch, 221; Story on Conflict of Laws, § 329, 362, 399, 400.

[2] Story on Conflict of Laws, § 343, 344; Ante, § 145, 146.

[3] Story on Conflict of Laws, § 318; Mr. Justice Martin in Vidal *v.* Thompson, 11 Martin, R. 23 to 25. But see Story on Conflict of Laws, § 260, and note (1), p. 216, § 262, 262 *a*; Wynne *v.* Jackson, 2 Russell, R. 351; Clegg *v.* Levy, 3 Camp. R. 166; James *v.* Catherwood, 3 Dowl. & Ryl. R. 190.

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those stamps, which are by law required on a Bill drawn there."[1]

§ 160. Having considered the principles applicable to the nature, validity, interpretation, and incidents and effects of contracts, we are next led to the consideration of the manner, in which they may be discharged, and what matters upon the merits will constitute a good defence to them. I say, upon the merits; for the objections, arising from the law of the State, where the suit is brought, (*Lex fori*,) such as the limitations of remedies, and the forms and modes of suit, constitute a separate head of inquiry.[2]

§ 161. And, here, the general rule is, that a defence, or discharge, good by the law of the place, where the contract is made, or is to be performed, is to be held of equal validity in every other place, where the question may come to be litigated.[3] John Voet has laid down this doctrine in the broadest terms. *Si adversus contractum aliudve negotium gestum factumve restitutio desideretur, dum quis aut metu, aut dolo, aut errore lapsus, damnum sensit contrahendo, transigendo, solvendo, fidejubendo, hereditatem adeundo, aliove simili modo; recte interpretes statuisse arbitror, leges regionis, in qua contractum gestumve est id, contra quod restitutio*

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[1] Ibid.

[2] Story on Conflict of Laws, § 330; Id. § 524 to 527.

[3] Story on Conflict of Laws, § 331; 2 Bell, Comm. B. 8, ch. 3, § 1267, p. 692 (4th edit.); Id. p. 688 (5th edit.); 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 7, p. 874 to 886; Id. ch. 22, p. 924 to 929. — As to what will constitute a discharge in foreign countries, and especially by novation, by confusion, by set-off or compensation, by payment or consignation, and by relapse, see 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 1 to 6, p. 781 to 880. See, also, Bartsch v. Atwater, 1 Connect. R. 409.

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petitur, locum sibi debere vindicare in terminandâ ipsâ restitutionis controversiâ; sive res illæ, de quibus contractum est, et in quibus læsio contigit, eodem in loco, sive alibi sitæ sint. Nec intererit utrum læsio circa res ipsas contigerit, veluti pluris minorisve, quam æquum est, errore justo distractas, an vero propter neglecta solennia in loco contractus desiderata. Si tamen contractus implementum non in ipso contractus loco fieri debeat, sed ad locum alium sit destinatum, non loci contractus, sed implementi, leges spectandas esse ratio suadet; ut ita secundum cujus loci jura implementum accipere debuit contractus, juxta ejus etiam leges resolvatur.[1] Casaregis in substance lays down the same doctrine;[2] and Huberus throughout his dissertation implies it,[3] as indeed does Dumoulin.[4]

§ 162. Burgundus says; *Idem ergo de solutionibus dicendum; scilicet, ut in omnibus, quæ ex ea sunt, aut inde oriuntur, aut circa illam consistunt, aut aliquo modo affinia sunt, consuetudinem loci spectemus, ubi eandem implendam convenit. Itaque ex solutione sunt solemnia, valor rei debitæ, pretium monetæ; ex solutione oriuntur præstatio apochæ, antigraphi, similaque. Affinia solutioni sunt, præscriptio, oblatio rei debitæ, consignatio, novatio, delegatio, et ejusmodi.*[5] *Ea, vero, quæ ad complementum vel executionem contractus spec-*

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[1] J. Voet, ad Pand. Lib. 4, tit. 1, § 29, p. 240.

[2] See Casaregis, Disc. 179, § 60, 61.

[3] Huberus, Lib. 1, tit. 3, § 3, 7; J. Voet, De Statut. § 9, ch. 2, § 20, p. 275 (edit. 1715); Id. p. 332, 333 (edit. 1661).

[4] 2 Boullenois, Observ. 46, p 462; Molin. Comm. ad Cod. Lib. 1, tit. 1, l. 1; Conclus. de Stat. Tom. 3, p. 554 (edit. 1681).

[5] Story on Conflict of Laws, § 331 *a*; Burgundus, Tract. 4, n. 27, 28, p. 114 to 116.

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tant, vel absoluto eo superveniunt, sola a statuto loci dirigi, in quo peragenda est solutio.[1] Many other foreign jurists maintain the same doctrine.[2]

§ 163. In England and America the same rule has been adopted, and acted on with a most liberal justice.[3] Thus, infancy, if a valid defence by the *Lex loci contractus*, will be a valid defence everywhere.[4] A tender and refusal, good by the same law, either as a full discharge, or as a present fulfilment of the contract, will be respected everywhere.[5] Payment in paper money bills, or in other things, if good by the same law, will be deemed a sufficient payment everywhere.[6] And, on the other hand, where a payment by a negotiable Bill or Note is, by the *Lex loci*, held to be conditional payment only, it will be so held, even in States, where such payment under the domestic law would be held absolute.[7] So, if, by the law of the place of a contract (even although negotiable), equitable defences are allowed in favor of the Maker, any subsequent indorsement will not change his rights in

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[1] Id. n. 29, p. 116.

[2] 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 7, p. 874 to 876.

[3] Story on Conflict of Laws, § 332; 2 Kent, Comm. Lect. 39, p. 459 (3d edit.); Potter *v.* Brown, 5 East, 124; Dwarris on Stat. Pt. 2, p. 650, 651; 2 Bell, Comm. § 1267, p. 691, 692 (4th edit.); Id. p. 688 (5th edit.).

[4] Thomson *v.* Ketchum, 8 Johns. R. 189; Male *v.* Roberts, 3 Esp. R. 163.

[5] Warder *v.* Arell, 2 Wash. Virg. R. 282, 293, &c.

[6] Warder *v.* Arell, 2 Wash. Virg. R. 282, 293; 1 Brown, Ch. R. 376; Searight *v.* Calbraith, 4 Dall. 325; Bartsch *v.* Atwater, 1 Connect. R. 409.

[7] Bartsch *v.* Atwater, 1 Connect. R. 409. See other cases cited, 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 21, § 7, p. 876 to 878.

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regard to the Holder.[1] The latter must take it *cum onere*.[2]

§ 164. The case of an acceptance of a Bill of Exchange in a foreign country affords another illustration. Although by our law it is absolute and binding in every event; yet, if by that of the foreign country it is merely a qualified contract, it is governed by that law in all its consequences.[3] Acceptances are deemed contracts in the country, where they are made; and the payments are regulated by the law thereof.[4]

§ 165. The converse doctrine is equally well established, namely, that a discharge of a contract by the law of a place, where the contract was not made, or to be performed, will not be a discharge of it in any other country.[5] Thus, it has been held in England, that a discharge of a contract, made in England, under an insolvent act of the State of Maryland, is no bar to a suit upon the contract in the Courts of England.[6] On that occasion, Lord Kenyon said; "It is impossible to say, that a contract, made in one country, is to be governed by the laws of another. It might as well

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[1] Story on Conflict of Laws, § 317. Ante, § 158.

[2] Ory *v.* Winter, 16 Martin, R. 277. See, also, Evans *v.* Gray, 12 Martin, R. 475; Charters *v.* Cairnes, 16 Martin, R. 1.

[3] Story on Conflict of Laws, § 333; Burrows *v.* Jemino, 2 Str. R. 733; S. C. 2 Eq. Abridg. 525. See Van Cleef *v.* Therasson, 3 Pick. R. 12.

[4] Lewis *v* Owen, 4 B. & Ald. 654; 5 Pardessus, § 1495; Story on Conflict of Laws, § 307, 317; Cooper *v.* Earl of Waldegrave, 3 Beavan, R. 282; Post, § 265.

[5] Story on Conflict of Laws, § 342. See 2 Bell, Comm. § 1267, p. 691 to 695 (4th edit.); Id. p. 688 to 692 (5th edit); Phillips *v.* Allan, 8 B. & Cressw. 479; Lewis *v.* Owen, 4 Barn. & Ald. 654; 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 22, p. 924 to 929; Quelin *v.* Moisson, 1 Knapp, R. 265, note; Rose *v.* McLeod, 4 S. & D. 311, cited 3 Burge, Comm. ubi supra, p. 927, 928

[6] Smith *v.* Buchanan, 1 East, R. 6, 11.

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be contended, that, if the State of Maryland had enacted, that no debts, due from its own subjects to the subjects of England, should be paid, the plaintiff would have been bound by it. This is the case of a contract, lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country, suing on a lawful contract made here? How can it be pretended, that he is bound by a condition, to which he has given no assent, either express or implied?"[1] In America the same doctrine has obtained the fullest sanction.[2] It is also clearly established in Scotland.[3]

§ 166. The subject of negotiable paper is generally governed by the same principles. Wherever the contract between the particular parties is made, the law of the place will operate, as well in respect to the discharge, as to the obligation thereof. A nice question, however, has recently arisen on this subject, in a case already mentioned.[4] A negotiable Note was made at

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[1] Ibid.; Lewis v. Owen, 4 Barn. & Ald. 654; Phillips v. Allan, 8 Barn. & Cressw. 477.

[2] Van Raugh v. Van Arsdaln, 3 Cain. R. 154; Frey v. Kirk, 4 Gill & Johns. R. 509; Green v. Sarmiento, Peters, Cir. R. 74; Le Roy v. Crowninshield, 2 Mason, R. 151; Smith v. Smith, 2 Johns. R. 235; Bradford v. Farrand, 13 Mass. R. 18; 2 Kent, Comm. Lect 37, p. 392, 393; Id. Lect. 39, p. 458, 459 (3d edit.); 2 Bell, Comm. § 1267, p. 692, 693 (4th edit.); Id. p. 688 to 692 (5th edit.); 3 Burge, Comm. on Col. and For. Law, Pt. 2, ch. 22, p. 924 to 929; Rose v. McLeod, 4 S. & D. R. 311, cited in 3 Burge, Comm. 928, 929.

[3] 2 Bell, Comm. § 1267, p. 692, 693 (4th edit.); Id. p. 688 to 692 (5th edit.).

[4] Ante, § 158; Story on Conflict of Laws, § 343; Id. § 317, 340.

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New York between persons resident there, and was payable generally; and the Payee subsequently indorsed the Note to a citizen of Massachusetts, by whom a suit was brought in the State Court of the latter State against the Maker. One point of the argument was; Whether a discharge of the Maker, under the insolvent laws of New York, operated as a bar to the suit? The case was decided upon another ground. But the Court expressed a clear opinion, that it did not; and said; "It is a debt payable anywhere, by the very nature of the contract; and it is a promise to whoever shall be the Holder of the Note." "The Promissor became, immediately upon the indorsement, the debtor to the Indorsee, who was not amenable to the laws of New York, where the discharge was obtained."[1]

§ 167. It is difficult (as has been already intimated) to perceive the ground, upon which this doctrine can be maintained, as a doctrine of public law.[2] The Court admit, that a debt contracted in New York, and not negotiable, would be extinguished by such a discharge; although such a debt is by its very nature payable everywhere, as debts have no locality. As between the original parties, (the Maker and the Payee,) the same result would follow. How, then, can the indorsement vary it? It does not create a new contract between the Maker and the Indorsee, in the place of the indorsement. The rights of the Indorsee spring from and under the original contract, and are a component part of it. The original contract

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[1] Braynard v. Marshall, 8 Pick. R. 194. See Ogden v. Saunders, 12 Wheaton, R. 358, 362 to 364; Story on Conflict of Laws, § 317, 340.

[2] Ante, § 158; Story on Conflict of Laws, § 344; Id. § 340.

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promises to pay the Indorsee, as much as the Payee, and from the first of its existence. The indorsement is but a substitution of the Indorsee for the Payee; and it transfers over the old liability, and creates no new liability of the Maker.[1] If the indorsement created a new contract, in the place, where it was made, between the Maker and the Indorsee, then the validity, obligation, and interpretation of the contract would be governed by the law of the place of the indorsement, and not by that of the place, where the Note was originally made. It would not, then, amount to a transfer of the old contract, but to the creation of a new one, which, from a conflict of laws, not unusual in different States, would, or might, involve obligations and duties wholly different from, and even incompatible with, the original contract. Nay, the Maker might, upon the same Instrument, incur the most opposite responsibilities to different Holders, according to the law of the different places, where the indorsement might be made.[2]

§ 168. Such a doctrine has never been propounded in any Common Law authority, nor even been supported by the opinion of any foreign jurist. The same principle would apply to general negotiable acceptances, as to negotiable Notes; for the Maker stands in the same predicament, as the Acceptor. Yet no one ever supposed, that an indorsement, after an acceptance, ever varied the rights or obligations of the Acceptor. It is, as to all persons, who become Holders, in whatever country, treated as a contract made by the Acceptor in the country, where such accept-

[1] Pothier de Change, art. 22; Story on Conflict of Laws, § 317.
[2] Story on Conflict of Laws, § 314, 316, 317.

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ance is made.[1] Yet, the acceptance being general, payment may be required in any place, where the Holder shall demand it. The other point, that the indorsement was to a citizen of another State, is equally inadmissible. The question is not, Whether he is bound by the laws of New York generally; but, Whether he can, in opposition to them, avail himself of a contract, made under the sovereignty of that State, and vary its validity, obligation, interpretation, and negotiability, as governed by those laws. If the Payee had been a citizen of Massachusetts, and the Note had been made by the Maker in New York, there could be no doubt, that the contract would still be governed by the laws of New York, in regard to the Payee. What difference, then, can it make, that the Indorsee is a citizen of another State, if he cannot show, that his contract has its origin there? In short, the doctrine of this case is wholly repugnant to that maintained by the same Court in another case, which was most maturely considered, and in which the argument in its favor was repelled. The Court there declared their opinion to be, that full effect ought to be given to such discharges, as to all contracts made within the State, where they are authorized, although the creditor should be a citizen of another State.[2]

§ 169. The Supreme Court of Louisiana have adopted the same reasoning; and held, that, where a negotiable Promissory Note was made in one State, and was indorsed in another State to a citizen of the latter, the contract was governed by the law of the

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[1] Story on Conflict of Laws, § 345; Id. § 314, 317.

[2] Blanchard *v.* Russell, 13 Mass. R. 1, 11, 12. See, also, Prentiss *v.* Savage, 13 Mass. R. 20, 23, 24; Story on Conflict of Laws, § 317, 310.

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place, where the Note was made, and not by that of the place, where the indorsement was made. "We see nothing" (said the Court), "in the circumstance of the rights of one of the parties being transferred to the citizen of another State, which can take the case out of the general principle." "It is a demand made under an agreement (a Note) entered into in a foreign State; and, consequently, the party, claiming rights under it, must take it with all the limitations, to which it was subject in the place, where it was made; and that, although he be one of our citizens."[1] This is certainly in conformity to what is deemed settled doctrine in England, as well as in some other States in America.[2] It was taken for granted by the Supreme Court of the United States, to be the true doctrine, in the case of a negotiable Bill of Exchange, in which the Drawer's responsibility was supposed to be governed by the law of the place, where the Bill was drawn, notwithstanding an indorsement in another country;[3] and also by the Court of King's Bench in England, in a case, in which the right to a Bank of England Note was supposed to be governed by the law of England, notwithstanding a transfer of the same had been subsequently made in France.[4]

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[1] Story on Conflict of Laws, § 346; Ory *v.* Winter, 16 Martin, R. 277; Sherrill *v.* Hopkins, 1 Cowen, R. 103; Story on Conflict of Laws, § 317, 340.

[2] See Blanchard *v.* Russell, 13 Mass. R. 12; Ogden *v.* Saunders, 12 Wheaton, R. 360; Potter *v.* Brown, 5 East, R. 123, 130.

[3] Slacum *v.* Pomeroy, 6 Cranch, R. 221.

[4] De la Chaumette *v.* The Bank of England, 9 Barn. & Cressw. 208; S. C. 2 Barn. & Adolph. 385; Story on Conflict of Laws, § 353. See, also, 2 Bell, Comm. § 1267, p. 692, 693 (4th edit.); Id. p. 688 to 692 (5th edit.). — "Quid si de literis cambii incidat quæstio, (says Paul Voet,) Quis locus spectandus? Is locus, ad quem sunt destinatæ, et ibidem

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§ 170. Pardessus has laid down a doctrine equally broad. He says, that it is by the law of the place, where a Bill of Exchange is payable, that we are to ascertain, when it falls due, the days of grace belonging to it, the character of these delays, whether for the benefit of the Holder, or of the debtor; in one word, everything, which relates to the right of requiring payment of a debt, or the performance of any other engagement, when the parties have not made any stipulation to the contrary.[1] And it is of little consequence, whether the person, who demands payment, is the creditor, who made the contract, or an assignee of his right; such as the Holder of a Bill of Exchange by indorsement. This circumstance makes no change in regard to the debtor. The Indorsee cannot require payment in any other manner, than the original creditor could.[2] And he applies this doctrine to the case of successive indorsements of Bills of Exchange, made in different countries, stating, that the rights of each Holder are the same, as those of the original Payee, against the Acceptor.[3] He adds, also, that the effects of an acceptance are to be determined by the law of the place, where it has been made;[4] that every indorsement subjects the Indorser to the law of the place, where it has been made; and that it governs his responsibility accordingly.[5]

§ 171. Questions have also arisen, whether negoti-

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acceptatæ." P. Voet, De Stat. § 9, ch. 2, § 14, p. 271 (edit. 1715); Id. p. 327 (edit. 1661); Story on Conflict of Laws, § 317.

[1] Story on Conflict of Laws, § 314, 316, 347, 361; Pardessus, Droit Comm. Tom. 5, art. 1495, 1498 to 1500; Ante, § 188; Post, § 177.

[2] Ibid.

[3] Ibid.

[4] Id. art. 1495.

[5] Id. art. 1499.

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able Notes and Bills, made in one country, are transferable in other countries, so as to found a right of action in the Holder against the other parties. Thus, a question occurred in England, in a case, where a negotiable Note, made in Scotland, and there negotiable, was indorsed, and a suit brought in England by the Indorsee against the Maker, Whether the action was maintainable. It was contended, that the Note, being a foreign Note, was not within the statute of Anne (3 and 4 Ann. ch. 9), which made Promissory Notes, payable to order, assignable and negotiable; for that statute applied only to inland Promissory Notes. But the Court overruled the objection, and held the Note suable in England by the Indorsee, as the statute embraced foreign, as well as domestic Notes.[1] In another case, a Promissory Note, made in England, and payable to the Bearer, was transferred in France; and the question was made, Whether the French Holder could maintain an action thereon in England; such Notes being by the law of France negotiable; and it was held, that he might.[2] But in each of these cases the decision was expressly put upon the provisions of the statute of Anne respecting Promissory Notes, leaving wholly untouched the general doctrine of international law.

§ 172. In a more recent case, which has been al-

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[1] Story on Conflict of Laws, § 353; Milne v. Graham, 1 Barn. & Cressw. 192. — It does not distinctly appear upon the Report, whether the indorsement was made in Scotland or in England. But it was probably in England. But see Carr v. Shaw, Bayley on Bills, p. 16, note (5th edit. 1830); Id. p. 22 (American edition, by Phillips & Sewall, 1836).

[2] De la Chaumette v. The Bank of England, 2 Barn. & Adolph. R. 385; S. C. 9 Barn. & Cressw. 208; and see Chitty on Bills, p. 551, 552 (8th edit.); Story on Conflict of Laws, § 346.

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ready cited,[1] a negotiable Note was made in France, and indorsed in France, and afterwards a suit was brought thereon by the Indorsee against the Maker in England. One question in the case was, Whether a blank indorsement in France was, by the law of France, sufficient to transfer the property in the Note, without any other formalities. It was held, that it was not sufficient. But it seems to have been taken for granted, that, if the Note was well negotiated by the indorsement, a suit might be maintained thereon in England by the Indorsee in his own name. On that occasion, the Court said; "The rule, which applies to the case of contracts made in one country, and put in suit in the courts of law of another country, appears to be this; that the interpretation of the contract must be governed by the law of the country, where the contract was made (*Lex loci contractus*); the mode of suing, and the time, within which the action must be brought, must be governed by the law of the country, where the action is brought. (*In ordinandis judiciis, loci consuetudo, ubi agitur.*) This distinction has been clearly laid down and adopted in the late case of De la Vega *v.* Vianna. See, also, the case of the British Linen Company *v.* Drummond, where the different authorities are brought together. The question, therefore, is, Whether the law of France, by which the indorsement in blank does not operate as a transfer of the Note, is a rule, which governs and regulates the interpretation of the contract, or only relates to the mode of instituting and conducting the suit; for, in the former case, it must be adopted by our courts, in the latter it may be altogether disregarded, and

[1] Ante, § 156; Story on Conflict of Laws, § 353 *a*; Id. § 316 *a*.

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the suit commenced in the name of the present plaintiff. And we think the French law, on the point above mentioned, is the law, by which the contract is governed, and not the law, which regulates the mode of suing. If the indorsement has not operated as a transfer, that goes directly to the point, that there is no contract upon which the plaintiff can sue. Indeed, the difference in the consequences, that would follow, if the plaintiff sues in his own name, or is compelled to use the name of the former Indorser, as the plaintiff by procuration, would be very great in many respects, particularly in its bearing on the law of set-off; and, with reference to those consequences, we think the law of France falls in with the distinction above laid down, that it is a law, which governs the contract itfelf, not merely the mode of suing. We therefore think, that our courts of law must take notice, that the plaintiff could have no right to sue in his own name upon the contract in the courts of the country, where such contract was made; and, that, such being the case there, we must hold, in our courts, that he can have no right of suing here."[1]

§ 173. Several other cases may be put upon this subject. In the first place, suppose a Note, negotiable by the law of the place, where it is made, is there transferred by indorsement; can the Indorsee maintain an action in his own name against the Maker in a foreign country, (where both are found,) in which there is no positive law on the subject of negotiable Notes, applicable to the case? If he can, it must be upon the ground, that the foreign tribunal would recognize

[1] Trimbey *v.* Vignier, 1 Bing. N. Cas. 151, 159, 160; Story on Conflict of Laws, § 316 *a*, 316 *b*, 317.

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the validity of the transfer by the indorsement, accord- to the law of the place, where it is made. According to the doctrine maintained in England, as choses in action are by the Common Law (independent of statute) incapable of being transferred over, it might be argued, that he could not maintain an action, notwithstanding the instrument was well negotiated, and transferred, by the law of the place of the contract.[1] So far, as this principle of the non-assignability of choses in action would affect transfers in England, it would seem reasonable to follow it. But the difficulty is, in applying it to transfers made in a foreign country, by whose laws the instrument is negotiable, and capable of being transferred, so as to vest the property and right in the assignee. In such a case, it would seem, that the more correct rule would be, that the *Lex loci contractus* ought to govern; because the Holder under the indorsement has an immediate and absolute right in the contract vested in him, as much as he would have in goods transferred to him. Under such circumstances, to deny the legal effect of the indorsement is, to construe the obligation, force, and effect of a contract, made in one place, by the law of another place. The indorsement, in the place, where it is made, creates a direct contract between the Maker and the first Indorsee; and, if so, that contract ought to be enforced between them everywhere. It is not a question, as to the form of the remedy, but as to the right.[2]

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[1] Story on Conflict of Laws, § 354. See 2 Black. Comm. 442; Jeffrey v. McTaggart, 2 Barn. & Cressw. 22, 23; Innes v. Dunlop, 8 T. R. 595. See, also, Jeffrey v. McTaggart, 6 Maule & Selw. R. 126; Story on Conflict of Laws, § 565, 566.

[2] See Trimbey v. Vignier, 1 Bing. New Cases, 159 to 161; Story on

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§ 174. In the next place, let us suppose the case of a negotiable Note, made in a country, by whose laws it is negotiable, and actually indorsed in another, by whose laws a transfer of Notes by indorsement is not allowed. Could an action be maintained, by the Indorsee, against the Maker, in the courts of either country? If it could be maintained in the country, whose laws do not allow such a transfer, it must be upon the ground, that the original negotiability, by the *Lex loci contractus*, is permitted to avail, in contradiction to the *Lex fori*. On the other hand, if the suit should be brought in the country, where the Note was originally made, the same objection might arise, that the transfer was not allowed by the law of the place, where the indorsement took place. But, at the same time, it may be truly said, that the transfer is entirely in conformity to the intent of the parties, and to the law of the original contract.[1]

§ 175. In the next place, let us suppose the case of a Note, not negotiable by the law of the place, where it is made, but negotiable by the law of the place, where it is indorsed. Could an action be maintained, in either country, by the Indorsee, against the Maker? It would seem, that, in the country, where the Note was made, it could not; because it would be inconsistent with its own laws. But the same difficulty would

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Conflict of Laws, § 353 *a*, — where the same reasoning seems to have applied, — § 565, 566.

[1] Story on Conflict of Laws, § 356. See Chitty on Bills, ch. 6, p. 218, 219 (8th London edit.). See Kaimes on Equity, B. 3, ch. 8, § 4; Story on Conflict of Laws, § 353, 354. — In the cases of Milne *v.* Graham (1 Barn. & Cressw. 192), De la Chaumette *v.* Bank of England (2 Barn. & Adolph. 385), and Trimbey *v.* Vignier (1 Bing. N. Cas. 151), the promissory notes were negotiable in both countries, as well where the note was made, as where it was transferred.

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not arise in the country, where the indorsement was made; and, therefore, if the Maker used terms of negotiability in his contract, capable of binding him to the Indorsee, there would not seem to be any solid objection to giving the contract its full effect there. And so it has been accordingly adjudged, in the case of a Note made in Connecticut, payable to A., or order, but, by the laws of that State, not negotiable there, and indorsed in New York, where it was negotiable. In a suit, in New York, by the Indorsee against the Maker, the exception was taken, and overruled. The Court, on that occasion, said, that personal contracts, just in themselves, and lawful in the place, where they are made, are to be fully enforced, according to the law of the place, and the intent of the parties, is a principle, which ought to be universally received and supported. But this admission of the *Lex loci contractus* can have reference only to the nature and construction of the contract, and its legal effect, and not to the mode of enforcing it. And the Court ultimately put the case expressly upon the ground, that the Note was payable to the Payee, or order; and, therefore, the remedy might well be pursued, according to the law of New York, against a party, who had contracted to pay to the Indorsee.[1] But, if the words, "or order," had been omitted in the Note, so that it had not appeared, that the contract between the parties originally contemplated negotiability, as annexed to it, a different question might have arisen, which would more properly come under

[1] Story on Conflict of Laws, § 357; Lodge *v.* Phelps, 1 Johns. Cas. 139; S. C. 2 Caines, Cas. in Error, 321. See Kaimes on Equity, B. 3, ch. 8, § 4; 3 Kent, Comm. Lect. 44, p. 88 (4th edit.).

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discussion in another place; since it seems to concern the interpretation and obligation of contracts, although it has sometimes been treated as belonging to remedies.[1]

§ 176. As to Bills of Exchange, it is generally required, in order to fix the responsibility of other parties, that, upon their dishonor, they should be duly protested by the Holder, and due notice thereof be given to such parties. And the first question, which naturally arises, is, Whether the protest and notice should be in the manner, and according to the forms, of the place, in which the Bill is drawn, or according to the forms of the place, in which it is payable. By the Common Law, the protest is to be made, at the time, in the manner, and by the persons, prescribed in the place, where the Bill is payable.[2] But, as to the necessity of making a demand and protest, and the circumstances, under which notice may be required or dispensed with, these are incidents of the original contract, which are governed by the law of the place, where the Bill is drawn.[3] They constitute implied conditions, upon which the liability of the Drawer is to attach, according to the *Lex loci contractus;* and, if the Bill is negotiated, the like responsibility attaches upon each successive Indorser, according to the law

[1] See Chitty on Bills, ch. 6, p. 218, 219 (8th London edit.); 3 Kent, Comm. Lect. 44, p. 77 (4th edit.); Story on Conflict of Laws. § 253 *a*.

[2] Story on Conflict of Laws, § 360; Chitty on Bills, p. 193, 506 to 508 (8th Lond. edit.); Savary, Le Parfait Négociant, Tom. 1, Part 3, Liv. 1, ch. 14, p. 851.

[3] Chitty on Bills, p. 506 to 508 (8th Lond. edit. 1833); 1 Boullenois, Observ. 23, p. 531, 532; Post, § 285, 296, 366, 391; Aymor *v.* Sheldon, 12 Wend. R. 439; Pardessus, Droit Comm. Tom. 5, art. 1488, 1491 to 1499.

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of the place of his indorsement; for each indorser is treated as a new Drawer.[1] The same doctrine, according to Pardessus, prevails in France.[2]

§ 177. Upon negotiable instruments, it is the custom of most commercial nations to allow some time for payment, beyond the period fixed by the terms of the instrument. This period is different in different nations; in some, it is limited to three days; in others, it extends as far as eleven days.[3] The period of indulgence is commonly called the *days of grace*; as to which, the rule is, that the usage of the place, on which a Bill is drawn, and where payment of a Bill or

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[1] Bayley on Bills, ch. A., p. 78 to 86, 5th edit. 1830 (5th Amer. edit. 1826, by Phillips & Sewall); Chitty on Bills, ch. 6, p. 266, 267, 370 (8th Lond. edit. 1833); Ballingalls *v.* Gloster, 3 East, R. 481; Story on Conflict of Laws, § 314 to 317.

[2] Pardessus, Droit Comm. Tom. 5, art. 1488, 1489, 1496 to 1499; Henry on Foreign Law, 53, Appx. p. 239 to 248; Pothier de Change, n. 155.— Boullenois admits, that the protest ought to be according to the law of the place, where the Bill is payable. But, in case of a foreign Bill, indorsed by several indorsements in different countries, he contends, that the time, within which notice or recourse is to be had upon the dishonor, is to be governed by a different rule. Thus, he supposes a Bill drawn in England on Paris in favor of a French Payee, who indorses it to a Spaniard (in Spain), and he to a Portuguese (in Portugal), and he to the Holder; and then says, that the Holder is entitled to have recourse against the Portuguese, within the time prescribed by the law of France, because the Holder is there to receive payment; the Portuguese is to give notice to the Spaniard within the time prescribed by the law of Portugal, because that is the only law, with which he is presumed to be acquainted, &c.; and so, in regard to every other indorser, he is to have recourse within the period prescribed by the law of the place, where the indorsement was made, and not of the domicil of the party indorsing. 1 Boullenois, Observ. 20, p. 370 to 372; Id. Observ. 23, p. 531, 532.

[3] Story on Conflict of Laws, § 361; Bayley on Bills, p. 234, 235 (5th Amer. edit. by Phillips & Sewall); Chitty on Bills, p. 407 (8th Lond. edit.); Id. p. 193.

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Note is to be made, governs, as to the number of the days of grace to be allowed thereon.[1]

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[1] Bank of Washington *v.* Triplett, 2 Peters, Sup. C. R. 30, 34; Chitty on Bills, ch. 4, p. 409 (8th Lond. edit.); Id. ch. 5, p. 191, 193; S. P. 2 Boullenois, Observ. 23, p. 531, 532; and Mascard. Conclus. 7, n. 72, there cited; Ante, § 155, 170. The case of Rothschild *v.* Currie (1 Adolph. & Ellis, New. Rep. 43) appears to contradict the doctrine stated in the text. See Post, § 296, note 2, where the circumstances of this case are stated, and the judgment of the Court is commented upon.

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CHAPTER VI.

BILLS OF EXCHANGE — CONSIDERATION OF.

§ 178. HAVING thus ascertained the general rights, obligations, and duties of the different parties to Bills of Exchange, and the operation of the *Lex loci contractus*, which is resorted to, in order to ascertain and regulate the rights, obligations, and duties growing out of them, we may next proceed to the examination of the question; What consideration is, in point of law, required in order to give those rights, obligations, and duties a solid support, so as to make them capable of being enforced and vindicated in courts of justice? Bills of Exchange enjoy, as has been already suggested,[1] the privilege, conceded to no unsealed instruments, not negotiable, of being presumed to be founded upon a valid and valuable consideration. Hence, between the original parties, and, *a fortiori*, between others, who, by indorsement or otherwise, become *bonâ fide* Holders, it is wholly unnecessary to establish, that a Bill of Exchange 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 protection and support of negotiable paper.[2] Still, however, this does not dispense, as we shall presently see, with the existence of an actual,

[1] Ante, § 14, 15.

[2] Chitty on Bills, ch. 3, § 1, p. 78 to 85 (8th edit 1833); Id. p. 90 to 92; Collins *v.* Martin, 1 Bos. & Pull. R. 651; Holliday *v.* Atkinson, 5 Barn. & Cressw. 501.

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valid, and valuable consideration to support the Bill; but it only shifts the burden of proof from the plaintiff to the defendant.[1]

§ 179. But, besides the question of the existence of a consideration, another may arise; In what cases, and between what parties, the consideration, on which the Bill is founded, or on which it has been transferred, is inquirable into? And under what circumstances may the want, or failure, or illegality of the consideration be insisted on, by way of defence or bar to the right of recovery on the Bill, not only between the original parties, but also between them and others possessing a derivative title thereto, under an indorsement, or otherwise, from them?[2] Let us, therefore, in the first place, examine what consideration, in point of law, is necessary, to give legal operation and support to a Bill of Exchange; and, in the next place, between what parties, and under what circumstances, the consideration is inquirable into, as a defence or bar to an action brought thereon.

§ 180. And, in the first place, as to what consideration is necessary to maintain a Bill of Exchange. At the Common Law (and the same rule pervades the Roman Law and the foreign Commercial Law[3]), a valuable consideration is, in general, necessary to support every contract, otherwise it is treated as a nude and void pact, *Nudum pactum;* and the maxim, in such a case is, *Ex nudo pacto non oritur actio.*[4] This

[1] Post, § 193, 194.

[2] Chitty on Bills, ch. 3, § 1, p. 78 to 85 (8th edit. 1833); Id. p. 90 to 92; Collins v. Martin, 1 Bos. & Pull. R. 651; Holliday v. Atkinson, 5 Barn. & Cresw. 501.

[3] Pothier on Oblig. n. 4, p. 42.

[4] Chitty on Bills, ch. 3, § 1, p. 79 to 85 (8th edit. 1833); Bayley on

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rule is equally applicable, under the limitations before suggested, to Bills of Exchange, as it is to other contracts.[1] And there must not only be a consideration, but, in the just sense of the law, it must be legal, as well as adequate.[2]

§ 181. What consideration is or is not deemed valuable and sufficient, in point of law, to support contracts generally, or Bills of Exchange in particular, may be stated in a few words. First; a consideration, founded in mere love, or affection, or gratitude, (which, in a technical sense, is called a good consideration, in contradistinction to a valuable consideration,) is not sufficient to maintain an action on a Bill of Exchange. Thus, a Bill drawn by the Drawer, as a gift to a son or other relative, or to a friend, is not sufficient to sustain the Bill between the original parties.[3]

§ 182. A mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a Bill between the same parties. It has, indeed, in some cases been broadly laid down, that, where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the

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Bills, ch. 12, p. 494 to 504 (5th edit. 1830); Sharington *v.* Strotten, Plowden, R. 308; Dig. Lib. 2, tit. 14, l. 7, § 4; Pothier, Pand. Lib. 2, tit. 14, n. 33; Pothier on Oblig. n. 4, p. 42; Pothier, by Evans, Vol. 2, n. 2, p. 19 to 25.

[1] Chitty on Bills, ch. 3, § 1, p. 78 to 85 (8th edit. 1833); Bayley on Bills, ch. 12, p. 494, 495 (5th edit. 1830).

[2] Chitty on Bills, ch. 3, § 1, p. 78 to 80 (8th edit. 1833); Bayley on Bills, ch. 12, p. 494, 495 (5th edit. 1830).

[3] Chitty on Bills, ch. 3, p. 85, 86, and notes (8th edit. 1833); Bayley on Bills, ch. 12, p. 502 to 504 (5th edit. 1830); Fisk *v.* Cox, 18 Johns. R. 145; Holliday *v.* Atkinson, 5 Barn. & Cressw. 501; Blogg *v.* Pinkers, 1 Ryan & Mood. R. 125. But see, contra, Bowers *v.* Hurd, 10 Mass. R. 427. It seems difficult to support this last case upon principle or authority.

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honesty and rectitude of the thing is a consideration.[1] But this doctrine must be received with many qualifications; and is now restricted to much narrower limits.[2] The true doctrine, as now established, seems to be, that a consideration, which the law esteems valuable, must in all cases exist, in order to furnish a just foundation for an action. Where there is a precedent duty, which would create a sufficient legal or equitable right, if there had been an express promise at the time, or where there is a precedent consideration, which is capable of being enforced, and is not extinguished, unless at the option of the party, founded upon some bar or defence, which the law justifies, but does not require him to assert, there an express promise will create or revive a just cause of action.[3] Thus, for example, if A. has paid a debt due by B., without the request of B., the law will not raise a promise by B., by implication, to repay the money to A.; but, if B., in consideration thereof, makes an express promise, it is valid and obligatory.[4] So, if a debt is discharged by mere operation of law, without payment, as by the statute of limitations, or by a discharge in bankruptcy, an express promise by the party to pay it will revive the obligation.[5] So, if a contract is voidable, but

[1] Hawkes *v.* Saunders, Cowp. R. 289; Lee *v.* Muggeridge, 5 Taunt. R. 86; Seago *v.* Deane, 4 Bing. R. 459.

[2] Littlefield *v.* Shee, 2 Barn. & Adolph. 811; Eastwood *v.* Kenyon, 11 Adolph. & Ell 438, 450.

[3] See Wennall *v.* Adney, 3 Bos. & Pull. 247, and the note of the learned Reporters, p. 249, note (*a*); Eastwood *v.* Kenyon, 11 Adolph. & Ell. R. 438; Bayley on Bills, ch. 12, p. 504 (5th edit. 1830); Chitty on Bills, ch. 3, p. 84 (8th edit. 1833).

[4] See Serg. Williams's note (1) to Osborne *v.* Rogers, 1 Saund. R. 264; Hayes *v.* Warren, 2 Str. R. 933; Stokes *v.* Lewis, 1 Term R. 20.

[5] Eastwood *v.* Kenyon, 11 Adolph. & Ell. 438; Hawkes *v.* Saunders, Cowp. R. 289, 290.

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founded in a consideration otherwise valuable or sufficient, an express promise to pay it will support and confirm its obligation; but not, if it be originally void. Thus, a promise, after age, by a person, to pay a debt not for necessaries, contracted during his infancy, will be binding; and a negotiable security given therefor will acquire validity by such new promise or confirmation of it.[2] But a promise by a woman, who is sole, to pay a debt, which she had previously contracted, while she was married and under coverture, would not be valid; because such a contract, on her part, is *ab origine* void, and not merely voidable.[3]

§ 183. Secondly. What, then, is a valuable consideration in the sense of the law? 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.[4] And, if either of these exists, it will furnish a sufficient valuable consideration to sustain the drawing, indorsing, or accepting a Bill of Exchange in favor of the Payee or other Holder. Thus, for example, not only money paid, or advances made, or credit given, or the discharge of a present debt, or work and labor done, will constitute a sufficient consideration for a Bill; but, also, receiving a Bill as security for a debt, or forbearance to sue a present claim or debt, or an

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[1] Littlefield *v.* Shee, 2 Barn. & Adolph. 811; Eastwood *v.* Kenyon, 11 Adolph. & Ellis, R. 438.

[2] Hawkes *v.* Saunders, Cowp. R 289, 290; Eastwood *v.* Kenyon, 11 Adolph. & Ell. 238.

[3] Eastwood *v.* Kenyon, 11 Adolph. & Ell. 238; Loyd *v.* Lee, 1 Str. R. 94.

[4] Com. Dig. Action on the Case, Assumpsit, B. 1 to 15.

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exchange of securities, or becoming a surety, or doing any other act at the request, or for the benefit, of the Drawer, Indorser, or Acceptor, will constitute a sufficient consideration for a Bill.[1] The common case of Bankers receiving Bills of their customers for collection, affords an apt illustration of this doctrine; for they are deemed holders for value not only to the amount of advances already made by them, either specifically or upon account, but also for future responsibilities incurred upon the faith of them.[2] So, also, will any act, done at his request, for or to a third person, such as paying the debt of a third person, or forbearing to sue a debt due by such person, or discharging such debt, or guarantying his debt, or becoming liable for his acts or defaults.[3] A preëxisting debt is equally available, as a consideration, as is a present sum, or value, given for the Bill.[4] Even the settle-

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[1] Com. Dig. Action of Assumpsit, B. 1, 2, 4, 5, 9, 10; Bayley on Bills, ch. 12, p. 505 (5th edit. 1830); Chitty on Bills, ch. 3, p. 84, 85 (8th edit. 1833); Bosanquet *v.* Dudman, 1 Starkie, R. 1; Heywood *v.* Watson, 4 Bing. R. 496; Kent *v.* Lowen, 1 Camp. R. 179, note; Rolfe *v.* Caslon, 2 H. Bl. 571; Hornblower *v.* Proud, 2 Barn. & Ald. 327; Post, § 191.

[2] Bosanquet *v.* Dudman, 1 Starkie. R. 1; Ex parte Bloxham, 8 Ves. 531; Heywood *v.* Watson, 4 Bing. R. 496; Bramah *v.* Roberts, 2 Bing. New Cas. 469; Percival *v.* Frampton, 2 Cromp. Mees. & Rosc. 180; Swift *v.* Tyson, 16 Peters, R. 1, 21, 22; Bank of Metropolis *v.* New England Bank, 1 Howard, Sup. Ct. R. 239; S. C. 17 Peters, R. 174.

[3] Com. Dig. Action of Assumpsit, B. 3, 11, 15; Bayley on Bills, ch. 12, p. 504 (5th edit 1830); Chitty on Bills, ch 3, p. 80, 84 (8th edit. 1833); Popplewell *v.* Wilson, 1 Str. R. 264; Ridout *v.* Bristow, 1 Tyrw. R. 84; S. C 1 Cromp & Jerv. 231. — A promise by an executor or administrator, to pay a debt of the intestate or testator, is not valid unless he has assets. Ten Eyck *v.* Vanderpoel, 8 Johns. R. 93; Schoonmaker *v.* Roosa, 17 Johns. R. 301; Bank of Troy *v.* Topping, 9 Wend. R. 273. But see Ridout *v.* Bristow, 1 Cromp. & Jerv. 231; S. C. 1 Tyrw. 84.

[4] Townsley *v.* Sumrall, 2 Peters, R. 170; Swift *v.* Tyson, 16 Peters, R. 11.

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ment of a doubtful claim preferred against the party, will be a sufficient and valid consideration, without regard to the legal validity of the claim, if fairly made.[1]

§ 184. The objection to a Bill may be, that there is a total want of consideration to support it; or that there is only a partial want of consideration.[2] In the first case, it goes to the entire validity of the Bill, and avoids it. In the latter case, it affects the Bill with nullity only *pro tanto*.[3] The same rule applies to cases, where there was originally no want of consideration; but there has been a subsequent failure thereof, either in whole, or in part. For a subsequent failure of the consideration is equally fatal with an original want of consideration, not, indeed, in all cases, but in many cases;[4] at least, where it is a matter capable of definite computation, and not of unliquidated damages.[5] So, if a Bill is given as an

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[1] Russell *v.* Cook, 3 Hill, R. 504.

[2] Bayley on Bills, ch. 12, p. 494 to 504 (edit. 1830); Id. (Amer. edit. 1836, by Sewall & Phillips) p. 531 to 556, where many of the American cases are collected. Swift *v.* Tyson, 16 Peters, R. 1; Post, § 191.

[3] Chitty on Bills, ch. 3, § 1, p. 79 to 83 (8th edit.); Bayley on Bills, ch. 12, p. 494, 495 (5th edit. 1830); Barber *v.* Backhouse, Peake, R. 61; Darnell *v.* Williams, 2 Stark. R. 166; Sparrow *v.* Chisman, 9 Barn. & Cressw. 241; Lewis *v.* Cosgrave, 2 Taunt. R. 2; Wintle *v.* Crowther, 1 Tyrw. R. 213, 216. See Gascoigne *v.* Smith, McClell. & Y. 338; Stephens *v.* Wilkinson, Barn. & Adolph. 320.

[4] Chitty on Bills, ch. 3, § 1, p. 85 to 88 (8th edit. 1833); Bayley on Bills, ch. 12, p. 494 to 496 (5th edit. 1830); Jackson *v.* Warwick, 7 Term R. 121; Mann *v.* Lent, 10 Barn. & Cressw. 877; Day *v.* Nix, 9 Moore, R. 159.

[5] Day *v.* Nix, 9 Moore, R. 159; Chitty on Bills, ch. 3, p. 88, 89, and note (*b*) (8th edit. 1833); Ledger *v.* Ewer, Peake, R. 216; Bayley on Bills, ch. 12, p. 495 to 499 (5th edit. 1830); Solomon *v.* Turner, 1 Stark. R. 51; Morgan *v.* Richardson, 1 Camp. R. 40, note; Tye *v.* Gwynne, 2 Camp. R 346; Moggridge *v.* Jones, 14 East, R. 486; Grant *v.* Welchman, 16 East, R. 207; Obbard *v.* Betham, 1 Mood. & Malk. 483. See

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indemnity, it is a sufficient answer to it, that the party has not been damnified at all, or that the original claim has been extinguished.[1] So, if a Bill of Exchange be originally a gift, in whole or in part;[2] or if it be founded upon a sale of goods, to which the title afterwards fails in whole or in part; it will be, *pro tanto*, void as between those parties.[3]

§ 185. In the next place, a Bill of Exchange will be void, where it is founded in fraud, or duress, or imposition, or circumvention, or taking an undue advantage of the party, as where he is intoxicated.[4] And this doctrine is so completely coincident with the dictates of natural justice, that it probably has a full recognition in the jurisprudence of every civilized country. Certain it is, that it has a most perfect sanction in the Roman Law, and in the jurisprudence of all the states of continental Europe.[5]

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the masterly judgment of Mr. Baron Parke in Mendel *v.* Steele, 8 Mees. & Welsb. 858; Bracey *v.* Carter, 12 Adolph. & Ellis, 373. A total failure of consideration will sometimes, but not always, be a good bar or defence of an action of covenant. Cooch *v.* Goodman, 2 Adolph. & Ell. New R. 580, 599; Com. Dig. Fait. C. 2.

[1] Chitty on Bills. ch. 3, p. 84, 85 (8th edit. 1833).

[2] Ibid.; Nash *v.* Brown, cited Chitty on Bills, p. 85, note (*c*); Holliday *v.* Atkinson, 5 Barn. & Cressw. 50; Blogg *v.* Pinkers, 1 Ryan & Mood. R. 125; Bayley on Bills, ch. 12, p. 502, 503 (5th edit.). See Tait *v.* Hibbert, 2 Ves. jr., 111; S. C. 4 Bro. Ch. R. 486.

[3] Ibid.

[4] Chitty on Bills, ch. 2, § 1, p. 21 (8th edit. 1833); Id. ch. 3, p. 83, 84; Duncan *v* Scott, 1 Camp. R. 100; Rees *v.* Marquis of Headfort, 2 Camp. R. 574; Grew *v.* Bevan, 3 Stark. R. 134; Gladstone *v.* Hadwen, 1 M. & Selw. 517; Noble *v.* Adams, 7 Taunt. R. 59; Bayley on Bills, ch. 5, § 2, p. 143 (5th edit. 1830); Id ch. 2, § 6, p 56, 57; Lord Galway *v.* Mathewson, 13 East, R. 175; Sheriff *v.* Wilkes, 1 East, R. 48; Fleming *v.* Simpson, 1 Camp. R. 40, note; Pitt *v.* Smith, 3 Camp. R. 33; Gregory *v.* Fraser, 3 Camp. R. 454.

[5] Pothier on Oblig. n. 28 to 33, and Pothier, by Evans, Vol. 2, No. 2,

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§ 186. In the next place, a Bill of Exchange will be void, if the consideration is illegal.[1] It may be illegal, either (as has been already suggested) because it is against the general principles and doctrines of the Common Law; or, because it is specially prohibited or interdicted by statute. The former illegality exists, wherever the consideration is founded upon a transaction against sound morals, public policy, public rights, or public interests; as, for example, a contract of this sort made with an alien enemy, a contract in general restraint of trade or marriage, a contract for the perpetration, or concealment, or compounding, of some crime, a contract offensive to Christian morals and virtue, as for illicit cohabitation, a contract for the purchase of a public office, a contract for indemnity against an act of known illegality, a contract in fraud of the rights and interests of third persons; and contracts justly reprehensible for their injurious effects upon the feelings of third persons; and contracts by way of wager, upon occasions not allowed by the general policy of law, if, indeed, in a just sense, mere wagers ought ever to be held legal.[2] The latter illegality (that created by statute) exists, not only where there is an express prohibition or interdiction of the act or contract; but also where it is implied from the nature and objects of the statute.[3] The

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p. 19 to 25; Id. No. 3, p. 28, 29; Dig. Lib. 4, tit. 14, l. 7, § 7; Id. l. 10, § 2.

[1] Bayley on Bills, ch. 12, p. 504 to 524 (5th edit. 1830); Story on Conflict of Laws, § 243 to 260; Pothier on Oblig. n. 43 to 45; Pothier, by Evans, Vol. 2, No. 2, p. 19.

[2] Chitty on Bills, ch. 3, p. 93 to 99 (8th edit. 1833); Bayley on Bills, ch. 12, p 508 to 511 (5th edit. 1830); Story on Conflict of Laws, § 243 to 259 *b*.

[3] Chitty on Bills, ch. 3, p. 99 to 118 (8th edit. 1833); Bayley on Bills,

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Roman Law has inculcated the same general principles in an emphatic manner. *Quod turpi ex causa promissum est, non valet.*[1] And it is followed out and supported in the French Law.[2]

§ 187. In the next place, Between what parties, and under what circumstances, is the consideration of a Bill of Exchange inquirable into, for the purpose of a defence or a bar to an action brought thereon? The general rule is, that the total or partial want or failure of consideration, or the illegality of consideration, may be insisted upon as a defence or a bar between any of the immediate or original parties to the contract. It may be insisted by the Drawer against the Payee, by the Payee against his Indorsee, and by the Acceptor against the Drawer.[3] Thus, for example, it is a good defence or bar to an action between these parties, that the Bill is a mere accommodation Bill, that the Drawer is a mere accommodation Drawer, the Payee an accommodation Indorser, and the Acceptor an ac-

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ch. 12, p. 504 to 514 (5th edit. 1830). — It has seemed to me unnecessary to go at large, in this place, into the doctrine of the illegality of consideration, as the elementary works above cited contain a large collection of the cases, all of which, however, turn upon one or more of the principles, which are stated in the text. Story on Conflict of Laws, § 243 to 260; 1 Story on Eq. Jurisp. § 296, 298 to 300; 1 Fonbl. Eq. Jurisp. B. 1, ch. 4, § 5 to 7, and note; 1 Harrison's Dig. Title, Contract, § 3 to 8. Mr Evans, in his Translation of Pothier on Oblig. Vol. 2, No. 1, p. 1 to 19, has examined this whole subject with much ability.

[1] Inst. Lib. 3, tit. 20, § 24.

[2] Pothier on Oblig. n. 43 to 46.

[3] Bayley on Bills, ch. 12, p. 494 to 523 (5th edit. 1830); Chitty on Bills, ch. 3, p. 78 to 83 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 80 to 82 (4th edit.); Jackson *v.* Warwick, 7 Term R. 121; Barber *v.* Backhouse, Peake, R. 61; Ledger *v.* Ewer, Peake, R. 216; Darnell *v.* Williams, 2 Stark. R. 166; Jones *v.* Hibbert, 2 Stark. R. 304; Pike *v.* Street, 1 Mood. & Malk. 226; Lewis *v.* Cosgrave, 2 Taunt. R. 2; Sumner *v.* Brady, 1 H. Black. R. 647; Knight *v.* Hunt, 5 Bligh, R. 432; Walker *v.* Parkins, 3 Burr. 1568.

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commodation Acceptor.[1] The same rule will apply to any derivative title under them by any person, who acts merely as their agent, or has given no value for the Bill.[2] It will also apply to all cases, where the party takes the Bill, even for value, after it has been dishonored, or is overdue; for then he takes it subject to all the equities, which properly attach thereto between the antecedent parties.[3] So, if he has notice, at the time, when he purchases it, that the Bill is void in the hands of the party, from whom he purchases it, either from fraud, or want, or failure, or illegality, of consideration, he will take it subject to the same equi-

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[1] Bayley on Bills, ch. 10, p. 420, 421 (5th edit. 1830); Id. ch. 12, p. 495; Chitty on Bills, ch. 3, p. 81 (8th edit. 1833); Darnell *v.* Williams, 2 Stark. R. 166; Wiffen *v.* Roberts, 1 Esp. R. 261; Jones *v.* Hibbert, 2 Stark. R. 304; Sparrow *v.* Chisman, 9 B. & Cressw. 241; De Launey *v.* Mitchill, 1 Stark. R. 439.

[2] Ibid.; Denniston *v.* Bacon, 10 Johns. R. 207; Grew *v.* Burditt, 12 Pick. R. 265.

[3] Chitty on Bills, ch. 3, p. 92, 93; Id. 113, 116; Id. ch, 6, p. 244, 245 (8th edit 1833); Bayley on Bills, ch. 5, § 3, p. 157, 158; Id. ch. 12, p. 512 (5th edit. 1830); Id. (Amer. edit. 1836, by Sewall & Phillips), p. 544 to 548; Taylor *v.* Mather, 3 Term R. 83, note; Brown *v.* Davies, 3 Term R. 80; Cruger *v.* Armstrong, 3 John. Cas. 5; Conroy *v.* Warren, 3 John. Cas. 259; Ayer *v.* Hutchins, 4 Mass. R. 370; Thompson *v.* Hale, 6 Pick. R. 259; Tucker *v.* Smith, 4 Greenl. R. 415; Brown *v.* Turner, 7 Term R. 630. — The equities, which are here intended, are not all the equities, which may exist between the parties, arising from other transactions; but all the equities, attaching to the particular Bill in the hands of the Holder. Post, § 22; Burrough *v.* Moss, 10 Barn. & Cressw. 588; Whitehead *v.* Walker, 10 Mees. & Welsb. 696. But see the cases collected in Bayley on Bills, ch. 12 (Amer. edit. 1836, by Sewall & Phillips), p. 546 to 552. A Bill, which has been accepted, payable on demand with interest, will not be treated as overdue, unless it has been presented for payment; for it may have been the intention of the parties, that it should be negotiated, and remain outstanding for some time. Barough *v.* White, 4 Barn. & Cressw. 325. But see Ayer *v.* Hutchins, 4 Mass. R. 370; Thompson *v.* Hale, 6 Pick. R. 259; Bayley on Bills (Amer. edit. 1836, by Sewall & Phillips), ch. 12, p. 546 to 552.

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ties as that party.[1] There is one peculiarity in cases of illegality of consideration, in which it is distinguishable from the want or failure of consideration. In the latter, if there be a partial want or failure of consideration, it avoids the Bill of Exchange only *pro tanto*; but, where the consideration is illegal in part, there it avoids the Bill *in toto*.[2] The reason of this distinction seems to be founded, partly at least, upon the ground of public policy, and partly upon the technical notion, that the security is entire, and cannot be apportioned. Probably a similar ground would be assumed in cases of fraud, at least where the ingredients were grossly offensive, or where the transactions were so connected, as to be incapable of a clear and definite separation. There is much force in the suggestion, which has sometimes been made, that, where the parties have woven a web of fraud, it is no part of the duty of courts of justice to unravel the threads, so as to separate the sound from the unsound.

§ 188. On the other hand, the partial or total failure of consideration, or even fraud between the antecedent parties, will be no defence or bar to the title of a *bonâ fide* Holder of the Bill, for a valuable consideration, at or before it becomes due, without notice of any infirmity therein.[3] The same rule will apply, although

[1] Ibid.; Bayley on Bills, ch. 12, p. 512 (5th edit. 1830); Amory *v.* Merryweather, 2 Barn. & Cressw. 573; Evans *v.* Kymer, 1 Barn. & Adolph. 528; Krasson *v.* Smith, 8 Wend. R. 437; Skilding *v.* Warren, 15 John. R. 270; Harrisburg Bank *v.* Meyer, 6 Serg. & Rawle, 537; Chitty on Bills, ch. 3, p. 92, 93 (8th edit. 1833); Id. p. 115, 116; Steers *v.* Lashley, 6 Term R. 61.

[2] Robinson *v.* Bland, 2 Burr. R. 1077; Bayley on Bills, ch. 12, p. 514 (5th edit. 1830); Scott *v.* Gilmore, 3 Taunt. R. 226. But see Chitty on Bills, ch. 3, p. 114, and note (8th edit. 1833).

[3] Chitty on Bills, ch. 3, p. 78, 79 (8th edit. 1833); Bayley on Bills, ch. 12, p. 499, 500 (5th edit. 1830); Collins *v.* Martin, 1 Bos. & Pull. 651;

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the present Holder has such notice, if he yet derive a title to the Bill from a prior *bonâ fide* Holder for value.[1] This doctrine, in both its parts, is indispensable to the security and circulation of negotiable instruments; and it is founded in the most comprehensive and liberal principles of public policy. No third person could otherwise safely purchase any negotiable instrument; for his title might be completely overturned by some latent defect of this sort, of which he could not have any adequate means of knowledge, or institute any inquiries, which might not end in doubtful results, or embarrassing difficulties. Hence it is, that a *bonâ fide* Holder for value, without notice, is entitled to recover upon any negotiable instrument, which he has received before it has become due, notwithstanding any defect or infirmity in the title of the person, from whom he derived it; as, for example, even though such person may have acquired it by fraud, or even by theft or robbery.[2]

§ 189. The same doctrine will generally apply to all cases of a *bonâ fide* Holder for value, without notice before it becomes due, where the Bill, or the indorsement or acceptance thereof, is founded on an illegal consideration; and this, upon the same general ground of public policy, without any distinction be-

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Bramah *v.* Roberts, 1 Bing. N. Cas. 649; Ante, § 14; Post, § 189, 191, 193, 417; Robinson *v* Reynolds, 2 Adolph. & Ell. New R 196, 211.

[1] Ibid.; Haley *v.* Lane, 2 Atk. 182; Lickbarrow *v.* Mason, 2 Term R. 71; Chalmers *v.* Lanion, 1 Camp. R. 383; Robinson *v.* Reynolds, 2 Adolph. & Ell. New R. 196, 211.

[2] 3 Kent, Comm. Lect. 44, p. 79, 80 (4th edit.); Bayley on Bills, ch. 12, p. 524 to 528 (5th edit. 1830); Miller *v.* Race, 1 Burr. R. 452; Grant *v.* Vaughan, 3 Burr. R. 1516; Peacock *v.* Rhodes, 2 Doug. R. 633; Lowndes *v.* Anderson, 13 East, R. 130; Solomons *v.* Bank of England, 13 East, R. 135, note (*a*); Thurston *v.* McKown, 6 Mass. R. 428; Wheeler *v* Guild, 20 Pick. R. 545.

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tween cases of illegality, founded in moral crime or turpitude, which is *malum in se*, and those founded in the positive prohibition of a statute, which is *malum prohibitum;* for, in each case, the innocent Holder is, or may be, otherwise, exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped.[1] The only exception is, where the statute, creating the prohibition, has, at the same time, either expressly, or by necessary implication, made the instrument absolutely void in the hands of every Holder, whether he has such notice or not. There are few cases, in which any statute has created a positive nullity of such instruments, either in England or America. The most important seem to be the statutes against gaming, and the statutes against usury.[2] And the

[1] Chitty on Bills, ch. 3, p. 92, 93 (8th edit. 1833); Id. p. 115, 116; Lowes *v.* Mazzaredo, 1 Stark. R. 385; Wyatt *v.* Bulmer, 2 Esp. R. 538; 3 Kent, Comm. Lect. 44, p. 79, 80, and note (4th edit.); Bayley on Bills, ch. 12, p. 512 to 516; Gould *v.* Armstrong, 2 Hall, R. 266.

[2] Bowyer *v.* Bampton, 2 Str. R. 1155; Peacock *v.* Rhodes, 2 Doug. R. 636; Lowe *v.* Walker, 2 Doug. R. 736; Ackland *v.* Pearce, 2 Camp. R. 599; 3 Kent, Comm. Lect. 44, p. 79, 80 (4th edit.); Bayley on Bills, ch. 12, p. 512 to 519 (5th edit. 1830); Preston *v.* Jackson, 2 Stark. R. 237; Shillito *v.* Theed, 7 Bing. R. 405; Henderson *v.* Benson, 8 Price, R. 281; Chitty on Bills, ch. 3, p. 115, 116 (8th edit. 1833). — In Bayley on Bills, ch. 12, p. 517 (5th edit. 1830), it is said; "The objection of illegality of consideration is, in some cases, confined to those persons, who were parties or privy to such illegality, and those, to whom they have passed the Bill or note without value; in other cases, it is extended even to holders *bonâ fide*, and for value. The latter cases are, where the consideration is, either wholly or in part, signing a bankrupt's certificate; money lost by gaming as aforesaid, or by betting on the sides of persons so gaming; money knowingly lent for such gaming or betting; money lent, at the time and place of such play, to any person either then gaming or betting, or who shall, during the play, play or bet; money lent on an usurious contract; the ransom, or money knowingly lent to enable the owner to obtain the ransom, of the ship or vessel of any British subject, or any merchandise or goods on board the same." On the other hand, Mr.

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policy of these enactments has been brought so much into doubt in our day, that in England the rule, as to usury, and gaming, and some other cases, has been changed by recent statutes; and a total repeal, or partial relaxation of it, has found its way into the legislation of America.[1]

§ 190. In respect to cases of illegality, also, this farther distinction may become important. The illegality may not only occur between the original parties to the Bill; but, where the Bill was originally given for a legal and valid consideration, there may be illegality in the subsequent indorsement, or other transfer of it. In such a case the illegality will displace the title of the parties thereto, but not the title of any *bonâ fide* Holder for value under them, who has no notice of the illegality, and is not bound to deduce his title to the Bill through such parties, or to state or prove their signatures.[2] As, for example, if the first indorsement be in blank, and the second indorsement

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Chancellor Kent, in his learned Commentaries, restricts the cases to those under the statutes against gaming and usury, and says, that there are no others, in which the instrument is void in the hands of an innocent Indorsee for value. 3 Kent, Comm. Lect. 44, p. 79, 80 (4th edit.). The former probably exhibits the present state of the English law most accurately. See Chitty on Bills, ch. 3, p. 115, 116 (8th edit. 1833). And it seems, that, wherever the defence of usury is set up, since the Statute of 58 Geo. 3, ch. 93, the plaintiff is compelled to prove, that he gave value for the Bill, otherwise he is not deemed to be within the protection of the Statute. Wyatt *v.* Campbell, 1 Mood. & Malk. 80; Bayley on Bills, ch. 12, p. 521 (5th edit. 1830).

[1] 3 Kent, Comm. Lect. 44, p. 79, 80 (4th edit.); Stat. 58 Geo. 3, ch. 98; Stat. 5 and 6 Will. 4, ch. 41; Bayley on Bills, ch. 12, p. 517, 521 (5th edit. 1830). See, also, Bayley on Bills, ch. 12, p. 557 to 580 (Amer. edit. 1836, by Sewall & Phillips), where the principal American cases are collected in the notes.

[2] Bayley on Bills, ch. 12, p. 522, 523 (5th edit 1830); Chitty on Bills, ch. 3, p. 93, 109, 116 (8th edit. 1833).

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for an illegal consideration, a subsequent *bonâ fide* Holder may claim title as Indorsee of the first Indorser, and thereby escape from the necessity of establishing his title by devolution through the second indorsement. In such a case he will be completely protected.[1] But, if the Holder is compellable to make title through the parties to the illegal consideration, and the transfer is thereby declared absolutely void by statute, it seems, that the Holder is not entitled to recover upon the Bill against any of the antecedent parties.[2] But, as between the Holder and any subsequent parties, his title will be good, if it is itself free from any illegality.[3]

§ 191. Neither is it any defence or bar, that the Bill was known to the Holder to be an accommodation Bill between the other parties, if he takes it for value, *bonâ fide*, before it has become due.[4] The reason is,

[1] Ibid.; Parr *v.* Eliason, 1 East, R. 82; Daniel *v.* Cartony, 1 Esp. R. 274; Munn *v.* Commission Company, 15 Johns. R. 44.

[2] Bayley on Bills, ch. 12, p. 522, 523 (5th edit. 1830); Chitty on Bills, ch. 3, p. 93, 109, 110 (8th edit. 1833); Lowes *v.* Mazzaredo, 1 Stark. R. 385; Ackland *v.* Pearce, 2 Camp. R. 599; Chapman *v.* Black, 2 Barn. & Ald. 590; Henderson *v.* Benson, 8 Price, R. 288; Gaither *v.* Farmers' & Mechanics' Bank of Georgetown, 1 Peters, R. 43; Lloyd *v.* Scott, 4 Peters, R. 205, 228. — The authorities on this point are in conflict with each other. Parr *v.* Eliason, 1 East, R. 92, and Daniel *v.* Cartony, 1 Esp. R. 274, affirm the right. But the text is supposed to contain the better established doctrine. The true distinction seems to be, between cases, where the indorsement is merely void, and cases, where it is voidable. In the former case, it is obvious, that no title can be deduced through a void title; in the latter, a title may be, at least against all parties except the person, who is entitled to avoid it. See Knights *v.* Putnam, 3 Pick. R. 184 (2d edit.), where many of the authorities are collected. See, also, Nichols *v.* Fearson, 7 Peters, R. 103; Reading *v.* Weston, 7 Conn. R. 409; Bush *v.* Livingston, 1 Cain. Cas. in Err. 66; Brathan *v.* Hess, 13 Johns. R. 52; Munn *v.* Commission Company, 15 Johns. R. 44.

[3] Chitty on Bills, ch 3, p. 109, 110 (8th edit. 1833); Bayley on Bills, ch. 12, p. 523, 524 (5th edit. 1830); Edwards *v.* Dick, 4 Barn. & Ald. 212; Bowyer *v.* Bampton, 2 Str. R. 1155; O'Keefe *v.* Dunn, 6 Taunt. R. 315.

[4] Ibid.; Charles *v.* Marsden, 1 Taunt. R. 224; Smith *v.* Knox, 3 Esp.

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that the very object of every accommodation Bill is, to enable the parties thereto, by a sale or other negotiation thereof, to obtain a free credit and circulation thereof; and this object would be wholly frustrated, unless the purchaser, or other Holder for value, could hold such a Bill by as firm and valid a title, as if it were founded in a real business transaction. The mere fact, that an accommodation acceptance has been indorsed, even after the Bill become due, does not of itself, without some other equity in the Acceptor, defeat the rights of the Holder.[1] In short, the parties to every accommodation Bill hold themselves out to the public, by their signatures, to be absolutely bound to every person, who shall take the same for value, to the same extent, as if that value were personally advanced to them, or on their account, and at their request. The French law seems to inculcate an equally broad and comprehensive doctrine.[2]

§ 192. Every person, in the sense of the rule, is treated as a *bonâ fide* Holder for value, not only who has advanced money or other value for it; but who has received it in payment of a precedent debt, or has a lien on it, or has taken it as collateral security, for a precedent debt, or for future as well as for past advances.[3] Thus, a banker, who is accustomed to make

R. 46; Scott v. Lifford, 1 Camp. R. 246; Bank of Ireland v. Beresford, 6 Dow, R. 237; Grandin v. Le Roy, 2 Paige, R. 509; Powell v. Waters, 17 Johns. R. 176.

[1] Sturtevant v. Ford, 4 Scott, R. 668.

[2] Pothier de Change, n. 118 to 121; Code de Comm. art. 117; Pardessus, Droit Comm. Tom. 2, art. 378.

[3] Chitty on Bills, ch. 3, p. 85 (8th edit. 1833); Ante, § 183; Heywood v. Watson, 4 Bing. R. 496; Bayley on Bills, ch. 12, p. 500, 501 (5th edit. 1830); Bosanquet v. Dudman, 1 Stark. R. 1; Ex parte Bloxham, 8 Ves. 531; Holmes v. Smith, 16 Maine, R. 117; Townsley v. Sumrall, 2 Peters, R. 170; Swift v. Tyson, 16 Peters, R. 1; Bacheller v. Priest, 12 Pick.

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advances or acceptances, from time to time, for his customers, and has in his possession negotiable securi-

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R. 399; Norton *v.* Waite, 2 Applet. R. 175. The earliest cases in the New York Reports (Warren *v.* Lynch, 5 Johns. R. 269; Bay *v.* Coddington, 5 Johns. Ch. R. 54) are coincident with the doctrine stated in the text. Some cases afterwards brought the doctrine into doubt, and in which it was decided, that taking a Bill in payment of a precedent debt did not entitle the creditor to be deemed a *bonâ fide* purchaser within the sense of the rule. See Bay *v.* Coddington, 20 Johns. R. 637; Wardell *v.* Howell, 9 Wend. R. 179; Bristol *v.* Sprague, 8 Wend. R. 423; Roosa *v.* Brotherson, 10 Wend. R. 85; Ontario Bank *v.* Worthington, 12 Wend. R. 593; Payne *v.* Cutler, 13 Wend. R. 606. The later cases, however, seem gradually receding from these decisions, and inclining to uphold the old rule. See Bank of Salina *v.* Babcock, 21 Wend. R. 490; Bank of Sandusky *v.* Scoville, 24 Wend. R. 115; Williams *v.* Smith, 2 Hill, N. Y. R. 301. The leading authorities were cited and commented on in Swift *v.* Tyson, 16 Peters, R. 15 to 22. On that occasion the Court said; "There is no doubt, that a bonâ fide holder of a negotiable instrument for a valuable consideration, without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes 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. This is a doctrine so long and so well established, and so essential to the security of negotiable paper, that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support. As little doubt is there, that the holder of any negotiable paper, before it is due, is not bound to prove that he is a bonâ fide holder for a valuable consideration, without notice; for the law will presume that, in the absence of all rebutting proofs, and therefore it is incumbent upon the defendant to establish by way of defence satisfactory proofs of the contrary, and thus to overcome the primâ facie title of the plaintiff. In the present case, the plaintiff is a bonâ fide holder without notice for what the law deems a good and valid consideration, that is, for a preëxisting debt; and the only real question in the cause is, whether, under the circumstances of the present case, such a preëxisting debt constitutes a valuable consideration in the sense of the general rule applicable to negotiable instruments. We say, under the circumstances of the present case, for the acceptance having been made in New York, the argument on behalf of the defendant is, that the contract is to be treated as a New York contract, and therefore to be governed by the laws of New York, as expounded by its Courts, as well upon general principles, as by the express provisions of the thirty-fourth section of the judiciary act of 1789. ch. 20. And then it is further contended, that by the law of New York, as thus

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ties, belonging to them, for collection, is deemed to be a Holder for value, to the extent of such advances and

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expounded by its Courts, a preëxisting debt does not constitute, in the sense of the general rule, a valuable consideration applicable to negotiable instruments. In the first place, then, let us examine into the decisions of the Courts of New York upon this subject. In the earliest case, Warren *v.* Lynch, 5 Johns. R. 289, the Supreme Court of New York appear to have held, that a preëxisting debt was a sufficient consideration to entitle a bonâ fide holder without notice to recover the amount of a note indorsed to him, which might not, as between the original parties, be valid. The same doctrine was affirmed by Mr. Chancellor Kent in Bay *v.* Coddington, 5 Johns. Chan. Rep. 54. Upon that occasion he said, that negotiable paper can be assigned or transferred by an agent or factor or by any other person, fraudulently, so as to bind the true owner as against the holder, provided it be taken in the usual course of trade, and for a fair and valuable consideration without notice of the fraud. But he added, that the holders in that case were not entitled to the benefit of the rule, because it was not negotiated to them in the usual course of business or trade, nor in payment of any antecedent and existing debt, nor for cash, or property advanced, debt created, or responsibility incurred, on the strength and credit of the notes; thus directly affirming, that a preëxisting debt was a fair and valuable consideration within the protection of the general rule. And he has since affirmed the same doctrine, upon a full review of it, in his Commentaries, 3 Kent, Comm. Lect. 44, p. 81. The decision in the case of Bay *v.* Coddington was afterwards affirmed in the Court of Errors, 20 Johns. R. 637, and the general reasoning of the chancellor was fully sustained. There were indeed peculiar circumstances in that case, which the Court seem to have considered as entitling it to be treated as an exception to the general rule, upon the ground either because the receipt of the notes was under suspicious circumstances, the transfer having been made after the known insolvency of the indorser, or because the holder had received it as a mere security for contingent responsibilities, with which the holders had not then become charged. There was, however, a considerable diversity of opinion among the members of the Court upon that occasion, several of them holding that the decree ought to be reversed, others affirming that a preëxisting debt was a valuable consideration, sufficient to protect the holders, and others again insisting, that a preëxisting debt was not sufficient. From that period, however, for a series of years, it seems to have been held by the Supreme Court of the state, that a preëxisting debt was not a sufficient consideration to shut out the equities of the original parties in favor of the holders. But no case to that effect has ever been decided in the Court of Errors. The cases cited at the bar, and especially Roosa *v.* Brotherson, 10 Wend. R. 85; The Ontario Bank

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acceptances.[1] In every such case he is deemed to have a lien on such securities for the balances from

v. Worthington, 12 Wend. R. 593; and Payne v. Cutler, 13 Wend. R. 605, are directly in point. But the more recent cases, The Bank of Salina v. Babcock, 21 Wend. R. 490, and The Bank of Sandusky v. Scoville, 24 Wend. R. 115, have greatly shaken, if they have not entirely overthrown those decisions, and seem to have brought back the doctrine to that promulgated in the earliest cases. So that, to say the least of it, it admits of serious doubt, whether any doctrine upon this question can at the present time be treated as finally established; and it is certain, that the Court of Errors have not pronounced any positive opinion upon it." And again; "It becomes necessary for us, therefore, upon the present occasion to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a preëxisting debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true, (which, however, may well admit of some doubt from the generality of the language,) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say, that receiving it in payment of, or as security for a preëxisting debt, is according to the known usual course of trade and business. And why upon principle should not a preëxisting 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 preëxisting debts. The creditor is thereby enabled to realize or to 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 preëxisting 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, often 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

[1] Bosanquet v. Dudman, 1 Stark. R. 1; Ex parte Bloxham, 8 Ves. 531.

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time to time, as well as for such acceptances, by the implied consent or agreement of his customers, resulting from the usage or course of business.[1]

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given by the same or by other parties, by way of renewal or 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 of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for preëxisting debts. This question has been several times before this Court, and it has been uniformly held, that it makes no difference whatsoever as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him is a preëxisting debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument. The cases of Coolidge *v.* Payson, 2 Wheaton, R. 66, 70, 73, and Townsley *v.* Sumrall, 2 Peters, R. 170, 182, are directly in point. In England the same doctrine has been uniformly acted upon. As long ago as the case of Pillans and Rose *v.* Van Meirop and Hopkins, 3 Burr. 1664, the very point was made, and the objection was overruled. That, indeed, was a case of far more stringency than the one now before us; for the bill of exchange, there drawn in discharge of a preëxisting debt, was held to bind the party as acceptor, upon a mere promise made by him to accept before the bill was actually drawn. Upon that occasion Lord Mansfield, likening the case to that of a letter of credit, said, that a letter of credit may be given for money already advanced, as well as for money to be advanced in future: and the whole Court held the plaintiff entitled to recover. From that period downward there is not a single case to be found in England in which it has ever been held by the Court, that a preëxisting debt was not a valuable consideration, sufficient to protect the holder, within the meaning of the general rule, although incidental dicta have been sometimes relied on to establish the contrary, such as the dictum of Lord Chief Justice Abbott in Smith *v.* De Witt, 6 Dowl. & Ryland, 120, and De la Chaumette *v.* The Bank of England, 9 Barn. & Cres. 209, where, however, the decision turned upon very different considerations. Mr. Justice Bayley, in his valuable work on bills of exchange and promissory notes, lays down the rule in the most general terms. 'The want of consideration,' says he, 'in toto or in part, cannot be insisted on, if the plaintiff or any intermediate party between him and the defendant took the bill or note bonâ fide and upon a valid consideration.' Bayley on Bills, p. 499, 500, 5th London edition, 1830. It is observable, that he here uses the words 'valid consideration,' obviously intending to make the distinction, that it is not intended to apply

[1] Ibid.

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§ 193. In the ordinary course of things, the Holder is presumed to be, *primâ facie*, a Holder for value; and

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solely to cases, where a present consideration for advances of money on goods or otherwise takes place at the time of the transfer and upon the credit thereof. And in this he is fully borne out by the authorities. They go farther, and establish, that a transfer as security for past, and even for future responsibilities, will, for this purpose, be a sufficient, valid, and valuable consideration. Thus, in the case of Bosanquet *v.* Dudman, 1 Starkie, R. 1, it was held by Lord Ellenborough, that if a banker be under acceptances to an amount beyond the cash balance in his hands, every bill he holds of that customer's, bonâ fide, he is to be considered as holding for value; and it makes no difference though he hold other collateral securities, more than sufficient to cover the excess of his acceptances. The same doctrine was affirmed by Lord Eldon in Ex parte Bloxham, 8 Ves. 531, as equally applicable to past and to future acceptances. The subsequent cases of Heywood *v.* Watson, 4 Bing. R. 496, and Bramah *v.* Roberts, 1 Bing. New Ca 469, and Percival *v.* Frampton, 2 Cromp. Mees. & Rosc. 180, are to the same effect. They directly establish that a bonâ fide holder, taking a negotiable note in payment of or as security for a preëxisting debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties. And these are the latest decisions, which our researches have enabled us to ascertain to have been made in the English Courts upon this subject. In the American Courts, so far as we have been able to trace the decisions, the same doctrine seems generally but not universally to prevail. In Brush *v.* Scribner, 11 Conn. R. 388, the Supreme Court of Connecticut, after an elaborate review of the English and New York adjudications, held, upon general principles of commercial law, that a preëxisting debt was a valuable consideration, sufficient to convey a valid title to a bonâ fide holder against all the antecedent parties to a negotiable note. There is no reason to doubt, that the same rule has been adopted and constantly adhered to in Massachusetts; and certainly there is no trace to be found to the contrary. In truth, in the silence of any adjudications upon the subject, in a case of such frequent and almost daily occurrence in the commercial states, it may fairly be presumed, that whatever constitutes a valid and valuable consideration in other cases of contract to support titles of the most solemn nature, is held à fortiori to be sufficient in cases of negotiable instruments, as indispensable to the security of holders, and the facility and safety of their circulation. Be this as it may, we entertain no doubt, that a bonâ fide holder, for a preëxisting debt, of a negotiable instrument, is not affected by any equities between the antecedent parties, where he has received the same before it became due, without notice of any such equities. We are all, therefore, of opinion, that the question on this point, propounded by the Circuit

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he is not bound to establish, that he has given any value for it, until the other party has established the want, or failure, or illegality of the consideration, or that the Bill had been lost or stolen, before it came to the possession of the Holder.[1] It may then be incumbent upon him to show, that he has given value, for, under such circumstances, he ought not to be placed in a better situation than the antecedent parties, through whom he obtained the Bill.

§ 194. What circumstances will amount to actual or constructive notice of any defect or infirmity in the title to the Bill, so as to let it in as a bar or defence against a Holder for value, has been a matter of much discussion, and of no small diversity of judicial opinion. It is agreed on all sides, that express notice is not indispensable; but it will be sufficient, if the circumstances are of such a strong and pointed character, as necessarily to cast a shade upon the transaction, and to put the Holder upon inquiry.[2] For a considerable length

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Court for our consideration, ought to be answered in the negative; and we shall accordingly direct it so to be certified to the Circuit Court." The New York cases are reviewed at large in the case of Swift v. Tyson, 16 Peters, R. 1. See, also, 3 Kent, Comm. Lect. 44, p. 80 to 82 (4th edit.); and Evans v. Smith, 4 Binn. R. 367; Bosanquet v. Dudman, 1 Stark. R. 1; Pillans v. Van Mierop, 3 Burr. 1664; Ex parte Bloxham, 8 Ves. 531; Heywood v. Watson, 4 Bing. R. 496; Bramah v Roberts, 1 Bing. New Cas. 469; Percival v. Frampton, 2 Cromp. Mees. & Roso. 180; Brush v Scribner, 11 Connect. R. 388.

[1] See Bayley on Bills, ch. 12, p. 529 to 531 (5th edit. 1830); Chitty on Bills, ch. 6, § 3, p. 277 to 284 (8th edit. 1833); Goodman v. Harvey, 4 Adolph. & Ellis, 870; Arbouin v. Anderson, 1 Adolp. & Ell. N. S. R. 498, 504. In this case Lord Denman said; "The owner of a Bill is entitled to recover upon it if he came to it honestly; that fact is implied, *primâ facie*, by possession; and to meet the inference so raised, fraud, felony, or some such matter must be proved." Post, § 415, § 416; Knight v. Pugh, 4 Watts & Serg. R. 445.

[2] Cone v. Baldwin, 12 Pick. R. 544; Hall v. Hale, 8 Conn. R. 236.

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of time, the doctrine prevailed, that, if the Holder took the Bill under suspicious circumstances, or without due caution and inquiry, although he gave value for it, yet he was not to be deemed a Holder *bonâ fide* without notice.[1] But this doctrine has been since overruled and abandoned, upon the ground of its inconvenience, and obstruction to the free circulation and negotiation of Exchange, and other transferable paper.[2]

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[1] Gill *v.* Cubitt, 3 Barn. & Cressw. 466; Snow *v.* Peacock, 3 Bing. R. 406; Strange *v.* Wigney, 6 Bing. R. 677; Slater *v.* West, 1 Dans. & Lloyd, 15; Eastley *v.* Crockford, 10 Bing. R. 243; Nicholson *v.* Patten, 13 Lewis, R. 213, 216; 3 Kent, Comm. Lect. 44, p. 81, 82 (4th edit.); Down *v.* Halling, 4 Barn. & Cressw. 330; Beckwith *v.* Correll, 3 Bing. R. 444; Chitty on Bills, ch. 6, § 3, p. 277 to 284 (8th edit. 1833); Bayley on Bills, ch. 12, p. 524, 529 to 531 (5th edit. 1830).

[2] Goodman *v.* Harvey, 4 Adolph. & Ellis, 870; Uther *v.* Rich, 10 Adolph. & Ellis, 784; Stephens *v.* Foster, 1 Cromp. Mees. & Rosc. 849; Arbouin *v.* Anderson, 1 Adolph. & Ellis, N. S. R. 498, 504; Post, § 415, § 416.

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CHAPTER. VII.

OF THE TRANSFER OF BILLS OF EXCHANGE.

§ 195. Let us proceed, in the next place, to the consideration of the Transfer of Bills of Exchange. We have already seen what persons, in general, are competent to draw, indorse, or accept Bills of Exchange;[1] and, therefore, little further seems necessary to be said, in this place, in respect to the persons, by whom the transfer of Bills may be made. In case of the bankruptcy of the Payee, or other Holder of a Bill of Exchange, all his rights of transfer of the same become vested in his assignees, who may, by law, transfer the same in their own names.[2] In case of the death of the Payee, or other Holder, the like right exists in the executors or administrators of the deceased; and they may, in their own names, transfer the Bill in the like manner.[3] In each of these cases, the transfer will be available, as assets, for the benefit of the estate of the bankrupt, or of the deceased testator or intestate, if the Bill was held by him *bonâ fide* on his own account; and if held, either positively or constructively, in trust for the benefit of third persons, the transfer will be for their sole use.[4]

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[1] Ante, § 70 to 106.

[2] Chitty on Bills, ch. 6, p. 227 to 238 (8th edit. 1833); Bayley on Bills, ch. 2, § 4, p. 49, 50 (5th edit. 1830); Id. ch. 5, § 2, p. 136 to 156.

[3] Chitty on Bills, ch. 6, p. 225, 226 (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 136 (5th edit. 1830); Id. ch. 5, § 2, p. 136, 137; Rawlinson *v.* Stone, 3 Wils. 1; S. C. 2 Str. 126; Watkins *v.* Maule, 2 Jac. & Walk. 237.

[4] Ibid.

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§ 196. In case of the marriage of a female, who is Payee or Indorsee of a Bill, the property thereof vests in her husband, and he becomes solely entitled to negotiate it, as Holder, and to indorse it in his own name.[1] The same rule applies in the case of a Bill made payable to a married woman after her marriage. The husband may transfer it in his own name.[2] In case of an infant Payee or Indorsee of a Bill, the infant may, by his indorsement, (which is a voidable act only, and not absolutely void,) transfer the interest to any subsequent Holder, against all the parties to the Bill except himself; but the indorsement will not bind him personally, or bind his interest in the Bill.[3]

§ 197. In case of a Bill, payable or indorsed to a trustee, for the use of a third person, (such as a Bill, payable or indorsed to A., for the use of B.,) the trustee alone is competent to convey the legal title to the Bill, by a transfer or indorsement.[4] In the case of a partnership, a Bill, payable or indorsed to the firm, may be transferred by any one of the partners in the

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[1] Ante, § 93; Chitty on Bills, ch. 2, p. 26 (8th edit. 1833); Id. ch. 6, p. 225, 226; Bayley on Bills, ch. 2, § 3, p. 47 to 49 (5th edit. 1830); Id. ch. 5, § 2, p. 135, 136; Miles v. Williams, 10 Mod. R. 243, 245; McNeilage v. Holloway, 1 Barn. & Ald. 218; Arnold v. Revoult, 1 Brod. & Bing. 445; Phillipskirk v. Pluckwell, 2 Maule & Selw. 393; Connor v. Martin, 1 Str. R. 516; Burrough v. Moss, 10 Barn. & Cressw. 558; Barlow v. Bishop, 1 East, R. 432; Miller v. Delameter, 12 Wend. R. 433.

[2] Ibid.

[3] Chitty on Bills, ch. 2, § 1, p. 21 to 24 (8th edit. 1833); Id. ch. 6, p. 224; Bayley on Bills, ch. 2, § 12, p. 44 to 46 (5th edit. 1830); Id. ch. 5, § 2, p. 136.

[4] Chitty on Bills, ch. 6, p. 226 (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 134 (5th edit. 1830); Evans v. Cramlington, Carth. R. 5; S. C. 2 Vent. 307; Skinn. R. 264.

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name of the firm,[1] at any time during the continuance of the partnership. But, where the partnership is dissolved during the lifetime of the partners, neither partner can afterwards indorse a Bill, payable to the firm, in the name of the firm.[2] But, where the dissolution is by the death of one partner, there the survivor may indorse a Bill, payable to the firm, in his own name.[3] The reason of the distinction is, that, in the former case, the implied authority for one partner to act for all is gone; whereas, in the latter case, the Bill, or chose in action, vests exclusively in the partner by survivorship, although he must account therefor, as a part of the assets of the partnership.[4] If a Bill be made payable or indorsed to several persons not partners, (as to A., B., and C.,) there the transfer can only be by a joint indorsement of all of them.[5]

§ 198. Thus far, in respect to the persons, by whom the transfer of Bills of Exchange may be made. Let us, for a moment, consider, to whom the transfer may be made. The transfer may, of course, be made to any person of full age, who is not otherwise incompetent. It may also be transferred to an infant, and thereby the interest will vest in him; or to a feme covert, and then the interest will vest in her husband, who thereby becomes the legal owner thereof, and may treat it, as payable to himself; or he may, at his election, treat it, as payable to himself and his wife;[6]

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[1] Chitty on Bills, ch. 2, p. 67 (8th edit. 1833); Id. ch. 6, p. 226; Bayley on Bills, ch. 2, § 6, p. 53, 54 (5th edit. 1830).

[2] Sanford *v.* Mickles, 4 John. R. 224; Story on Partn. § 323; Bayley on Bills, ch. 2, § 6, p. 59 (5th edit. 1830).

[3] Jones *v.* Thorn, 14 Martin, R. 463.

[4] Crawshay *v.* Collins, 14 Ves. 218, 226.

[5] Ibid.; Carvick *v.* Vickery, 2 Doug. R. 653, note.

[6] Bayley on Bills, ch. 2, § 3, p. 47 to 49 (5th edit. 1830); Chitty on Bills,

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and, then, if she survives her husband, he not having reduced the same into possession, she may hold and sue upon the indorsement in her own name, for her own use. If the transfer be to a person, who is an idiot, or a *non compos*, or a lunatic, there does not seem to be any legal incapacity in holding it to be valid in their favor, if it be clearly and unequivocally for their benefit, as, if it be a mere bounty to them. If the transfer be to an executor or administrator, or to any person, as trustee for another, it will operate, as a transfer to them personally, although the trust may attach upon the proceeds in their hands.[1] If the transfer be to an agent, by an indorsement of his principal in blank, he may treat the Bill, as between himself and all the other parties, except his principal, as his own, and fill it up in his own name; or he may hold it for his principal, and act in his name.[2] If the indorsement be filled up to the agent by the principal, then he is invested with the legal title, as to all persons but his principal. But the principal may, at any time, revoke his authority and reclaim his rights.[3]

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ch. 2, p. 26 (8th edit. 1833); Id. ch. 6, p. 225, 238; Id. Pt. 2, ch. 1, p. 556; Philliskirk *v.* Pluckwell, 2 M. & Selw. 393; Richards *v.* Richards, 2 B. & Adolph. 447; Burrough *v.* Moss, 10 Barn. & Cressw. 558.

[1] Richards *v.* Richards, 2 Barn. & Adolph. 447.

[2] Bayley on Bills, ch. 5, § 2, p. 132 to 134 (5th edit. 1830); Post, § 207, 224; Clark *v.* Pigot, 12 Mod. R. 192, 193; 1 Salk. 126; 3 Kent, Comm. Lect. 44, p. 78 to 81, 89, 90 (4th edit.); Chitty on Bills, ch. 6, p. 255, 256 (8th edit. 1833); Bank of Utica *v.* Smith, 18 Johns. R. 230; Guernsey *v.* Burns, 25 Wend. R. 640; Little *v.* O'Brien, 9 Mass. R. 423; Sterling *v.* Marietta & Susq. Trad. Co. 10 Rawle, 179; Mauran *v.* Lamb, 7 Cowen, R. 174; Banks *v.* Ebstin, 15 Martin, R. 291; Brigham *v.* Marean, 7 Pick. R. 40; Lovell *v.* Evartson, 11 Johns. R. 52; Bragg *v.* Greenleaf, 14 Maine, R. 396; Lowney *v* Perham, 2 Appleton, R. 235. But see, contra, Thatcher *v.* Winslow, 5 Mass. R. 58; Sherwood *v.* Roys, 14 Pick. R. 172; Wilson *v.* Holmes, 5 Mass. R. 543, 545, per Parsons, Chief Justice.

[3] Ibid.

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§ 199. In the next place, as to the Mode of Transfer of Bills of Exchange. If the Bill is not originally made negotiable, or, in other words, is not payable to the Bearer, or to order, it may be transferred by the Payee or Holder thereof, either by delivery or by indorsement, in such a manner as to bind himself, and to give his immediate assignee a right thereon against himself; but not to give him a right against any of the antecedent parties, which can be enforced, *ex directo*, at law, (however it may be in equity,) in his own name, against them.[1] Still, however, the transfer, if *bonâ fide* made for a valuable consideration, will entitle him to maintain an action at law thereon, in the name of the assignor, against the antecedent parties; and, if he recovers, he will be entitled to hold the proceeds for his own use.[2]

§ 200. But, if the Bill is negotiable, then the mode of transfer depends upon the manner, in which the Bill is originally made negotiable. If it is payable to the Bearer, then it may be transferred by mere delivery.[3] But, although it may be thus transferred by

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[1] But the government may sue on a note, not negotiable, in its own name, if assigned to it. U. States *v.* Buford, 3 Peters, R. 12, 30; U. States *v.* White, 2 Hill, N. Y. R. 59; Ante, § 60.

[2] Bayley on Bills, ch. 5, § 1, p. 120 (5th edit. 1830); Hill *v.* Lewis, 1 Salk. R. 132; Joscelyn *v.* Ames, 3 Mass. R. 274; Jones *v.* Witter, 13 Mass. R. 305; 3 Kent, Comm. Lect. 44, p. 77 (4th edit.). As to the effect of a guaranty on the back of a Bill, by a person, who is not a payee or party to the Bill, see Seabury *v.* Hungerford, 2 Hill, N. Y. R. 80; Miller *v.* Gaston, 2 Hill, N. Y. R. 188; Post, § 215, 372, and note, § 453 to 458, and note; Hall *v.* Newcomb, 3 Hill, R. 232; Manrow *v.* Durham, 3 Hill, R. 589.

[3] Chitty on Bills, ch. 5, p. 178, 179 (8th edit. 1833); Id. ch. 6, p. 218, 219, 252; Bayley on Bills, ch. 1, § 10, p. 30, 31 (5th edit. 1830); Id. ch. 9, p. 388; 3 Kent, Comm. Lect. 44, p. 78 (4th edit.).— Bills of Exchange are rarely made payable to the Bearer; but Promissory Notes are often made so, especially such notes as are issued by banks and bankers, where

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mere delivery, there is nothing in the law, which prevents the Payee of a Bill, payable to himself or Bearer, from transferring it, if he chooses, by indorsement. In such a case, he will incur the ordinary liability of an Indorser, from which, in the case of a mere transfer, by delivery, he is ordinarily exempt.[1] On a transfer of a Bill, payable to the Bearer, by delivery only, without indorsement, the person, making it, ceases to be deemed a party to the Bill;[2] although he may, in some cases, incur a limited responsibility to the person to whom he immediately transfers it, founded upon particular circumstances, as, for example, upon his express or implied guaranty of its genuineness, and his title thereto.[3] If the Bill is payable to a fictitious person or order, (as has been sometimes, although rarely, done,) then, as against all the persons, who are parties thereto, and aware of the fiction, (as, for example, against the Drawer, Indorser, or Acceptor,) it will be deemed a Bill payable to the Bearer, in favor of a *bonâ fide* Holder without notice of the fiction;[4] but, as

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they are intended to circulate as currency. We have already seen, that, by the law of France, Bills are not permitted to be drawn, payable to the Bearer. Ante, § 57, 62; Pothier de Change, n. 223; Pardessus, Droit Comm. Tom. 1, art. 338.

[1] Bank of England v. Newman, 1 Ld. Raym. 442; Brush v. Reeves's Administrator, 3 Johns. R. 439. See Chitty on Bills, ch. 6, p. 219 (8th edit. 1833); Id. p. 267; 1 Selwyn, N. Prius, Bills of Exchange, p. 342 (10th edit. 1842); Seabury v. Hungerford, 2 Hill, N. Y. R. 80; Hall v. Newcomb, 3 Hill, R. 232.

[2] Bayley on Bills, ch. 5, § 1, p. 120, 121 (5th edit. 1830).

[3] Ante, § 109, 111; Chitty on Bills, ch. 6, p. 268 to 270 (8th edit. 1833); Bayley on Bills, ch. 9, p. 363, 364 (5th edit. 1830).

[4] Chitty on Bills, ch. 5, p. 178, 179 (8th edit. 1833); Id. ch. 6, p. 252; Bayley on Bills, ch. 1, § 10, p. 30, 31 (5th edit. 1830); Id. ch. 9, p. 383; Stone v. Freeland, cited 1 H. Black. 316, note; Vere v. Lewis, 3 Term R. 182; Tatlock v. Harris, 3 Term R. 174; Minet v. Gibson, 3 Term R. 481; 1 H. Black. 569; Collis v. Emett, 1 H. Black. 313;

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it should seem, it would be deemed void, if the Holder had notice thereof.[1]

§ 201. If the Bill is originally payable to a person or his order, there it is properly transferable by indorsement. We say properly transferable, because in no other way will the transfer convey the legal title to the Holder, so that he can, at law, hold the other parties liable to him *ex directo*, whatever may be his remedy in equity.[2] If there be an assignment thereof without an indorsement, the Holder will thereby acquire the same rights only, as he would acquire upon an assignment of a Bill not negotiable.[3] If, by mistake, or accident, or fraud, a Bill has been omitted to be indorsed upon a transfer, when it was intended, that it should be, the party may be compelled, by a court of equity, to make the indorsement; and, if he afterwards becomes bankrupt, that will not vary his right or duty to make it; and, if he should die, his executor or administrator will be compellable, in like manner, to make it.[4] The assignees of a bankrupt,

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3 Kent, Comm. Lect. 44, p. 78 (4th edit.).; Plets *v.* Johnson, 3 Hill, R. 112.

[1] Bennett *v.* Farnell, 1 Camp. R. 130, note; Id. p. 180, (*b*), and (*c*), of Addenda.

[2] Bayley on Bills, ch. 5, § 1, p. 120, 121 (5th edit. 1830); Chitty on Bills, ch 6, p. 251 (8th edit. 1833); Id. p. 265; Gibson *v.* Minet, 1 H. Black. 605; Ante, § 60.

[3] In general, in such a case, the Holder, as against the prior parties, will, upon the transfer, have the same rights in equity, as the Payee or Assignor has; that is, he may, at law, sue the other parties thereto, in the name of the Payee or Assignor, or perhaps he may maintain a suit in equity in his own name, *ex directo*, against them. See Ante, § 199; 2 Story, Eq. Jurisp. § 1036, 1037, 1044, 1047.

[4] Chitty on Bills, ch. 6, p. 228, 229 (8th edit. 1833); Id. p. 263; Bayley on Bills, ch. 5, § 1, p. 123 (5th edit. 1830); Id. § 2, p. 136, 137; Watkins *v.* Maule, 2 Jac. & Walk. 237, 212; Smith *v.* Pickering, Peake, R. 50.

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under the like circumstances, may be compelled to make an indorsement of a Bill, transferred before his bankruptcy.[1] But, in the case of an executor, or administrator, or assignee of a bankrupt, the doctrine is to be understood with this limitation, that the indorsement cannot be insisted upon, except with the qualification, that it shall not create any personal liability of the executor, or administrator, or assignee to pay the Bill.[2]

§ 202. Where a Bill is not negotiable, or payable to order, if it is indorsed by the Payee in blank, or made payable to the Indorsee or order, the Indorser incurs, as to every subsequent Holder, the same obligations and responsibilities, as the Drawer of a like Bill would; for such an Indorser is treated, to all intents and purposes, as a new Drawer.[3] Where, upon the indorsement, in such a case, the Bill is payable to the Indorsee only, the Indorser incurs these obligations and responsibilities only to his immediate Indorsee; but, if the latter should again indorse the Bill, the Holder under him would be entitled to treat him as a new Drawer.

§ 203. Where a Bill is originally payable to Bearer, and, therefore, transferable by delivery only, actual or constructive delivery thereof would seem to be indispensable, to complete the legal title thereto.[4] But, where the transfer is by indorsement, there an actual

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[1] Bayley on Bills, ch. 5, § 2, p. 138 (5th edit. 1830); Ex parte Mowbray, 1 Jac. & Walk. 428.

[2] Ibid.; Ante, § 195.

[3] Ante, § 60; Chitty on Bills, ch. 6, p. 265, 266 (8th edit. 1833); Bayley on Bills, ch. 5, § 1, p. 120, 121 (5th edit. 1830); Hill v. Lewis, 1 Salk. R. 132; Evans v. Gee, 11 Peters, R. 80. See Seabury v. Hungerford, 2 Hill, N. Y. R. 80.

[4] But see Chitty on Bills, ch. 6, p. 219 (8th edit. 1833).

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or constructive delivery seems now to be deemed indispensable, to complete the title; and certainly must be so, if the transaction is not treated as consummated between the parties.[1] It is said, however, that, even if a delivery is not indispensable to perfect the title between private persons; yet, that the Crown will not be bound, unless there has been a delivery.[2]

§ 204. In cases, where an indorsement is necessary, as it is upon all Bills payable to order, no particular form of words is indispensable to be used. It is generally sufficient, if there be the signature of the In-

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[1] Marston v. Allen, 8 Mees. and Welsb. R. 494, 503; Brind v. Hampshire, 1 Mees. & Welsb. 369; Adams v. Jones, 12 Adolph. & Ell. 494, 503. But see Chitty on Bills, ch. 6, p. 252 (8th edit 1833); Id. p. 262, 263. See Bayley on Bills, ch. 5, § 1, p. 120, 121; Id. ch. 9, p. 391, 392 (5th edit. 1830). — The cases of Churchill v. Gardner, 7 Term R. 596, and Smith v. McClure, 5 East, R. 476, are usually cited, as establishing the position, that a delivery is unnecessary. But it does not appear to me, that either of them directly supports it. In the first, it was held, that, in a declaration against an Acceptor, it was sufficient, that it stated, that the Drawer made the Bill, and requested the Acceptor to pay it to the plaintiff, or order, without saying, that the Drawer delivered it to the plaintiff; because, said the Court, the allegation, that he made the Bill, imported, that it was delivered. In the other case, the Bill was payable to the order of the Drawer, and was accepted, and the Drawer sued on the acceptance. The declaration alleged, that the Drawer delivered the bill to the defendant, who accepted the same. But it did not allege any redelivery thereof to the Drawer. The Court thought, the acceptance must be taken, upon the declaration, to be a perfect acceptance, which vested a legal title in the Drawer. In the more recent cases, a delivery, actual or constructive, seems to have been held indispensable, to complete the title in the Indorsee, wherever the Bill is to pass by indorsement; and that, to constitute an indorsement in point of law, not only the writing the name of the Indorser upon the bill is necessary, but also a delivery of it to the Indorsee. Adams v. Jones, 12 Adolph. & Ellis, R. 455, 459; Brind v. Hampshire, 1 Mees. & Welsb. 369; Marston v. Allen, 8 Mees. & Welsb. 494, 503. However, even if the doctrine were established, that no delivery was absolutely indispensable, still a delivery, either actual or constructive, might, in many cases, be important to establish the title of the Holder, where, upon the indorsement, circumstances of fraud or misappropriation should occur. Marston v. Allen, 8 Mees. & Welsb. 494.

[2] Ibid.; The King v. Lambton, 5 Price, R. 428.

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dorser affixed, without any other words being used. And, if any other words are placed over or precede the signature, it is sufficient, if they import a present intent to transfer the same thereby.[1] It has even been held, that the initials of the Holder of a check indorsed on the check, are sufficient to charge him as Indorser.[2] The word, Indorsement, in its strict sense, seems to import a writing on the back of the Bill; but it is well settled, that this is not essential.[3] On the contrary, it will be a good indorsement, if it be made on the face of the Bill, or on another paper annexed thereto, (called, in France, *Allonge*,) which is sometimes necessary, when there are many successive indorsements to be made.[4] The signature ought, in all cases, to be written with ink, in order to prevent its defacement. But even this has been recently held not to be indispensable, and that an indorsement in pencil is sufficient.[5] The mode of making the indorsement, when it is by an agent, a partner, or a feme covert, or other person, acting officially, is precisely the same, as the signature should be in drawing a Bill.[6] In whatever way an indorsement may be made, by the general principles of law, unless varied by the contract of the parties, the Indorser is deemed to stand in the relation

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[1] Chitty on Bills, ch. 6, p. 253 (8th edit. 1833); Bayley on Bills, ch. 5, § 1, p. 122 (5th edit. 1830); Chaworth *v.* Beech, 4 Ves. 585.

[2] Merchants' Bank *v.* Spicer, 6 Wend. R. 443.

[3] Heineccius says; "Id, quod vocant indossamentum (das Indossement), quia dorso inscribi solet." Heinecc. de Camb. cap. 2, § 7. See, also, Pothier de Change, n. 22.

[4] Chitty on Bills, ch. 5, p. 147 (8th edit. 1833); Id. ch. 6, p. 253, 262; Pardessus, Droit Comm. Tom. 2, art. 343; Folger *v.* Chase, 18 Pick. 63.

[5] Chitty on Bills, ch. 6, p. 252 (8th edit. 1833); Geary *v.* Physic, 5 Barn & Cressw. 234; Ante, § 53.

[6] Ante, § 53, 74 to 77, 92.

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of a new Drawer of the Bill, and, of course, is affected with all the liabilities of a Drawer.[1]

§ 205. By the law of France, in order to pass a valid title to the Bill to the Indorsee, or Holder, it is essential, that the indorsement should be subscribed by the Indorser; that it should be dated truly (and not ante-dated); that it should be expressed to be for value received; and that the name of the person, to whose order it is payable, should be mentioned.[2] When an indorsement contains all these particulars, it is called a regular indorsement, and the title will thereby pass to the Indorsee.[3] If the indorsement be not attended with these formalities, it is called an irregular Indorsement, and will only operate as a simple procuration to the Indorsee, giving him authority to receive the contents.[4] A blank indorsement, therefore, is treated as an irregular indorsement, and will not transfer the property to the Indorsee or Holder, unless, indeed, the imperfection is cured by the Indorser, before it has become the subject of some notarial or public act, or before the Indorser has become incapable.[5] Still, a blank indorsement is not without effect in France; for, if the Bill has been accepted, and has been in-

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[1] Chitty on Bills, ch. 6, p. 265 to 267 (8th edit. 1833); Hodges v. Stewart, 1 Salk. R. 125; Heylin v. Adamson, 2 Burr. 674; Ballingalls v. Gloster, 3 East, R. 481; Bayley on Bills, ch. 9, p. 332 (5th edit. 1830); Pothier de Change, n. 38.

[2] Code de Comm. art. 136 to 139; Pothier de Change, n. 38 to 40; Jousse. sur L'Ord, 1673, Pt. 5, art. 23.

[3] Pardessus, Droit Comm. Tom. 2, art. 343 to 350; Ante, § 62.

[4] Code de Comm. art. 138; Pardessus, Droit Comm. art. 343, 353 to 355; Chitty on Bills, ch. 6, p. 251 (8th edit. 1833); Pothier de Change, n. 38, 39.

[5] Pardessus, Droit Comm. Tom. 2, art. 343, 354; Pothier de Change, n. 41; Trimbey v. Vignier, 1 Bing. N. Cas. 151; Ante, § 62.

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dorsed in blank, and the Bill is then lost or stolen, and the blank is filled up in a false or forged name, and the Acceptor should, without notice of the fact, pay the Bill to the Holder, he would be protected in so doing.[1] Blank indorsements seem also prohibited in many other of the continental nations of Europe. Heineccius, on this subject, says; "*Nec minus notari meretur, leges cambiales tantum non omnes ob innumeras fraudes prohibere cessiones, quæ solo subscripto nomine fiunt, ac proinde vocantur* INDOSSAMENTA IN BIANCO. *Ex his ne actio quidem datur, nisi ante præsentationem nomen indossatarii ab indossante inscriptum sit.*"[2] And it seems, that under certain circumstances, the Holder himself may fill up the blank, so as to make it a regular indorsement, if this be in conformity to the actual intention of the Indorser, and the authority be implied or expressed, at the time of the indorsement; and no intervening fact, such as the bankruptcy of the Indorser, has changed the rights or capacities of the party.[3]

§ 206. Indorsements are of various sorts, and have, or, at least, may have, very different operations, and import very different liabilities, rights, and duties. An indorsement may be in blank; or it may be in full; or it may be restrictive; or it may be qualified; or it may be conditional.[4] An indorsement is called an in-

[1] Pardessus, Droit Comm. Tom. 2, art. 446, 455; Ante, § 62.

[2] Heinecc. de Camb. cap. 2, § 11; Id. § 10. But see the very liberal and philosophical remarks of Mr. Professor Mittermaier on this subject, in Fœlix, Revue Etrang. et Franç. Tom. 8, 1841, p. 116 to p. 121, cited in Story on Promissory Notes, § 140 note.

[3] Pardessus, Droit Comm. Tom. 2, art. 346.

[4] Bayley on Bills, ch. 6, § 1, p. 123 to 129 (5th edit. 1830); Chitty on Bills, ch. 6, p. 253, 255, 257 to 264 (8th edit. 1833). See Merlin, Répertoire, Endossement; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 401, 402 (5th edit.).

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dorsement in blank, or a blank indorsement, when the signature of the party making it is alone put upon the Bill, without any words over or preceding it, expressive of any intention whatsoever.[1] It is called an indorsement in full, or a full indorsement, when there is written, over the signature of the Indorser, the name of the person, to whom, or in whose favor, it is made.[2] The common form is, "Pay to A. B. or order;"[3] but, if it be, "Pay to the order of A. B.," it has the same legal construction, that is, it is payable to A. B., as well as to his order.[4] An indorsement is restrictive, when it restrains the negotiability of the Bill to a particular person, or for a particular purpose.[5] An indorsement is qualified, when it restrains, or limits, or qualifies, or enlarges, the liability of the Indorser, in any manner different from what the law generally imports as his true liability, deducible from the nature of the instrument.[6] An indorsement is conditional, when

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[1] Bayley on Bills, ch. 6, § 1, p. 123, 124 (5th edit. 1830); Chitty on Bills, ch. 6, p. 253 (8th edit. 1833).

[2] Ibid.

[3] Ibid. — Pothier says, that the common form in France is, "Pour moi payerez à un tel ou à son ordre, valeur recue d'un tel comptant, ou bien, en marchandise." Pothier de Change, n. 23, 38. Heineccius says; "Hinc in cambiis ipsis plerumque scribitur, der Herr beliebe zu bezahlen an Titium, oder dessen Ordre, vel, an Titium, oder Commiss. Enimvero si vel maxime hæc formula in litteris cambialibus non legatur, indossamento nihilominus locus est, modo id leges cambiales speciatim non prohibeant quia cessionem et ignorante et invito debitore fieri posse, notum est ex l. 1, C. *de Novat.* Quin aliquando et invitus alii cambium cedere tenetur, si illi inest clausula, der Herr zahle an Titii Ordre. Tunc enim Titio solvi non potest, sed ejus indossatario." Heinecc. de Camb. cap. 2, § 8. Ante, § 56, 57.

[4] Fisher *v.* Pomfret, Carth. R. 403; Ante, § 19, 56.

[5] Bayley on Bills, ch. 6, § 1, p. 125 to 128 (5th edit. 1830); Chitty on Bills, ch. 6, p. 258 to 260 (8th edit. 1833).

[6] Chitty on Bills, ch. 6, p. 261, 262 (8th edit. 1833).

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it is made upon some condition, which is either to give effect to, or to avoid it.[1]

§ 207. Where a Bill is indorsed in blank by the original Payee, or other person, to whose order it is payable, it becomes, in effect, as long as that indorsement remains blank, a Bill payable to the Bearer, and it will pass from hand to hand by mere delivery.[2] One

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[1] Ibid. Mr. Chitty has placed in his text certain forms of indorsements applicable to various cases, which I here insert, as illustrative of my own text. "James Atkins," in all these forms, is supposed to be, solely, or with his partners, Payee and first Indorser.

MODES OR FORMS OF INDORSEMENTS AND TRANSFERS.

1. *First indorsement by Drawer or Payee in blank.*
"James Atkins."

2. *The like by a partner.*
"Atkins & Co."
or,
"For self and Thompson,
"James Atkins."

3. *The like by an agent.*
"Per procuration James Atkins,
"John Adams."
or,
"As agent for James Atkins,"
"John Adams."

4. *Qualified indorsement to avoid personal liability.*
"James Atkins,
"*sans recours.*"
or,
"James Atkins, with intent only to transfer my interest, and not to be subject to any liability in case of non-acceptance or non-payment."

5. *Indorsement in full, or special.*
"Pay John Holloway, or order,
"James Atkins."

6. *Restrictive indorsement in favor of Indorser.*
"Pay John Holloway for my use,
"James Atkins."
or,
"Pay John Holloway for my account,
"James Atkins."

7. *Restrictive indorsement in favor of Indorsee or a particular person only.*
"Pay to I. S. only,
"James Atkins."
or,
"The within must be credited to A. B.,
"James Atkins."

8. *Indorsement of a foreign Bill, dated, stating name of Indorsee, and value, and* au besoin, *and* sans protêt.

"Payee La Fayette frères, ou ordre, valeur recue en argent, (*or* 'en marchandises,' *or* 'en compte,')
"James Atkins."

"A Londre,
"18th Juin, A. D. 1831.

"Au besoin chez Messrs. ———,
"Rue ——, Paris.
"Retour sans Protêt."

Chitty on Bills, ch. 6, p. 250, 251 (8th edit. 1833).

[2] Chitty on Bills, ch. 6, p. 255 to 257 (8th edit. 1833); Bayley on Bills, ch. 6, p. 123, 124 (5th edit. 1830); Peacock *v.* Rhodes, Doug. R. 633, 636; Marston *v.* Allen, 8 Mees. & Welsb. 491, 504; 3 Kent, Comm. Lect. 44, p. 89, 90 (4th edit.); Ante, § 54; Evans *v.* Gee, 11 Peters, R.

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consequence of this doctrine is, that, if the Bill is transmitted to an agent, for the purpose of collection or negotiation, he may either fill up the blank, and make it payable to himself, or he may fill it up, as agent of his principal, in the name of a third person. In the former case, he may sue, as owner, upon the Bill, or transfer it to a third person. In the latter, the Indorsee will take it without any responsibility whatever of the agent.[1] Another consequence of this doctrine is, that, if the Bill should, after such blank indorsement, be lost, or stolen, or fraudulently misapplied, any person, who should subsequently become the Holder of it, *bonâ fide*, for a valuable consideration, without notice, would be entitled to recover the amount thereof, and hold the same against the rights of the owner at the time of the loss or theft.[2] It will make no difference, while the first indorsement remains blank, that there are subsequent indorsements in full on the Bill; for these do not change the original character of the first blank indorsement, as to the rights of the Holder against the Payee, the Drawer, and the Acceptor; but, at most, they will only restrict the Holder to the right to recover upon the Bill, as the immediate assignee of the first Indorser; and, therefore, he will be at liberty to pass over, or strike out, all the subsequent indorsements.[3] Indeed, if the other in-

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80; Seabury *v.* Hungerford, 2 Hill, N. Y. R. p. 80; Hall *v.* Newland, 3 Hill, R. 232.

[1] Clark *v.* Pigot, Salk. 126, 12 Mod. 192; Ante, § 148; Post, § 224.

[2] Ibid.; Marston *v.* Allen, 8 Mees. & Welsb. 494, 504; Bayley on Bills, ch. 5, § 2, p. 129 to 131 (5th edit. 1830); Anon. 1 Ld. Raym. 738, 1 Salk. R. 126, 3 Salk. R. 7; Miller *v.* Race, 1 Burr. R. 452; Grant *v.* Vaughan, 3 Burr. R. 1516; Chitty on Bills, ch. 6, p. 277 (8th edit. 1833); Id ch. 9, p. 429.

[3] Bayley on Bills, ch. 6, § 1, p. 124, 125 (5th edit. 1830); Chitty on

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dorsements are all in full, and not restrictive, so that the Holder could deduce a regular title through them, he would not be bound so to do, but might, at his election, waive his right under or against them, and claim simply under the first blank indorsement.[1] It is always in the power, however, of the Holder to fill up any blank indorsement in the name of any person he may choose; and thereby to restrain the negotiability of the instrument to those, who can legally acquire a right under such indorsement.[2] But an indorsement, however made, cannot be made so as to operate as a transfer of less than the full amount appearing to be due upon the Bill; for the law will not tolerate any person in splitting up a contract, so as to create distinct obligations to different parties, where the contract is an entirety, and there is no consent of the party contracting to any change.[3]

§ 208. Where a Bill is indorsed in full by the first Indorser, or by a Holder under him, no subsequent Holder can recover upon such indorsement against the antecedent parties, unless he can deduce a regular title to the Bill from the person, whose name stands as the first Indorsee. If all the subsequent indorsements are in blank, he may make himself, at his pleasure, the immediate Indorsee of any one of them, or he may

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Bills, ch. 6, p. 253, 255 to 257, 265, 266 (8th edit. 1833); Smith v. Clarke, Peake, R. 225; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 404 (5th edit.).

[1] Ibid

[2] Bayley on Bills, ch. 6, § 1, p. 123, 124 (5th edit. 1830); Chitty on Bills, ch. 6, p. 253, 255 to 257; Vincent v. Horlock, 1 Camp. R. 442; Archer v. Bank of England, Doug. R. 637, 639.

[3] Bayley on Bills, ch. 5, § 1, p. 129 (5th edit. 1830); Chitty on Bills, ch. 6, p. 262 (8th edit. 1833); Hawkins v. Cardy, 1 Ld. Raym. 360, Carth. R. 466, 12 Mod. R. 213, Salk R. 65; Johnson v. Kennion, 2 Wils. R. 262.

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dereign his title through them all in succession.[1] If some of the subsequent indorsements are in full, and some blank, then he must make a regular dereignment of title through them all, or make himself the immediate Indorsee under some prior blank indorsement.[2] And, wherever, in the regular course of indorsements, some are full, and some are blank, the Bill, as to all persons taking it subsequently to a blank indorsement, may pass either by delivery or by indorsement.[3]

§ 209. If a Bill be indorsed by the Payee, or other Holder, payable to a particular person, who is merely his agent, it seems, that he is at liberty to strike out such indorsement, whether it be an indorsement made by himself, or written over a blank indorsement of a prior Indorser, and sue upon the Bill, as if he had never made it payable to such agent; for, in such a

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[1] There are some advantages and some disadvantages, which practically may occur in either way. A good pleader would undoubtedly put into the declaration counts deducing title in different ways, according to the facts, and his means of proving them. Thus, if he could prove only the signature of the first Indorser, he would rely on a count stating the plaintiff to be his immediate Indorsee. If he could prove all the signatures of all the Indorsers, he ought to have a count in his declaration founded upon all of them. For, if the plaintiff should elect to recover upon an early blank indorsement, he might thereby discharge all the subsequent Indorsers, or waive any remedy against them. This might be a serious inconvenience to him, if there should be any doubt of the insolvency of such early Indorser. Great care and consideration are, therefore, necessary to be observed in all complicated cases of this sort, if the Holder means to rely upon the responsibility of all the Indorsers. See Bayley on Bills, ch. 11, p. 464, 467 (5th edit. 1830). See Chitty on Bills, Pt. 2, ch. 5, p. 628 to 631 (8th edit. 1833); Id. 636; Cocks *v.* Borradaile, cited Chitty on Bills, 631, note (*f*); Chaters *v.* Bell, 4 Esp. R. 210. See, also, Ante, § 190.

[1] Bayley on Bills, ch. 11, p. 464, 465 (5th edit. 1830); Chitty on Bills, Pt. 2, ch. 5, p. 629 to 631 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 404 (5th edit.).

[2] Chitty on Bills, ch. 6, p. 257 (8th edit. 1833); Ante, § 60, 207.

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case, he has never parted with the property;[1] and, indeed, if he had, and it had again been restored to him in the course of business, there does not seem any sound reason to say, that he ought not to be reinstated in his original rights.[2]

§ 210. The Payee or Indorsee, having the absolute property in the Bill, and the right of disposing of it, has the power of limiting the payment to whom he pleases, and also the purpose, to which the payment shall be applied; and thus to restrict its negotiability.[3]

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[1] Bank of Utica *v.* Smith, 18 Johns. R. 230; Pardessus, Droit Comm. Tom. 2, § 349. See, also, Dehers *v.* Harriot, 1 Show. R. 163.

[2] Ibid.; Dugan *v.* U. States, 3 Wheat. R. 172; U. States *v.* Barber, 1 Paine, Cir. R. 156; Bank of United States *v.* United States, 2 Har. Sup. Ct. R. 711.

[3] Mr. Chitty has remarked, on this subject; "It was once thought, that, although the Indorser might make a restrictive indorsement, when he intended only to give a bare authority to his agent to receive payment, yet, that he could not, when the indorsement was intended to transfer the interest in the Bill to the Indorsee, by any act preclude him from assigning it over to another person, because, as it was said, the assignee purchases it for a valuable consideration, and, therefore, takes it with all its privileges, qualities, and advantages, the chief of which is its negotiability. (Edie *v.* East India Company, 2 Burr. 1226). In a case (Bland *v.* Ryan, Peake, Addend. 39) before Lord Kenyon, he doubted, whether a Bill, indorsed in blank by A. to B., can be restrained in its negotiability by B.'s writing over A.'s indorsement, 'Pay the contents to C. or order.' In a note, the reporter has collected the cases, showing, that, in general, a restrictive indorsement may be made by a subsequent Holder, after an indorsement in blank; but observes, that the recent cases do not establish the right of an Indorsee in blank to write over the Indorser's name, but only, that a restrictive indorsement may be made below an indorsement. But the case of Clark *v.* Pigot (Salk. 126, 12 Mod. 192) seems to be an authority to prove that this may be done. It has long been settled, on the above principle, that any Indorser may restrain the negotiability of a Bill, by using express words to that effect, as by indorsing it, 'Payable to J. S. only;' or by indorsing it, 'The within must be credited to J. S.' (Archer *v.* Bank of England, Dougl. 637; Chitty on Bills, ch. 6, p. 258, note, 8th edit. 1833), or by any other words clearly demonstrating his intention to make a restrictive and limited indorsement. But a mere omission, in the indorse-

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In respect to restrictive indorsements, it is proper to observe, that, where the Bill is originally negotiable, or payable to order, an indorsement, directing payment to a particular person, by name, without adding the words, "or his order," will not make it an indorsement payable to him only, and restrain the negotiation thereof; for, in all cases of indorsement, the restriction must arise by express words or necessary implication, to produce such an effect.[1] The reason is, that the direction to pay to a particular person does not necessarily import, that it shall not be paid to any other person, to whom he may indorse it; but only that it shall not pass without his indorsement.[2] So, if a Bill is indorsed, "Pay to the order of A. B.," he may not only indorse it, but he may, in his own name, sue and recover upon the same, without averring, that he has made no order.[3]

§ 211. It is not, perhaps, easy, in all cases, 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 purposes, to

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ment, of the words, 'or order,' will not, in any case, prevent a Bill from being negotiable, *ad infinitum*." Chitty on Bills, ch. 6, p. 260, 261 (8th edit. 1833).

[1] Chitty on Bills, ch 6, p. 257, 258 (8th edit. 1833); Bayley on Bills, ch. 5, § 1, p. 128 (5th edit. 1830); Moore *v.* Manning, Com. R. 311; Acheson *v.* Fountain, 1 Str. R. 557; Edie *v.* East India Company, 1 Black. R. 295, 2 Burr. 1216.

[2] Ibid.

[3] Ibid.; Fisher *v.* Pomfret, Carth. R. 403; Smith *v.* McClure, 5 East, R. 476; Ante, § 19, 56. Heineccius informs us, that the law is different in Germany; for, in the like case, A. B. has no right to receive payment, but can only indorse it. "Quin aliquando et invitus alii cambium cedere tenetur, si illi inest clausula, der Herr zahle an Titii Ordre. Tunc enim Titio solvi non potest, sed ejus indossatario." Heinecc. de Camb. cap. 2, § 8; Ante, § 19, 56, 206, note.

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which the indorsement might otherwise entitle the Indorsee to apply it. Where the indorsement is, "Pay to A. B. only," there the word "only" makes it clearly restrictive, and does not authorize a payment or indorsement to any other party.[1] So, if a Bill should be indorsed, "The within to be accredited to A: B.,"[2] or, "Pay the within to A. B. for my use,"[3] or, "Pay the within to A. B. for the use of C. D.,"[4] it would be deemed a restrictive indorsement, so far as to restrain the negotiability, except for the very purposes indicated in the indorsement. In every such case, therefore, although the Bill may be negotiated by the Indorsee, yet every subsequent Holder must receive the money, subject to the original designated appropriation thereof; and, if he voluntarily assents to, or aids in, any other appropriation, it will be a wrongful conversion thereof, for which he will be responsible.[5]

§ 212. The French Law, in like manner, recognizes the right of the Indorser to make a restrictive indorsement. This is usually done by a direction, "Pay on my account to such a one" (*Pour moi paierez à un tel*); in which case, the payment can be made only

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[1] Chitty on Bills, ch. 6, p. 258 to 261, 263, 264 (8th edit. 1833); Archer *v.* Bank of England, Doug. R. 637, 638; Bayley on Bills, ch. 5, § 1, p. 125, 126 (5th edit. 1830); Edie *v.* East India Company, 2 Burr. 1216, 1227; Power *v.* Furnice, 4 Call, R. 411; 1 Bell, Comm. B. 3, § 4, p. 401, 402 (5th edit.).

[2] Ibid.; Archer *v.* Bank of England, Doug. R. 615, 637.

[3] Ibid.; Sigourney *v.* Lloyd, 8 B. & Cressw. 622, 5 Bing. R. 525, 3 Younge & Jerv. 229; Wilson *v.* Holmes, 5 Mass. R. 543; Savage *v.* Merle, 5 Pick. R 85.

[4] Ibid ; Treuttel *v.* Barandon, 8 Taunt. R. 100.

[5] Ibid.; Treuttel *v.* Barandon, 8 Taunt. R. 100; Sigourney *v.* Lloyd, 3 Younge & Jerv. 229; Bayley on Bills, ch. 5, § 1, p. 128, 129 (5th edit. 1830).

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to the person designated.[1] If it is intended to clothe the party with authority to procure payment through any other person, then the words are added, "to his order" (*ou à son ordre*); and, in that event, and in that only, the Bill may be negotiated to a third person, but still for the use of the Indorser.[2] Heineccius informs us, that a like difference in the mode of making indorsements prevails in Germany, in order to accomplish the like purposes. *Id vero præcipue observandum, Cambia cedi vel indossari bifariam. Aut enim ita improprie fit cessio, ut alter procurator indossantis fiat in rem alienam, quod fit formula, vor mich an Herrn Javolenus, soll mir gute Zahlung seyn, vel, es soll mir validiren: aut cessio est vera et propria, eum in finem facta, ut cessionarius fiat dominus cambii, quod fit formula, vor mich an Herrn Javolenus, Valuta von demselben. Prior indossatarius, quia tantum procurator est, cambium alterius indossare nequit; huic autem regulariter id est integrum. Unde sæpe sex vel plures cessiones dorso cambii inscriptæ leguntur, quale cambium tunc vocari solet ein Giro, vel, ein girirter Wechsel.*[3]

§ 213. But, although restrictive indorsements are thus clearly allowed, both by our law and the foreign law, still, as they necessarily tend to impair the negotiability of Bills of Exchange, an intention to create such a restriction will not be presumed from equivocal language, and especially where it otherwise admits of a satisfactory interpretation. Thus, for example, an indorsement, "Pay the contents to A. B., being part

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[1] Pothier de Change, n. 23, 42, 89; Pardessus, Droit. Comm. Tom. 2, § 348; Merlin, Répertoire, Endossement

[2] Pothier, ibid. See Pardessus, Tom. 2, art. 353 to 355.

[3] Heinecc. de Camb. cap. 2, § 10; Id. § 19.

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of the consideration on a certain deed of assignment executed by the said A. B., to the Indorser and others," has been held not to be restrictive.[1] So, where a Bill was made payable to A. and B. or Bearer, and the name of their bankers was written across it, and afterwards A. transferred the check, on his own account, to another banker, it was held, that the transfer to the latter was good, unless, by the common understanding of bankers, there was information of a special appropriation of the check to the bankers of A. and B.[2]

§ 214. A qualified indorsement is (as we have seen[3]) one which qualifies or limits the general responsibility of the Indorser; but it in no manner whatsoever restrains the negotiability of the Bill. Thus, for example, an indorsement of a Bill to A., "without recourse," or "at his own risk," will not restrain the negotiability of the Bill; but will simply exclude any responsibility of the Indorser, on the non-acceptance or non-payment thereof.[4] Neither will an indorsement to A. "or order, for my use," restrain its negotiability, although the In-

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[1] Potts v. Reed, 6 Esp. R. 57; Bayley on Bills, ch. 5, § 1, p. 127 (5th edit. 1830); Chitty on Bills, ch. 6, p. 259, 260 (8th edit. 1833).

[2] Stewart v. Lee, 1 Mood. & Malk. 158; Chitty on Bills, ch. 6. p. 260 (8th edit. 1833); Bayley on Bills, ch. 8, p. 324 (5th edit. 1830).

[3] Ante, § 206.

[4] Rice v. Stearns, 3 Mass. R. 225; Chitty on Bills, ch. 6, p. 251, 254, 261 (8th edit. 1833); Id. p. 37; Pike v. Street, 1 Mood. & Malk. 126; Goupy v. Harden, 7 Taunt. R. 159, 162; Welch v. Lindo, 7 Cranch, 159; Pardessus, Droit Comm. Tom. 2, art. 348; 3 Kent, Comm. Lect. 44, p. 92, 93 (4th edit.); Pothier de Change, n. 42, 89. — In Mott v Hicks (1 Cowen, R. 513), where a note was payable to A. B. or order, A. B. indorsed it thus, "A. B. agent." It was held by the Court, that this was a restrictive or qualified indorsement, and exempted A. B. from all personal responsibility on the note; and was equivalent to writing over it, that it was at the risk of the Indorsee. But, quære, if this case can be supported at law. See Story on Agency, § 154, 159, 276, and cases there cited.

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dorsee must take it, subject to my use.[1] And, *a fortiori*, an indorsement expressive of the consideration, for which the indorsement is made, will not restrain the negotiability; as, for example, an indorsement, "Pay the contents to A. B., being part payment of goods sold by him to me, or being in full of debt due to him by me."[2]

§ 215. On the other hand, an indorsement by the Payee, or other lawful Holder, may enlarge his responsibility beyond that ordinarily created by law, without, in any manner, restraining the negotiability of the Bill. We have already seen, that the obligation created by law, in cases of indorsement, is conditional, and requires the Holder to make due demand, and give due notice to the Indorser of the non-acceptance or non-payment of the Bill, and, if he omits so to do, the Indorser is discharged.[3] But an Indorser may absolutely guaranty the payment of the Bill in all events, and dispense with any such due demand or notice.[4]

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[1] Ante, § 211; Bayley on Bills, ch. 5, § 1, p. 128, 129, 134 (5th edit. 1830); Evans *v.* Cramlington, Carth. R. 5, 2 Vent. 307, Skinn. R. 264; Treuttel *v.* Barandon, 8 Taunt. R. 100.

[2] Potts *v.* Reed, 6 Esp. R. 57; Bayley on Bills, ch. 5, § 1, p. 127 (5th edit. 1830).

[3] Ante, § 107 to 109.

[4] Upham *v.* Prince, 12 Mass. R. 14. But see, contra, Taylor *v.* Binney, 7 Mass. R. 479; Canfield *v.* Vaughan, 8 Martin, R. 682; Allen *v.* Rightmere, 20 Johns. R. 365; Ketchell *v.* Barnes, 24 Wend. R. 456.—I am aware, that some doubt may exist upon this point, although it appears to me, that the true principle is as stated in the text. The true import of such a guaranty seems to me to be, that the Payee means to say, I indorse and transfer this Bill to you, and I agree absolutely to pay the same, if not paid by the Acceptor, and waive my general rights as Indorser, and claim only such demand and notice as a Guarantor might have. In Taylor *v.* Binney, (7 Mass. R. 479,) the note was payable to A. B. or order; and after the note became due, and remained unpaid, A. B. indorsed it, as follows; "Dec'r 13, 1805. I guaranty the payment of the within note, in 18 months, provided it cannot be collected of the Promissor before that

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In such a case, there is no reason to infer, that the Indorser means to restrain the further negotiability of the Bill, even if he does mean to restrain the effect of

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time." A. B. then passed the note, with this indorsement, to a third person, who passed it, without his own indorsement, to the plaintiff, who sued the Indorser. The Court held the action not maintainable. There were many special circumstances in the case. Mr. Justice Sewall, in delivering the opinion of the Court, said; "In the case at bar, the plaintiff relies on an indorsement, which is not blank in the form of it, but completed by the Indorser himself. The note, with the words of the Payee in his indorsement, are to be construed together as one written instrument. The special guaranty, expressed in that indorsement, is the whole ground, upon which the present action against this defendant can be maintained; and the plaintiff does not rely upon any implied responsibility, resulting from the indorsement in the common form. If this indorsement, in the whole tenor of it, may be construed to be, not only a guaranty, but also a transfer and assignment of the note, which seems to have been the intention and understanding of the parties, the principal objection to the title of the plaintiff remains in force. There is no name inserted of the party to be entitled by the indorsement; and, if this omission might be supplied by extraneous evidence, the facts proved in the case render it certain, that the present plaintiff was not the party to the guaranty or assignment, when it was made; and no evidence has been offered of any subsequent privity or assent between him and the defendant. But the argument of the plaintiff is, that the omission of the name of the Indorsee is evidence of an intention in the defendant and the other immediate party, whoever he was, to give an unlimited currency to this note, and to accompany it with the collateral promise of the Payee; according to the usage and construction, in ordinary cases, of blank indorsements upon negotiable Bills or Notes. But, in the case at bar, there is no necessary implication to this effect, arising from the circumstance of the omission of the name of the Indorsee or party to the guaranty. This may have been a mistake or accident. The negotiation was not upon the credit of the original Promissor, but wholly upon the final responsibility of the Indorser; the ability of the Promissor, considering the whole tenor of this indorsement, remaining at his risk; and the assignment seems to be rather a confidence for the collection of the note, than an absolute transfer of the property. The guaranty, taken independently of the note, is a promise not negotiable, being conditional, and not absolute; and, connected with it, the supposition is altogether unreasonable and improbable, of an unlimited currency intended for the note itself, at the risk of the Indorser. The plaintiff fails, therefore, in the evidence necessary to his title, even admitting the usage cited, respecting notes indorsed in blank, to have any application, where the in-

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the guaranty to his immediate Indorsee.[1] And, if the indorsement is either without the name of any person, to whom it is indorsed, but a blank is left for the name, or if the Bill is indorsed to a person or his order, or to the Bearer, with such guaranty, there is certainly strong

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dorsement is full and restrictive, and not at all in the form of a blank indorsement, unless in the mere circumstance of omitting the name of the Indorsee." In Upham *v.* Prince (12 Mass. R. 14), the note was payable to A. B. or order, on demand; A. B. indorsed the note, "I guaranty the payment of this note within six months;" and it was then transferred to C. D., who transferred it to the plaintiff. The note not being paid at the end of the six months, the plaintiff brought a suit thereon against A. B. The Court, upon that occasion, said; "Whatever effect such a writing on the back of a note might legally have, beyond that of an assignment of the note, we do not think it necessary to decide. But we are all of opinion, that the note did not lose its negotiability by this special indorsement, any more than it would, if it had been indorsed with the words, 'without recurrence to the Indorser,' which is a common form of indorsement, where the Indorser does not intend to remain liable. The defendant's engagement amounts to a promise, that the note should, at all events, be paid within six months. Now, this promise may not be assignable in law; and yet the note itself may be assignable by the party, to whom it was so transferred, so that, upon non-payment of it by the Promissor, the Holder would have a right of action against Prince, as Indorser. A demand was made upon the Promissor within a short time after the date of the note; and notice was given to the Indorser, as soon as he returned to this country, he being absent during the whole of the six months the note was to run. It does not appear, that he had any dwelling-house or place of business here while he was absent, so that a call upon him, as soon as he returned, was all that could be done or required. We think, upon the facts agreed, that the defendant must be called." This last decision seems to me to contain the true doctrine; and it is not easy to perceive what reasonable objection lies to it. The indorsement amounts, in legal effect, to an agreement to be bound as Indorser for six months, and that a demand need not be made upon the Maker of the note for payment at an earlier period. It is, therefore, a mere waiver of the ordinary rule of the law, as to reasonable demand and notice upon notes payable on demand. See, as to guaranty of Bills, Pothier de Change, n. 26, 50, 122, 123; Code de Comm. de l'Aval. art. 141, 142; Pardessus, Droit Comm. Tom. 1, art. 351, 394 to 399; Chitty on Bills, ch. 6, p. 272, 273 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 90, note (*d*) (4th edit.); Ketchell *v.* Barnes, 24 Wend. R. 456.

[1] Ibid

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reason to contend, that he means to give the benefit of the guaranty to every subsequent Holder;[1] and, at all events, such a Holder has a right to hold him as Indorser of the Bill, as he has left its negotiability unrestrained.[2]

§ 215. *a.* Where a person makes an indorsement in blank on a Bill, it will not be construed to be a guaranty, unless where such a construction is indispensable to give some effect to the indorsement, and to prevent an entire failure of the express or presumed contract. Thus, if a Bill be negotiable, and the Payee should indorse it in blank, the indorsement will not enure as a guaranty, but simply as the contract of an Indorser. The like rule will prevail, if the indorsement is made by another person than the Payee; for he may be well deemed as intending to stand in the character of a second Indorser after the Payee, although he was privy to the original consideration between the Drawer and the Payee, and indorsed it for the accommodation of the Drawer.[3] But it would have been otherwise, if the Bill had not been negotiable; for then the indorsement would be utterly unavailable, unless as a guaranty.[4]

§ 216. Sometimes the indorsement contains a clause, that the Bill may be returned, and notice may be

[1] See on this point Miller *v.* Gaston, 2 Hill, N. Y. R. 188; McLaven *v.* Watson, 26 Wend. R. 425; Post, § 372, and note, § 455 to § 458, and note; Hall *v.* Newcomb, 3 Hill, N. Y. R. 233.

[2] Upham *v.* Prince, 12 Mass. R. 14. See Blakeley *v.* Grant, 6 Mass. R. 386; Ketchell *v.* Barnes, 24 Wend. R. 456; Allen *v.* Rightmere, 20 Johns. R. 365. But see, contra, Taylor *v.* Binney, 7 Mass. R. 479; Canfield *v.* Vaughan, 8 Martin, R. 682. See, also, Lamourieux *v.* Hewit, 5 Wend. 307.

[3] Seabury *v.* Hungerford, 2 Hill, N. Y. R. 84; Hall *v.* Newcomb, 3 Hill, N. Y. R. 233.

[4] Ibid.

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given of the dishonor, without a protest, or without expense. This is often done in France, by adding to the indorsement the words, "*retour sans protêt*," or "*sans frais.*"[1] In such a case, the omission by the Indorsee, or any subsequent Holder, to protest the Bill in case of a dishonor, will in no manner prejudice his rights; but he will be entitled to the same, in as ample a manner as if a protest had been duly made. Sometimes, also, the indorsement limits the reëxchange and expenses, in case of dishonor; and this will, of course, be obligatory upon all the parties taking the Bill.[2]

§ 217. In respect to conditional indorsements, a very few words may suffice.[3] They may be on a concondition precedent or a condition subsequent; but, in either case, the Indorser will be bound only to the extent of his engagement, and upon a full compliance with the terms thereof. If the terms are not complied with, the right and property in the Bill will revert to the Indorser, and he may recover upon the same in the same manner, as if he had always been the Holder. Thus, where a Bill was indorsed, "Pay the within to Messrs. A. & B., or order, upon my name appearing in the Gazette as Ensign in any regiment of the line, between the 1st and the 64th, if within two months from this date;" and the Bill was subsequently indorsed by A. & B., and was paid by the Acceptor to the Holder; it was held, that, the name of the Indorser never having appeared in the

[1] Chitty on Bills, ch. 5, p. 188 (8th edit. 1833); Pardessus, Droit Comm. Tom. 2, art. 425.

[2] Chitty on Bills, ch. 5, p. 188 (8th edit. 1833).

[3] Chitty on Bills, ch. 6, p. 261 (8th edit. 1833); Pardessus, Droit Comm. Tom. 2, art. 341.

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"Gazette" as Ensign in any regiment of the line, the Indorser was entitled to recover the money from the Acceptor, notwithstanding such payment to the Holder.[1]

§ 218. There is no limit to the number of successive indorsements, which may be made upon a Bill; and, if they cannot all be written on the Bill itself, a paper may be annexed thereto, which (as we have seen)[2] is called, in France, *Allonge*, on which the later indorsements may be written, and which will be deemed a part of the Bill, and of the same obligation, as if written upon the Bill itself.[3] Sometimes a Bill, which has been indorsed by a prior Indorser, comes back again to him by reindorsement in the course of business. In such a case, he will be reinstated in his original rights in the Bill; but he will ordinarily have no claim upon any of the Indorsers subsequent to his own name. Peculiar circumstances may exist, which may vary the general rule; but then the party would not claim strictly in his character as a regular party to the Bill, but upon the special contract growing out of the circumstances.[4]

§ 219. Sometimes an Indorser, like a Drawer,[5] in order to avoid the inconvenience or necessity of a return of the Bill, in case it should be dishonored by the Drawee, directs the Payee or other Holder, in case

[1] Robertson *v.* Kensington, 4 Taunt. R. 30; Chitty on Bills, ch. 6, p. 261 (8th edit. 1833); Bayley on Bills, ch. 5, p. 126 (5th edit. 1830).

[2] Ante, § 204.

[3] Chitty on Bills, ch. 6, p. 262 (8th edit. 1833); Ante, § 204; Pardessus, Droit Comm. Tom. 2, art. 343; Pothier de Change, n. 24; Folger *v.* Chase, 18 Pick. R. 63.

[4] Chitty on Bills, ch. 2, p. 29, 30 (8th edit. 1833); Id. ch. 4, p. 239; Bishop *v.* Hayward, 4 Term R. 470; Britten *v.* Webb, 2 Barn. & Cressw. 483; Bayley on Bills, ch. 9, p. 329 to 331, 388 (5th edit. 1830).

[5] Ante, § 65.

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of need, to apply to Messrs. A. & B. (au besoin chez Messrs. A. & B., à ——). The meaning of this is, that the Payee or other Holder is, in case of dishonor, to apply to the persons named, who will accept the same for the honor of the Indorser, or Drawer, as the case may be. In such a case, the Holder may, and indeed is bound to, apply to the persons 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, will, upon payment, have a complete remedy for the same against the party, for whose account they shall thus accept and pay the Bill.[1]

§ 220. In the next place, as to the Time of Transfer. In general, it may be stated, that a transfer may be made at any time, while the Bill remains a good subsisting unpaid Bill, whether it be before or after it has arrived at maturity.[2] But the rights of the Holder against the antecedent parties may be most materially

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[1] Chitty on Bills, ch. 5, p. 188 (8th edit. 1833); Id. ch. 6, p. 262; Pardessus, Droit Comm. Tom. 2, art. 206, 341, 385, 421; Ante, § 58, 565. This mode of drawing and indorsing Bills *au besoin* is said to be common on the continent of Europe. But it is far less frequent in England and America, although there would not seem to be any doubt, that the legal effect thereof is the same in all these countries. See Chitty on Bills, ch. 5, p. 188 (8th edit. 1833).

[2] Chitty on Bills, ch. 6, p. 242 (8th edit. 1833); Mitford *v.* Walcot, 1 Ld. Raym. 574; Boehm *v.* Stirling, 7 Term R. 423; Bayley on Bills, ch. 5, § 3, p. 156 to 158 (5th edit. 1830); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 402, 403 (5th edit.); Havens *v.* Huntington, 1 Cowen, R. 387; Ante, § 183, 191. Bills are rarely drawn payable on demand, and, therefore, the principles applicable to the point, when they are to be deemed overdue or not, will more naturally arise, when we come to the consideration of the cases of notes and checks payable on demand. In the cases of Bills made payable at sight, or at so many days after sight, the time, when they should be presented, and, of course, the time, when they shall be deemed overdue, will be discussed under the head of the Time when Bills are to be presented.

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affected by the time of the transfer. If the transfer is made before the maturity of the Bill to a *bonâ fide* Holder, for a valuable consideration, he will take it free of all equities between the antecedent parties, of which he has no notice.[1] If the transfer is after the maturity of the Bill, the Holder takes it as a dishonored Bill, and is affected by all the equities between the original parties, whether he has any notice thereof or not.[2] But when we speak of equities between the parties, it is not to be understood, by this expression, that all sorts of equities existing between the parties, from other independent transactions between them are intended; but only such equities, as attach to the particular Bill, and, as between those parties, would be available, to control, qualify, or extinguish any rights arising thereon.[3] Still, however, subject to such equities, the Holder, by indorsement after the maturity of a Bill, will be clothed with the

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[1] Ante, § 14, 187; Chitty on Bills, ch. 6, p. 220, 221, 240 to 243 (8th edit. 1833); Boehm *v.* Sterling, 7 Term R. 423; Bayley on Bills, ch. 5, § 3, p. 157 to 163, 166 (5th edit. 1830); Taylor *v.* Mather, 3 Term R. 83, note; Brown *v.* Davis, 3 Term R. 80; Bosanquet *v.* Dudman, 1 Stark. R. 1; Dunn *v.* O'Keefe, 5 M. & Selw. 282, 6 Taunt. R. 305; Thompson *v.* Gibson, 13 Martin, R. 150; Marston *v.* Allen, 8 Mees. & Welsb. 504; Savings Bank of New Haven *v.* Bates, 8 Connect. R. 505; Swift *v.* Tyson, 16 Peters, R. 1.

[2] Ibid.; Bayley on Bills, ch. 5, § 3, p. 162, 163 (5th edit. 1830); Chitty on Bills, ch. 6, p. 243, 244 (8th edit. 1833); Lee *v.* Zagury, 8 Taunt. R. 114; Rothschild *v.* Corney, 9 Barn. & Cressw. 391; 3 Kent, Comm. Lect. 44, p. 91, 92 (4th edit.); Down *v.* Halling, 4 Barn. & Cressw. 330; Andrews *v.* Pond, 13 Peters, R. 65. — It seems, that, in Scotland, the indorsement of a Bill, which is overdue, does not affect the Indorsee with the equities between the original parties, unless there are some marks of dishonor on the Bill. 1 Bell, Comm. B. 3, ch. 2, § 4, p. 403 (5th edit.).

[3] Bayley on Bills, ch. 5, § 3, p. 161, 162 (5th edit. 1830); Burrough *v.* Moss, 10 Barn. & Cressw. 563; Ante, § 187, note (3); Whitehead *v.* Walker, 11 Mees. & Welsb. 696.

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same rights and advantages, as were possessed by the Indorser, and may avail himself of them accordingly.[1]

§ 221. The law of France, in a great measure, recognizes the like distinction between indorsements before, and indorsements after, the maturity of a Bill. In the latter case, all the equities between the other parties are not only let in, but even those of the creditors of the Indorser, who have, before the indorsement, and after the maturity, levied attachments of the debt in the hands of the debtor.[2]

§ 222. Indorsements are sometimes made upon Bills containing blanks, to be afterwards filled up, and sometimes upon blank paper, which are intended to be filled up, so as to make the party an Indorser. In all such cases, as against him, the Bill is to be treated exactly as if it had been filled up before he indorsed it, and he will be bound accordingly.[3] And it will make no difference in the rights of the Holder, that he knows the facts; unless, indeed, there should be a known fraud upon the Indorser, or a known misappropriation of the Bill to other purposes, than those which were intended.[4]

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[1] Chitty on Bills, ch. 6, p. 245 (8th edit. 1833); Chalmers *v.* Lanion, 1 Camp. R. 383.

[2] Pardessus, Droit Comm. Tom. 2, art. 351, 352; Chitty on Bills, ch. 6, p. 242, and note (*c*) (8th edit. 1833).

[3] Chitty on Bills, ch. 6, p. 240, 241 (8th edit. 1833); Snaith *v.* Mingay, 1 Maule & Selw. 87; Cruchley *v.* Clarance, 2 Maule & Selw. 90; Bayley on Bills, ch. 1, § 10, p. 36 (5th edit. 1830); Id. ch. 5, § 3, p. 167, 168; Russell *v.* Langstaffe, Doug. R 514; Usher *v.* Dauncey, 4 Camp. R. 97; Pasmore *v.* North, 13 East, R. 517; Putnam *v.* Sullivan, 4 Mass. R. 45; Mitchill *v.* Culwer, 7 Cowen, R. 336; Violett *v.* Patton, 5 Cranch, R. 142; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 390 (5th edit.). But see Abrahams *v.* Skinner, 12 Adolph. & Ellis, R. 763.

[4] Ibid.

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§ 223. But there is a period, when Bills cease altogether to be negotiable, in whosesoever hands they may then be, so far as respects the antecedent parties thereto, who would be discharged therefrom by the payment thereof. Thus, for example, when a Bill has once been paid by the Acceptor, after it has become due, (although not, if paid before due, and the fact be unknown to the Holder,[1]) it loses all its vitality, and can no longer be negotiable.[2] So, if it be dishonored by the Acceptor, and is then taken up by the Drawer, he cannot negotiate it, so as to charge the Indorsers, although he might, so as to charge himself, or the Acceptor, if the latter be liable to him.[3] Still, however, Bills remain negotiable even after payment, so far as respects the parties, who shall knowingly negotiate the same afterwards; for, in such a case, the negotiation cannot prejudice any other persons, and will only charge themselves.[4]

§ 224. We have already had occasion to consider, what, in general, are the obligations created by law on the part of Indorsers and Holders of Bills to subsequent Indorsees or Holders thereof.[5] Every party, indorsing a Bill, either in blank or in full, and without

[1] Bayley on Bills, ch. 5, § 3, p. 166 (5th edit. 1830); Burridge v. Manners, 3 Camp. R. 194; Chitty on Bills, ch 6, p. 248, 249 (8th edit. 1833).

[2] Bayley on Bills, ch. 5, § 3, p. 165, 166 (5th edit. 1830); Beck v. Robley, 1 H. Black. 89, note; Chitty on Bills, ch. 6, p. 248 (8th edit. 1833); Bartrum v. Caddy, 9 Adolph. & Ellis, 275, 281.

[3] Ibid.; Callow v. Lawrence, 3 Maule & Selw. 95; Hubbard v. Jackson, 4 Bing. R. 390; Chitty on Bills, ch. 6, p. 248, 249 (8th edit. 1833).

[4] Bayley on Bills, ch. 5, § 3, p. 166 (5th edit. 1830); Boehm v. Stirling, 7 Term R. 423; Callow v. Lawrence, 3 M. & Selw. 95; Hubbard v. Jackson, 4 Bing. R. 390; Guild v. Eager, 17 Mass. R. 615; Havens v. Huntington, 1 Cowen, R. 387; Mead v. Small, 2 Greenl. R. 207.

[5] Ante, § 108, 111.

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restriction or qualification, thereby passes the interest and property in the Bill to the Indorsee, if he takes it for value.[1] If he takes it as agent, he has an election to treat it, as to the other parties to the Bill, either as his own property, or as that of his principal; but as to the latter, the indorsement creates no property whatsoever in him, and the principal may revoke the authority, and reclaim the Bill from him, as long as it remains in his possession.[2]

§ 225. But, besides amounting to a transfer of the property in the Bill, the indorsement creates (as we have seen[3]) an implied contract, on the part of the Indorser, that the Bill shall be duly honored; and, if not, that he, upon due protest and notice, will pay the amount to the Indorsee, or to any subsequent Holder.[4] The indorsement, also, by the like implication, imports, that the antecedent names on the Bill are genuine; and that he has a good title, under them, to the same.[5] Where there is no indorsement by the

[1] Chitty on Bills, ch. 6, p. 265, 266 (8th edit. 1833); Code de Comm. art. 136; Pothier de Change, n. 79, 80.

[2] Ante, § 198, 207, 209; Pothier de Change, n. 90; Chitty on Bills, ch. 6, p. 255, 256, 260, 268 (8th edit. 1833); Id. ch. 9, p. 428, 429; Bayley on Bills, ch. 5, § 2, p. 132, 133, 143, 144 (5th edit. 1830); Id. ch. 10, p. 445; Ex parte Baldwin, 19 Ves. 232; Clark *v.* Pigot, 12 Mod. R. 192, 193, 1 Salk. R. 126; Little *v.* O'Brien, 9 Mass. R. 423; Brigham *v.* Marean, 7 Pick. R. 40; Guernsey *v.* Burns, 25 Wend. R. 411. Contra, Thatcher *v.* Winslow, 5 Mason, R. 58; Sherwood *v.* Roys, 14 Pick. R. 172. — Although there is some discrepancy in the authorities, I think that the text contains the true principle.

[3] Ante, § 108, 109, 111.

[4] Ante, § 108, 109, 110, 111, 200; Chitty on Bills, ch. 6, p. 265 to 267 (8th edit. 1833); Bailey on Bills, ch. 5, § 3, p. 169, 170 (5th edit. 1830); Pothier de Change, n. 79, 80.

[5] Ibid. But see East India Company *v.* Tritton, 3 Barn. & Cressw. 280; Ante, § 110, 111. — Pardessus expressly says, that an indorsement amounts to a guaranty of the future solvency of debtors, since the Indorser is a Guarantor *in solido* with the other persons, whose signatures are on

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Holder, but a mere delivery by him, as in the case of a Bill payable to Bearer, or a Bill having a blank indorsement by the Payee, or some third person, no obligation whatsoever is created, except between the immediate parties to the transfer.[1] But, as between the immediate parties, where the transfer by mere delivery is for a preëxisting debt, or for any valuable consideration paid or passed at the time, to the person so delivering the Bill, (and not a mere sale or exchange, at the risk of the Taker,) there is an implied obligation, that the Bill is genuine;[2] that the names of the parties to prior indorsements are also genuine;[3] and that, as far as the knowledge and information of the person, passing it, extends, there is no reason to doubt, that it will be duly honored upon presentment.[4] Indeed, the doctrine, now established, seems to extend further; and it is held, that, as between the immediate parties, unless the Bill be taken as absolute payment, or at the risk of the Taker or Transferree, there is an implied undertaking, on the part of the person, passing it by mere delivery, that it will be duly honored and paid upon due presentment,

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the Bill, of the verity of the Bill, as well as of its payment at maturity. Pardessus, Droit Comm. Tom. 2, art. 347.

[1] Chitty on Bills, ch. 6, p. 268 to 271 (8th edit. 1833); Ante, § 109.

[2] Chitty on Bills, ch. 6, p. 268 to 271 (8th edit. 1833); Camidge v. Allenby, 6 Barn. & Cressw. 373; Ante, § 111.

[3] Ibid.; Jones v. Ryde, 5 Taunt. R. 488; Bayley on Bills, ch. 5, § 3, p. 169, 170 (5th edit. 1830); Bruce v. Bruce, 1 Marsh. 163; Ante, § 111.

[4] Chitty on Bills, ch. 6, p. 268 to 271 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 232, 233 (5th edit. 1830); Ante, § 108 to 112; Camidge v. Allenby, 6 Barn. & Cressw. 373, 382; Beeching v. Gower, 1 Holt, N. P. R. 313.

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and, if not, that he will, upon due notice given to him, pay the amount to the Taker or Transferree.[1]

[1] Chitty on Bills, ch. 6, p. 268 to 271 (8th edit. 1833); Ante, § 108, 110, 111; Camidge v. Allenby, 6 Barn. & Cresw. 373; Owenson v. Morse, 7 Term R. 64; Ex parte Blackbriar, 10 Ves. 204; Emly v. Lye, 15 East, 7, 13, per Bayley, J. This subject seems involved in some perplexity by the authorities, especially where the Bill, when taken, (as, for example, the Bill of a banker payable to Bearer,) is the Bill of parties, who are insolvent and unable to pay at the time of the transfer, and that fact is unknown to both parties. Under such circumstances, it has been held in Pennyslvania, in the case of the transfer of bank notes, after the bank had failed, unknown to both parties, that the Holder had no right to recover against his immediate Transferrer. Bayard v. Shunk, 1 Watts & Serg. 92. The like doctrine seems to have been intimated in Young v. Adams (6 Mass. R. 182, 185), and was held in Scruggs v. Gass (8 Yerger, R. 175), and Lowsey v. Murrell (2 Porter, R. 282). But the opposite doctrine was maintained in Lightbody v. The Ontario Bank (11 Wend. R. 1), and affirmed on error, in the Court of Errors, in 13 Wend. 101; and in Fogg v. Sawyer, 9 New Hamp. Rep. 365; Post, § 419: Harley v. Thornton (2 Hill, R. So. Car. 509), is on the same side. After all, the point seems to resolve itself more into a question of fact, as to the intent, than as to law; and it must, and ought, to turn upon this, Whether, taking all the circumstances together, the Bill was taken as absolute payment by the Holder, at his own risk, or only as conditional payment, he using due diligence to demand and collect it. Mr. Chitty has discussed the subject somewhat at large, and says; "It has been said, that a transfer by mere delivery, without any indorsement, when made on account of a pre-existing debt, or for a valuable consideration passing to the Assignor at the time of the assignment (and not merely by way of sale or exchange of paper), as, where goods are sold to him, imposes an obligation on the person making it, to the immediate person, in whose favor it is made, equivalent to that of a transfer by formal indorsement. But this expression seems incorrect; for the party, transferring only by delivery, can never be sued upon the instrument, either as if he were an Indorser, or as having guarantied its payment, unless he expressly did so. The expression should be, 'that, if the instrument should be dishonored, the Transferrer in such case is liable to pay the debt, in respect of which he transferred it, provided it has been presented for payment in due time, and that due notice be given to him of the dishonor.' A distinction was once taken between the transfer of a Bill or check for a precedent debt, and for a debt arising at the time of the transfer; and it was held, that, if A. bought goods of B., and at the same time gave him a Draft on a banker, which B. took without any objection, it would amount to payment by A., and B. could not resort to him in the event of the failure of the banker. But it is now set-

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§ 226. In the case of a transfer of a Bill drawn in sets, each part must be delivered to the person, in whose favor the transfer is made; otherwise, the same inconveniences would ensue, as upon a neglect by the Drawer to deliver each of them to the Payee;[1]

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tled, that, in such case, unless it was expressly agreed, at the time of the transfer, that the Assignee should take the instrument assigned, as payment, and run the risk of its being paid, he may, in case of default of payment by the Drawee, maintain an action against the Assignor, on the consideration of the transfer. And, where a Debtor, in payment of goods, gives an order to pay the Bearer the amount in Bills on London, and the party takes Bills for the amount, he will not, unless guilty of laches, discharge the original debtor. And, where a person obtains money or goods on a bank note, navy bill, or other Bill or note, on getting it discounted, although without indorsing it, and it turns out to be forged, he is liable to refund the money to the party, from whom he received it, on the ground, that there is in general an implied warranty, that the instrument is genuine. And, though a party do not indorse a Bill or note, yet he may, by a collateral guaranty or undertaking, become personally liable. But, as, on a transfer by mere delivery, the Assignor's name is not on the instrument, there is no privity of contract between him and any Assignee, becoming such after the assignment by himself; and, consequently, no person, but his immediate Assignee, can maintain an action against him, and that only on the original consideration, and not on the Bill itself. And, if only one of several partners indorse his name on a Bill, and get it discounted with a banker, the latter cannot sue the firm, though the proceeds of the Bill were carried to the partnership account. When a transfer by mere delivery, without indorsement, is made merely by way of sale of the Bill or note, as sometimes occurs, or exchange of it for other Bills, or by way of discount, and not as a security for money lent, or where the Assignee expressly agrees to take it in payment, and to run all risks; he has, in general, no right of action whatever against the Assignor, in case the Bill turns out to be of no value. But there can be no doubt, that, if a man assign a Bill for any sufficient consideration, knowing it to be of no value, and the Assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received. And it should seem, that, if, on discounting a Bill or note, the promissory note of country bankers be delivered after they have stopped payment, but unknown to the parties, the person taking the same, unless guilty of laches, might recover the amount from the Discounter, because it must be implied, that, at the time of the transfer, the notes were capable of being renewed, if duly presented for payment." Chitty on Bills, ch. 6, p. 268 to 271 (8th edit. 1833).

[1] Ante, § 67; Bayley on Bills, ch. 5, § 3, p. 169 (5th edit. 1830); Id. ch. 1, § 9, p. 29.

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that is to say, there may be difficulties in negotiating the Bill, or in obtaining payment thereof. In the first place, the *bonâ fide* Holder of any one of the set, if accepted, might recover the amount from the Acceptor, who would not be bound to accept any other of the set, which was held by another person, although he might be the first Holder.[1] In the second place, payment to the Holder of any one part of the set would be a complete discharge of the Acceptor, as to all the other parts.[2]

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[1] Perriera *v.* Jopp, 10 Barn. & Cressw. 450, note (*a*); Holdsworth *v.* Hunter, 10 Barn. & Cressw. 449; Chitty on Bills, ch. 5, p. 176, 177 (8th edit. 1833); Pardessus, Droit Comm. Tom. 2, art. 358.

[2] Ibid.

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CHAPTER VIII.

PRESENTMENT OF BILLS FOR ACCEPTANCE.

§ 227. Let us next proceed to the consideration of the Presentment of Bills for Acceptance, after which we shall naturally be led to the mode and effect of an acceptance; and the proceedings to be had upon a non-acceptance. And, in the first place, as to the Presentment of Bills for Acceptance. The receipt of a Bill implies an undertaking from the receiver or Holder to every party to the Bill, who could be entitled to bring an action on paying it, to present the same in proper time to the Drawee for acceptance, when acceptance is necessary, and to the Acceptor for payment, when the Bill has arrived at maturity, and is payable; to allow no extra time for payment to the Acceptor; and to give notice without delay, and within a reasonable time, to every such person, of a failure in the attempt to procure a proper acceptance or payment.[1] Any default or neglect, in any of these respects, will discharge every such person from responsibility on account of a non-acceptance, or non-payment; and will make it operate generally as a satisfaction of any debt, or demand, or value, for which it was given.[2]

§ 228. And here, the first inquiry naturally is, In what cases an acceptance is necessary. The proper

[1] Bayley on Bills, ch. 7, § 1, p. 217 (5th edit. 1830); Id. § 2, p. 286; Heinecc. de Camb. cap. 4, § 26; Ante, § 112.

[2] Ante, § 112; Bayley on Bills, ch. 7, § 1, p. 217, 218 (5th edit. 1830); Syderbottom v. Smith, 1 Str. R. 649; Gee v. Brown, 2 Str. R. 792.

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answer is, That, upon all Bills payable at sight, or at so many days after sight, or after any other event not absolutely fixed, or after demand, a presentment to the Drawee for acceptance is absolutely necessary, in order to fix the period, when the Bill is to be paid.[1] This is sufficiently obvious in the cases of Bills payable at so many days after sight, or after demand, or after a certain event. The like rule prevails in the French Law.[2] But it is equally true in our law, although not in the French Law, as to Bills payable at sight, which are not, in fact, payable upon presentment, but which have the ordinary days of grace allowed them for payment, after presentment.[3] But Bills payable on demand, (which are immediately

[1] Bayley on Bills, ch. 7, § 1, p. 244, 245 (5th edit. 1830); Chitty on Bills, ch. 7, p. 299 (8th edit. 1833); Muilman v. D'Eguino, 2 H. Black. 365; Holmes v. Kerrison, 2 Taunt. R. 323; Pardessus, Droit Comm. Tom. 2, art. 358, 362, 363; 3 Kent, Comm. Lect. 44, p. 82, 83 (4th edit.); Aymar v. Beers, 7 Cowen, R. 705; Robinson v. Ames, 20 Johns. R. 146; Wallace v. Agry, 4 Mason, R. 336; S. C. 5 Mason, R. 118; Mitchell v. Degrand, 1 Mason, R. 176.

[2] Pardessus, Droit Comm. Tom 2, art. 358, 362, 381.

[3] Ibid.; Chitty on Bills, ch. 9, p. 407, 409, 410 (8th edit. 1833); Dehers v. Harriott, 1 Show. R. 163, 164; Coleman v. Sayer, 1 Barnard, B. R. 303; Anson v. Thomas, cited Bayley on Bills, ch. 3, § 2, p. 98, note (22) (5th edit. 1830); Id. ch. 7, § 1, p. 227; Townsley v. Sumrall, 2 Peters, R. 170, 178; Bank of Washington v. Triplett, 1 Peters, R. 25. — In this respect, our law differs from the law of France; for, in that country, Bills payable at sight are immediately payable as soon as presented, without any allowance of days of grace. Pothier de Change, n. 12, 172, 198; Jousse, sur L'Ord. de 1673, tit. 5, art. 4, p. 79 (edit. 1802); Code de Comm. art. 130; Pardessus, Droit Comm. Tom. 2, art. 420; Locré, Esprit du Code de Comm. Tom. 1, art. 130, p. 425. The law of Spain seems to agree with that of France. The law of Holland is like our law. Chitty on Bills, ch. 9, p. 409, 410 (8th edit. 1833). Even in England, the old writers held, that no days of grace were allowed on such Bills of Exchange. Ibid.; Beawes, Lex Merc. by Chitty, Vol. 1, p. 608, pl. 256 (edit. 1813); Kyd on Bills, 8, 9 (3d edit. 1795); 1 Bell, Comm. B. 3, ch. 2, p. 411 (5th edit.); Savary, Le Parfait Négociant, Tom. 1, Part. 3, Liv. 1, ch. 4, p. 814.

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payable on presentment,) or payable at a certain number of days after date, or after any other certain event, need not be presented for acceptance at all; but only for payment.[1] And, here, again, the French Law coincides with ours.[2] However, in practice, wherever the Bill is payable at a certain number of days after date, it is usual, and certainly is prudent, to present them for acceptance.[3] If presented, the Holder must conduct himself in the same way, and make protest, and give notice, in the same manner, as he would upon a Bill payable at so many days after sight.[4]

§ 229. In the next place, By whom, and to whom, is the Bill to be presented for acceptance? In general, it must be presented by the Holder, or his authorized agent.[5] If not presented by any person having proper authority to hold the Bill, the Acceptor may not be bound to accept it. But if he does, the acceptance will avail in favor of the true Holder.[6] As to the person, to whom the Bill should be presented, it is obvious, that it should be presented to the Drawee, if he can be found, or to his authorized agent.[7] If he cannot be found, or if he refuses to

[1] Chitty on Bills, ch. 7, p. 299, 300 (8th edit. 1833); O'Keefe *v.* Dunn, 6 Taunt. R. 305; S. C. 5 Maule & Selw. 282; Orr *v.* Magennis, 7 East, R. 362; Com. Dig. *Merchant*, F. 6; 3 Kent, Comm. Lect. 44, p. 82, 83 (4th edit.); Post, § 284.

[2] Pardessus, Droit Comm. Tom. 2, art. 358, 362, 381; Savary, Le Parf. Négociant, Tom. 1, Part 3, ch. 4, p. 814.

[3] Ibid.; Code de Comm. art. 125.

[4] Chitty on Bills, ch. 7, p. 299, 300 (8th edit. 1833); O'Keefe *v.* Dunn, 6 Taunt. R. 305; S. C. 5 Maule & Selw. 282; U. States *v.* Barker, 4 Wash. Cir. R. 464; Bank of Washington *v.* Triplett, 1 Peters, R. 25; Post, § 284.

[5] Chitty on Bills, ch. 7, p. 300, 301 (8th edit. 1833).

[6] Ibid.; Pardessus, Droit Comm. Tom. 2, art. 360.

[7] Chitty on Bills, ch. 7, p. 301, 303 (8th edit. 1833); Cheek *v.* Roper, 5 Esp. R. 175.

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accept, it should then be presented to the person, if any, to whom, in case of need (*au besoin*), he is directed to apply.[1] If the Bill be drawn on a partnership, it should be presented to the partners, or some one of them, for acceptance.[2] If drawn on persons, not partners, it is said, that it should be presented to each of them for acceptance.[3]

§ 230. Every Bill drawn imports a contract on the part of the Drawer (as we have seen), that the Drawee is a person competent to accept, as well as that he will accept the Bill.[4] If, therefore, the Holder, upon presentment of the Bill, ascertains, that the Drawee is an infant, or a feme covert, or otherwise incapable of contracting; he is not bound to take their acceptance, but he may treat the Bill as dishonored, and protest it accordingly, and give notice thereof to the antecedent parties.[5] The death of the Drawee, or his known bankruptcy, or insolvency, or absconding, will be no excuse for the omission of presentment of the Bill for acceptance; but, in the former case, a presentment should be made at his personal representatives, if any, or at his last place of domicil; and, in the latter cases, at his place of domicil or business; and the Bill

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[1] Ante, § 63, 219; Chitty on Bills, ch. 7, p. 301 (8th edit. 1833); Pothier de Change, n 137.

[2] Chitty on Bills, ch. 7, p. 321 (8th edit. 1833); Pothier de Change, n. 137; Code de Comm. art. 173.

[3] Chitty on Bills, ch. 7, p. 301, 310, 321 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 201 (5th edit. 1830); Molloy, B. 2, ch. 10, § 18, 19; Marius on Bills, p. 16. — There may be room for a doubt on this point; for, if one of the Drawees should refuse to accept, the Holder would not be bound to take the single acceptance of the other; and, if he did, it would be at his own risk, if the Bill was not protested.

[4] Ante, § 107.

[5] Chitty on Bills, ch. 7, p. 310 (8th edit. 1833).

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be protested, and notice of the non-acceptance be, in like manner, given to the antecedent parties.[1]

§ 231. In the next place, Within what period of time is the Bill to be presented for acceptance? This, of course, depends upon circumstances. If the Bill be drawn payable at a certain time after date, it must be presented before, or at the time when, it arrives at maturity.[2] If it be payable at sight, or at so many days after sight, or on demand, then, unless there be some clear 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),[3] 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.[4] Where a Bill is payable at sight, or at

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[1] Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 218, 219 (5th edit. 1830); Pothier de Change, n. 146.

[2] Bayley on Bills, ch. 7, § 1, p. 229, 230 (5th edit 1830); Post, § 344; Goupy v. Harden, 7 Taunt. R. 159; Bachellor v. Priest, 12 Pick. R. 399, 406; Townsley v. Sumrall, 2 Peters, R. 178; Locré, Esprit du Code de Comm. Tom. 1, Lib. 1, tit. 8, § 1, art. 160, p. 499, 500; Pardessus, Droit Comm. Tom. 2, art. 358; Heinecc. de Camb. cap. 4, § 24. — The language of Heineccius is; "Porro remittens litteras cambiales, sive solas, sive primas, sine cunctatione ad præsentantem mittet: nam si ea in re in mora est, omne damnum inde emergens ferre cogitur. (Vid. O. C. Lips. § 28.) Id vero intelligendum tantum est de cambiis platearum, quia cambia feriarum non nisi ineuntibus nundinis (wenn die Einläutung der Messe geschehen) præsentari, jam supra monuimus. Si certum tempus solutionis a datis litteris computandum exprimitur, sufficit, si paullo ante diem solutionis cambium præsentetur."

[3] Mellish v. Rawdon, 9 Bing. R. 416.

[4] Chitty on Bills, ch. 7, p. 301, 302 to 305 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 227, 228, 232 to 244 (5th edit. 1830); Muilman v. D'Eguino, 2 H. Bl. 565, 569; Goupy v. Harden, 7 Taunt. R. 159; Mellish v. Rawdon, 9 Bing. R. 416; Fry v. Hill, 7 Taunt. R. 397; Wallace v. Agry, 4 Mason, R. 336; S. C. 5 Mason, R. 118; Field v. Nickerson, 13 Mass. R. 131; Gowan v. Jackson, 20 Johns. R. 176; Aymar v. Beers, 7 Cowen, R. 503; Stroker v. Graham, 4 Mees. & Welsb. 721.

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a certain number of days after sight, if the Holder keeps it in his own possession for an unreasonable time, and thus locks it up from circulation, he makes the Bill his own, and will have no remedy against any of the other antecedent parties upon the Bill, from or through whom he derived his title.[1] But if the Bill (whether foreign or inland) is kept in circulation, and not held by any one Holder, through whose hands it passes, an unreasonable time, it seems difficult to assign any particular time, in which it ought to be presented for acceptance.[2] In respect to inland Bills, the rule may, in its application, require some limitations, resulting from the common course of business, or the circulation of particular classes of Bills (such as country banker's Bills), different from those, which ordinarily apply to foreign Bills.[3] But in respect to foreign Bills, the conveniences, if not the necessities, of trade, seem to require, that a very liberal allowance of time, both for the transmission and the presentment of Bills, should be allowed to every successive Holder.[4]

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[1] Bayley on Bills, ch. 7, § 1, p. 227 to 230; Muilman *v.* D'Eguino, 2 H. Black. 565, 569; Goupy *v.* Harden, 7 Taunt. R. 159; Chitty on Bills, ch. 7, p. 301 to 305 (8th edit. 1833); Mellish *v.* Rawdon, 9 Bing. R. 416; Fry *v.* Hill, 7 Taunt. R. 397; Gowan *v.* Jackson, 20 Johns. R. 176; Robinson *v.* Ames, 20 Johns. R. 146; Wallace *v.* Agry, 4 Mason, R. 336; S. C. 5 Mason, R. 118.

[2] Ibid.; Fry *v.* Hill, 7 Taunt. R. 397; Mellish *v.* Rawdon, 9 Bing. R. 416; Wallace *v.* Agry, 4 Mason, R. 336; S. C. 5 Mason, R. 118.

[3] Chitty on Bills, ch. 7, p. 301 to 304 (8th edit. 1833); Fry *v.* Hill, 7 Taunt. R. 397; Shute *v.* Robins, 1 Mood. & Malk. 133; S. C. 3 Carr. & Payne, 80.

[4] Muilman *v.* D'Eguino, 2 H. Black. 565, 569; Goupy *v.* Harden, 7 Taunt. R. 159; Mellish *v.* Rawdon, 9 Bing. R. 416; Gowan *v.* Jackson, 20 Johns. R. 176; Robinson *v.* Ames, 20 Johns. R. 146; Wallace *v.* Agry, 4 Mason, R. 336; S. C. 5 Mason, R. 118. — In the case of Mellish *v.* Rawdon (9 Bing. R. 416), which was the case of a foreign Bill, Lord Chief Justice Tindal, in delivering the opinion of the Court, said;

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§ 232. Pothier, upon general principles, holds the same doctrine in cases of Bills of Exchange payable at or after sight, that there is no absolute rule, as to the time, in which they should be presented for payment; and that it must be left to the judgment of the Court, whether the presentment has been made within a reasonable time; for it would not be equitable, that the Holder should, by too long a delay, throw the risk of the solvency of the Drawee upon the Drawer.[1]

"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. The judgment of the Court of Common Pleas, in the case of Muilman *v.* D'Eguino, seems to us to lead directly to this conclusion, and to no other. And, although one expression, used by Mr. Justice Buller in giving his judgment, is much relied on by the defendant, namely, that, 'if, instead of putting the Bill into circulation, the Holder were to lock it up for any length of time, I should say he was guilty of laches,' such expression, when properly considered, only leaves the rule above laid down as uncertain and undefined in its application as it was before. 'To lock the Bill up, for any length of time,' does not, and cannot mean, that keeping it in his hands for any time, however short, would make him guilty of laches. It never can be required of him, instantly, on the receipt of it, under all disadvantages, either to put it into circulation, or to send it forward to the Drawee for acceptance. To hold the purchaser bound by such an obligation would greatly impede, if not altogether destroy, the market for buying and selling foreign Bills, to the great injury, no less than to the inconvenience, of the Drawer himself. For, if he has no opportunity to realize his Bill by sale at home, he can only obtain the amount by sending it out to a correspondent, at the place upon which it is drawn, incurring thereby delay, expense, and risk; and, if the buyer is not to be allowed a reasonable discretion, as to the time of parting with the Bill, how can the Drawer expect to find a ready sale? The meaning, therefore, of the expression above referred to, is, and, indeed, the very form of the expression denotes it, that he must not lock the Bill up for an indefinite time; that there must be some limit to its being kept from circulation; and what limit can there be, except that the time, during which it is locked up, must be reasonable? But what is, or is not, reasonable for that purpose, a jury must, with the assistance of the Judge, under all the circumstances of the particular case, determine."

[1] Pothier de Change, n. 143; Pardessus, Droit Comm. Tom. 2, art. 358.

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The present Commercial Code of France has positively fixed the different periods, within which, Bills, drawn at or after sight, shall be presented for acceptance, varying the time according to the different places, where the Bills are drawn, and the different places, on which the Bills are drawn.[1]

§ 233. And here it becomes necessary to be understood, that no presentment of a Bill for acceptance is proper, and no acceptance can be required of a Drawee, on any day, which is set apart by the laws, or observances, or usages, of the country, for religious or other purposes, or which are not deemed days for the transaction of secular business. Thus, for example, no acceptance can be required, and no presentment for acceptance be regularly made, upon a Sunday, or Christmas day, or upon any day appointed by the public authorities for a solemn fast or thanksgiving, or upon any other day, which is a holyday, or is set apart by the religion of the Drawee for religious purposes, such as Saturday, in the case of Jews.[2] But this subject will more properly present itself, when we come to the consideration of the Time of Demand of Payment of Bills of Exchange.

§ 234. Delay in making the presentment for acceptance at a proper time may, under certain circumstances, be excused by illness, or by war being declared between the country, where the Bill is drawn

[1] Code de Comm. Liv. 1, tit. 8, art. 160; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 160, p. 499 to 502; Pardessus, Droit Comm. Tom. 2, art. 358, 359.

[2] Bayley on Bills, ch. 7, § 1, p. 248 (5th edit. 1830); Id. ch. 7, § 2, p. 271, 272; Chitty on Bills, ch. 9, p. 403, 410, 411 (8th edit. 1833). The fourth of July is, it seems, now deemed a holiday in New York. Ransom v. Mack, 2 Hill, N. Y. R. 587; Sheldon v. Benham, 4 Hill, N. Y. R. 129, 132; Post, § 308, § 327.

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or negotiated, and the country, where it is to be accepted, or by the political state of either country rendering it impracticable, or by any other reasonable cause or accident, not attributable to the misconduct or negligence of the Holder.[1] Indeed, the same rules generally apply, in such cases, to excuse the delay, as will excuse delay in not presenting Bills for payment at the proper time, or in not giving due notice of the dishonor to the other parties;[2] and, therefore, the particular consideration thereof may well be deferred, until those topics come under our notice. It may, however, be here added, that Pothier and Pardessus, both admit the competency of the excuse for delay in presenting Bills for acceptance, where it has been occasioned by inevitable accident, or by other overwhelming cause of obstruction, upon the general maxim, so fully recognised in the Roman Law, and the modern Law of continental Europe; *Impossibilium nulla obligatio est.*[3]

§ 235. In the next place, as to the place, where presentment of Bills for acceptance is to be made. And here, the general rule is, that presentment of the Bill must be made at the place of the domicil of the Drawee, without any regard to its being drawn payable generally, or payable at a particular place specified; because it is presumed, that the parties intend, that

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[1] Chitty on Bills, ch. 7, p. 305 (8th edit. 1833), and note (*k*); Id. ch. 9, p. 389, 423, 424; Id. ch. 10, p. 485, and note (*f*); Id. Part 2, ch. 2, p. 590; Hilton *v.* Shepherd, 6 East, R. 16; Patience *v.* Townley, 2 Smith, R. 223; Post, § 308, 327.

[2] Ibid.; Tunno *v.* Lague, 2 Johns. Cas. 1; Schofield *v.* Bayard, 3 Wend. R. 488; Martin *v.* Ingersoll, 8 Pick. R. 1; Hopkirk *v.* Page, 2 Brook. R. 20.

[3] Pothier de Change, n. 144; Pardessus, Droit Comm. Tom. 2, art. 426; Dig. Lib. 50, tit. 17, l. 185.

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the acceptance shall be at the place of domicil, whatever may be the place of payment.[1] If the Bill is addressed to a party, as living in one place, where he has never lived, or if he has removed to another place, the Holder should present it at the new or true domicil of the Drawee, if he can, by diligent inquiries, ascertain, where it is.[2] If he cannot, upon such inquiries, ascertain his domicil, or if the Drawee has absconded, and cannot be found, then the Holder may treat the Bill as dishonored, and protest it according to the facts.[3] If the Drawee has left the country, it will be sufficient to present the Bill at his place of domicil in the country, which he has left, unless he has a known agent in the same place; for, in that case, the Bill should be presented to the agent.[4] If the Drawee is dead, the Holder should inquire for his personal representative, to whom, if he can be found, the Bill should be presented, otherwise, it should be protested.[5]

§ 236. When it is said, that the Bill must be pre-

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[1] Chitty on Bills, ch. 7, p. 305, 307 (8th edit. 1833); Mitchell v. Baring, 10 Barn. & Cressw. 4. — It is laid down in Bayley on Bills, ch. 7, § 1, p. 218 (5th edit. 1830), that "The presentment is to be made, where the Bill or note is payable." This, I apprehend, is a mistake; and that the true rule is laid down by Mr. Chitty, as stated in the text.

[2] Ibid.; Bayley on Bills, ch. 7, § 1, p. 218, 219 (5th edit. 1830); Collins v. Butler, 2 Str. R. 1087; Bateman v. Joseph, 12 East, R. 433; Beveridge v. Burgis, 3 Camp. R. 262; Browning v. Kinnear, 1 Gow, R. 81; Anderson v. Drake, 14 Johns. R. 114; Freeman v. Boynton, 7 Mass. R. 483.

[3] Ibid.; Anon. 1 Ld. Raym. 743.

[4] Chitty on Bills, ch. 7, p. 307 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 259; Id. § 1, p. 219 (5th edit. 1830); Cromwell v. Hynson, 2 Esp. R. 511, 512. See Phillips v. Astling, 2 Taunt. R. 206; Macgruder v. Bank of Washington, 9 Wheat. R. 598; Whittier v. Graffam, 3 Greenl. R. 82.

[5] Chitty on Bills, ch. 7, p. 307 (8th edit. 1833); Molloy, B. 2, ch. 10, § 34; Bayley on Bills, ch. 7, § 1, p. 219, (5th edit. 1830); Pothier de Change, n. 146; Marius on Bills, p. 32 (edit. 1794).

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sented for acceptance at the place of the domicil of the Drawee, we are to understand, by this expression, the town, city, village, or other municipality, within which he has his residence. But, in many cases, the Holder will have an election as to the place of presentment. Thus, for example, if the Drawee has his home, or domestic establishment, in one town, and his place of business is in another town, a presentment made at either place will be good.[1] So, if the Drawee has his dwelling-house, or home, in one part of the same town, and his place of business in another part, a presentment may be made at either, at the option of the Holder.[2] But, in all cases, the presentment must be made within reasonable hours of the day. If made at the place of business of the Drawee, it will not be good, unless made within the usual hours of business, or, at farthest, while some person is there, who has authority to receive and answer the presentment.[3] If made at the dwelling-house of the Drawee, it may be at any seasonable hour, when the family are up, whether it be in the morning, or in the evening.[4] A presentment at an unseasonable time will be deemed a mere nullity, if not duly answered.

§ 237. The same doctrine is applicable to the case of a Bill so drawn, as to be payable by a third person in case of need (*au besoin*). If the original Drawee

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[1] See Chitty on Bills, ch. 7, p. 305 (8th edit. 1833). — I have not found any case directly in point, although it does not occur to me, that there is any doubt of the principle stated in the text.

[2] Chitty on Bills, ch. 7, p. 305 (8th edit. 1833).

[3] Ibid.; Bayley on Bills, ch. 7, § 1, p. 224, 225 (5th edit. 1830); Elford *v.* Teed, 1 M. & Selw. 28; Garnett *v.* Woodcock, 6 M. & Selw. 44; Morgan *v.* Davison, 1 Stark. R. 114; Wilkins *v.* Jadis, 2 Barn & Adolp. 188; Shed *v.* Brett, 1 Pick. R. 413.

[4] Ibid.

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should refuse to accept the Bill, it should be presented to the Drawee *au besoin*, precisely in the same way, and in the same place, and after the same inquiries, as if he were the original Drawee.[1] The proper proceedings to be had, in case the Drawee cannot be found, or is dead, or declines accepting it, will hereafter come under our consideration. It is only necessary here, to add, that, in every case of a presentment for acceptance, the Drawee is entitled, if he requires it, to have twenty-four hours to consider, whether he will accept the Bill, or not; and it is usual, in such cases, for the Holder to leave the Bill with him during that period.[2]

§ 238. Let us, in the next place, proceed to the consideration of the Acceptance of Bills of Exchange. We have already seen, that it is the duty of the Drawee, upon whom a Bill is regularly drawn, and who has funds appropriated for the purpose in his hands, or who has authorized the Draft, to accept and pay the Bill according to its tenor.[3] An acceptance

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[1] See Ante, § 65, 219, 229; Pothier de Change, n. 137.

[2] Chitty on Bills, ch. 7, p. 306, 307, 311 (8th edit. 1833); Com Dig. *Merchant*, F. 6; Marius on Bills, p. 15, 16; Bellasis *v.* Hester, 1 Ld. Raym. 281; Ingram *v.* Foster, 2 Smith, R. 242; Code de Comm. art. 125; Pardessus, Droit Comm. Tom. 2, art. 361; 2 Bell, Comm. B. 3, ch. 2, p. 409 (5th edit.).

[3] Ante, § 113, 117; Chitty on Bills, ch. 7, p. 308, 309 (8th edit. 1833). — Upon this subject, Mr. Chitty has remarked; "The Drawee of a Bill, unless he has, for adequate consideration, expressly or impliedly engaged to accept it, is not, although he be indebted to the Drawer in the full amount, or although adequate funds have been remitted to him for the express purpose, legally bound to accept, nor is he liable to any action for the consequences of his refusal; though, according to mercantile usage, such refusal would be deemed very improper. In this respect, the situation of an ordinary debtor, or agent, differs from that of a banker, who is liable to an action if he should refuse, having sufficient money in hand to honor the check of his customer; and, in case of refusal, the Holder

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is an assent and agreement to comply with the request and order contained in the Bill; or, in other words, it is an assent and agreement to pay the Bill, according to the tenor of the acceptance, when due.[1] It may be general, or it may be conditional or qualified. It may be verbal, or it may be written. It may be express, or it may be implied. It may be before the Bill is drawn, or after it is drawn.[2]

§ 239. An acceptance is general, when it imports an absolute acceptance, precisely in conformity to the tenor of the Bill itself.[3] It is conditional or qualified,

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(though the Drawer may withdraw the funds, or sue the Drawee for the debt) has not, in this country, any remedy at law against the Drawee, or the funds in his hands. However, in commercial transactions, frequently from prior intercourse and dealings between the parties, an engagement to accept may be inferred; and it should seem, that, when funds have been remitted to a Drawee for the express purpose of providing for a Bill drawn upon him, and he receives and retains the same, without objection or returning the amount, an engagement to accept may be implied. If the Drawee has expressly or impliedly promised the intended Drawer to accept a Bill, to be drawn on him for a valuable consideration, and afterwards should refuse to perform such contract, then the Drawer (but not any other party) may certainly sue him, and recover reëxchange and other damages occasioned by the dishonor of the Bill; and, where the Drawee has money in hand, very slight evidence, as previous commercial transactions, will support the presumption of a contract to accept; and a promise to give notice to a party, when he might draw a Bill, amounts to an undertaking to accept the Bill, when drawn in pursuance thereof." Ibid.

[1] Chitty on Bills, ch. 7, p. 307, 308 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 172 (5th edit. 1830); Pardessus, Droit Comm. Tom. 2, art. 362 to 364.

[2] Where a person writes his name as Acceptor on a blank which is to be afterwards filled up, his act imports an absolute acceptance; and if the acceptance is afterwards added to it by the Holder, payable at a particular place (as, at the Bank of England), that is a change of the acceptance, and does not bind the Acceptor as a general acceptance. Crotty v. Hodges, 4 Mann. & Gr. 561.

[3] Bayley on Bills, ch. 1, § 8, p. 29, 30; Id. (5th edit. 1830); Id. ch. 6, § 1, p 199, 200.—It was for a long time, in England, a vexed question, Whether, when a Bill is drawn upon a person generally, if it is accepted payable at a particular house, or a particular place, it is a qualified accept-

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when it contains any qualification, limitation, or condition, different from what is expressed on the face of

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ance, so as to discharge the other parties to the Bill, unless due protest and notice be given thereof to the other parties. In the case of Rowe *v.* Young (2 Brod. & Bing. 165, 2 Bligh, R. 391), it was finally decided in the House of Lords, that it was a qualified acceptance. It was also decided, in the same case, that in every such case it was necessary to make a demand of payment at such house or place, before the Acceptor would be in default. In America, some diversities of opinion have existed upon this latter point. But, in the Supreme Court of the United States, it has been held, that no such demand, as to time and place, is necessary to be made or proved by the Holder; although it may absolve the Acceptor from all damages and interest, if the Bill, upon presentment there, would have been paid; and, if the funds were there, and had since been lost by the failure of the house, without any default of the Acceptor, it would constitute a good defence to the action. It seems, at the same time, to have been admitted, that, to charge the Drawer or Indorsers of the Bill, a demand at the place, at the maturity of the Bill, is indispensable. Wallace *v.* M'Connell, 13 Peters, R. 136. In the opinion of the Court, delivered upon this occasion, the principal English and American authorities are collected and commented on. In England, since the decision in Rowe *v.* Young (2 Brod. & Bing. 165, 2 Bligh, R. 391), the Statute of 1 and 2 Geo. 4, ch. 78, has provided, that such an acceptance shall not be deemed a qualified acceptance, but a general acceptance, unless the words of the acceptance make the Bill payable at that house or place *only*, or *not elsewhere*. Still, however, the case itself is highly instructive; and the opinions of the Judges (which were opposed to each other on many points) contain very masterly discussions of all the principles involved in the decision. Mr. Chitty has given the following summary. "Much discussion, in modern times, arose upon the effect of an acceptance payable at a particular place, and before the recent Act, the following points were settled, in the House of Lords, in the case of Rowe *v.* Young; it was decided, 1st. That, if a Bill were accepted, payable at the house of P. and W., it was a qualified acceptance, restricting the place of payment, and the Holder was bound to present the Bill at the house for payment, in order to charge the Acceptor; and that, if he brought an action against the Acceptor, he must, in his declaration, aver, and on the trial prove, that he made such presentment; and, for want of such averment, the declaration was held bad on demurrer. 2dly. That an Acceptor might qualify his acceptance was clearly established, by cases including almost every species of qualification; and that, if the qualification as to place could not be introduced by the Acceptor, it must be on account of some circumstance, which belongs to place, and does not belong to time or mode of payment, or any other species of qualification whatever. 3dly. That, when a Bill is drawn generally, con-

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the Bill, or from what the law implies upon a general acceptance.[1] It is conditional, for example, when the Drawee accepts a Bill "to pay, when goods conveyed to him are sold;"[2] or "when in cash for the cargo of the ship A.;"[3] or "to accept, when a navy bill is paid;"[4] or "to pay, as remitted from thence, at usance."[5] And the condition may be implied from

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sidering that it is an address to the person, who is to accept it generally, it is the duty of the Acceptor, who intends to give a special acceptance, to accept in such terms, that the nature of his contract may be seen in the terms he has used, that the acceptance may clearly appear to be qualified or special, which he insists is not general. 4thly. That, when the Acceptor *uno flatu* writes the words, 'Accepted payable at such a house,' the word 'accepted' is not to be taken to express the whole of the Acceptor's contract, but the latter words are also to be taken as part of it, and are to be construed distinctly, as a direction or expansion of engagement. 5thly. That, if an Acceptor promise to pay at his banker's in London, and the Holder calls upon him in Northumberland, the payment is not the same. He presumes, that the demand is to be made at the banker's in London, and the funds are deposited there. But, if the Acceptor is unexpectedly to meet the demands in a distant place, the cost of the exchange, and remittance backwards and forwards, must be added. 6thly. That, if the law be, that, although a Bill is drawn generally, it may be accepted specially, it is the effect of the law to impose a duty upon the Holder, of giving notice to the Drawer and previous Indorsers, if he intend to keep alive their liability. 7thly. That it is not true, that an Acceptor must be antecedently the debtor, and that all the cases of qualified acceptances show the contrary; and that a man may accept to pay out of the produce of a cargo consigned to him, when that cargo shall arrive in England; and that, in the case of a consignee, his acceptance is almost universally qualified. 8thly. That money paid at Torpoint and in London are different things; and, if an Acceptor of a Bill is liable to be called upon at both places, his liability is rendered more inconvenient." Chitty on Bills, ch. 7, p. 321, 322 (8th edit. 1833); Id. ch. 9, p. 391, 392.

[1] Bayley on Bills, ch. 6, § 1, p. 175 (5th edit. 1830); Chitty on Bills, ch. 7, p. 331 (8th edit. 1833).

[2] Ibid.; Smith *v.* Abbott, 2 Str. R. 1152; Heinecc. de Camb. cap. 2, § 19; 3 Kent, Comm. Lect. 44, p. 83, 84 (4th edit.).

[3] Ibid.; Julian *v.* Scholbrooke, 2 Wils. R. 9.

[4] Ibid.; Pierson *v.* Dunlop, Cowp. R. 571.
Banbury *v.* Lissett, 2 Strange, R. 1211.

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circumstances, as well as expressed.[1] It is qualified, when the Drawee absolutely accepts the Bill, but makes it payable at a different time or place, or for a different firm, or in a different mode, from that, which is in the tenor of the Bill.[2]

§ 240. In all cases, the Holder is entitled to have

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[1] Sproat v. Matthews, 1 Term R. 182. — What words will amount to a conditional acceptance, or not, is sometimes a matter of considerable nicety. Mr. Justice Bayley has the following remarks, which may serve to illustrate the subject. "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 till certain goods, against which it was drawn, arrived, was held virtually an acceptance, when they did arrive and were received. But, if the Drawee says, he cannot accept without further directions from I. S., and I. S. afterwards desire him to accept, and draw upon A. B. for the amount, the mere drawing upon A. B. will not make this an acceptance, although the actual payment of the Bill upon him may." Bayley on Bills, ch. 6, § 1, p. 197 to 199 (5th edit. 1830). The cases, referred to by Mr. Justice Bayley, are Pierson v. Dunlop, Cowp. R. 571, Milne v. Prest, 4 Camp. R. 393, S. C. Holt, N. P. R. 181, and Smith v. Nissen, 1 Term R. 269; to which may be added Sproat v. Matthews, 1 Term R. 182, and Wilkinson v. Lutwidge, 1 Strange, R. 648; Molloy de Jur. Marit. B. 2, ch. 10, § 20; Smith v. Nissen, 1 Term R. 269. If a Bill is accepted by the Drawee thus, "A., administrator," the addition of the word Administrator, does not make it conditional. Tassey v. Church, 4 Watts & Serg. R. 346.

[2] Chitty on Bills, ch. 7, p. 331, 332 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 175, 176, 199, 200 (5th edit. 1830); Wegersloffe v. Keene, 1 Str. R. 214; Walker v. Attwood, 11 Mod. R. 190; Paton v. Winter, 1 Taunt. R. 420; Callaghan v. Aylett, 3 Taunt. R. 397; Rowe v. Young, 2 Brod. & Bing. 165; Petit v. Benson, Comb. R. 452; Molloy, B. 2, ch. 10, § 20, 21; Beawes, Lex Merc. by Chitty, Vol. 1, pl. 218, p. 594 (edit. 1813); Marius on Bills, p. 21.

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an absolute, unconditional, and unqualified acceptance of the Bill, as drawn; and he is not bound to take any other.[1] Mr. Justice Bayley has more fully stated the obligation and duty of the Drawee, in the following language. "Though any acceptance, varying from the tenor, will bind the person making it, the Holder of a Bill is entitled, from the undertaking of the Drawer and Indorsers, to expect an absolute acceptance by the Drawee, (or, if there be several not connected in partnership, by each,) for the payment of the full sum of money mentioned therein according to its tenor; specifying (if none be mentioned for the purpose) a place for its payment, and expressing, if the Bill be payable within a limited time after sight, the time of its presentment for acceptance; and he may reject any other."[2] Still, however, the Holder may, at his peril and risk, take a conditional or qualified acceptance; and, if he does, the Acceptor will, (as has been just intimated,) if the condition is complied with, or the qualification is admitted, be bound thereby.[3] If the Holder means to assent to a conditional offer of acceptance, he must do so at the time of the offer; for, if he then declines it, it will be a

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[1] Bayley on Bills, ch. 6, § 1, p. 175, and note (*g*) (5th edit. 1830); Id. p. 201, 202; Id. ch. 7, § 2, p. 252, 263; Marius on Bills, p. 21; Smith *v.* Abbott, 2 Str. R. 1152; Julian *v.* Scholbrooke, 2 Wils. R. 9; Pierson *v.* Dunlop, Cowp. R. 571; Boehm *v.* Garcias, 1 Camp. R. 425; Chitty on Bills, ch. 7, p. 315 (8th edit. 1833); Id. p. 330 to 331.

[2] Bayley on Bills, ch. 6, § 1, p. 201, 202 (5th edit. 1830).

[3] Chitty on Bills, ch. 7, p. 332, 333 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 175, 176, 195 to 198, 201 (5th edit. 1830); Pierson *v.* Dunlop, Cowp. R. 571; Milne *v.* Prest, 4 Camp. R. 393; Smith *v.* Nissen, 1 Term R. 269; Read *v.* Wilkinson, 2 Wash. Cir. R. 514; Campbell *v.* Pettengill, 7 Greenl. R. 126; Parker *v.* Gordon, 7 East, R. 385; Chitty on Bills, ch. 7, p. 315, 316 (8th edit. 1833).

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waiver of all right to hold the Drawee to the offer.[1] And, if the Holder should take an acceptance, varying, in any respect, from the tenor of the Bill, whether conditional or qualified, or otherwise, in such a case, he must give notice thereof to the antecedent parties; and, if he does not, they will not be bound, by it, but will be absolved from all responsibility upon the Bill.[2] Indeed, it should seem, that notice would not, of itself, be sufficient, without a protest of the Bill for the non-acceptance, according to the tenor of the Bill;[3] nor unless, after notice, such parties adopted or acquiesced in the conditional or qualified acceptance; for it may materially change their whole relations to, and responsibilities on, the Bill; and each of them has a right to say, *Non in hæc fœdera veni.*[4] And here it may be added, that, if any conditions are annexed to an

[1] Bayley on Bills, ch. 6, § 1, p. 202 (5th edit. 1830); Id. ch. 7, § 2, p. 253, 254; Sproat *v.* Matthews, 1 Term R. 182; Bentinck *v.* Dorrien, 6 East, R. 199; Chitty on Bills, ch. 7, p. 330, 331 (8th edit. 1833).

[2] Bayley on Bills, ch. 7, § 2, p. 253, 254 (5th edit. 1830); Id. ch. 6, § 1, p. 196; Sproat *v.* Matthews, 1 Term R. 182; Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 85, 86 (4th edit.).

[3] Marius on Bills, p. 21; Beawes, Lex Merc. by Chitty, Vol. 1, pl. 231, p. 594, 595 (edit. 1813); Chitty on Bills, ch. 7, p. 307 (8th edit. 1833); Molloy, B. 2, ch. 10, § 28; Paton *v.* Winter, 1 Taunt. R. 419, 422.

[4] Chitty on Bills, ch. 7, p. 307, 329, 330 (8th edit. 1833); Id. p. 360; Bayley on Bills, ch. 7, § 2, p. 253, 254 (5th edit. 1830). — I do not know, that any exact authority exists upon this last point; but it seems to me to be a necessary result of general principles; and seems to be so held in Chitty and Bayley on Bills, *ubi supra*. It is said, in Bayley on Bills, ch. 7, § 2, p. 254 (5th edit. 1830), that "A neglect to give notice, where there is a conditional acceptance, is done away by the completion of those conditions, before the Bill becomes payable; and a neglect, where there is an acceptance as to part and a refusal as to the residue only, discharges the person entitled to notice as to the residue only." No authority is cited for this position; and it seems to me open to much observation. But see Pothier de Change, n. 48. See also Chitty on Bills, ch. 8, p. 361 (8th edit. 1833).

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acceptance, they should all appear upon the face of the acceptance, if it is written; for, at all events, whatever may be the case as to the then Holder, it is clear, that, as to any subsequent Holder, *bonâ fide*, for value, without notice, any verbal conditions would not be binding, or qualify his rights."[1]

§ 241. The French Law is in exact accordance with ours, as to the right of the Holder to require an unconditional and absolute acceptance. It declares, that the acceptance ought to be pure, simple, and unconditional, and in conformity to the tenor of the Bill; that the Holder has a right to refuse any other acceptance; and that the Drawee has no right to insert any terms, which in any respect vary his general obligations, as to the time, place, or mode of payment.[2] The Code of Commerce goes further, and declares, that the acceptance cannot be conditional; but it may be limited in regard to the sum accepted.[3] In this

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[1] Pardessus, Droit Comm. Tom. 2, art. 370; Bayley on Bills, ch. 6, § 1, p. 197 (5th edit. 1830); Chitty on Bills, ch. 7, p. 332 (8th edit. 1833;) Id. p. 361; U. States v. Bank of Metropolis, 15 Peters, R. 377.

[2] Pardessus, Droit Comm. Tom. 2, art. 370, 372, 428; Pothier de Change, n. 47 to 49; Ord. 1673, art. 2; Jousse, sur l'Ord. 1673, art. 2, p. 71 to 73. — Heineccius, on the subject of conditional acceptances, says; "Probe etiam attendendum est, utrum acceptatio fiat pure, an vero addita clausula vel conditione. Posteriore enim casu interponenda est protestatio, et tunc conditio ista pro non adjecta habetur. Immo si præsentans damnum aliquod inde sentiat, regressus illi patet adversus trassantem. — Nec permissum est trassato, loco totius summæ, partis solutionem in se recipere; nec præsentans in eo promisso adquiescere debet, sed statim interponere protestationem, quamvis summam oblatam omnino accipere possit. Si tamen particularem solutionem promissam ratam habeat præsentans, et in ea promissione adquiescat, nec protestationem interponat; valida omnino habetur illa particularis acceptatio. Qua in re inter leges cambiales tantum non omnes convenire." Heinecc. de Camb. cap. 4, § 27, 29; Id. cap. 2, § 19.

[3] Code de Comm. art. 124.

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case, the Holder is bound to have the Bill protested for the deficiency.[1] And this seems, in substance, to conform to the Ordinance of 1673, on the same point.[2] But there does not seem any just objection, either in our law, or in the French Law, against the Drawee's introducing into his acceptance any reservation of his rights against the Drawer, provided it does not, in any manner, affect the rights of the Holder, and still leaves the acceptance, as to him, absolute and unconditional.[3] Thus, for example, if the Drawee, having no funds, should accept to pay the Bill, reserving his right of reimbursement against the Drawer, it would not seem to be objectionable; but it would be otherwise, if he should reserve the like right against the Holder, or should reserve the right to apply the proceeds to the discharge of a debt due to him from the Holder; as, if his acceptance should be, "*Accepté pour payer à moi même.*"[4]

§ 242. In the next place, an acceptance may, unless otherwise qualified or restrained (as by the local law

[1] Ibid.

[2] Jousse, sur l'Ord. 1673, tit. 5, art. 2, p. 71 to 73; Locré, Esprit de Comm. Tom. 1, Lib. 1, tit. 8, § 1, art. 124, p. 411, 412.

[3] Pardessus, Droit Comm. Tom. 2, art. 370, 372; Pothier de Change, n. 47 to 49.

[4] Pardessus, Droit Comm. Tom. 2, art. 372; Chitty on Bills, ch. 7, p. 315 (8th edit. 1833). — Pardessus seems to hint, that it might possibly be true, if the Bill be payable at sight, and there be a present debt due to the Drawee from the Holder, that the acceptance, with such a clause, might be good, because, by the French Law (Code Civ. art. 1290, 1291; Pardessus, Droit Comm. Tom. 2, art 230), the right of compensation or set-off exists, in such a case, by mere operation of law. But he does not affirm it; and it seems to me doubtful, upon principle, whether the Holder is bound to receive such an acceptance, as the object is, to have the very sum paid to him, and appropriated according to his own choice; whereas, the option, by such an acceptance, is given to the Drawee. Pothier, however, positively affirms, that such an acceptance is good, and binds the Holder. Pothier de Change, n. 47.

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of the place of acceptance,) be either verbal, or in writing.[1] By the French Law, every acceptance is required to be in writing.[2] By the English Law, a verbal acceptance is good in cases of foreign Bills; but an acceptance of inland Bills is required to be in writing on the Bill itself.[3] It is not essential, however, although usual, in either country, that the acceptance, when in writing, should be on the Bill itself; but it may be on another paper, or contained in a letter signed by the party.[4] But it seems, that the Holder has a right, in all cases, to insist upon an acceptance in writing on the Bill itself, in order to avoid mistakes, and to prevent the difficulties, which may arise from mere parol proof thereof.[5] And, if the Bill is payable at or after sight, the acceptance in writing on the Bill ought to contain the date thereof;[6] although, if it does

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[1] Bayley on Bills, ch. 6, § 1, p. 174 (5th edit. 1830); Chitty on Bills, ch. 7, p. 316, 317 (8th edit. 1833); Lumley *v.* Palmer, 2 Str. R. 1000; Julian *v.* Scholbrooke, 2 Wils. R. 9; Powell *v.* Monnier, 1 Atk. 612; Pillans *v.* Van Mierop, 3 Burr. R. 1674; 3 Kent, Comm. Lect. 44, p. 83, 84 (4th edit.); Grant *v.* Hunt, The Jurist, for 1845, Vol. 9, p. 228.

[2] Code de Comm. art. 122; Pardessus, Droit Comm. Tom. 2, art. 365; Ord. 1673, tit. 5, art. 2; Pothier de Change, n. 43; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 122, p. 406.

[3] Bayley on Bills, ch. 6, § 1, p. 174, and note (7) (5th edit. 1830); Chitty on Bills, ch. 7, p. 316, 317 (8th edit. 1833), and cases there cited; Caneppa *v.* Larcio, 2 Knapp, R. 273; Mahoney *v.* Astlin, 2 Barn. & Adolph. R. 478. — The Statute of 1 and 2 Geo. 4, ch. 78, § 2, requires every acceptance of an inland Bill to be in writing.

[4] Bayley on Bills, ch. 7, § 1, p. 174, 187, 188 (5th edit. 1830); Chitty on Bills, ch. 7, p. 316 (8th edit. 1833); Clark *v.* Cock, 4 East, R. 71; Ex parte Dyer, 6 Ves. 9; Crutchly *v.* Mann, 5 Taunt. 529; Powell *v.* Monnier, 1 Atk. 611; Wynne *v.* Raikes, 5 East, R. 514; Pardessus, Droit Comm. Tom. 2, art. 367; Grant *v.* Hunt, The Jurist, for 1845, Vol. 9, p. 228.

[5] Chitty on Bills, ch. 7, p. 315 (8th edit. 1833).

[6] See Bayley on Bills, ch. 6, § 1, p. 181, 182 (5th edit. 1830); Pardessus, Droit Comm. Tom. 2, art. 368; Code de Comm. art. 122; Chitty on Bills, ch. 7, p. 320, 321 (8th edit. 1833).

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not, the acceptance will be good, and the time may be proved *aliunde*.[1]

§ 243. In the next place, an acceptance, whether it be in writing or verbal, may be by express words, or by reasonable implication. Any written words, clearly denoting a present intention to accept or honor a Bill, will be deemed an acceptance, although, certainly, the appropriate mode is, to express in positive terms, as, for example, "January 1, 1842. Accepted to pay according to tenor of the Bill," or, "I accept to pay this Bill," or, simply, "Accepted."[2] But any other words will suffice, if expressive of the same intent, or admitting of no other reasonable and just interpretation. Thus, for example, if the Drawee writes on the Bill, with or without his signature, "I will pay this Bill," "I honor this Bill," or simply, "Honored," or "Presented," it will amount to an acceptance.[3] Nay, words far more indirect, and even acts, will, in many cases, be deemed an acceptance. Thus, if the Drawee should write on a Bill, "seen," or the date of the month and year, or his own signature in blank, or a direction to a third person to pay the Bill, such circumstances would, if not otherwise explained, be deemed an acceptance of the Bill.[4] So

[1] Ibid.

[2] Chitty on Bills, ch. 7, p. 320, 321, 323, 324 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 182, 183 (5th edit. 1830); Kyd on Bills, ch. 5, p. 68 to 72 (3d edit.)

[3] Ibid.

[4] Ibid.; Anon. Comberb. R. 401; Powell *v.* Monnier, 1 Atk. 611; Moore *v.* Whitby, 1 Buller, N. Prius, 270; Chitty on Bills, ch. 7, p. 313 (8th edit. 1833); Collis *v.* Emmett, 1 H. Black 313; Billings *v.* Devaux, 3 Mann. & Grang. 565. — Where a person writes his name on a blank piece of paper, for the purpose of binding himself as Acceptor upon a Bill to be drawn thereon, he will, after the Bill is drawn, be deemed, to all intents and purposes, the Acceptor, in the same way, as if the Bill had been filled up, when he accepted it. Collis *v.* Emmett, 1 H. Black. 313.

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if he should write his name across the Bill on its face.[1]

§ 244. In like manner, words written on a separate paper or letter will amount to an acceptance, especially where they are written after notice, that the Bill has been drawn. Thus, a writing, containing a promise to accept an existing Bill, or, that "it shall meet with due honor," or, that the Drawee "will accept or certainly pay it," will amount to an acceptance.[2] And it will make no difference, whether the Bill had then arrived at maturity, or not; or whether the Holder knew of the letter, or not.[3] But, if the import of the language be equivocal, as, if it merely state, "Your Bill shall have attention," there it will not be held to be an acceptance.[4]

§ 245. The French Law seems coincident with ours, upon the subject of such implied acceptances. Thus, it is held, that the words written on the Bill, "*Accepté*," "*Je ferai honneur*," "*Je paierai*," "*J'acquitterai*," will amount to an acceptance of the Bill. And Pardessus is of opinion, that even the word "*Vu*," written on the Bill, ought to be considered as equivalent to the word "*Accepté*," when no other sense can be fairly attributed to the word, according to the usage of the place, where it is written.[5] Pothier speaks with far more hesitation;

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[1] Spear v. Pratt, 2 Hill, N. Y. R. 582.

[2] Bayley on Bills, ch. 6, § 1, p. 187, 188 (5th edit. 1830); Chitty on Bills, ch. 7, p. 317, 318 (8th edit 1833); Clark v. Cock, 4 East, R. 57; Fairlie v Herring, 3 Bing. R. 625; Pierson v. Dunlop, Cowp. R. 571; Wynne v. Raikes, 5 East, R. 514; 3 Kent, Comm. Lect. 44, p. 84 (4th edit.); Billings v. Devaux, 3 Mann. & Grang. 565; Grant v. Hunt, The Jurist, for 1845, Vol. 9, p. 228.

[3] Ibid.

[4] Chitty on Bills, ch. 7, p. 319 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 188 (5th edit. 1830); Rees v. Warwick, 2 Barn. & Ald. 113.

[5] Pardessus, Droit Comm. Tom. 2, art. 366; Chitty on Bills, ch. 7, p.

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and inclines to hold, that the word is too equivocal, at least, unless fortified by other attendant circumstances.[1]

§ 246. In respect to verbal acceptances, our law is, perhaps, still more comprehensive and liberal, in creating implied acceptances. They may be inferred from circumstances. Thus, if the Drawee say to the Holder, or his agent, "Leave the Bill, and I will accept it," it will amount to an acceptance.[2] So, saying, "Send the Bill to my counting-house, and I will give directions for its being accepted," if the Bill be sent.[3] So, saying, "Leave your Bill, and call for it to-morrow, and I will accept it," or, "it shall be accepted," will amount to an acceptance.[4] So, keeping a Bill, which is sent to the Drawee for acceptance, a considerable length of time, without returning any answer, may, under circumstances, be treated as an acceptance; especially if, when sent, the Drawee is informed, that his so keeping it, without returning any answer, will be deemed an acceptance.[5] But, as such conduct is

320 (8th edit. 1833); Pothier de Change, n. 43. See Jousse, sur L'Ord. 1673, art. 2, p. 71 to 73; Locré, Esprit du Code de Comm. Tom. 1, Liv. 1, tit. 8, § 1, art. 122, p. 407.

[1] Pothier de Change, n. 45.

[2] Bayley on Bills, ch. 6, § 1, p. 189, 190 (5th edit. 1830); Molloy, B. 2, ch. 10, § 20; Marius on Bills, p. 16, 17; Chitty on Bills, ch. 7, p. 326, 327 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 84, 85 (4th edit.).

[3] Bayley on Bills ch. 6, § 1, p. 190 (5th edit. 1830); Chitty on Bills, ch. 7, p. 327 to 329 (8th edit. 1833); Anderson v. Hicks, 3 Camp. R. 179.

[4] Molloy, B. 2, ch. 10, § 20. — Quære, if goods are consigned to a factor upon the express condition, that he will accept certain Bills drawn on him on account thereof, whether the receipt of the goods without any qualification is not an acceptance? See Allen v. Williams, 12 Pick. R. 297 An acceptance of one Bill, drawn by a party, is no proof of acceptance of another subsequent, where the same party overdraws. Parsons v. Armor, 3 Peters, R. 413.

[5] Bayley on Bills, ch. 6, § 1, p. 191 to 194 (5th edit. 1830); Harvey v.

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equivocal, unless circumstances of a stringent character, such as those above stated, occur, the mere keeping of the Bill will not be held to amount to an acceptance.[1] Upon the Continent of Europe, generally, the retention of a Bill for a long time, unexplained, is ordinarily deemed an acceptance.[2] But, in France, where a written acceptance is required, it follows, of course, that there can be no tacit acceptance, resulting from the Drawee's receiving and detaining the Bill.[3]

§ 247. On the other hand, no language used to a third person, who is not a party to a Bill, or his agent for the purpose, although it might otherwise import a verbal acceptance thereof, will be obligatory as such; for, to such verbal acceptance, there must be an assent on the part of the Holder; since, perhaps, in no case is he bound to take a verbal acceptance, but may always insist upon a written acceptance. Thus, if the Drawee should say to such third person, "I must ac-

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Martin, cited ibid., and 1 Camp. R. 425, note; Chitty on Bills, ch. 7, p. 324 (8th edit. 1833); Id. 325; Jeune v. Ward, 1 Barn. & Ald. 653, 656.

[1] Ibid.; Mason v. Barff, 2 Barn. & Ald. 26; Chitty on Bills, ch. 7, p. 326 to 329 (8th edit. 1833).

[2] Scaccia (de Comm. et Camb. fol. 383, § 336) says; "Subdeclara hanc declarationem in secundo ejus membro de tertio modo acceptandi litteras cambii per earum receptionem cum taciturnitate; ut possit procedere in litteris propriis cambii; cum recipiens litteras cum taciturnitate præsumatur confessus, seu approbasse omnia contenta in eis." And for this he cites many authorities. Jousse (Comm. sur l'Ord. 1673, art. 2, p. 73) held the same doctrine. Heineccius says; "Quæritur, an acceptatio etiam tacite fieri possit, quin et facta esse præsumatur? Hoc merito affirmandum eo casu, si quis litteras cambiales sibi ad acceptandum oblatas aliquamdiu penes se retineat, nec quidquam adversus illas moneat. Qui enim hoc modo tacet, is consentire in acceptationem videtur. Vid. Marquard. de Jure Mercator. lib. 3, cap. 9, num. 60, et Stryck. in Diss. de Cambial. Litterar. Acceptat. cap. 3, § 21." Heinecc. de Camb. cap. 4, § 28.

[3] Pothier de Change, n. 46; Code de Comm. art. 125.

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cept and pay the Bill," or, "I shall have to accept or pay it," that would not be an acceptance.[1]

§ 248. Whether the destruction of a Bill by the Drawee, without any other circumstances explaining the fact, will amount to an acceptance of the Bill, has been a matter of a good deal of forensic discussion, and upon which learned Judges have differed in opinion.[2] *In odium spoliatoris*, it might not be inequitable to hold this doctrine; but, unless other circumstances lead to the supposition, that the Bill had been, in fact, accepted, and was afterwards destroyed, there is some difficulty in maintaining the doctrine upon general principles.[3] The appropriate remedy seems to be of another character, as, for example, trover, for the destruction of the Bill.[4]

§ 249. In the next place, as to the acceptance of a non-existing Bill, or a Bill before it is actually drawn. As between the Drawer and the Drawee, a promise, or agreement, to accept a Bill, which should be afterwards drawn, has never been deemed an acceptance.[5] But, as between the Drawee and a third person, who has taken the Bill upon the faith of the promise to accept it, the doctrine was, for a long time, maintained in England, that it amounted to an acceptance of the

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[1] Martin *v.* Bacon, 2 South Car. R. 132. See Anderson *v.* Heath, 4 M. & Selw. 303; Peck *v.* Cochran, 7 Pick. R. 34; Mendizabal *v.* Machado, 6 Carr. & Payne, 219, 3 Moore & Scott, 841.

[2] Jeune *v.* Ward, 1 Barn. & Ald. 653; Bayley on Bills, ch. 6, § 1, p. 192, 193 (5th edit. 1830).

[3] Ibid.; Chitty on Bills, ch. 7, p. 325 (8th edit. 1833). But see Jousse, Comm. sur L'Ord. 1673, art. 2, p. 73.

[4] Ibid.

[5] Chitty on Bills, ch. 7, p. 311 to 313 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 172, 174, and note; Id. p. 186; Pillans *v.* Van Mierop, 3 Burr. R. 1663; Pierson *v.* Dunlop, Cowp. R. 573; Mason *v.* Hunt, Doug. R. 296.

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Bill. It admits of no small question, whether this rule now prevails in England in respect to such a Holder and the Drawee.[1] But the rule, as formerly held, always included the qualification, that the paper containing the promise, should describe the Bill to be drawn, in terms not to be mistaken, so as to identify and distinguish it from all others; that the Bill should be drawn within a reasonable time after the paper was written; and it should be received, by the person taking it, upon the faith of the promised acceptance; and, if either of these circumstances should fail, the promise would not amount to an acceptance. Under these qualifications, the rule seems to be firmly established in America upon the footing of the old authorities.[2] But the rule is applicable only to the cases of Bills payable on demand, or at a fixed time after date, and not to Bills payable at or after sight; for it is obvious, that, to constitute an acceptance in the latter cases, a pre-

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[1] Bayley on Bills, ch. 6, § 1, p. 186, 187 (5th edit. 1830); Chitty on Bills, ch. 7, p. 311, 312 (8th edit. 1833); Johnson *v.* Collings, 1 East, R. 98; Wildes *v.* Savage, 1 Story, Rep. 22; Ex parte Bolton, 3 Mont. & Ayrt. 367. In the Bank of Ireland *v.* Archer, Easter Term Exchequer, 1843, it was decided, that a promise to accept a non-existing Bill did not amount to an acceptance. See the Jurist (English) May 6, 1843, p. 379; S. C. 11 Mees. & Welsb. 383. But see Ulster County Bank *v.* McFarlan, 5 Hill, N. Y. R. 432. In the French Law, a promise, even in writing, to accept a non-existing Bill, never has the effect of an acceptance. The most, which can arise, is, that if the Bill, when drawn, is not accepted, the Drawer may, under certain circumstances, have an action for interest and damages. Pardessus, Droit Comm. Tom. 2, art. 362, 363, 367.

[2] Coolidge *v.* Payson, 2 Wheat. R. 66; S. C. 2 Gallis. R. 283; Goodrich *v.* Gordon, 15 Johns. R. 6; Parker *v.* Greele, 2 Wend. R. 345; S. C. 5 Wend. R. 414; McEvers *v.* Mason, 10 Johns. R. 207; 3 Kent, Comm. Lect. 44, p. 84, 85 (4th edit.); Wilson *v.* Clements, 3 Mass. R. 1; Storer *v.* Logan, 9 Mass. R. 55; Boyce *v.* Edwards, 4 Peters, R. 111; Schimmelpennick *v.* Bayard, 1 Peters, R. 264; Wildes *v.* Savage, 1 Story, R. 22; Williams *v.* Winans, 2 Greenl. R. 339; Carnegie *v.* Morrison, 2 Metc. R. 381, 406; Ogden *v.* Gillingham, 1 Baldwin, R. 45.

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sentment is indispensable since the time, that the Bill is to run, cannot otherwise be ascertained.[1]

§ 250. An acceptance may not only be made by the Acceptor's writing his name on a blank paper, so as to be filled up afterwards, which is binding as an acceptance,[2] and also by promise to accept a non-existing Bill (as has been already suggested), under other circumstances;[3] but it may be made after a Bill, drawn payable after a certain date, has become payable, and the time for payment has passed. In such a case the Bill will be payable on demand.[4] Even if a person at first refuse to accept, he may afterwards accept the Bill, and bind himself as Acceptor.[5] But, in such a case, if the Holder would bind the other parties, the Bill must have been duly protested for non-acceptance.[6] A Bill, drawn in the lifetime of the Drawer, may be accepted by the Drawee after the death of the Drawer, although he has knowledge of the fact; for it is not a revocation of the Bill in the possession of a *bonâ fide* Holder for value.[7]

§ 251. In the next place, as to the form or mode of acceptances in particular cases. In general, we have seen, that the acceptance made by any written words, showing a clear intent to accept, will be sufficient.[8]

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[1] Wildes *v.* Savage, 1 Story, R. 22. See Code de Comm. art. 122.

[2] Collis *v.* Emmett, 1 H. Black. 313. See 3 Kent, Comm. Lect. 44, p. 85, 86 (4th edit.).

[3] Ante, § 243.

[4] Chitty on Bills, ch. 7, p. 313 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 181 (5th edit. 1830); Jackson *v.* Pigot, 1 Ld. Raym. 364, Salk. 127, 12 Mod. R. 212, Carth. R. 450; Mitford *v.* Walcot, 1 Ld. Raym. 574, Salk. 129, 12 Mod. R. 410, Com. R. 75.

[5] Wynne *v.* Raikes, 5 East, R. 521.

[6] Chitty on Bills, ch. 7, p. 313, 314 (8th edit. 1833).

[7] Ibid. ch. 7, p. 309, 310; Cutts *v.* Perkins, 12 Mass. R. 206.

[8] Ante, § 243, 244. Heineccius, as to the form of acceptances, uses

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If the Bill be payable at or after sight, the date of the acceptance should also be regularly written on the same paper.[1] Where the Bill is drawn on a partnership, it should be accepted in the partnership name.[2] Where it is drawn on two or more persons, who are not partners, all of them should sign the acceptance; for an acceptance by one will not bind the others; and the Holder is entitled to the acceptance of all.[3] Where the Bill is accepted by an agent, he should accept it in the name of his principal, and not in his own name.[4] Where a Bill is drawn in sets, the Drawee should take care not to accept more than one part of the set; for, if he does, he may incur responsibility to different Holders upon each of the accepted parts.[5]

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the following language; "Exactor vel præsentans litteras cambiales ad se missas mature præsentat trassato, rogatque, ut istas velit honorare. Id si hic facere detrectet, protestatione opus est, de qua paullo post dicemus. Sin trassatus promittit, se soluturum, acceptatio formula hac litteris subjecta fieri solet: Ich acceptire und verspreche contente Bezahlung. Berlin den ..... Benjamin Semler. Aliquando institor pro domino acceptat tamquam mandatarius, idque fieri solet his similibusque verbis: Im Namen seines Patrons N. N. und in dessen Vollmacht verspricht contente Bezahlung N. N. Berlin den ..... Ceterum plerisque hodie locis prohibitæ sunt acceptationes, quæ fiunt per signa, e. gr. accept.; vel formulis, Ich habe es gesehen; ich acceptire, um in der Zeit zu antworten. Vid. Savary, in Negotiat. perfect. part 1, cap. 21, et Stryckius in Diss. de Cambial. Litterar. Acceptat. cap. 3, § 20 sequ." Heinecc. de Camb. cap. 4, § 26; Savary, Le Parfait Négociant, Tom. 1, Pt. 3, ch. 10, p. 839.

[1] Ante, § 242, 244.

[2] Ante, § 78. Chitty on Bills, ch. 7, p. 310, 321 (8th edit. 1833); Bayley on Bills, ch. 2, § 6, p. 53, 54 (5th edit. 1830); Mason v. Rumsey, 1 Camp. R. 384.

[3] Chitty on Bills, ch. 7, p. 310, 321 (8th edit. 1833); Id. ch. 2, p. 67; Bayley on Bills, ch. 2, § 6, p. 52 (5th edit. 1830); Molloy, B. 2, ch. 10, § 19; Marius on Bills, p. 16; Buller, Nisi Prius, 279; Pardessus, Droit Comm. Tom. 2, art. 367.

[4] Chitty on Bills, ch. 7, p. 321 (8th edit. 1833); Id. ch. 2, p. 37 to 39.

[5] Chitty on Bills, ch. 5, p. 176 (8th edit. 1833); Id. ch. 7, p. 314. — Heineccius, on this subject, says; "Qui plures ejus generis tesseras colly-

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§ 252. The effect of an acceptance, when once made, has been already stated. It is an engagement to pay the Bill according to the tenor of the acceptance.[1] When an acceptance is once made, if the Bill has been delivered to the Holder, the transaction is complete, and the acceptance is irrevocable. Before such delivery, however, it is, in general, revocable; and, although written, it may be cancelled by the Acceptor.[2] We say, in general; because it may be otherwise, where the Holder has, in the intermediate time, with the knowledge of the Acceptor, passed it to another person for value, who should take it upon the faith of the acceptance, with the consent of the Acceptor. But, although an acceptance, when thus made and delivered, is irrevocable, it may be waived by the parties by an agreement or consent, express or implied;

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bisticas habet, primam statim potest præsentare ad acceptandum, dum reliquæ per alia loca girentur. Acceptantis enim æque, ac trassantis, non interest, si vel maxime reliquæ per cessionem in alienas manus perveniant, quia non nisi ex una solvit, ex reliquis vero tum demum solutio exigi potest, si illa ex prioribus nondum sit præstita." Heinecc. de Camb. cap. 2, § 18.

[1] Ante, § 113; Pardessus, Droit Comm. Tom. 2, art. 376, 377; 3 Kent, Comm. Lect. 44, p. 85 (4th edit.); Pothier de Change, n. 44.

[2] Cox v. Troy, 5 Barn. & Ald. 474; 3 Kent, Comm. Lect. 44, p. 85 (4th edit.); Pardessus, Droit Comm. Tom. 2, art. 377; Pothier de Change, n. 44; 1 Emerig. des Assur. ch. 2, § 4, p. 45. — Before the decision of this case, the earlier authorities held, that an acceptance once written, if not by mistake, was irrevocable, at least, without the assent of the Holder. Bayley on Bills, ch. 6, § 1, p. 204 to 207 (5th edit. 1830); Thornton v. Dick, 4 Esp. R. 270; Trimmer v. Oddie, cited 6 East, R. 200; Bentinck v. Dorrien, 6 East, R. 199. Heineccius, on the subject of the irrevocability of acceptances, says; "Vidimus hactenus, protestationem hanc fieri tantum debere denegata acceptatione: ea vero facta acceptans abscisse tenetur ad præstandam solutionem. Quod adeo verum est, ut acceptans recedere, voluntatemque mutare nequeat, si vel maxime trassans interim foro cesserit, Stryk. Diss. de Cambial. Litterar. Acceptat. cap. 4, § 1, vel si in acceptatione erraverit." Heinecc. de Camb. cap. 4, § 38. See id. § 39; Savary, Le Parfait Négociant, Tom. 1, Pt. 1, ch. 10, p. 840, max. 3.

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for it is entirely competent for the Holder and the Acceptor to make what arrangements they please, after the acceptance of the Bill.[1] But, in all cases, the other parties to the Bill will be discharged from their responsibility, unless the waiver has been consented to by them. Cases of express waiver may readily be suggested; as, where the Holder agrees to consider an acceptance at an end;[2] or, he informs the Acceptor, that he has settled the Bill with the Drawer, and he need give himself no further trouble.[3] The receipt by the Holder of the very consideration, which, between himself and the Acceptor, constituted the ground of the acceptance, will also operate as an implied waiver of the acceptance.[4] So, an agreement to enlarge the time for payment of the Bill is an implied waiver of the right to require payment, except at the enlarged time.[5] But, generally, nothing but an actual payment or discharge will exonerate the Acceptor;[6] and length of time, at least, if short of the statute of limitations, will be no discharge. And, in general, as to the rights of the Holder, it will make no difference, in any of these respects, whether the Acceptor be an Acceptor for value, or an accommodation Acceptor.[7]

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[1] Bayley on Bills, ch. 7, § 1, p. 208 to 212 (5th edit. 1830); Black *v.* Peele, 1 Doug. R. 236, 237, 248, 249; Mason *v.* Hunt, 1 Doug. R 297; Farquhar *v.* Southey, 1 Mood. & Malk. 14.

[2] Walpole *v.* Pulteney, cited in Dingwall *v.* Dunster, 1 Doug. R. 248, 249.

[3] Black *v.* Peele, cited 1 Doug. R. 236, 237, 248, 249.

[4] Mason *v.* Hunt, 1 Doug. R. 284, 297.

[5] Ellis *v.* Galindo, cited 1 Doug. R. 250, note.

[6] Farquhar *v.* Southey, 1 Mood. & Malk. 14; Bayley on Bills, ch. 6, § 1, p. 210, 211 (5th edit. 1830); Adams *v.* Gregg, 2 Stark. R. 531; Dingwall *v.* Dunster, 1 Doug. R. 235, 247.

[7] Bayley on Bills, ch. 6, § 1, p. 212 to 214 (5th edit. 1830); Raggett *v.* Axmore, 4 Taunt. R. 730; Fentum *v.* Pocock, 5 Taunt. R. 192;

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§ 253. Indeed, it may be laid down, as a general rule, that a *bonâ fide* Holder for value is entitled to the same rights and remedies against an accommodation Acceptor, as he is against an Acceptor for value, although he knows, that it is an accommodation acceptance.[1] Other circumstances, however, may intervene to modify or change his rights; as, for example, if he knows, that the acceptance has been for a particular purpose, and that that purpose has been accomplished, he cannot retain or apply the Bill to any other purpose; and the acceptance is discharged.[2] So, where a Bill is accepted for the mere accommodation of the Drawer, or other Holder, it is obvious, that such person can have no claim upon the Acceptor under the acceptance; for, as between them, no value exists or has passed.[3]

§ 254. There cannot be a series of successive Acceptors upon the same Bill. It must be accepted by the original Drawee, or by the Drawee *au besoin*, or by a third person for honor, or, where the Bill states no Drawee, by a person in that character. But, whenever accepted in either way, the party so accepting, and he only, is liable as Acceptor.[4] If any other

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Kerrison *v.* Cooke, 3 Camp. R. 362; Anderson *v.* Cleveland, 13 East, 430, note.

[1] Chitty on Bills, ch. 3, p. 82; Id. ch. 7, p. 334 to 336 (8th edit. 1833); Smith *v.* Knox, 3 Esp. R. 46; Fentum *v.* Pocock, 5 Taunt. R. 192; 3 Kent, Comm. Lect. 44, p. 86 (4th edit.); Bank of Ireland *v.* Beresford, 6 Dow, R. 233; Townsley *v.* Sumrall, 2 Peters, R. 173, 182. — Pardessus says, that a Drawee, who accepts without having value, or funds, is said to acccept *à découvert*. Pardessus, Droit Comm. Tom. 2, art. 380.

[2] Ibid.; Cartwright *v.* Williams, 2 Stark. R. 340; Fletcher *v.* Heath, 7 Barn. &. Cressw. 517.

[3] Ibid.; Chitty on Bills, ch. 3, p. 82 (8th edit. 1833); Sparrow *v.* Chisman, 9 Barn. & Cressw. 241.

[4] Chitty on Bills, ch. 7, p. 311 (8th edit. 1833); Jackson *v.* Hudson, 2 Camp. R. 447; Bayley on Bills, ch. 6, § 1, p. 177, 178 (5th edit. 1830). See Moies *v.* Bird, 11 Mass. R. 436.

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person subsequently accepts the Bill, for the purpose of guarantying its credit, in the usual form of an acceptance, there, if there is a sufficient consideration, he may be bound thereby as a Guarantor; but he is not liable as an Acceptor.[1]

§ 255. Where the original Drawee, and the Drawee *au besoin*, if any, refuse to accept the Bill, it is competent for any third person (as we have already seen)[2] to accept the Bill for the honor of any one, or more, or all of the antecedent parties on the Bill, whether Drawers, or Indorsers; and, in that case, it enures to the benefit of all the parties subsequent to the person, for whose honor it is accepted.[3] But this is at the election of the Holder, who is in no case bound to take an acceptance *supra protest* for honor, and may take it, or refuse it at his pleasure.[4] There are two

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[1] Ibid.; Hoare *v.* Cazenove, 16 East, R. 391; Williams *v.* Germaine, 7 Barn. & Cressw. 468; Ante, § 122.

[2] Ante, § 121 to 124; Chitty on Bills, ch. 2, p. 30 (8th edit. 1833); Id. ch. 8, § 2, 3, p. 374 to 376.

[3] Bayley on Bills, ch. 6, § 1, p. 176, 177 (5th edit. 1830). See Pothier de Change, n. 50, 113, 114; 3 Kent, Comm. Lect. 44, p. 87, 88 (4th edit.); Ante, § 121 to 124.

[4] Chitty on Bills, ch. 8, p. 376 (8th edit. 1833); Mitford or Mutford *v.* Walcot, 12 Mod. R. 410; S. C. 1 Ld. Raym. 575 — Heineccius takes notice of a similar usage on the continent of Europe. He says; "Aliquando cambiis accedunt litteræ commendatitiæ, quæ mercatoribus vocantur, eine Addresse, vel eine Notiz, et nihil aliud sunt, quam litteræ, quibus tertius paucioribus verbis rogatur, ut, si forte is, cui injuncta est solutio, acceptare cambium recuset, ipse præstet solutionem honorariam. Hæ litteræ separatæ schedulæ inscribi, et acu cambialibus litteris adnecti solent. Negante ergo acceptationem eo, cui illa injuncta est, exactor vel præsentans, prævia protestatione, litteras cambiales una cum commendatitiis offert tertio, cui commendatus est, eumque rogat, ut in honorem litterarum solvere velit. Quum vero commendatio alterum numquam obstringat: consequens est, ut et commendatitiæ hæ litteræ non obligent tertium ad solutionem præstandam. Quin ne declarare quidem voluntatem suam tenetur ante diem solutionis. Vid. Phoonsen. in Stil. camb. Amstelod. cap. 24, § 4. Denique observandum, denegata solutione vel acceptatione, protestationem

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cases (as we have also seen)[1] in which an acceptance for honor may be made; the first (which is the most usual case) is, where the Drawee refuses to accept the Bill; the second is, where, after acceptance, and before the maturity of the Bill, the Acceptor absconds, or becomes a bankrupt, or insolvent.[2] In the former case, the Holder is bound to protest the Bill for non-acceptance, and give notice thereof, if he means to bind the Drawer or prior Indorsers; and the protest is called a protest for non-acceptance. In the other case, he may protest the Bill at his pleasure, but he is not bound to do so; for, if he neglects to make this protest, it will not affect his remedies against the prior parties, either Drawers or Indorsers.[3] This protest is called a protest for better security.[4]

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fieri debere sumptibus trassantis, vid. O. C. Hamburg. art. 28; idque etiam necessarium videri doctoribus plerisque, quamvis dissentiat Franckius." Heinecc. de Camb. cap. 3, § 31, 32.

[1] Ante, § 121 to 124. Post, § 258.

[2] Chitty on Bills, ch. 8, § 2, p. 374 to 376 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 176, 177 (5th edit. 1830).

[3] Ibid.; Ex parte Wackerbath, 5 Ves. 574. See Beawes, Lex Merc. by Chitty, Vol. 1, p. 24, pl. 26 to 30, p. 566, 567 (edit. 1813).

[4] Ibid. Mr. Chitty, upon this subject, says; "The custom of merchants is stated to be, that, if the Drawee of a Bill of Exchange abscond before the day when the Bill is due, the Holder may protest it, in order to have better security for the payment, and should give notice to the Drawer and Indorsers of the absconding of the Drawee; and, if the Acceptor of a foreign Bill become bankrupt before it is due, it seems, that the Holder may also in such case protest for better security; but the Acceptor is not, on account of the bankruptcy of the Drawer, compellable to give this security. The neglect to make this protest will not affect the Holder's remedy against the Drawer and Indorsers, and its principal use appears to be, that, by giving notice to the Drawers and Indorsers of the situation of the Acceptor, by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the Bill when due, and thereby prevent the loss of reëxchange, &c., occasioned by the return of the Bill. It may be recollected, that, though the Drawer or Indorsers refuse to give better security, the Holder must, nevertheless, wait till the

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§ 256. Such an acceptance for the honor of a party, or of parties, is allowable, however, only when the Bill has been refused acceptance by the Drawee, and has been protested therefor, or has been protested for better security, and not before ;[1] and hence it is called an acceptance *supra protest*, in our law ;[2] in France it is called an acceptance *par intervention*.[3] The reason seems to be, that the Drawer and Indorsers have a right to say, that the Bill was not primarily drawn on the Acceptor for honor ; and the only proper proof of the refusal of the original Drawee is by a protest, that being the known instrument, by the custom of merchants, to establish the fact.[4] Nor is this alone sufficient ; for the Acceptor for honor must also state, in his acceptance, for whose honor he accepts, as his rights against the antecedent parties may be essentially affected thereby ; for, if the Acceptor for honor shall afterwards pay the Bill, he will be entitled to recourse for repayment to the person, for whose honor he made the acceptance, and to all other parties, who are

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Bill be due, before he can sue either of those parties." Chitty on Bills, ch. 8, § 2, p. 374. See also Marius on Bills, p. 21, 27, 28 ; Beawes, Lex Merc. by Chitty, Vol. 1, pl. 24 to 26, 29, 30 (edit. 1813) ; Kyd on Bills, p. 139 (3d edit.) ; Anon. 1 Ld. Raym. 743 ; Com. Dig. *Merchant*, F. 8.

[1] Chitty on Bills, ch. 8, § 3, p. 375, 397 (8th edit. 1833) ; Marius on Bills, p. 21, 22 ; Com. Dig. *Merchant*, F. 8 ; Hoare *v.* Cazenove, 16 East, R. 391, 396, 397 ; Bayley on Bills, ch. 6, § 1, p. 180 (5th edit. 1830) ; 3 Kent, Comm. Lect. 44, p. 87, 88 (4th edit.) ; Beawes, Lex Merc. by Chitty, Vol. 1, p. 38, 568 (edit. 1813) ; Brunetti *v.* Lewin, Lutw. R. 896 ; Pardessus, Droit. Comm. Tom. 2, art 383 ; Pothier de Change, n. 114 ; Heinecc. de Camb. cap. 6, § 9.

[2] Ibid. ; Ante, § 121 to 124.

[3] Chitty on Bills, ch. 8, § 3, p. 375 (8th edit. 1833) ; Code de Comm. art. 126 ; Pardessus, Droit Comm. Tom. 2, art. 383 ; 3 Kent, Comm. Lect. 44, p. 87 (4th edit) ; Savary, Le Parfait Négociant, Tom. 1, Pt. 3, Liv. 1, ch. 9, p. 835 to 839.

[4] Marius on Bills, p. 21, 22. See Pardessus, Droit Comm. Tom. 2, art. 383.

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liable to that person.[1] Hence, if he accepts for the honor of the Drawer only, he will, in general, have no right of recourse against the Indorsers; and if for the honor of an Indorser, he will have no right of recourse against any subsequent Indorser; unless, indeed, such person, for whose honor he accepts the Bill, might have such right of recourse against either; as, for example, if he were an accommodation Drawer or Indorser.[2]

§ 257. The like doctrine (as to a protest, and naming the party, for whose honor the Bill is accepted) seems to prevail in the Law of France,[3] and, generally, on the Continent of Europe. Heineccus says; *Cæterum commune id habent utraque cambia, quod aliquando a tertio, qui in cambio non est nominatus, solvantur. Quum enim sæpenumero contingat, ut is, ad quem cambium dirigitur, acceptationem deneget, tertius vero, trassantis amicus, illud sponte et ultro acceptet: Hæc acceptatio vocatur in honorem litterarum. Eaque non aliter fieri potest, quam* (1) *interposita a præsentate protestatione, et* (2) *expresso ejus nomine, cujus in honorem acceptatio facta sit.*[4] But in France, by the old law, the rights of the Acceptor for honor do not seem to have been as limited as in our law; at least, Pothier informs us, that such an Acceptor, upon payment, not only has a right of recourse to the person,

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[1] Ante, § 121 to 124, 255; Bayley on Bills, ch. 6, § 1, p. 176 to 178 (5th edit. 1830); Chitty on Bills, ch. 8, p. 382 (8th edit. 1833); Pothier de Change, n. 113; Ex parte Wackerbath, 5 Ves. 574; Beawes, Lex Merc. by Chitty, Vol. 1, pl. 47, 49, p. 569 (edit. 1813); Forbes on Bills, p. 149, cited in Chitty on Bills, ch. 8, § 3, p. 377, note (*f*); 3 Kent, Comm. Lect. 44, p. 87 (4th edit.); Konig *v.* Bayard, 1 Peters, R. 250.

[2] Ibid.; Ante, § 123, 124.

[3] Pothier de Change, n. 112 to 114; Code de Comm. art. 126 to 128; Pardessus, Droit Comm. Tom. 2, art. 383, 405.

[4] Heinecc. de Camb. cap. 2, § 16; Id. cap. 6, § 9.

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for whose honor he accepted; but he is also subrogated, under the Ordinance of 1673, to all the rights of the Holder of the Bill, at the time he pays it, against all other persons, who are liable to him thereon.[1] The modern French Law, however, seems to contain the same limitations as ours, and confines the remedy of the Acceptor for honor to the parties, for whom he accepts, and those, who are liable to him.[2]

§ 258. Where a bill is accepted *supra protest*, for the honor of a particular party, it would seem, by our law, that, if the Holder takes the acceptance, he is not at liberty to sue that party before the maturity of the Bill, and its dishonor by such Acceptor. But there seems no reason, why he may not, having given due notice, sue the other parties to the Bill, or, at least, the other prior parties to the Bill, who could have no recourse against the person, for whose honor the Bill is accepted. And, if the acceptance *supra protest* is generally for the honor of the Bill, or of all the parties upon the Bill, it would seem, that, in such case, the Holder would not be at liberty to sue any of the parties before the maturity and dishonor thereof; for that would defeat the whole object of the Acceptor *supra protest*.[3] But, according to the French Law, the Holder of the Bill retains all his rights against the Drawer and the Indorsers, on account of the non-acceptance by the person, on whom the Bill was drawn, notwithstanding any acceptance *supra protest*.[4]

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[1] Pothier de Change, n. 114; Jousse, sur l'Ord, 1673, tit. 5, art. 3, p. 75, 76 (edit. 1802.).

[2] Code de Comm. art. 159; Locré, Esprit du Code de Comm. Tom. 1, tit. 8, art. 159, p. 497, 498; Pardessus, Droit Comm. Tom. 2, art. 407.

[3] Chitty on Bills, ch. 8, § 3, p. 375, 378 (8th edit. 1833).

[4] Code de Comm. art. 128.

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Hence, the Holder has a right to require from the Drawer and Indorsers, either reimbursement of the amount, or security for the due payment thereof.[1]

§ 259. We have said, that an acceptance for honor, or *supra protest*, may be made by any third person. But, by our law, it may also be made by the Drawee; if he does not choose to accept the Bill, drawn generally, on account of the person, in whose favor, or on whose account, he is advised it is drawn, he may accept it for the honor of the Drawer, or of the Indorsers, or of all or of any of them.[2] The old French Law, in like manner, allows the Drawee to refuse acceptance of the Bill generally, and yet to accept it for the honor of any of the other parties, except the Drawer.[3] But the modern Commercial Code of France limits the right of acceptance for honor, or *supra protest*, to some third person, not a party to the Bill.[4] Whenever, in any case, a person accepts for honor, or *supra protest*, it is his duty, by the French Law, immediately to notify the fact to the person, for whose honor he accepts it.[5] The like rule seems to prevail in our law.[6]

§ 260. We have already seen,[7] that, after one ac-

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[1] Pardessus, Droit Comm. Tom. 2, art. 382, 387; Chitty on Bills, ch. 8, § 3, p. 375, 376 (8th edit. 1833).

[2] Chitty on Bills, ch. 8, § 3, p. 375 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 1, pl. 33, 34, p. 568 (edit. 1813); Bayley on Bills, ch. 6, § 1, p. 176, 177 (5th edit. 1830).

[3] Pothier de Change, n. 112.

[4] Code de Comm. art. 126; Pardessus, Droit Comm. Tom. 2, art. 384; Commercial Code, art. 387; Chitty on Bills, ch. 8, § 3, p. 375, note (8th edit. 1833).

[5] Code de Comm. art. 127; Pardessus, Droit Comm. Tom. 2, art. 386.

[6] Chitty on Bills, ch. 8, § 3, p. 375 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 2, pl. 33, 34, p. 368 (edit. 1813).

[7] Ante, § 122, 254.

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ceptance, completely made and perfected by the Drawee, no second person can intervene, and, by a subsequent acceptance, charge himself as Acceptor, although he may as Guarantor. But the like rule does not apply in cases of an acceptance *supra protest*, or for honor, to the same extent; for, although there cannot be more than one acceptance for the honor of any one party to the Bill, yet there may be a succession of acceptances for the honor of different parties. Thus, for example, one person may accept the Bill for the honor of the Drawer, another for the honor of the first Indorser, and another for the honor of the second Indorser, and so on.[1]

§ 261. The obligations, resulting from a general acceptance, have been already considered in another

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[1] Chitty on Bills, ch. 8, § 3, p. 376 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 1, pl. 42, p. 569 (edit. 1833); 2 Camp. R. 448, note. — The method of accepting *supra protest* is said, by Mr. Chitty, to be as follows. "The Acceptor must personally appear before a notary public with witnesses, and declare, that he accepts such protested Bill in honor of the Drawer or a particular named Indorser, or generally for honor, and that he will satisfy the same at the appointed time; and then he must subscribe the Bill with his own hand, thus; 'Accepted, *supra protest*, in honor of J. B.'; or, as is more usual, 'Accepts, S. P.'; and sometimes it is, 'Accepted under protest, for honor of Messrs. ——, and will be paid for their account, if regularly protested and refused when due.' A general acceptance *supra protest* is considered as made for the honor of the Drawer, unless otherwise expressed. Such acceptance, however, may be so worded, that, though it be intended for the honor of the Drawer, yet it may equally bind the Indorser; but, in this case, notice of such acceptance must be sent to the latter. If there be several offers of acceptance for honor, that which is most extensive should, it is said, be preferred. The Holder, as well as the Acceptor *supra protest*, should always take care to have the Bill protested for non-acceptance before the acceptance for honor is made, as otherwise, it is said, the Drawer might allege, that he did not draw on the person making the acceptance; and the Acceptor *supra protest* might not be able to recover from the Drawer the money he might pay." Chitty on Bills, ch. 8, § 3, p. 377, 378 (8th edit. 1833). See also Code de Comm. art. 126; Pardessus, Droit Comm. Tom. 2, art. 385.

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place.[1] They are, on the part of the Acceptor, to pay the Bill, upon presentment, at its maturity, or at any time afterwards, according to its tenor, to the Holder. The obligations of an acceptance for honor, or *supra protest*, are not (as has been already stated)[2] exactly coincident with the former; for, whereas the obligations of a general acceptance are absolute, those of an acceptance for honor, or *supra protest*, are conditional; to wit, that the Acceptor will pay the Bill, if duly presented to the original Drawee for payment, at the time of its maturity, and he refuses payment, and due protest is made thereof, and due notice is given to him of the dishonor.[3] All these acts must be punctually done, or the Acceptor will be discharged.[4] Pothier affirms the like doctrine as the law of France;[5] and Heineccius states it, without any distinction between cases, where the Bill is to be protested for non-acceptance, and cases, where it is protested for non-payment.[6]

§ 262. There is another collateral consideration resulting from an acceptance, which ought to be mentioned in this place. It is, 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 *bonâ fide* Holder for value without notice, if the

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[1] Ante, § 113.

[2] Ante, § 123.

[3] Ante, § 123; Chitty on Bills, ch. 8, § 3, p. 378 to 381 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 178, 179 (5th edit. 1830); Hoare *v.* Cazenove, 16 East, R. 391; Williams *v.* Germaine, 7 Barn. & Cressw. 468.

[4] Ibid.

[5] Pothier de Change, n. 113.

[6] Heinecc. de Camb. cap. 6, § 9; Ante, § 257.

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signature of the Drawer turns out to be a forgery, the acceptance will, nevertheless, be binding, and entitle such Holder to recover thereon according to its tenor.[1] But there is no such implied admission, on the part of the Acceptor, of the genuineness of the signature of the Payee, or of any other Indorser;[2] and consequently, the Holder, in order to recover against the Acceptor upon the Bill, must establish, by proofs, the genuineness of their signatures, in order to make title thereto, although he need not prove the genuineness of that of the Drawer. And this is equally true even in case the Bill is, or purports to be, drawn by the Drawer, payable to his own order, and purports to be indorsed by him; for still the genuineness of the indorsement must be proved against the Acceptor; unless, indeed, at the time of his acceptance, he knew the indorsement to be a forgery, and intended, that the Bill should be put in circulation by a forged

[1] Ante, § 113; Bayley on Bills, ch. 8, p. 318, 319 (5th edit. 1830); Id. ch. 11, p. 462, 463, 479; Chitty on Bills, ch. 7, p. 336, 337 (8th edit. 1833); Id. ch. 8, p. 376; Id. Pt. 2, ch. 5, p. 628; Wilkinson *v.* Lutwidge, 1 Str. R. 648; Cooper *v.* Le Blanc, 2 Str. 1051; Leach *v.* Buchanan, 4 Esp. R. 226; Price *v.* Neale, 3 Burr. 1354; Smith *v.* Chester, 1 Term R. 655; Bass *v.* Clive, 4 M. & Selw. 15; Smith *v.* Mercer, 6 Taunt. R. 76; Wilkinson *v.* Johnson, 3 Barn. & Cressw. 428; Free *v.* Hawkins, Holt, N. P. Rep. 550; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. Rep. 287; Bank of U. States *v.* Bank of Georgia, 10 Wheat. R. 333; S. P. Canal Bank *v.* Albany Bank, 1 Hill, N. Y. R. 287; Saunderson *v.* Collman, 4 Scott, R. 638.

[2] Chitty on Bills, Pt. 2, ch. 5, p. 628, 629, 635 (8th edit. 1833); Bayley on Bills, ch. 11, p. 464, 465, 479, 480, 483 (5th edit. 1830); Hemmings *v.* Robinson, Barnes's Notes, 436 (3d edit.); Gray *v.* Palmer, 1 Esp. R. 125; M'Ferson *v.* Thoytes, Peake, R. 20; Bosanquet *v.* Anderson, 6 Esp. R. 43; Robinson *v.* Yarrow, 7 Taunt. R. 455; Smith *v.* Chester, 1 Term R. 654; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. Rep. 287; Ante, § 113, 225; Beeman *v.* Duck, 11 Mees. & Welsb. 251, 255.

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indorsement.[1] In like manner, an acceptance 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.[2]

§ 263. The reason of this distinction between the case of a Drawer and that of an Indorser, as to the genuineness of their signatures, is not very apparent, since it applies equally to an Indorser, whether the Bill has been accepted before or after his indorsement.[3] The reason, however, usually assigned, is, that, when the Bill is presented for acceptance, the Acceptor only looks to the handwriting of the Drawer, with which he is presumed to be acquainted, and he affirms its genuineness, by giving credit to the Bill by his acceptance, in favor of the legal Holder thereof. But the Acceptor cannot be presumed to have any such knowledge of the handwriting of the Indorsers, and, therefore, ought not to be presumed to admit it.[4] It is true, that, in one sense, every Indorser is treated as a new Drawer to the Bill; but that is not so as to the Acceptor, but only as to the subsequent Indorsees under the

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[1] Beeman *v.* Duck, 11 Mees. & Welsb. 251, 255.

[2] Chitty on Bills, Pt. 2, ch. 5, p. 629, 630 (8th edit. 1833); Robinson *v.* Yarrow, 7 Taunt. R. 455; Allport *v.* Meek, 4 Carr. & Payne, R. 267; Bayley on Bills, ch. 8, p. 318, 319; Id ch. 11, p. 463, 464 (5th edit. 1830); Id. ch. 2, p. 45; Taylor *v.* Croker, 4 Esp. R. 187.

[3] Bayley on Bills, ch. 11, p. 464, 465 (5th edit. 1830); Smith *v.* Chester, 1 Term R. 654.

[4] See Price *v.* Neale, 3 Burr. R. 1354; Smith *v.* Chester, 1 Term R. 655; Robinson *v.* Yarrow, 7 Taunt. R. 455; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. Rep. 287.

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Indorser; for the Acceptor is, ordinarily, a perfect stranger to the Indorsers, and, upon payment of the Bill, has no right of recourse against any of them, at least, if he is not an accommodation Acceptor on their account, and at their request.

§ 264. The same doctrine is laid down by Pothier, as to the acceptance of the Bill being an admission of the genuineness of the signature of the Drawer, which binds him to the payment thereof in favor of a *bonâ fide* Holder for value without notice; although the Acceptor cannot recover over the amount from the Drawer, since he has never authorized the payment;[1] a doctrine of common justice, equally supported by our law, as well as the foreign law.[2] The same doctrine is affirmed by Scaccia,[3] and by Pardessus.[4]

§ 265. Having stated the general obligations and effects of an acceptance, let us, in the next place, consider, how the right of the Holder to enforce the same may be waived, or discharged, or extinguished. And this may be (1) by mere operation of law; or (2) by the express or implied waiver or agreement of the parties; or (3) by payment of the Bill; or (4) by a release. First, in regard to a discharge by mere operation of law. This takes place, whenever the Acceptor is duly discharged therefrom by virtue of the laws of the country, where the acceptance is made. Thus, for example, if the Acceptor should become a bankrupt, and should be discharged from his acceptance under the laws of the country, or should be discharged by the statute of limitations of that country.[5]

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[1] Pothier de Change, n. 103.

[2] Ibid.; Bayley on Bills, ch. 8, p. 318 to 320 (5th edit. 1830).

Scaccia de Comm. § 2, Gloss. 5, Quest. 15, pl. 393 to 396, p. 390.

[4] Pardessus, Droit Comm. Tom. 2, art. 378, 449 to 451.

[5] Ante, § 161 to 163.

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So, where, by the laws of the country, where the acceptance is made, if the Drawer fails, and the Acceptor has not sufficient effects of the Drawer in his hands at the time of the acceptance, he is discharged therefrom, that discharge will be held valid, and of equal obligation, everywhere.[1]

§ 266. Secondly. In respect to a discharge by the waiver or agreement of the parties. The general rule of our law is, that a simple contract (that is, a contract not under seal) may, previously to a breach thereof, be discharged by mere parol, or by a waiver of the rights, accruing under it.[2] But after it is broken, it can only be discharged by payment, or by a release, (that is, a discharge under seal,) or by taking some collateral thing in satisfaction, or by merger by operation of law, as by a judgment, or taking a higher security.[3] But, in cases of Bills of Exchange, and other negotiable instruments, the rule does not prevail to the same extent; but, for the convenience of commerce, it is greatly relaxed and modified. A discharge may be by any agreement between the parties, founded upon a sufficient consideration, and collateral to the payment of the money; and it may be express, or it may be implied from circumstances.[4] In the latter case, a

[1] Chitty on Bills, ch. 7, p. 339 (8th edit. 1833); Burrows v. Jemimo, 2 Str. R. 733; S. C. 2 Eq. Abridg. 524; Select Cases in Chan. 144; Story on Conflict of Laws, § 333; Ante, § 158, 164.

[2] Chitty on Bills, ch. 7, p. 339 to 342 (8th edit. 1833); Milward v. Ingram, 2 Mod. R. 43, 44; Com. Dig. *Action on the Case, Assumpsit*, G.

[3] Ibid.; Edwards v. Weeks, 2 Mod. R. 259; Langden v. Stokes, Cro. Car. 483; Heathcote v. Crookshanks, 2 Term R. 24; Kearslake v. Morgan, 5 Term R. 514; Com. Dig. *Action on the Case, Assumpsit*, G.

[4] Chitty on Bills, ch 7, p. 339 to 341 (8th edit. 1833); Id. ch. 9, p. 446 to 448; Bayley on Bills, ch 6, § 1, p. 208 to 213 (5th edit. 1830); Ellis Galindo, 1 Doug. R. 250, note; Dingwall v. Dunster, 1 Doug. R. 247; Anderson v. Cleveland, 13 East, R. 430, note.

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clear intention to discharge, or a clear renunciation of all claim against the Acceptor, must be established; for mere delay or omission to demand payment from him, not coupled with any other circumstances or consideration, will not be sufficient.[1] But, where the renunciation is clear, and the intention to discharge unquestionable, there, if there be a sufficient consideration, or an act done on the part of the Acceptor, which might not otherwise have been done, which affects his interests, the Acceptor will be discharged.[2] Thus, where the Holder, knowing that the Acceptor was an accommodation Acceptor, and possessing goods of the Drawer, from the produce of which he expected payment, told the Acceptor and his creditors, that he should look to the Drawer, and not come upon the Acceptor; and, in consequence, the Acceptor assigned his property for the benefit of his creditors; it was held, that, if, by the facts, an unconditional renunciation was established, it was a discharge of the Acceptor, although the goods, in the possession of the Holder, proved to be of little value, and the Drawer was insolvent; but, if a conditional renunciation only, namely, if the Holder were otherwise satisfied, then it was not.[3]

§ 267. For the most part, cases of waiver depend upon similar considerations, and result from express or implied agreements.[4] But they are not necessarily of

[1] Ibid.; Farquhar *v.* Southey, 1 Mood. & Malk. 14; S. C. 2 Carr. & Payne, 497; Adams *v.* Gregg, 2 Stark. R. 531.

[2] Ibid.

[3] Whatley *v.* Tricker, 1 Camp. R. 35; Parker *v.* Leigh, 2 Starkie, 229.

[4] Bayley on Bills, ch. 6, § 1, p. 208 to 213 (5th edit. 1830); Chitty on Bills, ch. 7, p. 333, 334, 339 to 344 (8th edit. 1833); Id. ch. 9, p. 446 to 449.

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this character. On the contrary, wherever the conduct of the Holder towards the Acceptor operates as a fraud upon him, or misleads him to his injury, or lulls him into a false security, as to his rights or remedies against the Drawer, or against any other party, who would be responsible to him upon payment of the Bill; there, it should seem, that the common principles of a Court of Equity are applied to the case, *ex æquo et bono*, and the Acceptor will be deemed exonerated, by such conduct, from all responsibility. Thus, for example, if the Holder, knowing that the Acceptor, being an accommodation Acceptor, had taken security for the amount of the Bill, or, having funds in his hands, should falsely state to him, that the Bill was paid, or otherwise discharged, and thereby the Acceptor should be induced to give up his security or funds, the proceeding would be treated, in Equity, as a fraud upon the Acceptor, and a waiver of the rights of the Holder against him, if he should afterwards attempt to enforce the acceptance. So, where the Holder had positively agreed to consider the acceptance at an end, and had entered in his own Bill-book, "Mr. P.'s (the Acceptor) acceptance annulled," and he lay by, and made no demand on the Acceptor for three years; it was held, that the acceptance was waived and discharged.[1] So, where the Holder arrested the Acceptor, and, finding that the acceptance was an accommodation one for the Drawer, his attorney took security from the Drawer, and sent a message to the Acceptor, that he had settled with the Drawer, and he need not trouble himself any further; and the Drawer having afterward become

[1] Walpole *v.* Pulteney, 1 Doug R. 248, 249; Bayley on Bills, ch 6, § 1, p. 208, note (80) (5th edit. 1830).

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bankrupt, the Holder sought to recover from the Acceptor; it was held, that the acceptance was waived and discharged.[1]

§ 268. But, inasmuch as the Acceptor is, as to the Holder, to be deemed the primary debtor, and the other parties to the Bill, as only secondarily liable, it seems clear, that merely taking security from the other parties, or giving them further time to pay the Bill, will not discharge the Acceptor, whether he be an accommodation Acceptor, or an Acceptor for value.[2]

§ 269. In respect to a discharge by payment, or by satisfaction, or by a release; it is plain, that a payment, or satisfaction by the Acceptor to a Bill discharges it, as to all the other parties; for the Holder cannot be entitled to a double compensation.[3] And it must, in such a case, be wholly immaterial, whether the acceptance be an accommodation acceptance, or one for value; for, in each case, so far as the Bill is concerned, the Acceptor is the party primarily liable, and all the others stand only as collaterally liable for the payment.[4] Payment, also, by any one of several

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[1] Black *v.* Peele, cited 1 Doug. R. 248, 249; Bayley on Bills, ch. 6, § 1, p. 208, note (81) (5th edit. 1830); Chitty on Bills, ch. 7, p. 333, 334, 339 to 341 (8th edit. 1833).

[2] Bayley on Bills, ch. 6, § 1, p. 212 to 214 (5th edit. 1830); Id. ch. 9, p. 338 to 345; Chitty on Bills, ch. 7, p. 333, 334, 339 to 341, 344, 345 (8th edit. 1833); Id. ch. 9, p. 446, 447; Id. p. 452, 453; Raggett *v.* Axmore, 4 Taunt. R. 730; Fentum *v.* Pocock, 5 Taunt. R. 192; Kerrison *v.* Cooke, 3 Camp. R. 362; Ellis *v.* Galindo, 1 Doug. R 247, note; Mallet *v.* Thompson, 5 Esp. R. 178; Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652; Bank of Ireland *v.* Beresford, 6 Dow, R. 233; Price *v.* Edwards, 10 Barn. & Cressw. 584; Harrison *v.* Courtauld, 3 Barn. & Adolph. 36; Nichols *v.* Norris, 3 Barn. & Adolph. 41, note. — Laxton *v.* Peat (2 Camp. 185) is to the contrary; but, as Lord Tenterden said, in Yallop *v.* Ebers (1 B. & Adolph. 703), it has been long overruled.

[3] See Code de Comm. art. 156.

[4] Wallace *v.* M'Connell, 13 Peters, R. 615.

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joint Acceptors, or by any one partner of the acceptance of a firm, will discharge all the Acceptors.[1] Payment by any of the other parties to the Bill does not discharge the Acceptor, unless it is so intended by the parties; but it merely operates to transfer to the party, so paying, the right to recover the amount from the Acceptor, unless the latter be an accommodation Acceptor for such party. The same principles apply, generally, to cases of release. A release of the Acceptor, by the Holder, extinguishes all right of recovery upon the Bill, not only against the Acceptor, but against all the antecedent parties.[2] So, a release of one of the Acceptors releases all the rest; for it amounts to an extinguishment of the debt created by the acceptance.[3]

§ 270. Pothier has put the case of the Holder's releasing the whole or a part of the amount of the Bill of Exchange to the Drawer, and says, that, in such a case, it will release the Acceptor, to the like amount, from any payment of the Bill, where he is an Acceptor without funds of the Drawer in his hands. He seems to deduce this conclusion from the presumed intention of the Drawer, who would otherwise be responsible to the Acceptor for the full amount of the Bill.[4] He insists, also, that the same rule will apply, where the Acceptor has funds in his hands; because, he says, the acceptance is but a security for the due payment of the amount by the Drawer at the place of payment; and

[1] Bayley on Bills, ch. 9, p. 345 to 348 (5th edit. 1830).

[2] Chitty on Bills, ch. 7, p. 346 (8th edit. 1833); Id. ch. 9, p. 449; Co. Litt. 232; Stirling *v.* Forester, 3 Bligh, R. 575, 590. See Solly *v.* Forbes, 2 Brod. & Bing. R. 38.

[3] Ibid.; Post, § 431.

[4] Pothier, de Change, n. 180.

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the obligation of the Drawer is the principal, and that of the Acceptor is merely accessorial. And, when the principal obligation is extinguished, the accessorial obligation is necessarily also extinguished.[1] Our law would probably treat both cases in the same way, where the parties positively intended, that it should have that operation, but not otherwise; not for the reason last assigned by Pothier, but because the transaction would amount to an agreement to treat it, *pro tanto*, as a payment in discharge of the Acceptor.[2] Pothier also holds, that a release by the Holder to the Drawer will discharge all the Indorsers;[3] and the like rule seems applicable to a release of any Indorser, as to the subsequent Indorsers. Our law holds the like doctrine in a more general form; and that is, that any release by the Holder to any party, whether Drawer or Indorser, will discharge every other party from payment of the Bill, to whom the Releasee would be liable, if he, the party to whom the Releasee would be so liable, should be compelled to pay it. But it will not discharge any other party, to whom the Releasee would not be so liable; as, for example, a prior Indorser to the Releasee.[4] The reason is, that thereby a circuity of action is avoided; and due effect is given to the release, for the Holder can never be permitted to insist, that his release shall not operate as a discharge of the debt in favor of the Releasee; and yet

[1] Pothier de Change, n. 181; Pothier des Oblig. n. 377, 617. — Our law treats the Acceptor as the primary debtor. See Ante, § 268, 269.

[2] See Chitty on Bills, ch. 9, p. 451 to 453 (8th edit. 1833); Ante, § 268, 269.

[3] Pothier de Change, n. 182.

[4] Bayley on Bills, ch. 9, p. 338 to 345 (5th edit. 1830); Carstairs *v.* Rolleston, 5 Taunt. R. 551; Smith *v.* Knox, 3 Esp. R. 46; English *v.* Darley, 2 Bos. & Pull. 62.

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such would be the effect, if he might be compelled to pay it to another party, to whom the Holder should have recourse, and whom he, the Releasee, was yet bound to indemnify.

§ 271. It remains only to remark, under this head, that the Acceptor is not discharged by any omission of the Holder to present the Bill for payment to him at maturity; nor (as we have seen) merely by the Holder's giving time to, or releasing any of, the antecedent parties to the Bill.[1]

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[1] Ante, § 268, 269; Wallace v. M'Connell, 13 Peters, R. 186.

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CHAPTER IX.

NON-ACCEPTANCE — PROCEEDINGS ON.

§ 272. THE order of our subject next leads to the consideration of the duties of the Holder upon Non-acceptance of the Bill according to its tenor, to entitle him to recover against any of the antecedent parties, from or through whom he has derived title. In respect to these duties, there is no difference, whether the refusal to accept be absolute, or qualified, or conditional.[1] In each case, if the Holder would bind the prior parties, he must act in the same manner, and perform substantially the same functions.[2] In this respect, the Law of France seems entirely coincident with ours.[3] If there is an acceptance of a foreign Bill

[1] Chitty on Bills, ch. 8, § 1, p. 354 (8th edit. 1833); Id. p. 363, 364; Bayley on Bills, ch. 7, § 2, p. 252 to 254 (5th edit. 1830). — It is said, in Bayley on Bills (ch. 7, § 2, p. 254, 5th edit. 1830), that "A neglect to give notice, where there is a conditional acceptance, is done away by the completion of those conditions before the Bill becomes payable; and a neglect, where there is an acceptance as to part, and a refusal as to the residue only, discharges the persons entitled to notice as to the residue only." For this no authority is cited. But Mr. Chitty adopts the doctrine from Bayley. It does not appear to me, that, upon principle, this doctrine can be supported; for the acceptance in both cases is contrary to the tenor of the Bill, and may vary the rights and interests of the antecedent parties. The duty, therefore, would seem to be clear, that there should be a due protest, and due notice to the antecedent parties of the dishonor, and qualified or conditional acceptance, in order to bind them. This is the doctrine asserted by Pothier (De Change, n. 47, 48). Ante, § 240, 241. If the Holder takes a conditional acceptance, he cannot resort to the Drawer, except upon failure of the Acceptor to pay according to the conditional acceptance. Campbell *v.* Pettingill, 7 Greenl. R. 126.

[2] Ante, § 227, 240.

[3] Pardessus, Droit Comm. Tom. 2, art. 370, 371, 428; Code de Comm. art. 124; Ante, § 241.

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supra protest, or for honor, this does not vary the duties of the Holder; and he must give notice thereof to all the parties, whom he means to hold responsible to him, the same as in other cases.[1] In this respect the case differs from a protest for better security, after acceptance, where notice thereof to the other parties is optional on the part of the Holder.[2]

§ 273. Immediately, then, upon the dishonor of a foreign Bill by the refusal of the Drawee to accept it, it is, in general, the indispensable duty of the Holder to have the Bill duly protested, and notice thereof given to the antecedent parties, to whom he looks for reimbursement or indemnity.[3] If he neglects so to do, the antecedent parties are discharged, and he himself must submit to the loss.[4] There is no difference in

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[1] Ante, § 237, 255, 256; Chitty on Bills, ch. 8, § 1, p. 354, 360, 361; Id. § 2, p. 374 to 376 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 253 (5th edit. 1830); Marius on Bills, p. 21; Beawes, Lex Merc. by Chitty, Vol. 1, pl. 221. p. 595 (edit. 1813); Code de Comm. art. 128.

[2] Chitty on Bills, ch. 8, p. 361 to 365, 374 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 1, pl. 24, 25, p. 567 (edit. 1813).

[3] 2 Black. Comm. p. 469, 470; Chitty on Bills, ch. 8, § 1, p. 354, 355 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 258 to 265, (5th edit.); Rogers *v.* Stephens, 2 Term R. 713; Gale *v.* Walsh, 5 Term R. 239; Brough *v.* Perkins, 2 Ld. Raym. 993, 6 Mod. R. 80, 1 Salk. 131; Union Bank *v.* Hyde, 6 Wheat. R. 572; Com. Dig *Merchant*, F. 8; 3 Kent, Comm. Lect. 44, p. 93 to 95 (4th edit.); 2 Black. Comm. 469, 470; 1 Bell, Comm. B. 3, ch. 2, p. 408 (5th edit.); Pothier de Change, n. 133, 134, 136, 138, 148, 156.

[4] Ibid. The same rule prevails generally, although, perhaps, not universally, in America. Upon this subject, Mr. Chancellor Kent says; "The English Law, requiring protest, and notice of non-acceptance of foreign Bills, has been adopted and followed, as the true rule of mercantile law, in the States of Massachusetts, Connecticut, New York, Maryland, Virginia, North Carolina, and South Carolina. But the Supreme Court of the United States, in Brown *v.* Barry, and in Clarke *v.* Russel, held, that, in an action on a protest for non-payment on a foreign Bill, protest for non-acceptance, or a notice of the non-acceptance, need not be shown, inasmuch as they were not required by the custom of merchants in this

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this respect, whether the Bill be payable at a certain time after date, or after sight; for, although the former class of Bills are not required to be presented, except at the maturity of the Bill, yet, if such a Bill be actually presented for acceptance and dishonored, the antecedent parties have a right to a protest and notice thereof.[1]

§ 274. Heineccius lays down the like general rule in unequivocal terms. Speaking upon the subject of the liability of the Drawer and the Indorsers of a Bill, he says, that it attaches, whether there be a dishonor by a non-acceptance, or by a non-payment of the Bill; but, in each case, there is a necessity of protesting the Bill for the dishonor, and, if it is neglected, the whole obligation is extinguished. *Deinde ipse trassans obligatur tum remittenti, tum præsentanti, vel ejus indossatario, ad restituendam pecuniam, præstandamque indemnitatem, si cambium vel acceptatum non sit, vel non solutum; quamvis utroque casu interposita protestatione opus sit, obligatio ista omnino exspirat.*[2] The

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country; and those decisions have been followed in Pennsylvania; protest for non-payment is sufficient. It becomes, therefore, a little difficult to know what is the true rule of the Law Merchant in the United States, on this point, after such contradictory decisions. The Scotch law is the same as the English; and it appears to me, that the English rule is the better doctrine, and the most consistent with commercial policy." 3 Kent, Comm. Lect. 44, p. 95. See Id. p. 94, note (*b*) (4th edit.). The decisions of the Supreme Court of the United States in Brown *v.* Barry (3 Dallas, R. 365), and Clarke *v.* Russel (3 Dallas, R. 415; S. C. cited 6 Serg. & Rawle, R. 358), if they would now be held law by that Court, would be so held, only upon the ground of the local law of Pennsylvania, as to Bills drawn or payable there.

[1] Ante, § 228; Chitty on Bills, ch. 7, p. 299, 300 (8th edit. 1833); Id. p. 354; O'Keefe *v.* Dunn, 6 Taunt. R. 305; S. C. 5 Maule & Selw. 282; United States *v.* Barker, 4 Wash. Cir. R. 464; Bank of Washington *v.* Triplett, 1 Peters, R. 25.

[2] Heinecc. de Camb. cap. 6, § 4; Ante, § 114 to 116.

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French Law requires similar proceedings and protests, where there is a presentment of the Bill, and a dishonor by non-acceptance or non-payment.[1]

275. Certain exceptions, however, have been admitted by our law to the general rule, which are entirely consistent with the reason, on which it is founded. One is, where the Drawer or Indorser has agreed or requested, that, in case of dishonor, it should be returned without protest, in order to save expenses.[2] Another, by our law, is (as we shall more fully see hereafter), where the Drawee had no funds in his hands belonging to the Drawer at the time of drawing the Bill, and he had no right to draw the Bill.[3] But, in all such cases of exception, the effect is strictly limited to the parties, who have made such an agreement, or who stand in the peculiar predicament pointed out by the nature of the exception, and it does not extend to other parties to the Bill.[4]

§ 276. A protest is, properly speaking, a solemn declaration on behalf of the Holder, against any loss to be sustained by the non-acceptance, or by the non-payment, of the Bill, as the case may be.[5] It is highly

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[1] Pardessus, Tom. 2, art. 381, 418, 424, 428; Code de Comm. art. 173 to 175. — The French Law does not seem to require any protest for non-acceptance, or notice thereof, where the Bill is not by law required to be presented for acceptance. Pardessus, Droit Comm Tom. 2, art 381, 424; Chitty on Bills, ch. 8, p. 355 (8th edit. 1833); Post, § 277, note (2); Savary, Le Parfait Négociant, Tom. 1, Part 3, ch. 7, p. 828, 829.

[2] Chitty on Bills, ch. 5, p. 188; Id. ch. 10, p. 490 (8th edit. 1833).

[3] Id. ch. 8, p. 356 to 359, 362; Id. ch. 10, p. 467 to 469, 490. See Pardessus, Droit Comm. Tom. 2, art. 381, 425.

[4] Pardessus, Droit Comm. Tom. 2, art. 425.

[5] Bayley on Bills, ch. 7, § 2, p. 258, 259 (5th edit. 1830); Chitty on Bills, ch. 8, p. 362, 363 (8th edit. 1833); Id. ch. 10, p. 489 to 494; Pothier de Change, n. 134, 135; Com. Dig. *Merchant*, F. 10; Leftly *v.* Mills, 4 Term. R. 170, 175; Starkie on Evid. Vol. 2, p. 162 (2d edit.);

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important, even if it be not absolutely essential, in all cases, that a copy of the Bill should be prefixed to all protests, with the indorsements thereon, *verbatim*, whenever practicable, and that the reasons given by the Drawee for non-acceptance, or non-payment, should also be stated in the protest.[1] The protest is required to be made out and drawn up by a notary public, if there be one in or near the place, where the Bill is payable, or the acceptance is to be made.[2] If there be no such notary, then it is sufficient, if the protest be made out, and drawn up by a respectable inhabitant of the place, in the presence of two witnesses. It should be made out, and drawn up, in the form required by the law or usage of the place, where it is made.[3] So essential is the production of a protest for

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Rogers *v.* Stephens, 2 Term R. 713; 3 Kent, Comm. Lect. 44, p. 93, 94 (4th edit.).

[1] Chitty on Bills, ch. 8, p. 362, 363 (8th edit. 1833); Id ch. 10, p. 509; Pothier de Change, n. 135, 145, 148; Pardessus, Droit Comm. art. 419; Code de Comm. 174.

[2] Ibid. The duties of a notary cannot be performed by his clerk or by a third person. The Onondaga County Bank *v.* Bates, 3 Hill, N. Y. R. 53.

[3] Chitty on Bills, ch. 8, p. 362, 363 (8th edit. 1833); Id. ch. 10, p. 490 to 496, and notes; Pothier de Change, n. 155. — The manner and circumstances, under which the protest is to be made, are thus described by Mr. Kyd. "If the person to whom the Bill is addressed, on presentment, will not accept it, the Holder is to carry it to a person vested with a public character, who is to go to the Drawee and demand acceptance in the same manner as before; and if he then refuse, the officer is there to make a minute on the Bill itself, consisting of his initials, the month, the day, and the year, with his charges for minuting. He must afterwards draw up a solemn declaration, that the Bill has been presented for acceptance, which was refused, and that the Holder intends to recover all damages, which he, or the deliverer of the money to the Drawer, or any other, may sustain on account of the non-acceptance; the minute is, in common language, termed the noting of the Bill; the solemn declaration, the protest; and the person, whose office it is to do these acts, a public notary; and to his protestation all foreign courts give credit. In making a protest, therefore, there are three things to be done; the noting, demanding, and drawing up the pro-

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non-acceptance, that it cannot be supplied by mere proof of noting the Bill for non-acceptance, and a subsequent protest for non-payment.[1]

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test. But the noting is unknown in the law, as distinguished from the protest; it is merely a preliminary step, and has grown into practice only in modern times. The party, making the demand, must have authority to receive the money; and, in case that be refused, the drawing up of the protest is mere matter of form, the demand being the material part. The demand of payment of a foreign Bill must be made by the notary public himself, and not by his clerk." Kyd on Bills, ch. 7, p. 136, 137 (3d London edit.). See also Chitty on Bills, ch. 8, p. 362, 363 (8th edit. 1833); Id. ch. 10, p. 490 to 496, and notes, 508, 509. The common form of the protest now in use in England, in cases of non-payment, and the same applies, *mutatis mutandis*, in cases of non-acceptance, is as follows; "On this day, the first of September, in the year of our Lord one thousand eight hundred and thirty-one, at the request of A. B., Bearer of the original Bill of Exchange, whereof a true copy is on the other side written, I. Y. Z., of London, notary public, by royal authority duly admitted and sworn, did exhibit the said Bill. [*Here the presentment is stated, and to whom made, and the reason, if assigned, for non-payment*] Wherefore I, the said notary, at the request aforesaid, have protested, and by these presents do solemnly protest, as well against the Drawer, Acceptor, and Indorsers of the said Bill of Exchange, as against all others, whom it may concern, for exchange, reëxchange, and all costs, charges, damages, and interest, suffered and to be suffered, for want of payment of the said original Bill. Thus done, and protested in London aforesaid, in the presence of E. F. [*The expenses of noting, and protest, are then subscribed.*]" Chitty on Bills, ch. 10, p. 497 (8th edit. 1833). Substantially the same form is in use in America. In France, the Code of Commerce contains the following provisions on the subject of protests. "Art. 173. The protest for non-acceptance, or non-payment, is made by two notaries, or by one notary and two witnesses, or by a bailiff and two witnesses. The protest must be made, At the domicil of the person, on whom the Bill was drawn, or at his last known place of residence; At the domicil of the person mentioned in the Bill of Exchange, who is to pay it in case of need; At the domicil of the Acceptor *supra protest*. The whole is a single instrument of writing. In case of false indication of domicil, the protest is preceded by a certificate of perquisition or inquiry. — Art. 174. The protest contains, The literal copy of the Bill of Exchange, the acceptance, indorsements, and directions

[1] Chitty on Bills, ch. 8, p. 362 (8th edit. 1833); Id. ch. 10, p. 489, 490; Bayley on Bills, ch. 7, § 2, p. 266, 267 (5th edit. 1830); Chaters *v.* Bell, 4 Esp. R. 48; Rogers *v.* Stephens, 2 Term R. 713.

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§ 277. The making or drawing up of such protests seems required by the universal custom of merchants in all countries, in all cases of foreign Bills of Exchange. Scaccia, Heineccius, and Pothier, constantly refer to such protests as in universal use.[1] 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 executed; and certified copies of those instruments are generally deemed of such high authority, as to be ordinarily admissible as evidence in courts of justice in those countries.[2] Hence, we may readily perceive, why protests of Bills of Ex-

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therein mentioned; The demand of payment of the Bill of Exchange. It declares, The presence or absence of the person, who ought to pay it; The motives of refusing payment, and the inability or refusal to sign." Code of Commerce, p. 143, translated by Rodman. See also Pothier de Change, n. 135, 136; Jousse, sur l'Ord. 1673, tit. 5, art. 8 to 10, p. 97 to 100; Chitty on Bills, ch. 10, p. 491, 492 (8th edit. 1833); Carter *v.* Burley, 9 New Hamp. Rep. 554.

[1] Scaccia de Comm. § 6, gloss. 1, n. 97 to 99, p. 439, 440; Heinecc. de Camb. cap. 4, § 30 to 35; Pothier de Change, n. 133 to 135. — Mr. Chitty says (Chitty on Bills, ch. 8, p. 355, 8th edit. 1833); "The law in France is different, for there a protest for non-acceptance is only requisite, when a presentment for acceptance was essential, as in case of Bills payable after sight; and in other cases, although there has been a refusal to accept, the Holder may or not, at his election, protest and give notice." For this he cites 1 Pardessus de Change, 404. The same doctrine will be found stated in Pardessus, Droit Comm. Tom. 2, art. 381; Ante, § 274, note (3); Savary, Le Parfait Négociant, Tom. 1, Part 3, ch. 7, p. 828, 829. The form of Protest used in England will be found in Chitty on Bills. The form used in Scotland will be found in Thomson on Bills of Exchange, 2d edit. 1836, Appendix No. 2, p. 786, 787. The form used in France will be found in Dictionnaire de Notoriat, edit. 1832, a Paris, art. Protest, p. 887.

[2] Story on Conflict of Laws, § 630, 631, 635. *c.* See Brown *v.* Thornton, 6 Barn. & Adolph. 185; Per Buller J., in Leftly *v.* Mills, 4 Term R. 175; Chitty on Bills, ch. 10, p. 489, 490 (8th edit. 1833).

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change should have been, from the earliest period, made by notaries; and why their certified protests, under their hands and seals of office, are universally admitted in all countries, even in those governed by the Common Law, as veritable documents, which prove themselves, and are, therefore, admitted, in all Courts of Justice, as *primâ facie* evidence of the facts contained therein.[1]

§ 278. The time of drawing up the protest, as well as the form thereof, is to be regulated by the law of the place, where the protest is made.[2] This varies in different countries. In England and America the protest is noted on the very day of the dishonor, although it is not, or may not be, ordinarily, drawn out in form on that day.[3] A mere noting of the Bill, without an actual protest for non-acceptance, will not suffice.[4] In

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[1] Bayley on Bills, ch. 11, p. 487 (5th edit. 1830); Chitty on Bills, ch. 8, p. 361, 362; Id. ch. 10, p. 643 (8th edit. 1833); Anon. 12 Mod. 345; 3 Kent, Comm. Lect. 44, p. 93, and note (*b*); Halleday *v.* McDougal, 20 Wend. R. 85; Townsley *v.* Sumrall, 2 Peters, R. 170; Nicholls *v.* Webb, 8 Wheat. R. 333. See Wilkinson on the Law of Shipping, p. 86, edit. 1843, as to Notaries in England. — It seems, that, although the protest of a Bill in a foreign country, which is drawn in England, but payable abroad, will, of itself, be admissible in evidence in England; yet, if the Bill be drawn in a foreign country, payable in England, and be protested in England, the latter will not be admissible in proof in a suit in England, but must be proved in the same manner, as if it were an inland Bill. This was so ruled by Lord Ellenborough, in Chesmer *v.* Noyes, 4 Camp. R. 129, 130. No authority was produced for the doctrine; and it seems to me open to some question upon principle. The true question does not seem to be, so much, Where it is protested; but, Whether the Bill be a foreign Bill, or an inland Bill.

[2] Ante, § 138, 276; Chitty on Bills, ch. 5, p. 193; Id. ch. 10, p. 506 (8th edit. 1833); Pothier de Change, n. 155.

[3] Chitty on Bills, ch. 10, p. 506, 509 (8th edit. 1833); Ante, § 276, note; Post, § 283; Bayley on Bills, ch. 7, § 2, p. 266, 267 (5th edit. 1830); Chaters *v.* Bell, 4 Esp. R. 48.

[4] See Orr *v.* Maginnis, 7 East, R. 358, 359.

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France, the protest cannot properly be made until the day after the Bill has been dishonored.[1]

§ 279. We have already seen, that the death, or bankruptcy, or insolvency, or absconding of the Drawee, constitutes no sufficient reason for the Holder not to present the Bill at the proper place and time for acceptance; but that he is bound so to make presentment, and to make due protest, and give due notice of the dishonor of the Bill, according to the facts.[2] Nay, if he has lost or misplaced the Bill of Exchange, he should still apply for acceptance thereof, and, upon refusal, protest the Bill.[3]

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[1] Ibid.; Pardessus, Droit Comm. Tom. 2, art. 183, 420; Code de Comm. art. 162; Post, § 283.

[2] Ante, § 230; Chitty on Bills, ch. 8, p. 360, 361 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 218, 219 (5th edit. 1830); Pothier de Change, n. 146, 147; Code de Comm. art. 163.

[3] Pothier de Change, n. 145. See Chitty on Bills, ch. 6, p. 288, 289 (8th edit. 1833); Id. 297, 389. See Pardessus, Droit Comm. Tom. 2, art. 408 to 410. — Pothier seems to lay down the doctrine generally, as applicable equally to cases of the presentment for acceptance, as well as to cases for payment. Mr. Chitty applies it only to cases of payment, and says; "It is incumbent also on the party, who has thus lost the Bill, even though it has been destroyed, to make application, at the time it is due, for payment, and to give notice to all the parties of the refusal of the Drawee to pay the same; for, otherwise, he will lose his remedy against the Drawer and Indorsers. It is said by Marius, that the Holder of a Bill, which has been lost, should, in the presence of a notary and two witnesses, acquaint the Acceptor with the loss, and signify to him, that, at his peril, he pay to none but himself or his order; and the same writer says, that no person should refuse to pay a Bill, which he has accepted, to the loser, on the ground of its having been lost, if he have sufficient security and indemnification offered to him; and that, if he do, he will be liable to make good all loss, reëxchange, and charges. The Drawee, however, has always a right to insist on the production of the Bill, before he pays it, and may legally defend an action, if it be not produced, it being part of his contract to pay only on presentment of the Bill. If the loser and Holder contest the right, the Acceptor must require indemnity, or file a bill of interpleader, or apply to the Court under the recent Act, 1 & 2 Wm. IV., ch. 58, § 1." Chitty on Bills, *ubi supra;* Dehers *v.* Harriott, 1 Show. R. 163.

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§ 280. But although, in general, a protest on the part of the Holder is essential, upon the dishonor of a Bill of Exchange, to found a right of action against the Drawer, or any prior Indorser; yet, there are circumstances, which may excuse or justify the want of such protest. Thus, for example, if the protest is prevented from being made in due season, or made at all, by an inevitable accident or casualty, or by superior force, that will excuse or justify the omission or want.[1] So, if the Bill be drawn by the Drawer without funds, or without having any right to draw, the want of a protest, like the want of notice to the Drawer, will not prejudice the Holder; but he will be entitled to recover against the Drawer, upon the ground, that he has not, and could not, sustain any loss or injury thereby.[2] This also seems to be the doctrine of the French Law, as it is expounded by Pothier, and other jurists.[3] So, a promise to pay the Bill, after a full knowledge of the fact, that no protest has been made, will be a waiver of the objection by the party, and he will be held bound in the same way, and to the same extent, as if there had been a regular protest.[4]

§ 281. Hitherto we have been speaking of protests of foreign Bills of Exchange. In respect to inland

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[1] Chitty on Bills, ch. 8, p. 360, 366 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 294, 295 (5th edit. 1830); Pothier de Change, n. 144; Pardessus, Droit Comm. Tom. 2, art. 426, 434, 435; Rogers v. Stephens, 2 Term R. 713; Orr v. Maginnis, 7 East, R. 359; Ante, § 234; Post, § 280, § 308, § 309.

[2] Chitty on Bills, ch. 8, p. 356, 357, 362 (8th edit. 1833); Legge v. Thorpe, 12 East, R. 171; Orr v. Maginnis, 7 East, R. 359.

[3] Pothier de Change, n. 156 to 158.

[4] Chitty on Bills, ch. 10, p. 535, 537 (8th edit. 1833); Patterson v. Becher, 6 Moore, R. 319; Gibbon v. Coggan, 2 Camp. R. 188; Greenway v. Hindley, 4 Camp. R. 52; Bayley on Bills, ch. 11, p. 474 to 476 (5th edit. 1830).

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Bills, a protest is not, in general, necessary, unless it is prescribed by the local municipal law, either for the purposes of founding the right, or enlarging the remedy. In England and America, a protest is not, generally, necessary to found a right of recovery against the other parties to an inland Bill; but in certain cases, in England, it may, by statute, entitle the Holder to a cumulative remedy.[1]

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[1] Chitty on Bills, ch. 8, p. 361, 364, 365 (8th edit. 1833); Id. p. 499 to 501; Bayley on Bills, ch. 7, § 2, p. 260 to 266 (5th edit. 1830); Brough *v.* Parkings, 2 Ld. Raym. 992, 6 Mod. R. 80, 1 Salk. R. 131; Windle *v.* Andrews, 2 Barn. & Ald. 696; Lumley *v.* Palmer, 2 Str. R. 1000; 3 Kent, Comm. Lect. 44, p. 93, 94. — Upon this subject, Mr. Chancellor Kent says; "On inland Bills, no protest was required by the Common Law, and it was only made necessary in England, in certain cases, by the statutes of 9th and 10th Wm. III., and 3d and 4th Anne; and yet, notwithstanding the language of those statutes, it has long been the settled rule and practice not to consider the protest of an inland Bill as necessary or material. Nor is a protest of an inland Bill generally deemed necessary in this country, though the practice is, to have Bills, drawn in one State on persons in another, protested by a notary, and the Act of the State of Kentucky of 1798, ch. 57, seemed to require it. It is also necessary in Virginia, and the omission to give notice of the protest of an inland Bill causes the loss of interest and damages." 3 Kent, Comm. Lect. 44, p. 93, 94 (4th edit.). See also Rice *v.* Hogan, 8 Dana, R. 135; Wilcock *v.* Riddle, 5 Call, R. 358. Mr. Chitty remarks; "At Common Law, no inland Bill could be protested for non-acceptance; but, by the statute 3 & 4 Anne, ch. 9, § 4, a protest was given 'in case of refusal to accept, in writing, any inland Bill amounting to the sum of five pounds, expressed to be given for value received, and payable at days, weeks, or months after date, in the same manner as in the case of foreign Bills of Exchange, and for which protest there shall be paid two shillings and no more." It has been supposed, that this protest must be made in order to entitle the Holder to demand of the Drawer or Indorsers costs, damages, and interest; but, in practice, the plaintiff recovers interest against a Drawer or Indorser of an inland Bill, on proof of due notice, without proving a protest; and it has recently been decided, that a protest is not essential to the recovery of interest. If the Bill be of the above description, and under the amount of £20, the Holder is certainly entitled to the above accumulative remedy, though no protest were made. This protest is directed to be made by such persons as are appointed by 9 & 10 Wm. III., ch. 17, § 1, to protest inland

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§ 282. The place of the protest for non-acceptance should be the place, where the Bill is to be presented for acceptance.[1] But, upon a Bill drawn upon the Drawees in one place, payable in another, a question has been made, Whether, in case of an acceptance, and refusal of payment afterwards, the protest should be made at the place of acceptance, or at the place of payment? The latter would seem to be the proper place.[2]

Bills for non-payment, namely, by a notary public; and, in default of him, by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses. Within fourteen days of the making of this protest, the same must be sent, or other notice thereof must be given to, or left in writing at the usual place of abode of, the party, from whom the Bill was received. The protest for non-acceptance, in the case of an inland Bill, is by no means neccessary, and the want of it does not affect the Holder's right to the principal sum, as it would in the case of a foreign Bill; and it is in practice seldom made. An inland Bill is, in general, only noted for non-acceptance, which noting, as already observed, is of no avail; and if not paid when due, it is then noted, and sometimes, though not very often, protested for non-payment; and a protest for non-acceptance, made in this country, must be proved by the notary, who made it, and it will not, as in the case of a protest made abroad, prove itself." Chitty on Bills, ch. 8, p. 364, 365 (8th edit. 1833).

[1] Chitty on Bills, ch. 8, p. 363 (8th edit. 1833); Mitchell *v.* Baring, 10 Barn. & Cressw. 1, 4; Marius on Bills, p. 26.

[2] Chitty on Bills, ch. 8, p. 363 (8th edit. 1833), note (*a*); Mitchell *v.* Baring, 10 Barn. & Cressw. 1, 11; Pardessus, Droit Comm. Tom. 2, art. 421. But see Marius on Bills, p. 126. — By the recent statute of 2 and 3 William IV., ch. 98, it is provided; "Whereas, doubts having arisen as to the place, in which it is requisite to protest for non-payment, Bills of Exchange, which, on the presentment for acceptance to the Drawee or Drawees, shall not have been accepted, such Bills of Exchange being made payable at a place other than the place mentioned therein to be the residence of the Drawee or Drawees thereof, and it is expedient to remove such doubts; be it therefore enacted, that, from and after the passing of this Act, all Bills of Exchange, wherein the Drawer or Drawers thereof shall have expressed, that such Bills of Exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the Drawee or Drawees thereof, and which shall not, on the presentment for acceptance thereof, be accepted, shall or may be, without

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§ 283. As to the time of making the protest, it should seem, that it is governed by the law of the place, where the dishonor takes place; and, by our law, it should ordinarily be made, or, at least, noted, on the same day, on which the non-acceptance or refusal has taken place.[1] But it may be presumed, by analogy to the cases of an omission to give notice of the dishonor, that, where the making of the protest by the Holder, or his agent, or by the notary, is prevented by inevitable casualty or accident, or by superior force, or by a public calamity, or by a public

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further presentment to the Drawee or Drawees, protested for non-payment in the place, in which such Bills of Exchange shall have been, by the Drawer or Drawers, expressed to be payable, unless the amount owing upon such Bills of Exchange shall have been paid to the Holder or Holders thereof, on the day, on which such Bills of Exchange would have become payable, had the same been duly accepted." This statute appears to have been passed in consequence of the decision in Mitchell *v.* Baring, 10 Barn. & Cresw. 1.

[1] Per Buller, J., in Leftly *v.* Mills, 4 Term R. 170, 174; Ante, § 278; S. P. Bank of Rochester *v.* Gray, 2 Hill, 227; Chitty on Bills, ch. 10, p. 506 to 509 (8th edit. 1833); Id. ch. 5, p. 193; Bayley on Bills, ch. 7, § 2, p. 266, 267 (5th edit. 1830).—His language was; "With regard to foreign Bills of Exchange, all the books agree, that the protest must be made on the last day of grace. Now, that supposes a default in payment, for a protest cannot exist unless default be made. But, if the party has till the last moment of the day to pay the Bill, the protest cannot be made on that day. Therefore, the usage on Bills of Exchange is established; they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be at an unreasonable hour; but, on the other hand, to say, that the demand should be postponed till midnight, would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a Bill of Exchange could not be demanded till sunset; and, if so, the situation of bankers would be extremely hazardous; for they would then be obliged to send out their clerks at night with Bills to a very considerable amount, all of which must be presented within a short space of time, though to houses in different parts of the town." Leftly *v.* Mills, 4 Term R. 174, 175.

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prohibition, in such cases, if the protest is made as soon afterwards, as it reasonably can be, that will be sufficient.[1] In France, a Bill cannot be protested until the day after the refusal to accept, or to make payment, as the case may be.[2] And, by the like analogy to the cases of a demand of payment of a Bill, no presentment for acceptance, or protest for non-acceptance, or notice thereof, is required to be made on a Sunday, or on any holyday, or upon any day, which, by the religious ordinances or customs of the sect or country, to which the Drawee belongs, is set apart for religious observances, and is not allowed to be devoted to secular purposes; and, consequently, no protest need be made on that day.[3] This seems,

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[1] Chitty on Bills, ch. 8, p. 360, 365 (8th edit. 1833); Id. ch. 8, p 422, 485, and note; Id. ch. 10, p. 524; Pothier de Change, n. 144; Pardessus, Droit Comm. Tom 2, art. 426. — Whether, by our law, an omission to make a presentment for acceptance or for payment, on the day required, will be excused by the like inevitable casualty or accident, or by superior force, may admit of more doubt. See Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id. ch. 9, p. 384, 385, 389, 422; Id. ch. 10, p. 485, and note. But in the foreign law, there can be no doubt, that it would be an excuse. Pothier de Change, n. 144. See Patience *v.* Townley, 2 Smith, R. 223, 224; Pardessus, Droit Comm. Tom. 2, art. 426.

[2] Ante, § 278; Chitty on Bills, ch. 5, p. 193 (8th edit. 1833); Id. ch. 8, p. 365; Id. ch. 10, p. 506; Pardessus, Droit Comm. Tom. 2, art. 183, 420. See Hopkirk *v.* Page, 2 Brock. R. 20. — By the statute of 9 and 10 Will. III., ch. 17, no inland Bill can be protested until the expiration of the days of grace, and, of course, neither can the protest be made, or notice thereof given, until the day after the Bill falls due. If such a protest is made, although unnecessarily so, the same, with notice thereof, is, by section 2d of the same Act, to be forwarded, within fourteen days after it is made, to the proper parties. Chitty on Bills, ch. 10, p. 511 (8th edit. 1833).

[3] Chitty on Bills, ch. 8, p. 367, 368 (8th edit. 1833); Id. ch. 10, p. 507, 511, 519, 520; Lindo *v.* Unsworth, 2 Camp. R. 602; Pothier de Change, n. 140; Heinecc. de Camb. cap. 4, § 37, 41; Howard *v.* Ives, 1 Hill, N. Y. R. 263, 265.

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also, to be the law of France, and of Continental Europe generally.[1]

§ 284. In the next place, not only must a protest for non-acceptance be duly made; but notice of the dishonor should be, as soon as it reasonably can be, given to all the antecedent parties, whom the Holder means to hold chargeable with the dishonor. We have already seen,[2] that notice is, by our law, required to be given upon all Bills, which have been dishonored upon presentment for acceptance, whether they were necessary to be so presented or not; and, therefore, the doctrine hereafter stated will equally apply to all cases, in which notice is required by law.[3] The reason, why the law, in general, requires the Holder to give due notice of non-acceptance by the Drawee, is, that the Drawer may forthwith withdraw from the possession of the Drawee such effects, as he may already have, or may stop those, which he is in course of receiving; and that the Drawer and Indorsers may respectively take the necessary measures to obtain payment from the parties respectively liable to them. And, if notice be not given, it is a presumption of law, that the Drawer and Indorsers are prejudiced by the omission; and it is on this principle, that notice of non-acceptance and non-payment is required.[4] This subject of notice will necessarily embrace the consid-

[1] Pardessus, Droit Comm. Tom. 2, art. 420; Code de Comm. art. 162; Heinecc. de Camb. cap. 4, § 37, 41.

[2] Ante, § 228; Bank of Washington v. Triplett, 1 Peters, R. 35.

[3] Ante, § 228.

[4] Chitty on Bills, ch. 8. p. 356 (8th edit. 1833); Whitfield v. Savage, 2 Bos. & Pull. 280; Orr v. Maginnis, 7 East, R. 362; Claridge v. Dalton, 4 Maule & Selw. 226; Cory v. Scott, 3 Barn. & Adolph. 621. The French Law seems to be different. Ante, § 228; Pardessus, Droit Comm. Tom. 2, art. 381; Chitty on Bills, ch. 8, p. 355 (8th edit. 1833).

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eration of the time, the place, the mode, and the form of giving notice, and the persons, by whom, and to whom, it should be given.

§ 285. As to the time of giving notice. It is impossible to lay down any absolute rule, in regard to foreign Bills, upon this subject, since it is obvious, that the circumstances of different cases must necessarily, in this respect, affect the rights and duties of the Holder. All, that can properly be said, is, that the notice must be given within a reasonable time after the dishonor and protest of the Bill, and due diligence be exercised for this purpose.[1] This reasonable time is sometimes positively fixed by the law of particular countries; and then, as to the parties governed by that law, it must be strictly followed.[2] Thus, 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 respectively made.[3]

§ 286. Independent of any such positive law or local usage, what constitutes a reasonable time for giving notice is a matter dependent upon the circumstances of each particular case. When, as frequently occurs between distant countries, the usual inter-

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[1] Chitty on Bills, ch. 8, p. 366, 367 (8th edit. 1833); Id. ch. 10, p. 509 to 512; Darbishire v. Parker, 6 East, R. 3, 8, 9; Haynes v. Birks, 3 Boss. & Pull. 599.

[2] Chitty on Bills, ch. 5, p. 193 (8th edit. 1833); Id. ch. 10, p. 490, 506 to 508. See Pothier de Change, n. 155; Ante, § 176, 177, and note 2.

[3] Ibid.; Pardessus, Droit Comm. Tom. 5, art. 1485, 1488, 1497 to 1499; Wallace v. Agry, 4 Mason, R. 336. But see Rothschild v. Currie, 1 Adolph. & Ellis, New R. 43, and note. Ante, § 176, 177, and note 2 Post, § 296, 366, 391.

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course is carried on by means of regular packets, sailing at particular periods, (as is the case between New York and England, and New York and Havre,) or by means of regular steam-ships, sailing at the like periods, (as is the case between Boston and Liverpool,) then, and in such cases, notice should be sent by the next regular packet or steam-ship, that sails for the port, where the party, to whom notice is to be given, resides, or to some neighboring port, according to the usual course of transportation of letters of business, if a reasonable time before her departure is left for writing and forwarding the notice.[1] On the other had, if there are no such regular packets or steam-ships, or their times of sailing are at distant intervals, and, in the mean time, other ships are about to sail for the same port, or for some neighboring port, it may be proper to send the notice by such ship, if, upon reasonable calculation, her arrival may be presumed to be earlier than the regular packets or steam-ships.[2] If, with the ports of the country, where the Bills are protested, the communication is irregular, or at different seasons by different routes or ways of conveyance, that should be adopted, to send the notice, which may reasonably be presumed to be the most certain and expeditious, under all the circumstances. Thus, for example, if a Bill drawn in America is protested in St. Petersburg in the winter, the usual mode of communication by land, in common commercial transactions, through the continental ports, to London or

[1] See Bayley on Bills, ch. 7, § 2, p. 279 (5th edit. 1830); Muilman *v.* D'Eguino, 2 H. Black. 565; Chitty on Bills, ch. 10, p. 505, 508 (8th edit. 1833); Darbishire *v.* Parker, 6 East, R. 3, 7.

[2] See Muilman *v.* D'Eguino, 2 H. Black. 565; Darbishire *v.* Parker, 6 East, R. 3, 7; Bayley on Bills, ch. 7, § 2, p. 279 (5th edit. 1830).

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Havre, would seem to be proper; whereas, if the protest were in the summer, the direct route by water between St. Petersburg and America might be more expedient and satisfactory. So, if a Bill be protested in China or India, the mode of giving notice must vary according to circumstances, and sometimes be direct by water between that and the foreign country, to which the notice is destined; and sometimes be indirect and overland; and, in each case, there will be a just compliance with the requisitions of the law. So, if, by reason of war or other political occurrences, the usual direct mode of communication be interdicted or obstructed, any other suitable and reasonable mode may be adopted.[1] And, indeed, it would seem, that an omission to give due notice, in consequence of an accident, or casualty, or superior force, would, in all cases, excuse the Holder from a strict compliance with the general rule.[2]

§ 287. Again. When the protest of a foreign Bill takes place in one state or country, and notice thereof is to be sent to another state or country, with which the usual communication is by post or mail, by land, as is customary among the nations of continental Europe, and is universal through the United States of America, that mode of notice should be positively adopted; and, if omitted, might be fatal to the rights of the Holder, unless under special circumstances.[3]

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[1] Chitty on Bills, ch. 9, p. 389 (8th edit. 1833); Id. ch. 9, p. 422; Id. ch. 10, p. 485, 505, 510.

[2] Chitty on Bills, ch. 10, p. 485, 486, 524 (8th edit. 1833); Pothier de Change, n. 144. See Hopkirk *v.* Page, 2 Brock. R. 200.

[3] See Chitty on Bills, ch 10, p. 504, 505 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p 278 to 281 (5th edit. 1830); Munn *v.* Baldwin, 6 Mass. R. 316; Lincoln and Kennebec Bank *v.* Hammatt, 9 Mass. R. 139;

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§ 288. And here the question often arises, How early, after the dishonor, is the notice to be sent by post or mail, when that is the proper and usual mode of giving notice? The answer is, by the next post or mail after the day of the dishonor, if a reasonable time exists for the purpose; for it need not be sent by the post or mail of the same day. Thus, if the post or mail leaves the next day after the dishonor, the notice should be sent by that post or mail, if the time of its closing or departure is not at too early an hour to disable the Holder from a reasonable performance of the duty.[1] So that the rule may be fairly stated in more general terms to be, that the notice is, in all cases, to be sent by the next practicable post or mail after the day of the dishonor, having a due reference to all the circumstances of the case.[2] If the dishonor and protest should be on Saturday, it will be early enough to send the notice by the post or mail of Monday, leaving out the intermediate Sunday, which is not deemed a business day.[3]

§ 289. And here it may be proper to suggest another circumstance, which may materially affect the consideration of the time, within which notice should

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Bussard v. Levering, 6 Wheat. R. 102; Smith v. Hawthorne, 3 Rawle, R. 355; Stanton v. Blossom, 14 Mass. R. 116.

[1] See Darbishire v. Parker, 6 East, R. 3, 8; Storken v. Collins, 9 Carr. & Payne, 653; S. C. 7 Mees. & Welsb. 515; Howard v. Ives, 1 Hill, N. Y. Rep. 263, 265; Haynes v. Birks, 3 Bos. & Pull. 599, 601; Eagle Bank at New Haven v. Chapin, 3 Pick. R. 180; 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.); United States v. Barker's Admin'r, 4 Wash. Cir. R. 464; S. C. 12 Wheat. 559.

[2] See Post, § 289, and note; Lennox v. Roberts, 2 Wheat. R. 373; Carter v. Burley, 9 New Hamp. R. 556.

[3] Haynes v. Birks, 3 Bos. & Pull. 599, 601; Howard v. Ives, 1 Hill, N. Y. Rep. 263; Wright v. Shawcross, 2 Barn. & Ald. 501, note; Eagle Bank of New Haven v. Chapin, 3 Pick. R. 180.

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be given, and that is, the fact, that the parties, to whom notice is to be given, reside in or near the town or place, where the dishonor occurs. In such cases, it is not unreasonable to require (and, accordingly, the rule is so established), that notice, whether given verbally, or by a special messenger, or by the local post, (sometimes called the penny post,) should be given to the parties upon the day of the dishonor, or, at farthest, upon the succeeding day, early enough for it to be actually received by them before the expiration of the same day.[1] Such cases are readily distinguishable from others, where the parties reside at a distance, and the ordinary communication of notice is by the general post. Nor can there be any inconvenience or hardship in requiring the notice, in such cases, to be sent or given within the usual hours of business, or, at least, within such reasonable time, as may insure a delivery to the party on that very day.[2] The time and place, when and where a demand is to be made of the acceptance and payment of a Bill, furnish a strong analogy to justify the enforcement of the rule. In large cities, such as London, and Liverpool, and New York, the habits of business naturally suggest a usage of this sort; and, from its convenience and certainty, it has been adopted as a positive rule, by the Courts of Justice.[3]

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[1] Chitty on Bills, ch. 10, p. 515, 516 (8th edit. 1833); Id. p. 540; Tindal v. Brown, 1 Term R. 167; Darbishire v. Parker, 6 East, R. 3, 8, 9.

[2] Chitty on Bills, ch. 10, p. 503, 504 (8th edit. 1833).

[3] Ibid.; Smith v. Mullett, 2 Camp. R. 208. — Upon this subject, Mr. Chitty says; "But there is a very material distinction in the time of giving or forwarding notice in cases, where the parties reside in or near to the same town, and when notice may be readily given on the day after the dishonor, or notice of it, either verbally, or by special messenger, or by local

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§ 290. Again. When a foreign Bill is protested in the same state or country, where any of the parties live, who are to be charged therewith, the time of giving notice is susceptible of other modifications; similar, indeed, to those, which ordinarily apply to cases of notice of the dishonor of inland Bills and Promissory Notes. In the first place, then, it is not, by our law, necessary, in any case, to give notice, either by the post or otherwise, on the very day, on which the dishonor and protest take place, although the Holder

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post, and cases, where the parties reside at a distance, and when the ordinary mode of communication is by general post. Thus, when the parties reside in the same town, the Holder, or other person to give the notice, must, on the day after the dishonor, or on the day after he received the notice, cause notice to be actually forwarded by the post or otherwise, to his next immediate Indorser, sufficiently early in the day, that the latter may actually receive the same before the expiration of that day; and, therefore, in London, if a letter, containing such notice, be put into the post-office after five o'clock in the afternoon of the second day, and, in consequence, it is not received till the morning of the third day, the party, who ought to have actually received the notice on the second day, will be discharged. In London, the local post (usually termed the two-penny post) forward letters to be delivered in the metropolis three times within the same day, namely, at eight, two, and five o'clock; and letters, put into any receiving house before either of those hours, ought regularly to be delivered on the same day. But, when out of the metropolis, and within ten miles, there are only two deliveries in each day to and from the metropolis; and a letter, put into any proper office in London, before five o'clock in the afternoon, will be delivered on the same day, at any place within such distance of ten miles; and a letter, put into a country office within that distance, before four o'clock, ought properly to be delivered in London on the same day. The Holder, or party forwarding the notice, may give it verbally, or he may put a letter in the two-penny post, directed even to an Indorser, who resides in the same street. If he send notice by a private hand, it must be given or left at the Indorser's residence before the expiration of the day; if to a banker, during the hours of business; but to another person the hour is not material. If, by an irregularity in the post-office, a letter, put in in due time, be not delivered till the third day, it should seem, that such laches will not prejudice." Chitty on Bills, ch. 10, p. 515, 516 (8th edit. 1833).

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is at liberty to do so at his option.[1] He is always allowed, by law, a whole day for this purpose, and is not compellable to lay aside all other business (*omissis omnibus aliis negotiis*), to devote himself to that particular purpose. For it would be most inconvenient and unreasonable to require such strictness, as it might interfere with other business and duties of quite as pressing an importance; and, therefore, it is sufficient, if he sends notice by the post or otherwise the next day.[2]

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[1] Chitty on Bills, ch. 10, p. 504, 510, 511, 513, 517 to 520 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 267 to 270 (5th edit. 1830); Burbridge *v.* Manners, 3 Camp. R. 193; Ex parte Maline, 19 Ves. 216; Tindal *v.* Brown, 1 Term R. 167, 186; Bancroft *v.* Hall, 1 Holt, N. P. Rep. 476; Darbishire *v.* Parker, 6 East, R. 3, 8, 9; Lindenberger *v.* Beall, 6 Wheat. R. 104; 3 Kent, Comm. Lect. 44, p. 106 to 108 (4th edit.).

[2] Ibid.; Scott *v.* Lifford, 9 East, R. 347; Smith *v.* Mullett, 2 Camp. R. 208; Stocken *v.* Collins, 9 Carr. & Payne, 653; S. C. 7 Mees. & Welsb. 515; 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.). — Mr. Chitty, whose practical experience on this subject deserves great attention, says; "If notice of the non-payment of a foreign Bill is to be given to a person in this country, the time of giving it would, it should seem, be governed by the rules and practice applicable to inland Bills and notes. But if the notice is to be forwarded to a Drawer or Indorser abroad, then it will be safest, if it be sent by the very next regular post or ordinary conveyance. It has, indeed, been said, that notice ought to be forwarded on the very day of refusal, if any post or ordinary conveyance sets out on that day; and if not, then by the next earliest ordinary conveyance. And, unquestionably, if such expedition can be effected, it is advisable to send off notice by the foreign post of the same day, especially, if there should be no foreign post to the same place for some considerable time afterwards. But, if the reasoning in some of the cases on inland Bills be not inapplicable, it should seem, that there is no legal necessity for a Holder, *omissis omnibus aliis negotiis*, to devote himself in such hurry, to the causing protest to be made, and forwarding notice by post of the same day, in every case." Chitty on Bills, ch. 10, p. 510 (8th edit. 1833). He afterwards adds; "It is settled, that it is never necessary to give or forward notice of the non-payment on the same day, when a Bill or note falls due, whether the instrument was circulated only in London, or in the country, and whether or not the Drawer or Indorsers reside in the same town, where the dishonor took

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§ 291. Other modifications of the time of notice may arise in cases, where personal, or verbal, or even written notice is to be given to a party, who is resi-

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place, and this without regard to the nearness of residence, or, whether or not the Holder might readily have given the notice, or put a letter in the post on that day; or, whether or not a post goes out from the place of dishonor on the same day, or not until or after the third day. In all these cases, it suffices to cause notice to be received on the next day, by the preceding Indorser, when resident in or near the same place. And, where the parties do not reside in or near the place of the dishonor, it suffices to forward notice by the general post, that goes out on the day after the refusal, or, if there be no post on that day, then on the third day, though thereby the Drawer or Indorser may not, in fact, receive notice till the third day, or sometimes, according to the course of the post, not until the fourth, or even subsequent day. The reason, why it has been decided, that it shall in no case be necessary to give notice on the day of the dishonor, or on the same day, when an Indorser receives notice, although the Indorser may even live in the same street as the Holder, and although the post may go out on the same day, and not on the next, is, to prevent nice and difficult inquiries, whether or not, in this or that particular case, the Holder could conveniently have given notice on the same day, or whether the pressure of other business did not prevent him from so doing, the affirmative or negative of which might be in the knowledge only of the Holder himself, or might become a very critical inquiry, and be very difficult and uncertain in legal proof. Another reason is, that the Holder ought not to be required, *omissis omnibus aliis negotiis*, to occupy himself immediately in forwarding notice to the prior parties, when, by delaying that step till the next morning, he would, after the press of other business had subsided, have, in the evening, or early the next morning, before his general business commences, time to look into his accounts with the other parties, and to consider his best steps to obtain payment from them, and to ascertain their precise residences, and to prepare and forward, either by hand, or by such next day's post, a proper notice to all the parties, against whom he means to proceed to enforce payment. But the rule is now well settled, that the Holder must, in order to subject all the parties to actions at his suit, give or forward all his notices to every one of the Indorsers, and to the Drawer, whose residences he can ascertain, on the day after the Bill or note was dishonored; and, if he omit to give or forward such direct and distinct notice to each, he may be deprived of all remedy against the omitted party, unless some other party to the Bill has given him notice of the dishonor in due time, in which case, such latter notice will enure to the benefit of any Holder. Formerly, indeed, it seems, that, when notice was to be given by the general post, it was considered, that a party ought to forward it on the

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dent in, or near the same town, where the dishonor takes place, otherwise than by the general post; and these may respect the hours, within which the notice

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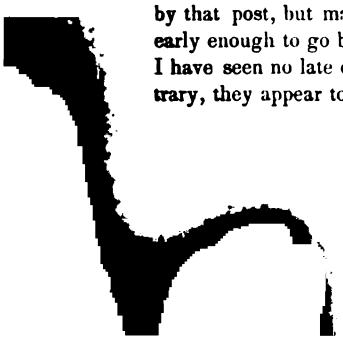
same day he had received it, if there was a reasonable time, as a few hours, between the receipt of the notice and the going out of the post from the same place. Thus, Mr. Justice Lawrence said; 'The general rule, as collected from the cases, seems to be, with respect to persons living in the same town, that the notice shall be given by the next day; and with regard to such as live at different places, that it should be sent by the next post (that is, the post on the very day of receiving it); but, that, if, in any particular place, the post should go out so early after the receipt of the intelligence, as that it would be inconvenient to require a strict adherence to such general rule, then, with respect to a case so circumstanced, it would not be reasonable to require the notice to be sent till the second post.' But the inquiry into circumstances, whether or not the notice might readily have been forwarded by the post of the same day, having been found inconvenient, the rule was afterwards settled, so as always to exclude the necessity of 'forwarding notice until the day after a party has himself received notice; and, therefore, Lord Tenterden, long after the above *dictum* of Lawrence, J., said; 'The time, within which notice of the dishonor of a Bill must be given, I have always understood to be the departure of the post on the day following that, in which the party receives the intelligence of the dishonor.'" Chitty on Bills, ch. 10, p. 513 to 515 (8th edit. 1833). And again, Mr. Chitty says; "When the parties do not reside in the same place, and the notice is to be sent by the general post, then the Holder or party, to give the notice, must take care to forward notice by the post of the next day after the dishonor, or after he received notice of such dishonor, whether that post sets off from the place, where he is, early or late; and, if there be no post on such next day, then he must send off notice by the very next post, that occurs after that day; but he is not legally bound, on account of there being no post on the day after he receives notice, to forward it on the very day he receives it." Chitty on Bills, ch. 10, p. 517, 518. It appears to me, that the rule is not so strict as it is laid down in this last passage of Mr. Chitty; and that it would be more correct to say, that the Holder is entitled to one whole day, to prepare his notice, and that, therefore, it will be sufficient, if he sends it by the next post, that goes after twenty-four hours from the time of the dishonor. Thus, suppose the dishonor is at four o'clock P. M., on Monday, and the post leaves on Tuesday, at nine or ten o'clock, it seems to me, that the Holder need not send by that post, but may safely wait, and put the notice into the post-office early enough to go by the post on Wednesday morning, at the same hour. I have seen no late case, which imports a different doctrine; on the contrary, they appear to me to sustain it. But, as I do not know of any direct



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should be given. And here, also, the general rule is, that the notice should be given within reasonable hours. If given at the domicil or dwelling-house of the party, it should be at such an hour as that the family may be up; for, if left after the usual hour of retirement, it will be too late. If given at the place of business of the party, as at his counting-house or store, it should be within the usual hours of business.[1] For, in all cases of this sort, where the notice is to be given on a particular day, it should be given at such an hour, that it may be reasonably received on the same day.[2]

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authority, which positively so decides, this remark is merely propounded for the consideration of the learned reader. See 3 Kent, Comm. Lect. 44, p. 105, 106 (4th edit.); Scott *v.* Lifford, 9 East, R. 347; Geill *v.* Jeremy, 1 Mood. & Malk. 61; Williams *v.* Smith, 2 Barn. & Ald. 496; Williams *v.* Shawcross, 2 Barn. & Ald. 501, note; Darbishire *v.* Parker, 6 East, R. 3, 8; Hawkes *v.* Salter, 4 Bing. R. 715; Whitwell *v.* Johnson, 17 Mass. R. 449; Mead *v.* Engs, 5 Cowen, R. 303; Bray *v.* Hadwen, 5 M. & Selw. 68; Smith *v.* Mullett, 2 Camp. R. 208; Jameson *v.* Swinton, 2 Taunt. 224; Bayley on Bills, ch. 7, § 2, p. 269, 270 (5th edit. 1830). But see Bank of Alexandria *v.* Swann, 9 Peters, R. 33; Mead *v.* Engs, 5 Cow. R. 307; Howard *v.* Ives, 1 Hill, N. Y. Rep. 263, 265.

[1] Chitty on Bills, ch. 7, p. 305 (8th edit. 1833); Id. ch 10, p. 503, 515, 516; Bayley on Bills, ch. 7, § 1, p. 224 to 226 (5th edit. 1830); Id. § 2, p. 276; Crosse *v.* Smith, 1 M. & Selw. 545; Bancroft *v.* Hall, 1 Holt, N. P. R. 476; Parker *v.* Gordon, 7 East, R. 385; Henry *v.* Lee, 2 Chitty, R. 124; Garnett *v.* Woodcock, 6 Maule & Selw. 44; Cayuga County Bank *v.* Hunt, 2 Hill, N. Y. R. 635.

[2] Ibid. — Mr. Chitty, on this subject, says; "As the giving notice of non-payment is not a mere form or ceremony, like that of protest, it ought, obviously, if practicable, to be so given as to be actually received; and though, when considering the mode of giving notice, we have seen, that it is not absolutely necessary to leave a written notice, and that it suffices to make a verbal application during the usual hours of business; yet, it is recommended to leave a written notice, when an actual notice cannot be personally communicated to the party himself. In some cases, where the Indorser's residence is unknown, but he is known to resort, during certain hours, at a certain place, as at the Royal Exchange, the Bank of England, Corn Exchange, or any public office, the notice ought to be given during

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§ 291. *a.* But, in the next place, it may, and often does, become necessary for other parties, besides the immediate Holder, to give notice of the dishonor, to other antecedent parties upon the Bill, who may be liable to repay the amount to them, if they should be called upon to pay, and should punctually pay, the Bill. Thus, if an Indorser upon the Bill should receive due notice of the dishonor, it may be indispensable, in many cases, in order to entitle him to charge an antecedent Indorser, that he should give him notice thereof. And the question then arises, Within what time such notice should be sent? The true answer is, within a reasonable time, and, in the ordinary course of things, it is deemed sufficient, if sent by the next post after twenty-four hours have elapsed since his own receipt of the notice of the dishonor.[1] For the general rule is, that every successive Indorser, who receives notice of the dishonor of a bill, is entitled to, at least, one full day after he has received the notice, before he is required to give notice of the dishonor to any antecedent Indorser, who is chargeable

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those hours; and to bankers, who are known to shut up their place of business at a certain hour, notice ought to be given there before that hour, though, if a person be stationed there to transact business after that time, notice to him would suffice. In other cases, notice, or application to give notice, at any reasonable time, (not during the hours of rest,) as between eight and nine in the evening, would suffice. Sending notice by a messenger, instead of the post, although he do not arrive quite so early as the post, will not prejudice, provided he deliver the notice on the same day, as that, on which it would have arrived by the post." Chitty on Bills, ch. 10, p. 516, 517 (8th edit. 1833). See also Id. ch. 9, p. 421, 422.

[1] Ante, § 229, 285, 288; Bayley on Bills, ch. 7, § 2, p. 267, 268 (5th edit. 1830); Chitty on Bills, ch. 10, p. 510, 513, 520, 521 (8th edit. 1833); Smith *v.* Mullett, 2 Camp. R. 208; Bray *v.* Hadwen, 5 Maule & Selw. 68; Wright *v.* Shawcross, 2 Barn. & Ald. 501, and note; Lenox *v.* Roberts, 2 Wheat. R. 373; Hawkes *v.* Salter, 4 Bing. R. 715; Carter *v.* Burley, 9 New Hamp. R. 556.

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over to him upon payment of the Bill.[1] In this respect he is, in general, entitled to stand upon the same rights, and to perform the same duties as the original Holder.[2] And it will make no difference, that all the parties, to whom notice is successively given, reside in the same town; for each party, so receiving notice, will be entitled to a full day to give notice to the antecedent parties.[3] But each party receiving notice, is limited as to the time of his giving notice to the other parties to a day after he receives it, notwithstanding he may have received his own notice earlier than the law positively required; as, for example, if he received notice by mail, or otherwise, on the day of the dishonor, and not on the day after the dishonor (which would have been sufficiently early), he will be limited in giving notice to the other party to one day after he so received notice on the day of the dishonor.[4]

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[1] Ibid.; Jameson v. Swinton, 2 Taunt. R. 224; Geill v. Jeremy, 1 Mood. & Malk. 61. — Mr. Bayley has given the following summary, deduced from the cases, which may serve as a brief exposition of the general doctrine. "To such of the parties as reside in the place, where the presentment was made, the notice must be given, at the farthest, by the expiration of the day following the refusal; to those, who reside elsewhere, by the post of that or the next post day. Each party has a day for giving notice. And he is entitled to the whole day; at least, eight or nine o'clock at night is not too late. He will be entitled to the whole day, though the post, by which he is to send it, goes out within the day; and though there be no post the succeeding day for the place, to which he is to send. Therefore, where the notice is to be sent by the post, it will be sufficient, if it be sent by the post of the following day; or, if there be no post the following day, the day after." Bayley on Bills, ch. 7, § 2, p. 268, 270 (5th edit. 1830); 3 Kent, Comm. Lect. 44, p. 107, 108 (4th edit.).

[2] Ibid.; Pardessus, Droit Comm. Tom. 2, art. 442 to 444.

[3] Chitty on Bills, ch. 10, p. 520 to 522 (8th edit. 1833); Hilton v. Shepherd, 6 East, R. 14, note; Smith v. Mullett, 2 Camp. R. 208; Scott v. Lifford, 9 East, R. 347.

[4] Carter v. Burley, 9 New Hamp. R. 556.

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§ 292. The benefit of this rule is not confined to a mere Holder for value. But, if the Bill has been transmitted to an agent or banker, for the purpose of procuring the acceptance or payment of the Bill, he will be entitled to the same time, to give notice to his principal, or customer, and to the other parties to the Bill, as if he were himself the real Holder, and his principal or customer were the party next entitled to notice; and the principal or customer will be entitled, after such notice, to the like time, to communicate notice to the antecedent parties, as if he received the notice from the real Holder, and not from his banker or agent.[1] In short, in all such cases, the banker or agent is treated as a distinct Holder.[2]

§ 293. In the next place, the general rule is affected by other modifications, arising from the religious observances of the particular sect, to which the Holder, or other party, belongs, and by the laws, and ordinances, and usages, and the religious festivals and fasts of the particular country. Thus, if the day, on which notice of the dishonor should ordinarily be given, should happen to fall on Sunday, or on Christmas day, or on any other holyday, or on any day set apart by public authority or usage for a solemn fast or thanksgiving, or consecrated to purposes not secular, or on any other day, which, according to the religion of the Holder, or other party, is required to be devoted to

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[1] Bayley on Bills, ch. 7, § 2, p. 272, 273 (5th edit. 1830); Chitty on Bills, ch. 10, p. 521, 522 (8th edit. 1833); Haynes v. Birks, 3 Bos. & Pull. 599; Scott v. Lifford, 9 East, R. 347; Langdale v. Trimmer, 15 East, R. 291; Howard v. Ives, 1 Hill, N. Y. Rep. 263; Colt v. Noble, 5 Mass. R. 167; Church v. Barlow, 9 Pick. 547, 549; U. States Bank v. Goddard, 5 Mason, R. 366; Mead v. Engs, 5 Cowen, R. 303; 3 Kent, Comm. Lect. 44, p. 108 (4th edit.).

[2] Ibid.

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religious purposes (such as Saturday, in the case of the Jews);[1] in all such cases, the party will be entitled to the same indulgence, as to his giving notice, as if no such day had intervened. In other words, such non-secular day is struck out of the calculation of the time; and the notice is sufficiently early, if duly sent on the next succeeding secular day.[2] If,

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[1] Ibid.

[2] Bayley on Bills, ch. 7, § 2, p. 271 to 273 (5th edit. 1830); Chitty on Bills, ch. 9, p. 403, 410, 411 (8th edit. 1833); Id. ch. 10, p. 506 to 514; Id. p. 519, 520; Smith *v.* Mullett, 2 Camp. R. 208; Geill *v.* Jeremy, 1 Mood. & Malk. 61; Bray *v.* Hadwen, 5 M. & Selw. 68; Wright *v.* Shawcross, 2 Barn. & Ald. 501, note; Hawkes *v.* Salter, 4 Bing. R. 715; Haynes *v.* Birks, 3 Bos. & Pull. 599; Scott *v.* Lifford, 9 East, 347; Williams *v.* Smith, 2 Barn. & Ald. 496; Ante, § 233; Lindo *v.* Unsworth, 2 Camp. R. 602; Cuyler *v.* Stevens, 4 Wend. R. 566; Eagle Bank of New Haven *v.* Chapin, 3 Pick. R. 183. — Here, again, Mr. Bayley's summary may well be quoted; "Where a party receives notice on a Sunday, he is in the same situation, as if it did not reach him till the Monday; he is not bound to pay it any attention till the Monday; and has the whole of Monday for the purpose. So, if the day, on which notice ought thus to be given, be a day of public rest, as Christmas day, or Good Friday, or any day appointed by proclamation for a solemn fast or thanksgiving, the notice need not be given until the following day. And it has been held, that, where a man is of a religion, which gives to any other day of the week the sanctity of Sunday, as in the case of Jews, he is entitled to the same indulgence as to that day. Where Christmas day, or such day of fast or thanksgiving, shall be on a Monday, notice of the dishonor of Bills or notes, due or payable the Saturday preceding, need not be given until the Tuesday. And Good Friday, Christmas day, and any day of fast or thanksgiving, shall, from 10th April, 1827, as far as regards Bills and notes, be treated and considered as Sunday. But these provisions do not apply to Scotland." Bayley on Bills, ch. 7, § 2, p. 271, 272 (5th edit. 1830). Mr. Chitty says; "The Statute of 7 and 8 Geo. IV., ch. 15, provides, that, when a Bill or note would be payable, under the Statute of 39 and 40 Geo. III., ch. 42, or otherwise, on the day preceding Good Friday, or Christmas day, it shall not be necessary to give notice of the dishonor thereof, until the day after such Good Friday, or Christmas day; and that, when Christmas day falls on a Monday, it shall not be necessary to give notice of the dishonor of a Bill due on the preceding Saturday, before the Tuesday following such Christmas day; and that, when Bills or notes shall fall due upon days appointed by proclamation for solemn fasts,

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therefore, the dishonor takes place on Saturday, the Holder will have until the next Monday to give notice; and notice on any part of that day will be sufficient. So, if an Indorser receives notice from the Holder, on Saturday, it will be sufficient for him to give the like notice to any prior Indorser on the next Monday. And, on the other hand, if he receives notice of the dishonor on Sunday, he is at liberty to treat it, as if received on the next Monday, and the notice, to be given by him to any prior Indorser, will be sufficiently early, if given on Tuesday.[1]

§ 294. Where there are numerous parties in succession on the Bill, as Drawers or Indorsers, who are entitled to notice, and may, as Drawers or Indorsers, be liable, on the dishonor of the Bill, not only to the Holder, but to any intermediate Indorser, standing between him and themselves, it is apparent, that, as each of such successive parties is entitled to a full day to give notice to any antecedent party on the Bill, several days may elapse without any laches in any party, between the time of the dishonor, and the time of notice thereof to the Drawer, or the other early Indorsers.[2] Nay, this may occur in respect to parties, all of whom reside in the same town; and yet, if the notice is communicated to them in regular succession, making an al-

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or days of thanksgiving, or upon the day next preceding the same, the Bills shall be payable the day before such proclaimed day, and may, in case of non-payment, be noted and protested on such preceding day; and that it shall not be necessary to give notice of the dishonor, until the day after such proclaimed day, and that Good Friday, or Christmas day, and every such fast or thanksgiving day, shall, as relates to Bills and notes, be considered as a Sunday. But these regulations do not extend to Scotland." Chitty on Bills, ch. 10, p. 511 (8th edit. 1833).

[1] Ibid.

[2] Chitty on Bills, ch. 10, p. 520 to 523 (8th edit. 1833); Ante, § 289 to 291; Carter v. Burley, 9 New Hamp. R. 556; Ante, § 382, § 384.

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lowance of one day for each party, who receives notice, to give notice to the antecedent parties, they will all be held liable, and the notice be deemed sufficient to bind them.[1] Thus, if there should be ten successive Indorsers on the Bill, the last of whom shall receive notice of the dishonor from the Holder, it will be sufficient for him, on the next day, to communicate notice thereof to the next antecedent Indorser, and he to the next, and so on; and thus, in particular cases, ten or more days may elapse before the notice reaches the first Indorser. Yet, in such a case, the first Indorser will be liable to pay the Bill, although the Holder has given notice only to the last Indorser on the Bill, and he only to the next antecedent Indorser, and so on to the first Indorser.[2] But, if any one of these Indorsers should miss a day in duly giving or forwarding notice, without any legal excuse for the omission, a link in the regular chain will be broken; and all the prior parties, unless they have received notice from some one of the other parties on the Bill, to whom such Indorser is liable, will be discharged from payment of the Bill.[3] The Holder (and the same

[1] Chitty on Bills, ch. 10, p. 520, 522, 523 (8th edit. 1833); Smith *v.* Mullett, 2 Camp. R. 208; Dobree *v.* Eastwood, 2 Carr. & Payne, 250; Carter *v.* Burley, 9 New Hamp. R. 556; Ante, § 382, § 384.

[2] Ibid.

[3] Chitty on Bills, ch. 10, p. 522, 523 (8th edit. 1833); Dobree *v.* Eastwood, 3 Carr. & Payne, 250; Marsh *v.* Maxwell, 2 Camp. R. 210, note; Turner *v.* Leach, 4 Barn. & Ald. 451; Bayley on Bills, ch. 7, § 2, p. 255 (5th edit. 1830); Id. p. 275; Pothier de Change, n. 148, 152, 153.— Mr. Bayley says; "It is no excuse for not giving notice the next day after a party receives one, that he received his notice earlier than the preceding parties were bound to give it; and that he gave notice within what would have been proper time, if each preceding party had taken all the time the law allowed him. The time is to be calculated according to the period, when the party in fact received his notice. Nor is it any excuse, that there are several intervening parties between him, who gives the notice,

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thing is true as to each successive Indorser) may, when it has been dishonored, either resort to his immediate Indorser, and then he must give him notice within the proper time, or he may resort to any, or all, of the other Indorsers, in which case he must give them notice respectively, in the same manner as if each were the sole Indorser; for the Holder is not entitled to as many days to give notice, as there are prior Indorsers; but each Indorser has his own day.[1] If, therefore, there are five Indorsers, and the Holder should not give notice to the first Indorser until five days, that will be too late; and, unless some subsequent Indorser has given him notice in due time, who has himself received due notice, such first Indorser will be discharged from all liability to the Holder.[2] In this respect, the French Law seems to be in entire conformity to ours.[3]

§ 295. Hitherto we have mainly spoken of the time of giving notice by means of the general post, or by regular packets, or by some other regular conveyance,

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and the defendant, to whom it is given; and that if the notice had been communicated through those intervening parties, and each had taken the time the law allows, the defendant would not have had the notice sooner." Bayley on Bills, ch. 7, § 2, p. 275; Id. p. 255 (5th edit. 1830).

[1] Bayley on Bills, ch. 7, § 2, p. 275 (5th edit. 1830); Chitty on Bills, ch. 10, p. 522 (8th edit. 1833); Dobree v. Eastwood, 3 Carr. & Payne, 250; Marsh v. Maxwell, 2 Camp. R. 210; Turner v. Leech, 4 Barn. & Ald. 451.

[2] Bayley on Bills, ch. 7, § 2, p. 275 (5th edit. 1830); Chitty on Bills, ch. 10, p. 522, 527 (8th edit. 1833); Marsh v. Maxwell, 2 Camp. R. 210; Dobree v. Eastwood, 3 Carr. & Payne, R. 250; Turner v. Leech, 4 Barn. & Ald. 451; U. States Bank v. Goddard, 5 Mason, R. 366. — The reason of the exception, where notice has been given by a subsequent Indorser, will appear, when we come to examine, by whom notice is to be given. See Post, § 303.

[3] Pardessus, Droit Comm. Tom. 2, art. 429, 430; Chitty on Bills, ch. 10, p. 523, note (a). See Code de Comm. art. 165; Pothier de Change, n. 148, 152, 153.

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where the parties reside at a distance, or in a foreign country. But there is nothing in the rules of law, which prevents notice in any case from being given by a private messenger, if the Holder should elect so to do, and is willing to run the chance of this hazardous mode of giving notice. If he does so elect, and thus supersede the ordinary and regular mode of giving notice by the general post, or otherwise, it is indispensable, that the notice should reach the party, for whom it is designed, on the same day (although not, perhaps, at as early an hour) as he would otherwise be entitled to receive it; for, if it arrive a day later, the party will be discharged.[1] Cases, indeed, may exist, in which notice by a special messenger may be most reasonable and proper (and then his expenses must be borne by the party, who receives the notice); as, for example, where the party resides at a distance from any post-town, or there is no regular or speedy communication with his place of residence.[2] It does not seem, however, that, in any case, it is necessary to send notice by a special messenger, if there be a regular mode of giving it by the post or otherwise, even if thereby the notice might have arrived earlier.[3]

§ 296. We have already seen, that the time of giv-

[1] Chitty on Bills, ch. 10, p. 504, 505, 518, 519 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 279, 280 (5th edit. 1830); Darbishire v. Parker, 6 East, R. 8, 9; Pearson v. Cranlan, 2 Smith, R. 404; Bancroft v. Hall, 1 Holt, R. 476; Ante, § 290, note; 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.).

[2] Chitty on Bills, ch. 10, p. 504, 505, 518, 519 (8th edit. 1833); Pearson v. Cranlan, 2 Smith, R. 404.

[3] Chitty on Bills, ch. 10, p. 503, 505, 518, 519 (8th edit. 1833); Muilman v. D'Eguino, 2 H. Black. R. 565; Darbishire v. Parker, 6 East. R. 7; Bank of Columbia v. Lawrence, 1 Peters, R. 582, 584; Kuf v. Weston, 3 Esp. R. 54. But see Hordern v. Dalton, 1 Carr. & Payne, 181.

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ing notice of the dishonor of a foreign Bill of Exchange is governed by the law of the place, where the contract is entered into, and not by the law of the place, where the protest is made.[1] And this time is

[1] Ante, § 176, 177, note, § 285; Chitty on Bills, ch. 10, p. 506 to 508 (8th edit. 1833); Aymar v. Sheldon, 12 Wend. R. 439; Wallace v. Agry, 4 Mason, R. 336, 344. But see Rothschild v. Currie, 1 Adolph. & Ellis, New R. 43, which is *contra*. — This was the case of a Bill drawn in England on, and accepted by, a house in France, payable at Paris, in favor of a Payee domiciled in England, by whom it was indorsed, in England, to an Indorsee, who was also domiciled there. The Bill was dishonored at maturity, and due notice was given to the Payee of the protest and dishonor, according to the law of France; but not (as it was suggested) according to the law of England; and it was held, by the Court, in a suit brought by the Indorsee against the Payee, that the notice was good, being according to the law of France, the *Lex loci contractus* of acceptance. For this doctrine, reliance was mainly placed upon the text of Pothier de Change, n. 155. The language of Pothier is, that the form of the protest, the time of making it, and the notice of it, are to be regulated by the law of the place, where the Bill of Exchange is payable. In respect to the form of the protest, he says, there is no doubt; for it is a general rule, that, in respect to the formalities of acts, we are to follow the law and style of the place, where the act is done. He then adds, that the same thing applies in respect to the time, within which the protest ought to be notified; for the Bill of Exchange is to be deemed contracted in the place, where it is payable, according to the rule, Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit; and, consequently, the obligations of it ought to be governed by the laws and usages of the same place, to which the parties must be presumed to have submitted themselves according to another rule; In contractibus veniunt ea, quæ sunt moris et consuetudinis in regione, in qua contrahitur. Now, so far as regards the formalities of the protest, and the time of making it, there is no doubt whatsoever, that the rule is universally adopted in the commercial world, that they are to be according to the law of the place, where the acceptance and payment of the Bill are to be made. Chitty on Bills, ch. 10, p. 490 (8th edit. 1833). But the doctrine of Pothier is supposed to go much farther; and, if it does, and extends to the case of notice to Indorsers, who have indorsed the Bill in a foreign country, (upon which, it seems to me, there may be room for doubt,) his reasoning in support of it is founded upon a false foundation; and the maxim, cited by him, Contraxisse, &c., would lead to the opposite conclusion. The Acceptor agrees to pay in the place of acceptance, or the place fixed for the pay-

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variously regulated in different countries. In France, particular periods are prescribed, within which notice

ment (Cooper v. Earl of Waldegrave, 2 Beavan, R. 282); but, upon his default, the Drawer and the Indorser do not agree, upon due protest and notice, to pay the like amount in the same place; but agree to pay the like amount in the place, where the Bill was drawn or indorsed by them respectively. Hence it is, that the notice, to be given to each of them, must and ought to be notice, according to the law of the place, where he draws or indorses the Bill, as a part of the obligations thereof. The Drawer and Indorser, in effect, contract in the place, where the Bill is drawn, or indorsed, a conditional obligation, that is, if the Bill is dishonored, and due notice is given to them of the dishonor, according to the law of the place of their contract, they will respectively pay the amount of the Bill at that place. The law of the place of the acceptance or payment of the Bill has nothing to do with their contract; for it is not made there, and has no reference to it. The maxim, Contraxisse, &c., in truth, has no just application to such a case. It properly applies to the case, where the same person, by a contract made in one place, promises to pay money in another place. But, if it is to have any application to the case of a Drawer or an Indorser of a Bill, it must be to make the other maxim apply; In contractibus veniunt ea, quæ sunt moris et consuetudinis in regione, in qua contrahitur. Pardessus lays down the rule in its true sense; and insists upon the distinction between the cases of the contract of the Acceptor, and the contract of the Drawer and Indorser. The contract of the Acceptor is a contract made in the place of acceptance, and governed by the law of that place. But the contract of the Drawer is a contract made in the place, where it is drawn, and of the Indorser, a contract in the place, where the indorsement is made, and governed by the law thereof. Hence he says, that, if a Bill is drawn in France, where a protest is required to prove the dishonor of a Bill, upon a foreign country, where no protest is required; still the Drawer will not be bound, unless a protest is duly made in the foreign country. Whether this doctrine be strictly correct, or not, it shows, in a striking manner, the opinion of Pardessus upon the whole subject. He adds, what is most material to the present purpose, that the Indorser is liable only in the same manner, and under the same circumstances, as the Drawer would be; that is, according to the law of the place of his contract; and that all the obligations and qualifications of it, imposed by the local law, are binding and operative upon him. (Pardessus, Droit Comm. Tom. 5, art. 1488, 1497 to 1499, p. 252 to 255, 280 to 287; Post, § 347.) And he expressly declares, that every Indorser is to have notice, according to the law of the place of his indorsement, since it is a part of the contract. (Id. art. 1485, 1499.) His reasoning is at variance with that of the learned Judge, who delivered

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of non-acceptance, as well as of non-payment of a Bill should be given, and the shortest periods seem to be fifteen days after the dishonor and protest.[1]

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the opinion of the Court in Rothschild *v.* Currie (1 Adolph. & Ellis, New R. 43). With the greatest deference for that learned Judge, it seems to me, that the decision of the Court is not sustained by the reasoning, on which it purports to be founded. The Court there admit, that the notification of the dishonor is parcel of the contract of the Indorser; and, if so, then it must be governed by the law of the place (England), where the indorsement was made, upon the very rules cited by the Cour from Pothier. The error (if it be such) seems to have arisen from confounding the contract of the Acceptor with the contract of the Drawer and the Indorser. Mr. Chitty takes the same view of the law, which is taken in the text. Chitty on Bills, ch. 10, p. 490, 491 (8th edit. 1833); Id. p. 506. The case of Aymar *v.* Sheldon (12 Wend. R. 439) seems also opposed to the doctrine in Rothschild *v.* Currie. See also 3 Burge, Comm. 773; 2 Kent, Comm. 460, and note, (4th edit.); Astor *v.* Benn, 1 Stuart, Canada R. 69, 70; Wallace *v.* Agry, 4 Mason, R. 336 – 344; Pothier, n. 64, 67, as to Reëxchange; Ante, § 285, 296; Post, § 366, 391.

[1] Chitty on Bills, ch. 10, p. 506, 507 (8th edit. 1833). — Mr. Chitty gives the following summary statement of the French Law; "In France, also, a protest for non-payment must not be made until the day after the day, when the Bill became due, that entire day being allowed by law to the Drawee to prepare for, and make payment; but it is otherwise with respect to Bills payable at sight, when the terms of the Bill denote, that the party is to pay upon demand; and, therefore, the protest may, in that case, be made on the very day of presentment. If the day for making the protest should fall on a Sunday, or legalized holyday, then the protest is to be made on the day after it; and, if the distance of parties, or other circumstances, occasion delay, a reasonable further time, on making the protest, will not prejudice. A premature protest, would, no doubt, be unavailing. In France, also, the time, within which the notice of dishonor must be given, differs materially from that required in England, and affords more indulgence to the Holder. Thus, it there suffices, if the protest be notified within five days, reckoned from the date of the protest, when the Drawer or Indorser resides within fifteen miles; and, if the party, to whom the notice is to be given resides more than fifteen miles from the place, where the Bill was payable, the time is increased in proportion, and according to such increased distance; but, if the last of the five days be a Sunday, the notice must arrive the day before. When the Bill drawn in France falls due in a foreign country (as in England), the Drawer and Indorsers, resident in France, must have notice within two months after the date of the protest; and, when the Bill is

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§ 297. In the next place, in respect to the place, to which the notice is to be sent. This, in general, is governed by the same considerations as the present-

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payable in other countries, more or less prescribed time is allowed; and, if the English Holder neglect to observe the law of France, as to the time of protest, and notice, and proceeding in France, he will lose his remedy against the French Drawer and Indorsers. The French Law does not assume to determine what delay may be allowed in giving notice to, and proceeding against, the Drawer and Indorsers residing in a foreign country. In general, they are regulated, and are to be given effect to, in France, according to the law of such foreign country, where there are conflicting regulations in the different countries in regard to commerce." Chitty on Bills, ch. 10, p. 507, 508 (8th edit. 1833). It appears to me, that Mr. Chitty has mistaken the rule of the French Law; and that it is fifteen instead of five days, and twenty-five miles instead of fifteen miles. Indeed, he seems, in p. 508, in some measure to correct his own errors. Mr. Rodman gives the following translation of the two articles (165 and 166) of the Code of Commerce; "If the Holder would pursue his remedy individually against his immediate Indorser, or the Drawer, in case the Bill came directly from him, he must give him notice of the protest, and, in default of reimbursement, commence his suit against him within fifteen days from the date of the protest, if the said Indorser or Drawer reside within the distance of five myriametres (ten leagues, equal to twenty-five miles). This period of delay, with respect to the Indorser or Drawer, domiciled at a greater distance than five myriametres from the place, where the Bill of Exchange was payable, shall be increased one day for every two and a half myriametres exceeding the five before mentioned. In the case of the protest of Bills of Exchange drawn in France, and payable out of the continental territory of France in Europe, the remedy against the Drawers and Indorsers residing in France must be pursued within the following periods, to wit: Two months for Bills payable in Corsica, in the island of Elba, or of Capraja, in England, and in the countries bordering on France; Four months for those payable in the other states of Europe; Six months for those payable in the ports of the Levant, and on the northern coasts of Africa; A year for those payable on the western coasts of Africa, as far as and including the Cape of Good Hope, and in the West Indies; Two years for those payable in the East Indies. These periods of delay are allowed in the same proportions, for pursuing the remedy against the Drawers and Indorsers residing in the French possessions situated out of Europe. The abovementioned delays, of six months, a year, and two years, are allowed to be doubled in time of maritime war." Code of Commerce, by Rodman, p. 139, 141 (edit. 1814). In the recent case of

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ment for acceptance.[1] If the party has changed his domicil after he became a party to the Bill, and his removal is known, notice should be given or sent to him at his new place of domicil, if known, or if, by reasonable diligence and inquiry, it can be ascertained.[2] If the notice is to be given to a party in or near the place of the dishonor of the Bill, and it is not sent by the general post, it should be sent to, or given at, his place of domicil, or his place of business; and either will be sufficient.[3] If sent by the

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Rothschild v. Currie (1 Adolph. & Ellis, New Rep. 43), the Court of Queen's Bench seems to construe the French Code as I have construed it. See also Pardessus, Droit Comm. Tom. 2, art. 430, 431; Pothier de Change, n. 152; Jousse, sur l'Ord. 1673, art. 13 – 15, p. 105 – 107 (edit. 1802); Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 165, 166, p. 519 – 522.

[1] Ante, § 235, 236; Williams v. Bank of U. States, 2 Peters, R. 100.

[2] Bank of Utica v. Phillips, 3 Wend. R. 408; Cuyler v. Nellis, 4 Wend. R. 398; Bank of Utica v. Davidson, 5 Wend. R. 587; Catskill Bank v. Stall, 15 Wend. R. 364; Wells v. Whitehead, 15 Wend. R. 527; Lowery v. Scott, 24 Wend. R. 358; Bayley on Bills, ch. 7, § 2, p. 280 to 282 (5th edit. 1830); McMurtrie v. Jones, 3 Wash. Cir. R. 226; Barker v. Clarke, 2 Appleton, R. 156; Spencer v. Bank of Salina, 3 Hill, R. 520.

[3] Chitty on Bills, ch. 7, p. 305 (8th edit. 1833); Id. ch. 10, § 502, 503, 516; Bayley on Bills, ch. 7, § 1, p. 218 to 226, 244 (5th edit. 1830); Id. § 2, p. 276; 3 Kent, Comm. Lect. 44, p. 106 to 108 (4th edit.); Ireland v. Kip, 10 John. R. 501; S. C. 11 John. R. 230; Smedes v. Utica Bank, 20 John. R. 372; Ransom v. Mack, 2 Hill, N. Y. R. 587; Laforte v. Lamdry, 17 Martin, R. 359; Clay v. Oakley, 17 Martin, R. 137; Porter v. Boyle, 8 Miller, R. 170. See Stuckert v. Anderson, 3 Wharton, R. 116. — Mr. Chancellor Kent has summed up the general doctrine in the following brief and comprehensive terms; "Where the parties live in the same town, and within the district of the letter-carrier, it is sufficient to give notice by letter through the post-office. If there be no penny-post, that goes to the quarter, where the Drawer lives, the notice must be personal, or by a special messenger sent to the dwelling-house; and it is necessary, in that case, that the notice be personally given to the party to be charged, or at his dwelling-house or place of business, and the duty of the Holder does not require him to give notice at any other place. The notice, in all cases, is good, if left at the dwelling-house of the party, in a way reasonably cal-

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general post, and his place of business is in one town, and his domicil in another, and the mail goes to both, it would seem sufficient to send the notice to either place, properly directed, especially if the party is accustomed to receive notices and letters at the post-office of each town.[1] It is not indispensable for the notice to be sent to the post-office nearest to the residence of the party, nor even to the town, in which he resides, if it be, in fact, sent to the post-office, to which he usually resorts for his letters.[2] And if a party reside in a county, and not in a town, it seems, that it will be sufficient to send notice to him, directed to him at the Court of Justice of the county, although, in point of fact, there is a post-office nearer to his residence, where he usually receives his letters.[3] Where there is no post-office in the town, where the party resides, it would, perhaps, be sufficient to send a letter, directed to him, to the nearest post-office, to

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culated to bring the knowledge of it home to him; and if the house be shut up by a temporary absence, still the notice may be left there. If the parties live in different towns, the letter must be forwarded to the post-office nearest to the party, though, under certain circumstances, a more distant post-office may do; but the cases have not defined the precise distance from a post-office, at which the party must reside, to render the service of notice through the post-office good." 3 Kent, Comm. Lect. 44, p. 107 (4th edit.).

[1] See Bayley on Bills, ch. 7, § 1, p. 218 to 226, 244 (5th edit. 1830); Chitty on Bills, ch. 7, p. 305, 307 (8th edit. 1833); Id. ch. 10, p. 488; Bank of Columbia *v.* Lawrence, 1 Peters, R. 582; Reed *v.* Paine, 16 Johns. R. 218; Williams *v.* Bank of U. States, 2 Peters, R. 100; Bank of U. States *v.* Carneal, 2 Peters, R. 549; Cuyler *v.* Nellis, 4 Wend. R. 398; 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.); Ransom *v.* Mack, 2 Hill, N. Y. R. 587.

[2] Bank of Geneva *v.* Howlett, 4 Wend. R. 328; Cuyler *v.* Nellis, 4 Wend. R. 398; Catskill Bank *v.* Stall, 15 Wend. R. 364; Reed *v.* Paine, 16 John. R. 218.

[3] Weakly *v.* Bell, 9 Watts, R. 213. See Yeatman *v.* Erwin, 5 Miller, R. 264; Bank of U. States *v.* Carneal, 2 Peters, R. 543.

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which letters addressed to that town are usually sent.[1] But it has been held, that if the person entitled to notice, is living in the wilderness twenty or thirty miles from any post-office, it is not sufficient to send notice to him by mail to the post-office nearest the residence of the party; but, that it should be sent by a special messenger, or given in person.[2]

§ 298. The same rule will generally apply to cases, where the notice is to be sent abroad to a foreign country. It should be directed to the party at his domicil, or at his place of business, if they are in different towns; and it should be sent by the regular packet, if there be any, bound for the port or place of his domicil; and, if there be none, then by some other conveyance to, or as near his place of domicil, or other direction, as is practicable. If the packet do not proceed directly to the port, where the party resides, or has his place of business, it would seem sufficient to write the proper direction of the party on the notice, so that it may be sent in the usual manner, by the post or otherwise, after the arrival of the packet, to the proper place, to which it is directed. It is, however, almost impracticable, on such a subject, to lay down any specific rules, which shall govern all cases, since the circumstances may so essentially vary. The most, that can be said, is, that reasonable diligence should be used, in all cases, to make the notice effectual.[3]

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[1] Shed v. Brett, 1 Pick. R. 401; Ireland v. Kip, 11 Johns. R. 231. As to the effect of misdirection as to place, see Spencer v. Bank of Salina, 3 Hill, R. 520.

[2] Fisk v. Jackman, 1 Appleton, R. 467.

[3] See Bank of U. States v. Carneal, 2 Peters, R. 549; Post, § 383.— Mr. Chitty has deduced from the decisions some more minute directions;

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§ 299. In cases, where the residence of the parties, who are to receive notice, is unknown, it is incumbent upon the Holder, and all other parties, who are required to give notice, to make due inquiries, with reasonable diligence, as to the true domicil and place of business of the party; and, unless they do so, those parties will be discharged, if, upon the exercise of due diligence, their places of domicil and business could have been ascertained. What will be due and reasonable diligence, in this respect, must essentially depend upon the particular circumstances of each case.[1] If all reasonable diligence is used, and all the inquiries are unsuccessful, then the Holder, and other persons bound to give notice, are excused thereby

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"When the notice (says he) is to be sent in a letter by post, care must be observed, that the letter be accurately directed; for any mistake, occasioning delay, and which might have been avoided by due care, will deprive the Holder of all remedy against the party, to whom the notice ought to have been given. If the party reside in a city or large town, the directions should not be to him at that place generally, but state the particular street, or part of the town, where he resides, and his trade or occupation, so as to prevent the risk of misdelivery, which might at least occasion delay in the proper person receiving such notice; therefore, it has been held, that a notice to an Indorser, thus, 'Mr. Haynes, Bristol,' is too general and insufficient, without express evidence, that the proper party received it in due time, because the place being so populous, there may be many persons of the same name there. And though a distinction has been taken as to a Drawer, who himself dated his Bill so generally as 'Manchester,' it was considered, that a notice directed to him, equally general, sufficed; every prudent Holder should, in all cases, make active inquiries, and write the fullest description on a letter giving notice. It has been suggested, that, if it be proved, that there was a directory for the place, where it is supposed the Indorser or Drawer resides, then, that the adoption of the address, given in such directory, might, perhaps, be held sufficient. It is not usual to advertise the dishonor of a Bill or note in the public papers; but, where the sum is considerable, and all other inquiries after an Indorser have failed, it might be expedient to adopt that means of giving notice." Chitty on Bills, ch. 10, p. 506 (8th edit. 1833).

[1] See Spencer *v.* Bank of Salina, 3 Hill, R. 520.

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from giving notice.[1] Where there are several persons, who are joint Drawers, or Indorsers, entitled to notice, who are not partners, each would seem to be

[1] Chitty on Bills, ch. 10, p. 516, 524, 525 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 274, 275, 280, 283 (5th edit. 1830); McMurtrie *v.* Jones, 3 Wash. Cir. R. 206; Pardessus, Droit Comm. Tom. 2, art. 434; Fisher *v.* Evans, 5 Binn. R. 542; Chapman *v.* Lipscombe, 1 Johns. R. 294; Browning *v.* Kinnear, Gow, R. 81; Bateman *v.* Joseph, 12 East, R. 433; Beveridge *v.* Burgis, 3 Camp. R. 262; Firth *v.* Thrush, 8 Barn. & Cressw. 387; Clarke *v.* Sharpe, 3 Mees. & Welsb. 166; Barnwell *v.* Mitchill, 3 Conn. R. 101; 3 Kent, Comm. Lect. 44, p. 107, 108, 109 (5th edit.); Stewart *v.* Eden, 2 Cain. R. 121; Blakely *v.* Grant, 6 Mass. R. 386; Safford *v.* Wyckoff, 1 Hill, N. Y. R. 11; Howard *et al.* *v.* Ives, 1 Hill, N. Y. R. 263; Ransom *v.* Mack, 2 Hill, N. Y. R. 587. — Mr. Chitty says; "If the residence of the party, to whom the notice ought to be given, be not known to the Holder, he must, nevertheless, not remain in a state of passive and contented ignorance, but must use due diligence to discover his residence, and, if he do, then the Indorser remains liable, though a month or more may have elapsed before actual notice be given; and, if he (the Holder), before the Bill become due, should apply to one of the parties, to ascertain the residence of any Indorser, and he should decline giving him any information, the Holder need not, after the Bill became due, renew his inquiries of that party.* But, in general, the Holder should not only immediately apply to all the parties to the Bill for information, but also make inquiries, and send notice to the place, where it may reasonably be supposed the party resides; and, if he has employed an attorney, who, at length, discovers the residence, we have seen, that it will suffice, if the attorney, on the next day, consults with his client, and the latter, on the third day, forwards the notice to the discovered Indorser, though, in general, notice ought to be given on the next day. And a letter from the Holder, giving notice of the dishonor, containing this passage, 'I did not know where, till within these few days, you were to be found,' is not to be taken as proving, that the notice was not given on the next day after the residence of the party was discovered. Where the traveller of a tradesman received, in the course of business, a promissory note, which was delivered to him for the use of his principal, without indorsing it, and the note having been returned to the principal dishonored, and the latter, not knowing the address of the next preceding Indorser, wrote to his traveller, who was then absent from home, to inquire respecting it, it was held, that such principal was not guilty of laches, although it was urged, that the traveller ought to have stated the residence, when he remitted the notes, and though several days elapsed before he received an answer, and thereupon he gave

* I have varied Mr. Chitty's text in this place, to correct its inaccuracy and obscurity.

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entitled to notice, and, therefore, notice should be directed to his own proper domicil, or place of business.[1] Where they are partners, notice to either of

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notice to the next party, as he had used due diligence in ascertaining the address." Chitty on Bills, ch. 10, p. 524, 525 (8th edit. 1833); Id. 516. Mr. Bayley says; "A letter directed to a man at a large town, without specifying the part, in which he lives, the trade he carries on, or any other circumstance to distinguish him, may be sufficient, if he be the Drawer, and has dated the Bill generally at that place; or if, upon reasonable inquiry, no information can be obtained to enable the party to give a better direction. But, *primâ facie*, such a direction will be insufficient, because it is not likely, upon such a direction, the letter will reach the person, for whom it is intended, in proper time. If, however, it be proved, that there was a directory at the time, for that place, and that a reference to the directory would have shown in what part of the place the person intended lived, such a direction might, perhaps, be held sufficient. Where it is not known, where a party lives, due diligence must, in general, be used to find out. And, where such diligence is unsuccessful, it will excuse want of notice. But merely inquiring at the house, where a Bill is payable, is not due diligence for finding out an Indorser. Inquiry should be made of some of the other parties to the Bill or note, and of persons of the same name. Calling on the last Indorser, and last but one, the day after the Bill becomes due, to know where the Drawer lives, and, on his not being in the way, calling again the next day, and then giving the Drawer notice, may be sufficient. But, if a party, when he passes a Bill or note, decline saying, where he lives, and undertake to call upon the Acceptor to see if the Bill is paid, he cannot complain of want of notice. Where the residence of a party entitled to notice is unknown, and the person next to him upon the Bill or note will give no information, where he lives, a note addressed to the former, if sent to the place, where such latter person lives, will be sufficient, though the application for information be made before the Bill or note is due; especially if the person applied to has acted in any respect, with regard to the Bill or note, as agent for the party entitled to notice. And, if the Holder employ an attorney to give notice, and the attorney, after a lapse of time, discover, where the party lives, he may take a day to apprize the Holder, and take his further directions, before he gives the notice." Bayley on Bills, ch. 7, § 2, p. 280 to 283 (5th edit. 1830.)

[1] I have not been able to find any English authority exactly in point; but the rule to be found in the Text Books, as to notice to one being notice to all, is exclusively applied to partners. The American authorities are opposed to each other. In Ohio it is held, that notice to one is notice to all joint Indorsers. Harris *v.* Clark, 10 Ohio, R. 5. In Connecticut it is held, that notice should be given severally to each joint Indorser. Shephard *v.*

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the partners will suffice, at the domicil of either of them, or at their usual place of business.[1]

§ 300. In the next place, as to the mode of notice. As has been already intimated, it is not essential, in general, that notice should be communicated by a written statement, at least, where the parties are resident in the same country. It may be by a verbal notice to the party personally, or it may be by a written notice, left at his domicil or place of business. If the notice be written, it is not indispensable to be given to him personally. It is sufficient, if it be sent or delivered to some suitable person at his place of business, such as his clerk or agent; or to some suitable person at his place of residence.[2] If the call is made at reasonable hours, and no person can be found, to whom the notice can be communicated, the Holder, or other party giving the notice, will be excused from further efforts.[3] Where the notice is to be sent by

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Hawkey, 1 Connect. R. 368. See, also, 3 Kent, Comm. Lect. 44, p. 105, n. (*b*) (5th edit.). Whether notice to a Director of a Bank, is notice to the Bank, see Story on Agency, § 140 *a*, 140 *b*; 1 Story, Eq. Jurisp. § 408 *a*.; Commercial Bank *v.* Cunningham, 24 Pick. 270, 276.

[1] See Chitty on Bills, ch. 8, p. 355, 369, 370 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 285 (5th edit. 1830); Porthouse *v.* Parker, 1 Camp. R. 82. — I do not know of any direct authority to this point; but it seems to me to be the result of general principles.

[2] Chitty on Bills, ch. 10, p. 502 to 504 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 276 to 278 (5th edit. 1830); 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.); U. States *v.* Barker's Admin., 4 Wash. Cir. R. 464.

[3] Ibid.; Crosse *v.* Smith, 1 Maule & Selw. 545; Bancroft *v.* Hall, 1 Holt, R. 476; Stewart *v.* Eden, 2 Caines, R. 121; 3 Kent, Comm. Lect. 44, p. 106 to 108 (4th edit.). — Mr. Chitty says; "With respect to the mode of giving the notice, personal service is not necessary, nor is it requisite to leave a written notice at the residence of the party; but it is sufficient to send to, or convey verbal notice at, the counting-house or place of abode of the party, without leaving notice in writing; and the giving such verbal notice to a servant at his home, the defendant having left no

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the general post, or other regular conveyance, it is, of course, necessary, that it should be in writing, and properly directed, otherwise the error may be fatal. Where it is sent by a special messenger, it may be verbal; but, in such a case, it is far more desirable, to prevent mistakes, that it should be in writing. But, whatever mode is adopted to transmit notice, if it be that, which is pointed out by the law, and conformable to it, it is of no consequence, whether it ever actually reaches the party or not. It is sufficient, that the Holder, or other party giving the notice, has done his duty. Thus, for example, if a letter, containing the notice, has been regularly put into the post-office, or regularly sent by any other proper conveyance, it is wholly immaterial, whether it has reached the party, who is entitled to notice, or not.[1]

§ 301. In the next place, as to the form of the notice. In general, it may be stated, that no particular form or language is indispensable to be used. It is sufficient, if it contains a true description of the Bill, so as to identify it; that it states, that it has been presented for acceptance, and has been dishonored, and protested for non-acceptance, and that the Holder,

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clerk in his counting-house, as it was his duty to do, suffices. And where the Drawee has a counting-house, where he transacts business, and at which the Bill was addressed, it suffices to apply there for the purpose of giving notice, without attempting to give or leave notice at the residence of the Drawee. And it is sufficient, both in the case of a foreign and an inland Bill, to send twice during hours of business, and to knock there and wait a short time, and then go away without leaving or sending any written notice." Chitty on Bills, ch. 10, p. 502, 503 (8th edit. 1833).

[1] Chitty on Bills, ch. 10, p. 502 to 504 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 279 (5th edit. 1830); Saunderson *v.* Judge, 2 H Black. 509; Dobree *v.* Eastwood, 3 Carr. & Payne, 250; Kufh *v.* Weston, 3 Esp. R. 54; 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.); Gallagher *v.* Roberts, 2 Wash. Cir. R. 91.

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or other party sending the notice, looks to the party, to whom the notice is sent, for indemnity and satisfaction.[1] Indeed, these statements need not appear in positive or express words; but it will be sufficient, if they arise by fair and reasonable implication from the language used.[2]

§ 302. It is often laid down, that, in cases of a foreign Bill of Exchange, the notice of the dishonor

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[1] Chitty on Bills, ch. 8, p. 365 (8th edit. 1833); Id. ch. 10, p. 501, 502; Bayley on Bills, ch. 7, § 2, p. 256, 257 (5th edit. 1830); Tindal v. Brown, 1 Term R. 167, 186; Hartley v. Case, 4 Barn. & Cressw. 339; Mills v. Bank of U. States, 11 Wheat. R. 431; Cook v. French, 10 Adolph. & Ellis, 131; Lewis v. Gompertz, 6 Mees. & Welsb. 399; Stocken v. Collins, 7 Mees. & Welsb. 515; Cowles v. Harts, 3 Conn. R. 517; 3 Kent, Comm. Lect. 44, p. 108 (4th edit.).

[2] Mr. Chitty (Chitty on Bills, ch. 10, p. 502, note, 8th edit. 1833) has given a comprehensive form of a notice of dishonor of a Bill of Exchange for non-payment, which may (*mutatis mutandis*) equally serve for cases of non-acceptance. Upon the subject of what notices of the dishonor are, and what are not, sufficient in form, there are a great variety of decisions, not easily reconcilable with each other, principally, however, arising in cases of promissory notes. But the same principles apply to cases of Bills of Exchange in respect both to notice of non-acceptance and notices of non-payment. The earlier cases insist upon a good deal of strictness. The later are far more liberal, and founded upon more just and equitable considerations. See Hartley v. Case, 4 Barn. & Cressw. 339; Solarte v. Palmer, 7 Bing. R. 530; S. C. on appeal, 8 Bligh, R. (N. S.) 874; 1 Bing. New Cas. 194; Beauchamp v. Cash, Dow. & Ryl. N. P. C. 3; Cook v. French, 10 Adolph. & Ellis, 131; Boulton v. Welsh, 3 Bing. New Cas. 688; Hedger v. Steavenson, 2 Mees. & Welsb. 799; S. C. 1 Bing. New Cas. 125, 2 Clark & Fin. 93; Lewis v. Gomperts, 6 Mees. & Welsb. 399; Messenger v. Southey, 1 Mann. & Grang. 76; Stocken v. Collins, 7 Mees. & Welsb. 515; Grugeon v. Smith, 6 Adolph. & Ellis, 499; Houlditch v. Cauty, 4 Bing. New Cas. 411; 3 Kent, Comm. Lect. 44, p. 108 (4th edit.); Robsor v. Curlewis, 1 Carr. & Marsh. R. 374; Boulton v. Welsh, 3 Bing. New Cas. 688; Hedger v. Steavenson, 2 Mees. & Welsb. 799; King v. Beckley, 2 Gale & David. R. 131, note; S. C. 2 Adolph. & Ell. New R. 49; Furze v. Sharwood, 2 Adolph. & Ell. New R. 388; S. C. 2 Gale & David. R. 116. In this last case the principal authorities on this subject are reviewed by Lord Denman. See his Judgment, Post, § 390, note.

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should be accompanied with a copy of the protest.[1] But this doctrine never seems to have been established in our law; and, on the contrary, it may now be laid down, that it is not necessary, that the notice should be accompanied by a copy of the protest; and, that it will be sufficient for the notice to state, that the Bill had been protested, leaving the proof to be made by the production of the protest at the trial, if the case is contested.[2]

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[1] Chitty on Bills, ch. 8, p. 363, 366 (8th edit. 1833); Id. ch. 10, p. 509; Bayley on Bills, ch. 7, § 2, p. 258, 259 (5th edit. 1830). See Orr v. Maginnis, 7 East, R. 362.

[2] Cromwell v. Hynson, 2 Esp. R. 511; Robins v. Gibson, 1 Maule & Selw. 288; Goodman v. Harvey, 4 Adolph. & Ellis, 870; Lenox v. Leverett, 10 Mass. R. 1; Wallace v. Agry, 4 Mason, R. 336 — There is no case in our law, which I have been able to find, which positively requires, that a copy of the protest should accompany the notice, but only that a protest should actually be made and proved, when required. Of this latter point there can be no doubt. Ante, § 273, 278; Bayley on Bills, ch. 7, § 2, p. 258, 259 (5th edit. 1830); Chitty on Bills, ch. 8, p. 361, 362 (8th edit. 1833); Rogers v. Stephens, 2 Term R. 713; Gale v. Walsh, 5 Term R. 239. But the cases, usually cited to establish the point, that a copy of the protest should accompany the protest, by no means establish any such doctrine. They are Brough v. Perkins, 2 Ld. Raym. 993; S. C. 1 Salk. R. 131, 6 Mod. 80; Orr v. Maginnis, 7 East, R. 362; Goostrey v. Mead, Bull. N. Prius, 271; Gilbert on Evid. p. 79 (edit. 1761). On the contrary, the decisions in Cromwell v. Hynson, 2 Esp. R. 511; Robins v. Gibson, 1 Maule & Selw. 288; S. C. 3 Camp. R. 334, are the other way; and the very point was positively adjudged in Goodman v. Harvey, 4 Adolph. & Ellis, 870, that there was no necessity of sending a copy of the protest. To the same effect is Lenox v. Leverett, 10 Mass. R. 1, and Wallace v. Agry, 4 Mason, R. 336; Wells v. Whitehead, 15 Wend. R. 527; 3 Kent, Comm. Lect. 44, p. 108 (4th edit.). See also 1 Selw. N. Prius, 338 (10th edit. 1842). Pothier seems to hold the like doctrine under the old French Law. Pothier de Change, n. 148 to 150. It is said by Pardessus, that a copy of the protest, however, should accompany the notice under the modern law of France. Pardessus, Droit Comm. Tom. 2, art. 431. But I do not find it positively required by the Code of Commerce; but it is only said, that the protest should be notified to the Drawers and Indorsers. Code de Comm. art. 165; Locré, Esprit du Code de Comm. Tom. 1, tit. 8, § 1, art. 165, p. 519, 520.

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§ 303. In the next place, as to the persons, by whom notice is to be given. From what has been already stated, it is sufficiently apparent, that notice must be given by the Holder to the parties, whom he means to hold chargeable with the Bill upon its dishonor; and the like rule applies to all the other parties on the Bill, who receive notice, and are liable thereupon to pay the Bill, as to giving notice to the prior parties, who, upon notice, would be liable to reimburse them.[1] 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.[2] The reason is, that the notice is required to be

[1] Ante, § 284; Chitty on Bills, ch. 10, p. 525 to 532 (8th edit. 1833).

[2] Ibid. p. 526; Bayley on Bills, ch. 7, § 2, p. 254 to 556 (5th edit. 1830); Nicholson v. Gouthit, 2 H. Black. 612; Tindal v. Brown, 1 Term R. 167; Whitfield v. Savage, 2 Bos. & Pull. 277; Stewart v. Kennett, 2 Camp. R. 177; Ex parte Barclay, 7 Ves. 597; Jameson v. Swinton, 2 Taunt. R. 224; Chamoine v. Fowler, 3 Wend. R. 173; Stanton v. Blossom, 14 Mass. R. 116; Tunno v. Lague, 2 Johns. Cas. 1; Mead v. Engs, 5 Cowen, R. 503. — A notice from a notary public, to whom the Bill has been handed for the purpose of having it presented by him, will, upon non-acceptance, be sufficient; for he will be deemed an agent for the Holder, for the purpose of giving notice; and, indeed, it is usual for notaries to give such notice. Bank of Utica v. Smith, 18 Johns. R. 230; Smedes v. Utica Bank, 20 Johns. R. 372; S. C. 3 Cowen, R. 662; Safford v. Wyckoff, 1 Hill, N. Y. R. 11; Howard *et al.* v. Ives, 1 Hill, N. Y. R. 263. So any person, in whose possession a Bill lawfully is, is clothed with sufficient authority to give notice. And a verbal authority is, in all cases, as good as a written authority. Ibid. But an agent is not ordinarily bound to give notice to the other parties of the dishonor, and, therefore, an omission on his own part to do so, although it may subject him to an action by his principal, if he has undertaken to give notice, and his principal has suffered a loss thereby; yet the other parties to the Bill have no rights against him; and they will be bound by a notice given to them in due season by the principal. Ante, § 292; Bank of U. States v. Goddard, 5 Mason, R. 366; Bank of Washington v. Triplett, 1 Peters, R. 25; Smedes v. Utica Bank,

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given, not merely that the parties to whom it is given, may give notice to those, who are liable to them for an indemnity upon receiving notice, but also to show, that the Holder intends to stand upon his legal rights, and to resort to the antecedent parties, to whom he gives notice for payment.[1] Hence it is, that the notice given by the Holder must, either expressly or by natural implication, import, that the Holder looks to the antecedent parties for payment.[2] And it is perfectly competent for the Holder to waive his recourse over against the antecedent parties; and, if he does not give or authorize any notice to be given, he is deemed, to all intents and purposes, to intend such a waiver, or, at least, it becomes an effectual waiver in point of law.

§ 304. We have said, that, in general, the notice must come from the Holder of the Bill, or his agent, and not from a mere stranger. There is, however, a qualification introduced into the rule by the modern authorities. It is this, that the 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, enure 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.[3]

20 Johns. R. 372; S. C. 3 Cowen, R. 662; Bayley on Bills, ch. 7, § 2, p. 290 (5th edit. 1830); Story on Agency, § 247.

[1] Ibid.; Chapman v. Keane, 3 Adolph. & Ell. 193, 197.

[2] Ante, § 301.

[3] Chitty on Bills, ch. 10, p. 524, 527 (8th edit. 1833); Id. ch. 8, p. 368, 369; Bayley on Bills, ch. 7, § 2, p. 254 to 256 (5th edit. 1830). —

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The doctrine, indeed, may now be stated, even in more general terms; and it may be laid down as universally true, that a party entitled, as Holder, to sue upon a Bill, may avail himself of the notice given in due time by any other party to it, against any other person upon the Bill, who would be liable to him, if he, the Holder, had himself given him due notice of the dishonor.[1]

The language, both of Mr. Chitty and Mr. Bayley, in the cases cited, is qualified, and does not seem to cover the doctrine in its fullest extent, probably because, in the then state of the authorities, they did not come exactly up to the enunciation of a universal principle. Mr. Chitty says; "However, according to the more recent decisions, it is not absolutely necessary, that the notice should come from the person, who holds the Bill, when it has been dishonored; and it suffices, if it be given, after the Bill was dishonored, by any person, who is a party to the Bill, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement; and such notice will, in general, enure to the benefit of all the antecedent parties, and render a further notice from any of those parties unnecessary; because it makes no difference, who gives the information, since the object of the notice is, that the parties may have recourse to the Acceptor." 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 enure 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 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. Though a Holder, or any other party, give no notice but to the person, of whom he took the Bill, yet, if notice be communicated without laches to the prior parties, he may avail himself of such communication, and sue any of such prior parties. It is no objection, in such case, that there was no notice immediately from the plaintiff to the defendant." 3 Kent, Comm. Lect. 44, p. 108 (4th edit.); Howard *v.* Ives, 1 Hill, N. Y. Rep. 263; Safford *v.* Wyckoff, 1 Hill, N. Y. Rep. 11.

[1] The doctrine of Lord Mansfield, in Tindal *v.* Brown (1 Term R. 167,

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§ 305. In the next place, as to the persons, to whom notice is to be given. Subject to the qualifications just stated, the notice must, of course, be given by the Holder, or other party, to all the persons, whose names are on the Bill, who are liable to him upon its dishonor, and to whom he means to look for payment or reimbursement.[1] But notice to a regularly authorized agent will be equivalent to notice to the principal.[2] Notice to one of several partners is notice to all the partners;[3] and the notice may be given to any partner, either at his usual place of business, or at his dwelling-house, or at the usual place of business of the firm.[4] If the party entitled to notice has become bankrupt,

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2 Term R. 186), and of Lord Eldon, in Ex parte Carkey (7 Ves. 597), is certainly the other way. But they were qualified or overruled, in effect, by Lord Kenyon, in Shaw v. Croft, cited in Chitty on Bills, ch. 10, p. 527 (8th edit. 1833); by Mr. Justice Lawrence, in Jameson v. Swinton (2 Camp. R. 373); and by Lord Ellenborough, in Wilson v. Swabey (1 Stark. R. 34), and Rosher v. Kieran (4 Camp. R. 87). And all doubts upon the subject are now finally put at rest, by the decision in Chapman v. Keane (3 Adolph. & Ellis, 193), where all the authorities were reviewed, and the doctrine stated in the text expressly affirmed. The same doctrine seems to have been held in Stafford v. Yates, 18 Johns. R. 327, and Abat v. Rion, 9 Martin, R. 465; Stanton v. Blossom, 14 Mass. R. 116; Bank of U. States v. Goddard, 5 Mason, R. 366; Bachellor v. Priest, 12 Pick. R. 406. The like doctrine applies to notice on inland Bills, as is applied to Foreign Bills. Chitty on Bills, ch. 8, p. 368, 369 (8th edit. 1833).

[1] Chitty on Bills, ch. 8, p. 368 (8th edit. 1833).

[2] See Bayley on Bills, ch. 7, § 2, p. 311; Smith v. Thatcher, 4 Barn. & Ald. 200.

[3] Chitty on Bills, ch. 8, p. 355, 369, 370 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 285, 286 (5th edit. 1830); Id. ch. 11, p. 462; Porthouse v. Parker, 1 Camp. R. 82; Rhode v. Proctor, 4 Barn. & Cressw. 517; Bignold v. Waterhouse, 1 Maule & Selw. 255, 259; Gowan v. Jackson, 20 Johns. R. 176; Rhett v. Poe, 2 How. Sup. Ct. Rep. 457.

[4] Ante, § 299. — If the Drawer of a Bill be a partner in a firm on which the Bill is drawn, the Holder need not give him notice of the dishonor by non-acceptance of the Bill by the firm; for, as the firm must have notice thereof, that is notice to himself. Gowan v. Jackson, 20 Johns. R. 176.

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and assignees have been chosen or appointed, notice to the assignees is proper, and will be sufficient.[1] But, if no assignees have been chosen or appointed, notice to the bankrupt will be sufficient.[2] If the party, entitled to notice, is dead, notice should be given to his executor or administrator, if there is any appointed; and, if there is none, it will be prudent to have the notice sent to the last residence or domicil of the deceased party.[4] If there be a guaranty on the Bill, although it is not absolutely necessary, yet it will be expedient to give notice, also, of the dishonor to the Guarantor.[5] If the party entitled to notice is abroad,

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[1] Bayley on Bills, ch. 7, § 2, p. 285, 286 (5th edit. 1830); Chitty on Bills, ch. 8, p. 369 (8th edit. 1833); Id. ch. 10, p. 488, 528 to 530; Ex parte Moline, 19 Ves. 216.

[2] Ibid.

[3] Chitty on Bills, ch. 8, p. 369, 370 (8th edit. 1833); Id. ch. 10, p. 474, 528 to 530; Bayley on Bills, ch. 7, p. 286 (5th edit. 1830).

[4] Ibid.

[5] Ibid.; Post, § 372; Warrington v. Furbor, 8 East, R. 242; Holbrow v. Wilkins, 1 Barn. & Cressw. 10; Phillips v. Astling, 2 Taunt. R. 206; Hitchcock v. Humphrey, The (English) Jurist for May 20, 1843, p. 423. See Lee v. Dick, 10 Peters, R. 482. — Mr. Bayley says; "And a surety, though not a party to a Bill or note, may be discharged by want of notice and neglect to present, if it be probable, he would otherwise have been safe; as, if the parties, who ought to have paid, were solvent, when the Bill or note became due, and have failed since. But a person, not a party to a Bill or note, cannot complain of laches, or want of notice, unless he can show it has done him prejudice. And, if he can prove it has done him prejudice, he can only recover to the extent of such prejudice. Therefore, each case will depend upon its own peculiar circumstances. And the questions, in each case, will be, Whether there has been any prejudice, and what." Bayley on Bills, ch. 7, § 2, p. 286 to 290 (5th edit. 1830). Mr. Chitty says; "In general, if the Bill or note be given as a collateral security, and the party delivering it were no party to it, either by indorsing, or transferring it by delivery, when payable to Bearer; but merely caused it to be drawn or indorsed, or delivered over by a third person, as a security, or has merely guarantied the payment, it has been considered, that he is not, within the custom of merchants, an Indorser, or party to it, so as to be absolutely entitled to strict regular notice, nor discharged from his liability

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at the time of the dishonor, the notice should be left at his regular residence or domicil in his own country.[1]

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by the neglect of the Holder to give him such notice, unless he can show, by express evidence, or by inference, that he has actually sustained loss or damage by the omission. For, if a person deliver over a Bill to another, without indorsing it, he does not subject himself to the obligations of the Law Merchant, and cannot be sued upon the Bill; and, as he does not subject himself to the obligation, he is not entitled to the advantages; and, if he can prove, that he has sustained damage, then he is only discharged to the extent of such actual damage. If the parties, who ought primarily to have paid the Bill or note, were solvent at the time, when the same became due, and for some time afterwards, and only subsequently became insolvent, before notice; an inference of actual damage from the want of notice to the party guarantying, or otherwise collaterally liable, will prevail, until rebutted by actual proof, that, if notice had been given, payment would not have been obtained. But, if the parties became bankrupt, or wholly insolvent, before the Bill or note fell due, then the inference will be, that no injury arose from the want of notice; but that inference may be rebutted. Thus, it was decided, that a person, who has guarantied the payment of money, to be paid by a Bill, was entitled (though no party to it) to insist on the neglect to make a proper presentment, or to give due notice of the dishonor of such Bill, the Drawer having become insolvent after it became due. In another case, the defendant, being indebted to the plaintiff for goods sold, and C. being indebted to the defendant, the plaintiff, with the consent of defendant, drew a Bill on C., payable at two months, which C. accepted, but afterwards dishonored; and it was held, that the defendant was not entitled to notice of the dishonor, his name not being on the Bill, and that the Bill was not to be esteemed a complete payment of the debt, under the Statute of Anne; but then it appeared, that the Drawee was certainly, from the time the Bill fell due, not in a condition to pay it. And it has been held, that proof, that, before the Bill became due, the parties liable upon it were bankrupt or insolvent, will be *primâ facie* evidence, that a demand upon them would have been of no avail, and will dispense with the necessity of making such presentment or giving notice, because the same strictness of proof is not necessary to charge a guarantor, as is necessary to support an action upon the Bill itself, and the circumstances created a presumption, that the guarantor was not prejudiced by the want of notice. Where the plaintiff sold goods to C. and P., and took their acceptance for the amount, half of which was guarantied by the defendant, and before the Bill became due, C. and P. became insolvent, of which the defendant was then informed, and, also, that the plaintiffs looked to him for the sum,

[1] Chitty on Bills, ch. 8, p. 369, 370 (8th edit. 1833); Cromwell *v.* Hynson, 2 Esp. R. 511.

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If the party, entitled to notice, has changed his residence or domicil, and his new residence or domicil is known, notice is there to be given.[1] If the new residence or domicil is unknown, and cannot, upon reasonable inquiry, be ascertained, then the notice will, in point of law, be dispensed with, or excused.[2] If several persons, not partners, are joint Drawers, or

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which he had guarantied, it was held, that, under these circumstances, it was unnecessary for the plaintiffs to present the Bill, when due, or give the defendant notice of the non-payment of it. Where A. & Co., resident in America, employed B., resident at Birmingham, in this country, to purchase and ship goods for them, and, on account of such purchases, they sent to B. a Bill drawn by C., in America, on D., in London, but did not indorse it, B. employed his bankers to present the Bill for acceptance, and D. refused to accept; but of this the bankers did not give notice until the day of payment, when it was again presented and dishonored; and, before the Bill arrived in this country, C. became bankrupt, and he had not, either when the Bill was drawn, or at any time before it became due, any funds in the hands of D., the Drawee; in an action by B. against the bankers, for negligence, in not giving him notice of the non-acceptance, it was held, that, inasmuch as A. & Co., not having indorsed the Bill, were not entitled to notice of dishonor, and still remained liable to B. for the price of the goods sent to them, and the Drawer was not entitled to notice, as he had no funds in the hands of the Drawee, B. could not recover the whole amount of the Bill, but only such damages as he had actually sustained, in consequence of having been delayed in the pursuit of his remedy against the Drawer. Where even a party's name is on the Bill, yet, if he give a bond, conditioned for payment by the Acceptor, within a month after it was due, without any stipulation about notice, the want of notice is no defence, the bond being an absolute engagement, that payment should be made. But we have seen, that the Drawer of a renewed Bill is, by the neglect to give him notice of the dishonor of it, not only discharged from the liability to pay it, but also from all liability to pay the prior Bill. The doctrine, that, unless a person is a party to a Bill or note, he cannot complain of the want of regular notice of the dishonor, must be understood with considerable qualification; and we have seen, that, if a person has transferred, by mere delivery, a note payable to Bearer, he is entitled to regular notice, for, though he has not indorsed, he, as having been the Bearer, is to be considered as a party to the instrument." Chitty on Bills, ch. 10, p. 474 to 476 (8th edit. 1833).

[1] Ante, § 297, 299; Chapman *v.* Lipscombe, 1 Johns. R. 294.

[2] Ibid.

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joint Indorsers, upon the Bill, and entitled to notice, the notice must be given to each severally, otherwise he will not be bound.[1]

§ 306. Where a party to a Bill is entitled to strict notice of the dishonor, in order to charge him, it is no excuse, that he has sustained no injury or prejudice by the want of notice; for he has a right to stand upon the terms and conditions of his contract, and to require a strict fulfilment of duty, on the part of the Holder, in giving him notice, although he has sustained no injury or prejudice. Hence, it will constitute no excuse for want of notice, that the Drawee is insolvent, or that, from other causes, the party, entitled to notice, could not have sustained any injury or prejudice.[2] The French Law differs from ours on this point; for, by that law, it is a sufficient answer (as it seems) for the omission to give notice, that the party entitled to notice has not sustained any injury or prejudice by the want of such notice.[3]

§ 307. Hitherto, we have been considering the cases, in which notice of the dishonor is required to be given, and the place, and the time, and the form and manner, and the persons by, and to, whom it is to be given. The general principle, to be deduced from the authorities on this subject, is, that, *primâ facie*, the Drawer of the Bill, and every Indorser thereof, antecedent to the Holder thereof at the time of the

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[1] Ante, § 299.

[2] Bayley on Bills, ch. 7, § 2, p. 302, 303 (5th edit. 1830); Chitty on Bills, ch. 8, p. 356 (8th edit. 1833); Id. ch. 10, p. 471, 472; Dennis v. Morrice, 3 Esp. R. 158; Baker v. Birch, 3 Camp. R. 107; Ante, § 230, 279, 318, 319, 320, 378, 478.

[3] Post, § 478, and note; Pothier de Change n. 156, 157; Kemble v. Mills, 1 Mann. & Grang R. 762, note (*b*).

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dishonor, is entitled to due notice thereof, because he is presumed to be entitled to bring an action, upon paying it. And, therefore, if such notice be neglected, or omitted, he will be discharged from all responsibility.[1] But there are certain exceptions from the generality of the rule, which will either excuse or justify the omission, or want of notice. These, we shall now proceed to consider; and, in doing so, we shall naturally be led to consider, what circumstances will not be an excuse or justification of such omission, or want of notice.

§ 308. And, in the first place, it will be a sufficient excuse for omitting to give notice to a party, that there is a physical or moral impossibility of so doing. Thus, for example, the absconding or absence of a party entitled to notice, and his place of residence being unknown;[2] the general prevalence of a malignant dis-

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[1] Bayley on Bills, ch. 7, § 2, p. 286 (5th edit. 1830); Id. p. 291, 293, 294.

[2] Mr. Chitty, on this subject, says; "The Holder of a Bill of Exchange is also excused for not giving regular notice of its being dishonored to an Indorser, of whose place of residence he is ignorant, if he use reasonable diligence to discover, where the Indorser may be found. And Lord Ellenborough observed; 'When the Holder of a Bill of Exchange does not know, where the Indorser is to be found, it would be very hard, if he lost his remedy by not communicating immediate notice of the dishonor of the Bill: and I think the law lays down no such rigid rule. The Holder must not allow himself to remain in a state of passive and contented ignorance; but, if he use reasonable diligence to discover the residence of the Indorser, I conceive, that notice, given as soon as this is discovered, is due notice of the dishonor of the Bill, within the usage and custom of merchants.' And, in a late case, where the traveller of A., a tradesman, received, in the course of business, a promissory note, which he delivered to his master, and the note having been returned to A. dishonored, the latter, not knowing the address of the next preceding Indorser, wrote to his traveller, who was then absent from home, to inquire respecting it; it was held, that A. was not guilty of laches, although several days elapsed before he received an answer, and before he gave notice to the next party, as

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ease, such as the yellow fever or the cholera;[1] the sudden illness or death of the Holder, or other accident or inevitable casualty, or obstruction;[2] the stoppage of the mail by ice, or snow, or freshets; war, or other political events, or other circumstances, interrupting the intercourse between different countries, or different parts of the same country;[3] or, the day being a public holyday, or religious festival, or solemn fast;[4] these will, ordinarily, constitute a sufficient excuse for not

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he had used due diligence in ascertaining his address; and two days' delay, after ascertaining the residence, in forwarding notice, were excused, the Holder and his attorney occupying that time. And it has been considered to be sufficient, when a promissory note has been dishonored, to make inquiries at the Maker's, for the residence of the Payee. But, in a subsequent case, it was held, that, to excuse the not giving regular notice of the dishonor of a Bill to an Indorser, it is not enough, to show, that the Holder, being ignorant of his residence, made inquiries upon the subject at the place, where the Bill was payable; he should have inquired of every other party to the Bill, and have applied to all persons of the same name in the directory. Applying to the last Indorser, and last but one, the day after the Bill was due, to ascertain, where the Drawer lives; and, on his not being in the way, calling again the next day, and then giving the Drawer notice, has been considered sufficient; and, when a person, upon transferring a Bill or note, declines stating, where he lives, but engages to call upon the Acceptor, to ascertain, whether the Bill has been paid, he thereby dispenses with the necessity of giving him any notice." Chitty on Bills, ch. 10, p. 486 to 488 (8th edit.). He cites Pothier de Change, n. 144; Bateman *v.* Joseph, 2 Camp. R. 461; S. C. 12 East, R. 433; Baldwin *v.* Richardson, 1 Barn. & Cressw. 245; Firth *v.* Thrush, 8 Barn. & Cressw. 387; Sturges *v.* Derrick, Wight. R. 76; Beveridge *v.* Burgis, 3 Camp. R. 262; Browning *v.* Kinnear, 1 Gow, R. 81; Phipson *v.* Kneller, 2 Camp. R. 285; S. C. 1 Stark. R. 116. See also Stewart *v.* Eden, 2 Cain. R. 121; Chapman *v.* Lipscombe, 1 Johns. R. 294; Blakely *v.* Grant, 6 Mass. R. 386.

[1] Tunno *v.* Lague, 2 Johns. Cas. 1.

[2] Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id. ch. 9, p. 389, 422; Id. ch. 10, p. 485, 524.

[3] Patience *v.* Townley, 2 Smith, R. 223; Hopkirk *v.* Page, 2 Brock. R. 20; Chitty on Bills, ch. 9, p. 389 (8th edit. 1833).

[4] Lindo *v.* Unsworth, 2 Camp. 602; Martin *v.* Ingersoll, 8 Pick. 1; Ante, § 233.

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giving seasonable notice of the dishonor; and, indeed, under certain circumstances, will dispense with all notice.[1]

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[1] Ante, § 234, 286; Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id. ch. 9, p. 389, 422; Id. ch. 10, p. 485 to 489, 524; Scholefield v. Bayard, 3 Wend. R. 488. — Mr. Chitty (p. 485) says; "A neglect or delay to give, or delay in giving immediate notice, may also be excused by some other circumstances. Thus, the absconding or absence of the Drawer or Indorser may excuse the neglect to advise him; and the sudden illness or death of the Holder, or his agent, or other accident, or forcible obstruction, may constitute an excuse for the want of a regular notice to any of the parties, provided it be given as soon as possible after the impediment is removed. So, the circumstance of an Indorser himself having handed over to the Indorsee the Bill too late to make protest, or give notice in the time usually required, would preclude him from objecting to the delay. But absence from home, in consequence of the dangerous illness of a near relative, is no excuse for not leaving there a competent agent to receive and forward notice." In a note to this passage, he adds; "There is no reported case, deciding, whether accident will excuse a delay in giving notice of non-acceptance or non-payment. In Hilton v. Shepherd, 6 East, R. 16, in notes, Garrow and Russell contended, that, whether due notice has been given in reasonable time, must, from the necessity of the thing, be a question of fact for the consideration of the jury; that it depended upon a thousand combinations of circumstances, which could not be reduced to rule; if the party were taken ill, if he lost his senses, if he were under duress, &c., how could laches be imputed to him? Suppose he were prevented from giving notice, within the time named, by a physical impossibility. Such a rule of law must depend upon the distance, upon the course of the post, upon the state of the roads, upon accidents, all which it is absurd to imagine. Lord Kenyon, C. J.; 'I cannot conceive how this can be matter of law. I can understand, that the law should require, that due diligence shall be used, but that it should be laid down, that the notice must be given that day or the next, or at any precise time, under whatever circumstances, is, I own, beyond my comprehension. I should rather have conceived, that, whether due diligence had or had not been used, was a question for the jury to consider, under all the circumstances of the accident, necessity, and the like. This, however, is a question very fit to be considered, and when it goes down for trial again, I shall advise the jury to find a special verdict. I find invincible objections, in my own mind, to consider, that the rule of law, requiring due diligence, is tied down to the next day.' In Darbishire v. Parker, 6 East, 3, it was held, that reasonable time is a matter of law for the Court. In Poth. pl. 144, and Pardess. du Contrat de Change, pl. 426, it is considered, that inevitable

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§ 309. The like doctrine is fully borne out by the language of Pothier and Pardessus; and, indeed, the Civil Law, which constitutes the basis of the general jurisprudence of continental Europe, fully supports them in the statement, by its declaration, *Impossibilium nulla obligatio est*;[1] and, among these impossibilities, constituting an excuse, Pothier enumerates the death or illness of the Holder, or his agent.[2] Pardessus treats the operation of the *vis major* as, in all cases, a sufficient excuse for a non-compliance, on the part of the Holder, with the requisites of law; and, that the like rule applies, where the residence or domicil of the party, entitled to notice, cannot be ascertained.[3]

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accident excuses delay, provided notice be given as soon as circumstances will admit; and it is stated, that the death of a correspondent, to whom the Bill has been sent for presentment, and a sudden accident happening to a messenger, will excuse delay. In America, the decisions are contradictory, whether the prevalence of a malignant fever, or epidemic, would excuse delay of notice during its continuance. Tunno *v.* Lague, 2 Johns. Cas. 1; Roosevelt *v.* Woodhull, Anth. N. P. 35; Bayl. (Amer. edit.) 175 In Thomp. on Bills, 548, the excuse, as to accidents, is laid down as in the above text, but, that the accident must not be attributable to the Holder's fault. And in Young *v.* Forbes, Morrison, 1580, Thompson on Bills, 483, it is stated to have been the opinion of London merchants, that any cause, preventing the Holder, without his fault, from protesting the Bill, as his detention by contrary winds, or sickness, would excuse him from protesting." Chitty on Bills, ch. 10, p. 485, and note (*f*), 486 (8th edit. 1833). Scholefield *v.* Bayard, 3 Wend. R. 488. In Price *v.* Young (1 McCord, So. Car. R. 339), it seems to have been held, that the death of the Holder of a Bill or note, before it became due, and no administration being taken out at the time, did not excuse the want of a due presentment for payment, and want of due notice of the dishonor. But, quære, if this be consistent with the general principles of law on this subject. See Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id. ch. 9, p. 422; Id. ch. 10, p. 485, 524.

[1] Dig. Lib. 50, tit. 17, l. 185.

[2] Pothier de Change, n. 144.

[3] Pardessus, Droit Comm. Tom. 2, art. 426, 434. — Both Pothier and Pardessus apply their doctrine directly to the case of an omission to make the protest in proper season. But their reasoning covers all other cases.

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§ 310. Other excuses for the omission or want of notice may arise from the peculiar relation or situation of particular parties. In the first place, no Drawer is entitled to require notice from the Holder, or any other party, who stands in the relation of a mere accommodation Holder or Indorser to and for him; for, in such case, the debt is primarily his own debt, and payment made of the Bill, by the Holder or Indorser, is payment of money for his use, and at his request; at least, he is not so entitled to notice, unless he sustains some special loss or injury from the want thereof.[1]

§ 311. In the next place, if the Drawer has no right whatsoever to draw the Bill, or no reasonable ground to expect the Bill to be accepted, he is not deemed entitled to notice of the dishonor thereof, for it was his own fault to draw the same; and, correctly speaking, he cannot be said to have suffered any loss by the want of notice. Thus, for example, ordinarily, if the Drawer draws the Bill, without having funds in the hands of the Drawee, or expectation of funds, or any arrangement or agreement, on the part of the Drawee, to accept the Bill, he will not be entitled to notice, and not be discharged by the want thereof.[2]

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[1] See Sharp v. Bailey, 9 Barn. & Cressw. 44. See Bayley on Bills, ch. 7, § 2, p. 294, 297, 298 (5th edit. 1830); Ex parte Heath, 2 Ves. & Beam. 240. — In case of a mere accommodation acceptance, the Drawer could not be entitled to notice, upon the dishonor of the Bill by non-payment by the Acceptor. Sharp v. Bailey, 9 Barn. & Cressw. 44.

[2] Bayley on Bills, ch. 7, § 2, p. 294 to 302 (5th edit. 1830); Chitty on Bills, ch. 10, p. 477 to 480 (8th edit. 1833); Rogers v. Stephens, 2 Term R. 713; Bickerdike v. Bollman, 1 Term R. 405; Legge v. Thorpe, 12 East, R. 171; Rucker v. Hillier, 3 Camp. R. 217, 16 East, R. 43; Claridge v. Dalton, 4 Maule & Selw. 226; Warden v. Tucker, 7 Mass. R. 452; Hopkirk v. Page, 2 Brock. R. 20; Hoffman v. Smith, 1 Caines, R. 157; Savage v. Merle, 5 Pick. R. 83; Valk v. Simmons, 4 Mason, R. 113; Baker v. Gallagher, 1 Wash. Cir. R. 461; Ramddulollday v. Daneux,

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But, although the Drawer has no funds in the hands of the Drawee; yet, if he has a right to expect to have funds in the hands of the Drawee, to meet the

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4 Wash. Cir. R. 86; Walwyn v. St. Quintin, 1 Bos. & Pull. 652. — Mr. Chitty has summed up the general result of the authorities in the following passage; "If, at any time between the drawing of the Bill, and its presentment and dishonor, the Drawee had some effects or property of the Drawer in his hands, though insufficient to pay the amount, he will, nevertheless, in general, be entitled to notice of the dishonor, and the laches of the Holder will discharge him from liability; for this case differs from that, where there are no effects whatever of the Drawer in the hands of the Drawee at the time, because the Drawer must then know, that he is drawing upon accommodation, and without any reasonable expectation, that the Bill will be honored; but, if he have some effects at the time, it would be dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary; it would be introducing a number of collateral issues upon every case upon a Bill of Exchange, to examine how the accounts stood between the Drawer and the Drawee, from the time, the Bill was drawn, down to the time, when it was dishonored. For the same reason, if the Drawer of a Bill of Exchange, when it is presented for acceptance, has effects in the hands of the Drawees, though he is indebted to them in a much larger amount, and they, without his privity, have appropriated the effects in their hands to the satisfaction of their debt, he is entitled to notice of the dishonor. Nor is actual value in the hands of the Drawee, at the time of drawing, essentially necessary to entitle the Drawer to notice of dishonor of the Bill; for circumstances may exist, which would give a Drawer good ground to consider, he had a right to draw a Bill upon his correspondent; as, where he had consigned effects to him, to answer the Bill, though they may not have come to him at the time, when the Bill was presented for acceptance; to which may be added the case of Bills drawn in respect of other fair mercantile agreements. So, it is no excuse for not giving notice to the Drawer, that he had, in fact, no funds in the hands of the Drawee, if he had made provision to have such funds there, and might reasonably expect they were there; as, where a Bill was drawn in respect of a cargo shipped by the Drawer to this kingdom, and in the hands of a broker, who was to pay the proceeds to the Drawee, to enable him to take up the Bill, in which case, notice was held requisite. And, therefore, where the Drawer had sold and shipped goods to the Drawee, and drew the Bill before they had arrived, and the Drawee, not having received the Bill of lading, refused to accept the goods, because they were damaged, and who refused to accept the Bill; it was decided, that the Drawer was discharged for want of notice. But, if the vendor of goods, sold upon credit, draws upon the purchaser a Bill, which

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Bill, or if he has a right to expect the Bill to be accepted by the Drawee, in consequence of an agreement or arrangement with him; or, if, upon taking up the Bill, he would be entitled to sue the Drawee, or any other party on the Bill; as, if he be an accommodation Drawer for the Drawee, or Payee, or any subsequent Indorsee;[1] then, and in every such case, he is entitled to strict notice of the dishonor.[2] The distinc-

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would be due long before the expiration of the stipulated credit, he is not entitled to notice of the dishonor; because he had no reasonable expectation, that the Drawee would honor the Bill, but, on the contrary, a pretty clear assurance, that it would be dishonored. And, in one case, it seems to have been suggested, that the want of notice is no defence, where the defendant had not, at the time the Bill became due, sufficient effects, although he had such, when the Bill was drawn; as, where the party, having £712 at his bankers, accepted a Bill for £300, payable there, but, when due, he had only £41; in which case, notice to him was considered unnecessary; but the decision proceeded on the ground, that an Acceptor is not entitled to notice, and, therefore, cannot be relied upon as altering the general rule. Where the Drawer of a Bill of Exchange had no effects in the hands of the Acceptor, from the time of drawing the Bill till it became due, but the Acceptor had received from the Drawer, prior to this Bill, on which the action was brought, acceptances of the Drawer, upon which he had raised money, some of which acceptances had been returned dishonored, and others were outstanding, it was held, that the Drawer was entitled to notice of dishonor of the Bill. And it should seem, that, although the Drawer, or other party, may not have advanced money or goods to the Drawee, yet, if he has deposited short Bills, or policies, or even title-deeds, in his hands, or has accepted cross Bills, and had reasonable ground to expect, that the Drawee would accept or pay in respect thereof, he is entitled to notice of the dishonor." Chitty on Bills, ch. 10, p. 477 to 480 (8th edit. 1833); Id. ch. 8, p. 358, 359. The leading cases are also collected in Bayley on Bills, ch. 7, § 2, p. 294 to 302 (5th edit. 1830).

[1] Chitty on Bills, ch. 10, p. 481 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 305 to 310 (5th edit. 1830).

[2] Bayley on Bills, ch. 7, § 2, p. 296 to 302 (5th edit. 1830); Chitty on Bills, ch. 8, p. 356 to 358 (8th edit. 1833); Id. ch. 10, p. 477 to 480; Rucker *v.* Hillier, 3 Camp. R. 217, 16 East, R. 43; Ex parte Heath, 2 Ves. & Beam. 240; Cory *v.* Scott, 3 Barn & Ald. 619; Norton *v.* Pickering, 8 Barn. & Cressw. 610; Robins *v.* Gibson, 3 Camp. R 334; Orr *v.* Magennis, 7 East, R. 559; Blackham *v.* Doren, 2 Camp. R. 503; Brown *v.* Maffey, 15 East, R. 216; Legge *v.* Thorpe, 12 East, R. 171; Ham-

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tion between the cases may seem, at first view, to be somewhat artificial, and not altogether satisfactory. But it is founded upon this consideration, that, in the latter case, the Drawer draws the Bill in good faith, and has reasonable grounds to believe, that it will be honored; and, therefore, he may well insist upon a punctual discharge of duty, on the part of the Holder; whereas, in the former cases, it is his own fraud or folly to Draw a Bill, which he has no reasonable ground to expect to be honored; and, therefore, he may well impute the injury, if any, to himself, to his own laches, and to his having misled the Holder.[1] And it will be no sufficient answer in any such case, to say, that the Drawer has not sustained any injury or prejudice by the want of notice.[2] The Drawer will, however, be

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mond *v.* Dufrene, 3 Camp. R. 145; Thackray *v.* Blackett, 3 Camp. R. 164; Stanton *v.* Blossom, 14 Mass. R. 116; French's Executors *v.* Bank of Columbia, 4 Cranch, R. 141; Robinson *v.* Ames, 20 Johns. R. 146; Grosvenor *v.* Stone, 8 Pick. R. 83; Campbell *v.* Pettingill, 7 Greenl. R. 126.

[1] It has often been lamented by Judges, that any exception, arising from the want of funds in the hands of the Drawee, has been admitted into the law. The ground, originally stated, why notice, in general, is required to be given to the Drawer, is, that he may withdraw his funds from the hands of the Drawee, and that otherwise a loss might happen to him from his want of notice. But it was then said, that, where the Drawer has no funds in the hands of the Drawee, he cannot be injured; and, therefore, is not entitled to notice. Bickerdike *v.* Bollman, 1 Term R. 405. We see, from the text, that there are other cases, where the Drawer may sustain an injury, besides cases, where the Drawee has funds. See also Orr *v.* Magennis, 7 East, R. 359; Brown *v.* Maffey, 15 East, R. 216; Legge *v.* Thorpe, 12 East, R. 171.

[2] Ante, § 275; Bayley on Bills, ch. 7, § 2, p. 302, 303 (5th edit. 1830); Chitty on Bills, ch. 8, p. 356 (8th edit. 1833); Hill *v.* Martin, 12 Martin, R. 177. — Mr. Justice Blackstone, in his Commentaries (Vol. 2, p. 469), seems to suppose, that the Drawer, or other party to be charged, must have suffered some damage. His language is; "But, if no protest be notified to the Drawer, and any damage accrues by such neglect, it shall fall on the Holder of the Bill." But this is not a correct statement of the doctrine.

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entitled to strict notice, where he has any funds in the hands of the Drawee, although they are not equal to the sum mentioned in the Bill.[1] Nay, he will be entitled to strict notice, if he has funds in the hands of the Drawee, although the latter represented to the Drawer, at the time the Bill was drawn, that he should not be able to provide for it, and that the Drawer must provide for it.[2]

§ 312. The proof, that the Drawer had no effects in the hands of the Drawee, only affords a *primâ facie* excuse for the want of due notice of the dishonor; and it may be rebutted by its appearing, that the Drawer, on taking up the Bill, would be entitled to some remedy over against some other party; as, a right to sue the Acceptor, or any other party, or by showing, that he has been actually prejudiced by the want of notice; as, if the Bill were drawn for the accommodation of the Acceptor, or the Payee, or any Indorser. And there is a distinction as to the necessity for notice to the Drawer of a dishonored Bill, when accepted for the accommodation of the Drawer, between the case of a single transaction, and the case of various dealings, the excess being for the accommodation of the Drawer or Acceptor. In the latter case, notice is equally necessary, without actual effects. So, where W. drew a Bill upon a person, to whom he had been sending goods for sale, and who accepted the Bill, neither party knowing the state of accounts between them, and it turned out, that W., at the

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[1] Ibid.; Chitty on Bills, ch. 10, p. 477, 478 (8th edit. 1833).

[2] Ibid. p. 477, 483; Bayley on Bills, ch. 7, § 2, p. 303 to 305 (5th edit. 1830); Prideaux *v.* Collier, 2 Stark. R. 57; Staples *v.* Okines, 1 Esp. R. 332; Clegg *v.* Cotton, 3 Bos. & Pull. 239.

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time, was indebted to the Drawee, the Court held, that this was not to be considered as an accommodation Bill within the acceptation of that term, and, consequently, that there was no implied contract of indemnity as to costs.[1]

§ 313. Upon the same general gound, that the Drawer has sustained, and can sustain, no loss, or injury, or prejudice, by the want of notice of the dishonor, he will be held liable, notwithstanding the want of such notice, if, having funds in the hands of the Drawee, he voluntarily withdraws them, or if, having no funds in the hands of the Drawee, but having them on their way to reach him, and to be applied to the discharge of the Bill, he intercepts and stops them, so as to prevent them from being received by the Drawee.[2] The same doctrine has been held to apply, where the Drawer, before acceptance, orders the Drawee not to accept the Bill.[3]

§ 313. *a.* In like manner, if the Drawer and Acceptor of the Bill are either general partners or special partners in the adventure of which the Bill constitutes a part, notice of the dishonor and nonpayment of the Bill need not be given to the Drawer,

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[1] Bignall *v.* Andrews, 7 Bing. R. 217; Chitty on Bills, ch. 8, p. 356 to 358, 368, 369 (8th edit. 1833); Id. ch. 10, p. 472, 473, 480, 481; Brown *v* Maffey, 15 East, R. 216; Cory *v.* Scott, 3 Barn. & Ald. 619; Norton *v.* Pickering, 8 Barn. & Cressw. 610; Bayley on Bills, ch. 7, § 2, p. 297, 306 to 308 (5th edit. 1830); Ex parte Heath, 2 Ves. & Beam. 240; Goodall *v.* Dolley, 1 Term R. 712; Wilks *v.* Jacks, Peake, R. 202.

[2] Bayley on Bills, ch. 7, § 2, p. 296 (5th edit. 1830); Rucker *v.* Hillier, 3 Camp. R. 217, 16 East, R. 43; Lilley *v.* Miller, 2 Nott & McCord, 257, note; Valk *v.* Simmons, 3 Mason, R. 113; Conroy *v.* Warren, 3 Johns. Cas. 259; Murray *v.* Judah, 6 Cowen, R. 484; Rhett *v.* Poe, 2 How. Sup. Ct. R. 457.

[3] Bird *v.* McDowell, 2 Nott & McCord, 254.

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for the knowledge of one partner is the knowledge of the other, and notice to one partner is notice to the other.[1]

§ 314. As to Indorsers, the like considerations do not necessarily or ordinarily apply to them, as apply to the Drawer, who draws without funds, or has no right to draw; for the Indorsers are entitled to strict notice, whether the Drawer has drawn the Bill with or without funds, or whether he had reasonable ground to draw it, or not. For an Indorser ordinarily stands in a very different relation to the Bill from the Drawer; for he is considered as in the nature of a surety, or guarantor of its payment upon due presentment, and is not presumed to know anything about the arrangements between the Drawer and Drawee. His engagement is, therefore, treated as strictly collateral and conditional, and due notice is one condition, upon which his liability attaches.[2] But, if the Indorser is the real party to the Bill, for whose accommodation alone it is drawn by the Drawer, and is to be accepted by the Drawee, the latter having no funds of either in his hands, it may be different; and no notice may be required in order to charge him.[3]

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[1] Rhett *v.* Poe, 2 How. Sup. Ct. R. 457, 483; Porthouse *v.* Parker, 1 Camp. R. 82; Bignold *v.* Waterhouse, 1 M. & Selw. 259; Whitney *v.* Sterling, 14 Johns. R. 215; Gowan *v.* Jackson, 20 Johns. R. 176.

[2] Bayley on Bills, ch. 7, § 2, p. 306 to 309 (5th edit. 1830); Barton *v.* Baker, 1 Serg. & Rawle, 334; Warder *v.* Tucker, 7 Mass. R. 452; Denniston *v.* Imbrie, 3 Wash. Cir. R. 401; Ramddulollday *v.* Daneux, 4 Wash. Cir. R. 61.

[3] See Chitty on Bills, ch. 10, p. 470, 471, 481 (8th edit. 1833); Id. p. 473; Bayley on Bills, ch. 7, § 2, p. 297 (5th edit. 1830); Id. p. 306, 307; Ex parte Heath, 2 Ves. & Beam. 240; Cory *v.* Scott, 3 Barn. & Ald. 619; Norton *v.* Pickering, 8 Barn. & Cressw. 610; Brown *v.* Maffey, 15 East, R. 216; Agan *v.* McManus, 11 Johns. R. 180; French's Executors *v.* Bank of Columbia, 4 Cranch, R. 141.

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§ 315. The old French Law seems, in some respects, different from ours, upon this subject. If the Drawee has no funds of the Drawer in his hands, at the time when the Bill is drawn, it seems, that the Drawer is not entitled to strict notice of the dishonor by non-acceptance; and, unless he can show some injury or prejudice, by the omission to give him notice of the dishonor, the want of it will not exonerate him from liability to the Holder.[1] The same rule seems also to have been applied to the Indorsers, in case the Drawee had not any funds in his hands belonging to them, or to the Drawer; for then they remained liable, even although no notice of the dishonor had been given to them, unless they could show some injury or prejudice to themselves by reason of the omission.[2] Pothier insists, however, that there ought to be a distinction made in favor of the Indorsers, where the Bill has been accepted; for, thereby, the Acceptor admits himself to be their debtor, and they, therefore, have an interest in having notice of the dishonor, in order to take measures against him.[3] The modern Code of Commerce has, in some degree, modified these doctrines. The Drawer is never liable, if he has made provision for the payment of the Bill at its maturity, unless he has received due notice of the dishonor; but, if he has made no provision, then he cannot object, that he has not had due notice.[4] If the Drawer, or

[1] Pothier de Change, n. 156 to 158; Jousse, sur l'Ord, 1673, tit. 5, art. 16, p. 109; Pardessus, Droit Comm. Tom. 2, art. 424, 435; Post, § 372, § 393, § 478.

[2] Pothier de Change, n. 156 to 158.

[3] Ibid. n. 158.

[4] Code de Comm. art. 117, 170; Locré, Esprit du Code de Comm. art. 117, 170, Tom. 1, p. 384, 526, 527; Pardessus, Droit Comm. Tom. 2, art. 435.

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any of the Indorsers, after the notice of the dishonor has been given, has received, in account, compensation, (set-off) or otherwise, the funds destined for the payment of the Bill, that will make him liable thereon, notwithstanding the want of due notice.[1] On the other hand, (as it should seem,) the Indorsers, with the exception of the cases last stated, are entitled to strict notice, and are absolved from all liability by the want of it, whether the Drawer has made provision for the Bill, or not, or whether the Bill has been accepted, or not, or whether the Indorsers have received any injury or prejudice from the want of notice, or not.[2]

§ 316. There are other cases, in which an Indorser would not be entitled to strict notice. As, for example, if he is a mere accommodation Indorser, and, at the time of his indorsement, he has received funds of the Drawer to pay the Bill, and secure him an ample indemnity, he will not be permitted to object, that he has not received due notice of the dishonor of the Bill; for, in such a case, he cannot complain of any loss or injury from want of notice, since he has funds in his own hands to meet the payment.[3] If he has received funds from the Drawer for a part payment only, he will still be entitled to strict notice; but, at the same time, al-

[1] Code de Comm. art. 170, 171; Locré, Esprit du Code de Comm. Tom. 1, p. 526, 527, art. 170, 171; Pardessus, Droit Comm. Tom. 2, art. 435.

[2] Pardessus, Droit Comm. Tom. 2, art. 435. But see Sautayra, Comm. Code de Comm. art. 117; Post, § 372, § 393. But see Post, § 478.

[3] Chitty on Bills, ch. 8, p. 356 (8th edit. 1833); Id. ch. 10, p. 472, 473, 481, 482; Bayley on Bills, ch. 7, § 2, p. 310 (5th edit. 1830); Corney v. Da Costa, 1 Esp. R. 303. See Whitfield v. Savage, 2 Bos. & Pull. 377; Rogers v. Stephens, 2 Term R. 713; Martel v. Tureand, 18 Martin, R. 117. But see Kramer v. Sandford, 4 Watts & Serg. 328.

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though no such notice has been given, the Holder will be entitled to the funds.[1]

§ 317. It follows, *a fortiori*, that, if, by prior arrangements between any of the parties, the necessity of notice has been expressly or impliedly dispensed with, as between these parties no notice need be given, and the want of it is entirely excused; for here the maxim strictly applies; *Quilibet potest renunciare juri pro se introducto.*[2] The same doctrine, founded upon

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[1] Bayley on Bills, ch. 7, § 2, p. 303 (5th edit. 1830); Chitty on Bills, ch. 8, p. 368 (8th edit. 1833); Id. ch. 10, p. 489; Baker *v.* Birch, 3 Camp. R. 107; Corney *v.* Da Costa, 1 Esp. R. 303. See Whitfield *v.* Savage, 2 Bos. & Pull. 277. — "It is no excuse for not giving notice to the Drawer, that, on an apprehension, that the Bill would be dishonored, he lodged other money, which he had of the Drawee's, in the hands of the Indorser, on an undertaking by the Indorser, that he would return it, whenever it should appear, that he was exonerated from the Bill; for his having other money of the Drawee's does not entitle him to apply it to the dishonored Bill, unless he had notice of the dishonor." Chitty on Bills, ch. 10, p. 476 (8th edit. 1833); Clegg *v.* Cotton, 3 Bos. & Pull. 239.

[2] 2 Co. Inst. 183; Wingate, Max. 483; Norton *v.* Lewis, 2 Connect. R. 478; Leonard *v.* Gary, 10 Wend. R. 504; Taunton Bank *v.* Richardson, 5 Pick. 436. But see Chitty on Bills, ch. 10, p. 483, 484 (8th edit. 1833); Central Bank *v.* Davis, 19 Pick. 373, 375; Andrews *v.* Boyd, 3 Metc. R. 434. — Some of the cases upon this subject stand upon very nice grounds, and are not, perhaps, always easily reconcilable with the general principle here stated. In Free *v.* Hawkins, 8 Taunt. R. 92, it was held, that evidence of a parol agreement between the Holder and the Indorser of a promissory note, at the time of making and indorsing it, that payment should not be demanded of the Maker of the note, at the time, when it became due, nor until after the sale of certain estates of the Maker, was held inadmissible, because it controlled and varied the legal obligations of the Indorser. Chitty on Bills, ch. 10, p. 483 (8th edit. 1833); Bayley on Bills, ch. 12, p. 491, 492 (5th edit. 1830). The same point was, in effect, adjudged in Woodbridge *v.* Spooner, 3 Barn. & Ald. 233; Rawson *v.* Walker, 1 Stark. R. 361; Hoare *v.* Graham, 3 Camp. R. 57; Bank of U. S. *v.* Dunn, 6 Peters, R. 51; Spring *v.* Lobett, 11 Pick. R. 417; Trustees in Hanson *v.* Stetson, 5 Pick. R. 506. But there is some difficulty in reconciling this doctrine with that promulgated by the Supreme Court of the United States, in the case of Renner *v.* Bank of Columbia, 9 Wheat. R. 581. But parol evidence of a bargain, after a note or Bill has

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the same general principle, pervades the French Law;[1] and, indeed, it is so reasonable, that it should seem to be founded in the very elements of universal jurisprudence.

§ 318. On the other hand, let us consider some of the cases, in which it has been held, that the want of notice is fatal, and not excused on the part of the Holder. And, in the first place, it may be stated, that neither the death, nor the bankruptcy, nor the known stoppage or insolvency of the Drawee, will constitute any sufficient excuse for not making a due presentment of the Bill, or for not giving due notice of the dishonor of the Bill.[2] Neither is it any excuse for the want of

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been given or transferred, may be admissible to establish a waiver of notice, or a valid agreement to postpone payment, if founded on a sufficient consideration. Bayley on Bills, ch. 12, p. 493 (5th edit. 1830); Hoare v. Graham, 3 Camp. R. 57; Gibson v. Scott, 2 Stark. R. 286.

[1] Pardessus, Droit Comm. Tom. 2, art. 425, 436.

[2] Bayley on Bills, ch. 7, § 1, p. 251, 252 (5th edit. 1830); Id. ch. 7, § 2, p. 302, 306 to 309; Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id. ch. 10, p. 482, 525; Russell v. Langstaffe, Doug. R. 497, 515; Esdaile v. Sowerby, 11 East, R. 114; Ex parte Wilson, 11 Ves. 412; Whitfield v. Savage, 2 Bos. & Pull. 279; Rohde v. Proctor, 4 Barn. & Cressw. 517; Boultbee v. Stubbs, 18 Ves. 21; Nicholson v. Gouthit, 2 H. Black. 609; Camidge v. Allenby, 6 Barn. & Cressw. 682; Dennis v. Morrice, 3 Esp. R. 158. — Mr. Chitty states the reason of this doctrine as follows; "The death, known bankruptcy, or known insolvency, of the Drawee, or Acceptor, or Maker of a note, or his being in prison, or the notorious stopping payment of a banker, constitute no excuses, either at law, or in equity, or in bankruptcy, for the neglect to give due notice of non-acceptance, or non-payment; because many means may remain of obtaining payment by the assistance of friends, or otherwise, of which it is reasonable, that the Drawer and Indorsers should have the opportunity of availing themselves, and it is not competent to the Holders to show, that the delay in giving notice has not, in fact, been prejudicial. It has been observed, that it sounds harsh, that the known bankruptcy of the Acceptor should not be deemed equivalent to a demand, or notice, but the rule is too strong to be dispensed with; and a Holder of a Bill has no right to judge, what may be the remedies over of a party liable on a Bill. It is no excuse, that the chance of obtaining any thing upon the remedy over was hopeless, — that

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notice, that the Drawee, or his place of residence, could not be found; nor, that he was imprisoned;[1] nor, that the Drawer or Drawee are non-existing or fictitious persons, and their names were used for purposes of fraud, unless the Payee or Indorser, who is sued, was privy to the fraud.[2]

§ 319. The French Law, in like manner, requires a protest to be made, and notice to be given by the Holder, notwithstanding the bankruptcy, or insolvency, or death of the Drawee.[3] It is true, that, in the French Law, the rule is directly applied to cases of non-payment of the Bill; but there does not seem any good reason to suppose, that it is not equally applied to cases of non-acceptance.

§ 320. The cases, already mentioned, are cases of excuse on the part of the Holder, for want of notice. But the party, entitled to notice, may, if he please, waive his right to notice, and render himself responsible for the dishonor of the Bill, notwithstanding the want of any notice whatsoever, or of any regular notice. Let us, then, consider, in what cases such a waiver is to be inferred, and under what circumstances it is obligatory. In the first place, then, such a waiver may arise from an original agreement made with the Holder, contemporaneous with the citation or trans-

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the person or persons against whom that remedy would apply, were insolvent, or bankrupts, or had absconded. Parties are entitled to have that chance offered to them; and, if they are abridged of it, the law, which is founded upon the usage and custom of merchants, says, they are discharged." Chitty on Bills, ch. 10, p. 482, 483 (8th edit. 1833).

[1] Ibid.; Price *v.* Young, 1 McCord, R. 339; Haynes *v.* Birks, 3 Bos. & Pull. 601.

[2] Bayley on Bills, ch. 7, § 2, p. 310 (5th edit. 1830); Leach *v.* Hewitt, 4 Taunt. R. 731.

[3] Code de Comm. art. 163; Pardessus, Droit Comm. Tom 2, art. 424.

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fer of the Bill. Thus, for example, if the Drawer or Indorser of the Bill should, at the time of making or indorsing it, write on the same an express waiver or dispensation of notice to him of the dishonor, that will relieve the Holder from all responsibility of giving notice. But the language must be very clear to produce such an effect, and the intention will not be inferred from equivocal words, or words susceptible of a different interpretation.[1] In the next place, a waiver may be implied from subsequent circumstances. In general, it may be stated, that a party, who is once discharged, by want of notice, or other laches, on the part of the Holder, is always discharged, and he cannot be made again liable, unless by his own voluntary act.[2] But, as has been already suggested, he may waive his right to take the exception, and confirm his original obligation. If he makes such a waiver, in ignorance of the facts, he will not be bound thereby.[3] But, if he makes it with a full knowledge of all the facts, but under a mistake of the law, he will be bound thereby.[4] And, under such circumstances, it will make

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[1] Post, § 371; Lane v. Steward, 2 Appleton, R. 98.

[2] Bayley on Bills, ch. 7, § 2, p. 312 (5th edit. 1830); Chitty on Bills, ch. 10, p. 541 (8th edit. 1833).

[3] Chitty on Bills, ch. 8, p. 373 (8th edit. 1833); Id. ch. 10, p. 533 to 536, 538, 539; Bayley on Bills, ch. 7, § 2, p. 290 to 294 (5th edit. 1830); Blessard v. Hirst, 5 Burr. R. 2670; Goodall v. Dolley, 1 Term R. 712; Stevens v. Lynch, 12 East, R. 38; Jones v. Savage, 6 Wend. R. 658; Miller v. Hackley, 5 Johns. R. 385; May v. Coffin, 4 Mass. R. 341; Warder v. Tucker, 7 Mass. R. 432; Canal Bank v. Bank of Albany, 1 Hill, N. Y. R. 287.

[4] Chitty on Bills, ch. 10, p. 534 to 536 (8th edit. 1833); Bilbie v. Lumley, 2 East, R. 469; Story on Eq. Jurisp. § 111, 116, 137; Stewart v. Stewart, 6 Clark & Finell. R. 964 to 971; Richter v. Selin, 8 Serg. & Rawl. 438. — On this subject, Mr. Chitty says; "It seems to have been once considered, that a misapprehension of the legal liability would prevent a subsequent promise to pay from being obligatory, and that even money

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no difference, whether the party has paid the Bill under a mistake of law, or has only promised to pay the Bill.[1] Indeed, a promise, by the party entitled to notice, to pay the Bill, is deemed a full and complete waiver of the want of due notice; and payment of a part of the money due on the Bill will have the same effect.[2] But, then, in all cases of this sort, the promise

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paid in pursuance of such promise, might be recovered back. But from subsequent cases it appears, that such doctrine is not law, and that money, paid by one knowing (or having the means of such knowledge in his power) all the circumstances, cannot, unless there has been deceit or fraud on the part of the Holder, be recovered back again on account of such payment having been made under an ignorance of the law, although the party paying expressly declared, that he paid without prejudice. And, as an objection made by a Drawer or Indorser to pay the Bill, on the ground of the want of notice, is *stricti juris*, and frequently does not meet the justice of the case, it is to be inferred from the same cases, and it is, indeed, now clearly established, that even a mere promise to pay, made after notice of the facts, and laches of the Holder, would be binding, though the party making it misapprehended the law. Therefore, where the Drawer of a Bill of Exchange, knowing, that time had been given by the Holder to the Acceptor, but apprehending, that he was still liable upon the Bill in default of the Acceptor, three months after it was due, said, 'I know I am liable, and, if the Acceptor does not pay it, I will,' it was adjudged, that he was bound by such promise; and the Court said, 'that the cases, above referred to, proceeded on the mistake of the person paying the money under an ignorance or misconception of the facts of the case, but that, in the principal case, the defendant had made the promise with a full knowledge of the circumstances, three months after the Bill had been dishonored, and could not now defend himself upon the ground of his ignorance of law, when he made the promise." Chitty on Bills, ch. 10, p. 536, 537 (8th edit. 1833).

[1] Ibid.

[2] Ibid.; Bayley on Bills, ch. 7, p. 291 to 293 (5th edit. 1830); Vaughan *v.* Fuller, 2 Str. R. 1246; Rogers *v.* Stephens, 2 Term R. 713; Wilkes *v.* Jacks, Peake, R. 202; Blessard *v.* Hirst, 5 Burr. R. 2670; Horford *v.* Wilson, 1 Taunt. R. 12; Selwyn, Nisi Prius, Vol. 1, p. 52 (10th edit. 1842); 7 East, R. 236, note; Whitaker *v.* Morris, 1 Esp. R. 58, cited in Chitty on Bills, ch. 10, p. 533, note, 8th edit.; Id. p. 500, 9th edit., as being reported in 1 Esp. R. 58, but it is a mistake; Lundie *v.* Robertson, 7 East, R. 231; Wood *v.* Brown, 1 Stark. R. 217. — Mr. Chitty says; "The consequences, however, of a neglect to give notice of non-payment of a Bill or note, or to protest a foreign Bill, may be waived by the person

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must be equivocal, and amount to an admission of the right of the Holder; or the act done must be of a

entitled to take advantage of them. Thus, it has been decided, that a payment of a part, or a promise to pay the whole or part, or to 'see it paid;' or an acknowledgment, that 'it must be paid,' or a promise, that 'he will set the matter to rights;' or a qualified promise, or a mere unaccepted offer of a composition with other creditors, made by the person insisting on the want of notice (after he was aware of the laches) to the Holder of a Bill, amounts to a waiver of the consequence of the laches of the Holder, and admits his right of action." He immediately adds, what, in a practical view, with reference to the declaration and pleadings in a suit, may be most material. "And, in some of the cases upon this subject, the effect of such partial payment, or promise to pay, has been carried still further, and been considered not merely as a waiver of the right to object to the laches, but even as an admission, that the Bill or note had, in fact, been regularly presented and protested, and that due notice of dishonor had been given; and this, even in cases, where the party, who paid or promised, afterwards stated, that, in fact, he had not had due notice, &c.; because it is to be inferred, that the part payment, or promise to pay, would not have been made, unless all circumstances had concurred to subject the party to liability, and induce him to make such payment or promise. Thus, where an Indorsee, three months after a Bill became due, demanded payment of the Indorser, who first promised to pay it, if he would call again with the account, and afterwards said, that he had not had regular notice, but, as the debt was justly due, he would pay it; it was held, that the first conversation, being an absolute promise to pay the Bill, was, *primâ facie*, an admission, that the Bill had been presented to the Acceptor for payment in due time, and had been dishonored, and that due notice had been given of it to the Indorser, and superseded the necessity of other proof, to satisfy those averments in the declaration; and that the second conversation only limited the inference from the former, so far as the want of regular notice of the dishonor to the defendant went, which objection he then waived. So, where the Drawer of a foreign Bill, upon being applied to for payment, said, 'My affairs are at this moment deranged, but I shall be glad to pay it, as soon as my accounts with my agents are cleared,' it was decided, that it was unnecessary to prove the averment of the protest of the Bill. And, in an action by the Indorsee against the Drawer of a Bill, the plaintiff did not prove any notice of dishonor to the defendant, but gave, in evidence, an agreement made between a prior Indorser and the Drawer, after the Bill became due, which recited, that the defendant had drawn, amongst others, the Bill in question, that it was over-due, and ought to be in the hands of the prior Indorser, and that it was agreed, the latter should take the money due to him upon the Bill by instalments; it was held, that this was evidence, that the Drawer was, at that time, liable

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nature clearly importing a like admission of his right. If it be defective in either respect, or if it be a conditional offer of payment, not accepted, then, and in such a case, the Holder has no right to insist upon it as a waiver.[1] So, if the promise be qualified, it must be

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to pay the Bill, and dispensed with other proof of notice of dishonor. Again, where, in an action against the Drawer, in lieu of proof of actual notice, the defendant's letter was proved, stating, 'that he was an accommodation Drawer, and that the Bill would be paid before next term,' though not saying, 'by defendant,' Lord Ellenborough said, 'The defendant does not rely upon the want of notice, but undertakes, that the Bill will be duly paid before the term, either by himself or the Acceptor. I think the evidence sufficient.'" Chitty on Bills, ch. 10, p. 533 to 536 (8th edit. 1833). It is probably too late to attempt to modify or recall the doctrine in respect to a waiver of notice, by a new promise to pay the Bill. When such a promise is made, after the party is discharged in point of law, it would seem, upon principle, difficult to perceive, how it can, or ought to be binding, if there is not a new and sufficient consideration to support it; for a moral obligation is not sufficient. (See Borradaile *v.* Lowe, 4 Taunt. R. 93). And there might, originally, have been a good ground to say, that the money, if paid by mistake of law, ought not to be recovered back, if, in point of moral propriety, it could be retained; and to have held, at the same time, that a mere promise to pay, under a mistake of law, was not of binding obligation, so as to be enforced in a suit. And, upon the other point, as a matter of evidence, a promise to pay may, in the absence of all controlling circumstances, be, *primâ facie*, sufficient evidence of a regular protest and notice. But, when the fact is made out, that there was no protest or notice, it seems difficult to perceive, upon what ground it can be maintained, that the promise to pay, with knowledge of the fact, can be evidence of a protest and notice, which never existed. Mr. Bayley (on Bills, ch. 9, p. 406, 5th edit. 1830) has justly remarked, that, under an allegation of notice, it may be questionable, whether evidence can be given to excuse the want of notice, or, whether, to let in such evidence, the facts, to excuse notice, should not be pleaded specially; and he has cited Cory *v.* Scott, 3 Barn. & Ald. 619. In this respect, there may be just ground for a distinction between a case of protest, and notice given, but too late, and a case, where no protest or notice has been given at all. Firth *v.* Thrush, 8 Barn. & Cressw. 387; Baker *v.* Gallagher, 1 Wash Cir. R. 461; Potter *v.* Rayworth, 13 East, 417; Richter *v.* Selin, 8 Serg. & Rawle, 438; Pierson *v.* Hooker, 8 Johns. R. 71; Martin *v.* Ingersoll, 8 Pick. R. 1; Thornton *v.* Wynn, 12 Wheat. R. 183.

[1] Chitty on Bills, ch. 10, p. 539 (8th edit. 1833); Bayley on Bills, ch.

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received with its qualifications, and cannot be insisted upon as an absolute waiver.[1] And this doctrine of waiver of the laches of the Holder, in omitting due notice, either by acts, or by a new promise, seems equally applicable to the case of Indorsers, as it is to that of the Drawer.[2]

7, § 2, p. 291, 292 (5th edit. 1830); Dennis v. Morrice, 3 Esp. R. 158; Cuming v. French, 2 Camp. R. 106. But see Margetson v. Aitkin, 3 Carr. & Payne, R. 338.

[1] Ibid.; Fletcher v. Froggatt, MSS., cited Chitty on Bills, ch. 10, p. 540, note (8th edit. 1833): S. C. 2 Carr. & Payne, 569. — Mr. Chitty (on Bills, ch. 10, p. 539, 540, 8th edit. 1833) says; "The conduct, however, of the party insisting on the want of notice, must, in general, be unequivocal, and his promise must amount to an admission of the Holder's right to receive payment; and, therefore, where a foreigner only said, 'I am not acquainted with your laws, if I am bound to pay it, I will,' such promise was not considered a waiver of the objection of want of notice; and it has been considered, that, if the promise were made on the arrest, it shall not prejudice; but this doctrine seems questionable. If an Indorser propose to the Holder to pay the Bill by instalments, and such offer be rejected, he is at liberty afterwards to avail himself of the want of notice. So, it was decided, that, if the Drawer or Indorser, after having been arrested, upon being asked what he had to propose by way of settlement, said, 'I am willing to give my Bill at one or two months,' but which was rejected, this does not obviate the necessity of proving notice; and Lord Ellenborough observed, 'This offer is neither an acknowledgment, nor a waiver, to obviate the necessity of expressly proving notice of the dishonor of the Bill. He might have offered to give his acceptance at one or two months, although, being entitled to notice of the dishonor of the former Bill, he had received none, and, although, upon this compromise being refused, he meant to rely upon this objection. If the plaintiff accepted the offer, good and well, if not, things were to remain on the same footing as before it was made.' But an offer to the Holder of a Bill of a general composition of so much in the pound on all the party's debts, although not accepted, has been considered as dispensing with proof of notice of dishonor." This last point is founded on the case of Margetson v. Aitkin, 3 Carr. & Payne, 338, which seems very questionable as an authority; for the composition was not accepted.

[2] Thornton v. Wynn, 12 Wheat. R. 183. — Mr. Chitty, on this subject, says; "It has been considered, that, admitting that a Drawer of a Bill may, by circumstances, impliedly waive his right of defence founded on the laches of the Holder; yet, an Indorser can only do so by an express

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§ 321. Having thus considered the cases, in which the parties to a Bill may be charged, or discharged from their liability, as Drawers or Indorsers on the same; let us proceed to examine, what are the rights attached by law in favor of the Holder, in case of a dishonor of a foreign Bill, by non-acceptance, where he has given due notice, or, where he is absolved from giving notice, and is in no default. And here, by our law (different, as we shall presently see, from the foreign law), immediately upon the dishonor of the Bill by non-acceptance, the Holder has a right to insist upon an immediate payment of the Bill, together with interest, damages, and costs, as well from the prior Indorsers, as from the Drawer; and, in default thereof, he may immediately commence separate actions against each of them, and pursue such actions to judgment and execution, until he has received full satisfaction from some one or more of the parties.[1]

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waiver, there being a material distinction in this respect between the situation of a Drawer and Indorser." Chitty on Bills, ch. 10, p. 540 (8th edit. 1833). For this position, he relies on the dictum of Sir James Mansfield, in Borradaile *v.* Lowe, 4 Taunt. R. 93. But I know of no other authority, which takes any such distinction between the case of a Drawer and an Indorser, as to waiver of notice, or other defence; and, upon principle, it seems difficult to support it. The case itself went off upon the ground, that there was no express proof of any waiver. The intimations of Mr. Chief Justice Mansfield rather seemed to point to the question, Whether, as to the Indorser, there was any debt binding in conscience, upon which to found a valid promise. See Shepherd's (Serg.) argument in the case upon the point of a valid consideration, and the distinction in point of fact, if not of law, between the case of a Drawer and that of an Indorser. In Thornton *v.* Wynn, 12 Wheat. R. 183, the Supreme Court of the U. States held the Indorser liable on a waiver by him of the laches of the Holder in not giving notice. See Bayley on Bills, ch. 11, p. 478 (5th edit. 1830).

[1] Post, § 366; Chitty on Bills, ch. 8, p. 370 (8th edit. 1833); Bayley on Bills, ch. 9, p. 327, 331, 332 (5th edit. 1830); 2 Black. Comm. p. 469, 470; Bright *v.* Purrier, Bull. N. Pr. 269; Milford *v.* Mayor, Doug. R.

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What the damages are, and should be, will more properly come under review, when we have occasion to consider cases of dishonor for non-payment of Bills. But it may be here stated, that the like damages are ordinarily allowed in cases of non-acceptance, as in cases of non-payment of Bills;[1] and that they are governed by the *Lex Loci contractus;* that is to say, the Drawer is responsible for damages, according to the law of the place, where the Bill is drawn, and the Indorsers are severally liable according to the law of the place, where they have made their respective indorsements.[2]

§ 322. In France, the liability of the Drawer and Indorsers, upon a dishonor of the Bill by non-acceptance, and due notice thereof, involves very different rights and responsibilities. For there, upon protest for non-acceptance, and due notice, the Drawer and Indorsers are, by the modern Code of Commerce, respectively bound to give security only for the payment of the Bill, when due, or for reimbursement, together with the expenses of protest and reëxchange. This security, whether given by the Drawer or Indorser, creates an obligation, *in solido*, only with the person

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55, 56; Ballingalls *v.* Gloster, 3 East, R. 481; Whitehead *v.* Walker, 9 Mees. & Welsb. 506; Mason *v.* Franklin, 3 Johns. R. 202; Boot *v.* Franklin, 3 Johns. R. 208; Robinson *v.* Ames, 20 Johns. R. 146; Watson *v.* Loring, 3 Mass. R. 557; Weldon *v.* Buck, 4 Johns. R. 144; Wild *v.* Bank of Passamaquoddy, 4 Mason, R. 505; Morgan *v.* Towles, 8 Martin, R. 730; Lenox *v.* Cook, 8 Mass. R. 460; Graves *v.* Dash, 12 Johns. R. 17; Denston *v.* Henderson, 13 Johns. R. 322; Bank of Rochester *v* Gray, 2 Hill, N. Y. R. 227.

[1] Mason *v.* Franklin, 3 Johns. R. 208; Graves *v.* Dash, 12 Johns. R. 17; Weldon *v.* Buck, 4 Johns. R. 144; Auriol *v.* Thomas, 2 Term R. 52; Mellish *v.* Simeon, 2 H Black. 378; Laing *v.* Barclay, 3 Stark. R. 41; Chitty on Bills, Pt. 2, ch. 6, p. 666 to 670 (8th edit. 1833).

[2] Ante, § 153, 169, 170, 176, 177, note.

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for and to whom the particular security is given.[1] And this seems, in its spirit and objects, to conform to the antecedent state of the commercial law of France; for the Drawer and Indorsers, under that law, were held bound to a guaranty of an acceptance by the Drawee; although it did not decide, what the effect of the guaranty should be.[2] But, whether a Bill of Exchange has been accepted, or has been protested for non-acceptance, the Holder of the Bill is, according to the French Law, equally bound to present it, at its maturity, to the Drawee, or Acceptor, for payment; and, in case of his refusal, he must verify that refusal by a protest in due form, and give notice thereof also in due form, and proceed thereon against the Drawer and Indorsers within the time prescribed by law.[3] What proceedings are to be had under the French Law, in cases of the dishonor of Bills by non-payment thereof after acceptance, or non-acceptance, we shall presently have occasion to see.[4]

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[1] Code de Comm. art. 120; Locré, Espirt du Code de Comm. Tom. 2, art. 120; Pardessus, Droit Comm. Tom. 2, art. 381, 382.

[2] Locré, Esprit du Code de Comm. Tom. 2, art. 120; Jousse, sur l'Ord. 1673, art. 2, note, p. 74, 75 (edit. 1802); Pothier de Change, n. 70.

[3] Pothier de Change, n. 133; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 409, 410 (5th edit.).

[4] See Pardessus, Droit Comm. Tom. 2, art. 429 to 435; Code de Comm. art. 163; Post, § 393 to 395.

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CHAPTER X.

PRESENTMENT FOR PAYMENT.

§ 323. We come, in the next place, to the consideration of the Presentment of a foreign Bill of Exchange. We have already seen, that the contract of the Acceptor, by his acceptance, is, that he will pay the Bill, upon due presentment thereof, at its maturity, or its becoming due.[1] The contract of the Drawer, and of the Indorsers also, respectively is, not only, that the Bill shall be duly accepted, but, that the Bill shall be duly paid by the Acceptor, upon due presentment for payment; and, if not then paid, and due protest is made, and due notice of the dishonor is given to them respectively, they will, upon demand, pay the Bill, and also the damages and expenses accruing to the Holder thereby.[2] It is obvious, from this statement, that, while the contract of the Acceptor is absolute, that of the Drawer and Indorsers is conditional.[3] Hence it becomes important to ascertain, at what time the presentment for payment ought to be made, in order to bind the Drawer and Indorsers; and, if not duly paid, within what time the protest should be made, and notice given to them, respectively, of the dishonor. This will, of course, require us to consider, (1.) the time; (2.) the place; (3.) the mode

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[1] Ante, § 113, 114, 115, 252.

[2] Chitty on Bills, ch. 9, p. 384, 385 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 408 (5th edit.). Ante, § 108, 109, 110, 111, 119, 120, 200, 224, 225.

[3] Ibid.

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of presenting the bill for payment; (4.) the person, by whom it is to be presented; (5.) the person, to whom it is to be presented; and (6.) what will be a good payment, or other sufficient discharge, of the Bill.

§ 324. First, as to the time of presentment for payment. It is obvious, that, where a Bill is made payable at a particular time, either with reference to its date, or to the sight thereof, or otherwise, payment is demandable, only when that time has expired, and not before. Still, however, although then demandable, the Holder might not choose to demand payment of the Acceptor at that time, but might omit, and delay it, at his pleasure, to a future time, unless there were some known rule of law, which should compel him to strict punctuality in point of time. Now, it would be highly injurious to the interests of commerce, and to the security of the Drawers and Indorsers of negotiable instruments, if the Holder were at liberty to consult his own mere pleasure as to the time of making any demand of payment after a Bill became due, and might, after long delays, and non-payment, still have recourse over or against the Drawer or Indorsers. It would expose the latter to serious, and perhaps, to irremediable losses, which an earlier demand might have prevented; and thus it would have a tendency to discourage the use and circulation of negotiable paper.[1]

§ 325. Hence, the Commercial Law, which, throughout all its departments, inculcates the doctrine of reasonable diligence, and frowns upon and discourages laches, has introduced a rule of great strictness

[1] Chitty on Bills, ch. 9, p. 385 (8th edit. 1833.)

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on this subject, which although it may sometimes be found harsh, and, perhaps, severe in its practical operation, is, for the general purposes of business, highly useful to the commercial community, by introducing promptness, fidelity, and exactness, in the demand of payment of Bills of Exchange. The reason of the rule is thus briefly, but exactly, stated by Mr. Justice Blackstone; "The Bill, when refused, must be demanded of the Drawer, as soon as conveniently may be; for though, when one draws a Bill of Exchange, he subjects himself to the payment, if the person, on whom it is drawn, refuses either to accept or pay, yet, that is with this limitation, that, if the Bill be not paid, when due, the person, to whom it is payable, shall, within convenient time, give the Drawer notice thereof; for, otherwise, the law will imply it paid; since it would be prejudicial to commerce, if a Bill might rise up to charge the Drawer, at any distance of time; when, in the mean time, all reckonings and accounts may be adjusted between the Drawer and Drawee."[1] In respect to the Acceptor, who is held to be the party primarily liable, and the absolute debtor, the Holder is at liberty to allow him whatever indulgence or delay he may please, short of the period, which would, under the statute of limitations, or prescription of the particular state or country, where the suit is brought, operate as a bar to his claim. But, as to the Drawer and Indorsers, who are only collaterally and conditionally liable, the rule is far different. It is, that, in order to charge them, a demand of payment should be made of the Acceptor on the very day, on which, by law, the Bill becomes due; and, unless the

[1] 2 Black. Comm. p. 470; Allen v. Dockwra, 1 Salk. R. 127.

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demand be so made, it is, generally, a fatal objection to any right of recovery against the Drawer, or the Indorsers, although the Acceptor himself may, and will, still be held on the Bill.[1] If no particular time is fixed for the payment of the Bill, as, if it be pay-

[1] Chitty on Bills, ch. 9, p. 385, 386, 422, 423 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 217, 232, 247 (5th edit. 1830); Pothier de Change, n. 129; Camidge v. Allenby, 6 Barn. & Cressw. 373; Bridges v. Berry, 3 Taunt. R. 130; Jackson v. Newton, 8 Watts, R. 401; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 408 to 410 (5th edit.); Robinson v. Blen, 2 Appleton, R. 109. Mr. Chitty has remarked; "It is a general rule of law, that, where there is a precedent debt or duty, the creditor need not allege or prove any demand of payment before the action brought, it being the duty of the debtor to find out his creditor, and tender him the money; and, as it is technically said, the bringing of the action is a sufficient request. It might not, perhaps, be unreasonable, if the law, in all cases, required presentment to the Acceptor of a Bill, or Maker of a note, before an action be commenced against him; because, otherwise, he might, on account of the negotiable quality of the instrument, and the consequent difficulty to find out the Holder of it on the day of payment, in order to make a tender to him, be subjected to an action without any default whatever; and the engagement of the Acceptor of a Bill, or Maker of a note, is to pay the money, when due, to the Holder, who shall, for that purpose, make presentment. And one reason, why a party cannot recover at law, on a lost Bill or note, is, that the Acceptor of the one, and Maker of the other, has a right to insist on having it delivered up to him, on his paying it. It seems, however, that, in general, the Acceptor or Maker of a note cannot resist an action, on account of neglect to present the instrument at the precise time, when due, or of an indulgence to any of the other parties. And, on the above-mentioned principle, that an action is, of itself, a sufficient demand of payment, it has been decided, that the Acceptor or Maker of a note cannot set up, as a defence, the want of a presentment to him, even before the commencement of the action, and although the instrument be payable on demand. But, in such a case, upon an early application, the Court would stay proceedings without costs." Chitty on Bills, ch 9, p. 391, 392 (8th edit. 1833); Bayley on Bills, ch. 6, § 1, p. 214, 215 (5th edit. 1830); Id. ch. 9, p. 402; Dingwell v. Dunster, Doug. R. 247; Anderson v. Cleveland, cited in Esp. Digest, N. Prius, 58 (4th edit.), and in 13 East, R. 430, note; Rumball v. Ball, 10 Mod. R. 38; Reynolds v. Davies, 1 Bos. & Pull. 625; Hansard v. Robinson, 7 B. & Cressw. 90; Williams v. Waring, 10 Barn. & Cressw. 2; Mackintosh v. Haydon, Ryan & Mood. R. 363; 2 Chitty, R. 11; 1 Tidd, Pract. 145 (9th edit.).

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able on demand, or at sight, payment must be demanded within a reasonable time, otherwise the Drawer and Indorsers will be discharged.[1] A presentment or demand of payment must be made personally upon the Acceptor, at his place of business, or at his dwelling-house, where his residence is known, or may be ascertained by reasonable inquiry; and cannot be made by a written demand, sent to him through the post-office.[2]

§ 326. Even the death, or known bankruptcy or insolvency of the Acceptor, will (as we shall presently more fully see)[3] be no excuse for the omission to demand payment at the time, when the Bill becomes due.[4] The French Law is precisely the same upon

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[1] Chitty on Bills, ch. 9, p. 385, 412 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 217, 232, 234 to 244 (5th edit. 1830); Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Berry *v.* Robinson, 9 Johns. R. 121; Fry *v.* Hill, 7 Taunt. R. 397; Field *v.* Nickerson, 13 Mass. R. 131; Sice *v.* Cunningham, 1 Cowen, R. 397; Martin *v.* Winslow, 2 Mason, R. 241; Lord *v.* Chadbourne, 8 Greenl. R. 198. — Mr. Chitty, in treating of the consequences of neglect to make due presentment, makes the following pertinent remarks; "In considering the necessity for a due presentment for acceptance, and for payment, and the time, when the same should be made, we have anticipated this inquiry; and it may suffice to observe, that, on principle, perhaps more exactness and punctuality, in a presentment for payment, may reasonably be required, than even in a notice of non-payment; because a prompt and regular demand of payment may frequently obtain payment from an Acceptor of a Bill and Maker of a note, who is in a state of progressive insolvency, when a subsequent application of the same nature would become unavailing; whereas, the loss of a day or more, in giving notice of non-payment, rarely makes any actual difference. The rules, applicable to delay in notice of non-payment, will in general apply, and with more force, to delay in due demand of payment." Chitty on Bills, ch. 9, p. 423, 424 (8th edit. 1833).

[2] Stuckert *v.* Anderson, 3 Whart. R. 116.

[3] Post, § 346.

[4] Ante, § 234, 279, 307, 318, 319; Post, § 346; Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id. ch. 9, p. 386, 389; Bayley on Bills, ch. 7, § 1, p. 251 (5th edit. 1830); Molloy, B. 2, ch. 10, § 34; Russell *v.*

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this point.[1] And it will make no difference, in the application of the rule by our law, whether the Bill has been taken or transferred for a precedent debt, or for money advanced on a purchase thereof. In the former case, the right to recover the precedent debt, as well as the right to recover on the Bill, will be gone, and so also the right to recover back the money, or recover on the Bill, in the latter case.[2] Nor will the circumstance, that the Holder has received the Bill so near the time, when it becomes due, as to render it impracticable to make a presentment for payment at its maturity, constitute any excuse for the want of a due presentment, as to the other parties to the Bill; whatever might be the case, as to the party, from whom he then first received it; in respect to whom, perhaps, all, which can be required under such circumstances, is to present it with reasonable diligence, as soon as it can be, for payment, and, if dishonored, to give him due notice thereof.[3] The French Law, upon this point also, seems exactly in coincidence with ours.[4]

§ 327. Still, however, the same general grounds, which will ordinarily excuse the Holder for the want of due notice of dishonor, upon non-acceptance of the Bill, will furnish a sufficient excuse for the delay to

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Langstaffe, Doug. R. 515; Esdaile *v.* Sowerby, 11 East, R. 117; Bowes *v.* How, 5 Taunt. R. 30; S. C. 16 East, R. 112; 1 Maule & Selw. 555.

[1] Pothier de Change, n. 146, 147; Pardessus, Droit Comm. Tom. 2, art. 424; Tom. 5, art. 1497; Post, § 347.

[2] Chitty on Bills, ch. 9, p. 385 to 387, 417, 418 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 232 to 234 (5th edit. 1830); Camidge *v.* Allenby, 6 Barn. & Cressw. 373; Bridges *v.* Berry, 3 Taunt. R. 130.

[3] Chitty on Bills, ch. 9, p. 423 (8th edit. 1833); Anderton *v.* Beck, 16 East, R. 248; Bayley on Bills, ch. 7, § 1, p. 243 (5th edit. 1830)

[4] Pardessus, Droit Comm. Tom. 2, art. 426; Id. Tom. 5, art. 1497; Post, § 347.

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make a due presentment for payment of the Bill.[1] Thus, for example, the sudden illness or death of the Holder, or of his agent, or any other accident or casualty, or the operation of superior force, or political events, or war, which prevents a due presentment, will not prejudice the rights of the Holder, if he should afterwards make presentment, and give notice, as soon as it can be reasonably done.[2] So, if the Holder, at the time of the maturity of the Bill, be at a great distance from the Maker, so that it is impossible to make a due presentment on his part, and he has been, in fact, guilty of no laches in being in such a predicament, it has been held, that he will be excused, if he afterwards makes a presentment, as soon as he reasonably may.[3] So, if the Acceptor has absconded before the day of payment, and he cannot be found, and his place of residence is deserted, the omission to make due presentment would, it seems, be thereby excused.[4] In

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[1] Ante, § 233, 234, 308; Post, § 365.

[2] Ante, § 234, 280, 308, 309, 327; Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id ch. 9, p. 389, 390, 422, 423; Id. ch. 10, p. 485, 524; Patience *v* Townley, 2 Smith, R 223, 224; Tunno *v.* Lague, 2 Johns. Cas. 1; Hopkirk *v.* Page, 2 Brock. R. 20. But see Scholefield *v.* Bayard, 3 Wend. R. 488. — Mr. Chitty, on this subject, says; "Provided the party, entitled to a Bill or note, produce it, as soon as the impediment has been removed, and, in the mean time, take 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." Chitty on Bills, ch. 9, p. 422, 423 (8th edit. 1833).

[3] Freeman *v.* Boynton, 7 Mass. R. 483. The case itself went much further, and on this account may be open to some question.

[4] Chitty on Bills, ch. 7, p. 307 (8th edit. 1833); Id. ch. 8, p. 360; Id. ch. 10, p. 485, 524; Lehman *v.* Jones, 1 Watts & Serg. 126.

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like manner, the delay to make a presentment for payment in due time will be excused, so far as respects the Drawer, but not as to the Indorsers, where the Drawer has no funds in the hands of the Acceptor, and had no right to expect acceptance or payment of the Bill.[1] So, it will be excused by a new promise to pay the Bill, with a knowledge of the want of due presentment, or by an unequivocal waiver of the laches.[2]

§ 328. And not only must the Bill, ordinarily, be presented for payment on the very day, when it becomes due, but it should be presented within reasonable hours of that day, otherwise, the objection will be fatal.[3] What is a reasonable hour, must depend upon the known habits of business and customs of the place, where the Bill is payable. If the Bill is payable at a banker's, it should be presented there within the usual banking hours of business.[4] If presented for payment

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[1] Chitty on Bills, ch. 7, p. 300 (8th edit. 1833); Id. ch. 9, p. 389, 390, 423, 424; Id. ch. 10, p. 485; Ante, § 311; Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652.

[2] Chitty on Bills, ch. 9, p. 390, 424 (8th edit. 1833).

[3] Post, § 346; Ante, § 236, 291; Chitty on Bills, ch. 9, p. 421, 422 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 224 to 226 (5th edit. 1830); Parker *v.* Gordon, 6 Esp. R. 42; S. C. 7 East, R. 385; Elford *v.* Teed, 1 Maule & Selw. 28.

[4] Ibid.; Parker *v.* Gordon, 7 East, R. 385; Elford *v.* Teed, 1 Maule & Selw. 28; Morgan *v.* Davidson, 1 Starkie, R. 114; Garnell *v.* Woodcock, 1 Starkie, R. 476, 6 Maule & Selw. 44; Jenks *v.* Doyleston Bank, 4 Wells & Serg. 505. — Mr. Chitty says; "A presentment for payment of a Bill, payable on a day certain, should, in all cases, be made within a reasonable time before the expiration of the day, when it is due; and, if, by the known custom of any particular place, Bills are only payable within limited hours, a presentment there, out of those hours, would be improper; and this rule extends, also, to a presentment, out of the hours of business, to a person of a particular description, where, by the known custom of the place, all such persons begin and leave off business at stated hours. And, therefore, when a Bill is accepted, payable at a banker's, it must be presented there before five o'clock, or the usual hour of shutting up their shop; and pre-

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at the counting-room of the Acceptor, it should be within the usual hours of his keeping his counting-house open, or the ordinary course of transacting business at counting-houses in the same place. If presented for payment at the dwelling-house, or other place of residence of the Acceptor, it should be within such reasonable hours as the family are up, and in a condition usually to receive demands of that nature, or to transact business.[1]

§ 329. But the question will still remain, At what time is a Bill properly due? Or, in other words, At what time has it arrived at maturity, so that payment may be demanded of the Acceptor? At first view, an uninstructed reader might imagine, that this could scarcely present any practical difficulties as to its solution. Upon farther inquiry, however, it will be found to involve questions of a highly important character, and originally not without difficulty, although now the rule is fixed and established beyond any reasonable controversy. Let us, for example, suppose a Bill to be

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sentment afterwards will not entitle the notary to protest it. And no inference is to be drawn from the circumstance of the Bill being presented by a notary in the evening, that it had before been duly presented within the banking hours. However, a presentment of a Bill at a banker's where it is payable, is sufficient, although it be made after banking hours, provided a person be stationed there by the banker to return answers, and he refuses to pay the Bill. And, when the party to the Bill or note is not a banker, a presentment at any time, not during the hours of rest, however late in the evening, will, in general, suffice. And in a recent case it was decided, that a presentment between eight and nine o'clock in the evening, at the house of a trader or merchant, is quite sufficient; and this, although no person was there to give an answer." Chitty on Bills, ch. 9, p. 421, 422 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 224 to 226 (5th edit. 1830).

[1] Ibid.; Ante, § 236; Barclay *v.* Bailey, 2 Camp. R. 527; Wilkins *v.* Jadis, 2 Barn. & Adolph. 188; Morgan *v.* Davidson, 1 Starkie, R. 114; Triggs *v.* Newnham, 10 Moore, R. 249.

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drawn on the first day of January, 1842, payable at ten days after date, without grace. Is it due on the tenth day of January, or on the eleventh day of January? It is now settled, that it is due on the eleventh day of January, or, in other words, the day of the date is excluded from the computation.[1] The same question might be propounded, as to a Bill payable ten days after sight, without grace, and accepted on the first day of January; and it ought to receive a similar answer.[2] But it will be found, that, in other cases, not of a commercial nature, great controversies have arisen, at the Common Law, as to the computation of time, when deeds and other instruments are to have effect and operation from the date, or from the day of the date thereof, or with reference thereto, whether the day of the date is to be taken as exclusive or inclusive.[3]

§ 329. *a.* The French Law recognizes the same doctrine, that the time when a Bill is to become due is exclusive of the day of the date, if it is payable at a certain number of days after date, exclusive of the day of the acceptance, if it is payable at a certain number of days after acceptance; the general rule being, *Dies termini non computatur in termino.*[4]

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[1] Chitty on Bills, ch. 9, p. 403, 404, 406 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 248 to 250 (5th edit. 1830); Bellasis *v.* Hester, 1 Ld. Raym. 280; Coleman *v.* Sayer, 1 Barnard. R. 303; Blanchard *v.* Hilliard, 11 Mass. R. 85; Woodbridge *v.* Brigham, 12 Mass. R. 403; S. C. 13 Mass. R. 556; Henry *v.* Jones, 8 Mass. R 453.

[2] Ibid.

[3] See Pugh *v.* The Duke of Leeds, 2 Cowp. 714; Glassington *v.* Rawlins, 3 East, R. 407; Lester *v.* Garland, 15 Ves. 254; Castle *v.* Burditt, 3 Term R. 623; 4 Kent, Comm. Lect. 56, p. 95, note (*b*) (4th edit.). See Bigelow *v.* Willson, 1 Pick. R. 485; Presbrey *v.* Williams, 15 Mass. R. 193.

[4] Delvincourt, Droit Comm. Tom. 1, Liv. 1, tit. 7, p. 77 (2d edit.); Pothier de Change, n. 138.

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§ 330. Again. Suppose a foreign Bill of Exchange, drawn on the tenth day of January, payable in a month, without grace; how is the month to be reckoned? Is it a lunar month, or a calendar month, or the period of thirty days? By the Common Law of England a month is constantly deemed a lunar month, as well in computations made in the construction of statutes, as in the construction of mere Common Law contracts.[1] But, by the universal rule of the commercial world, including England and America, a month is now deemed, in all cases of negotiable instruments, and, indeed, in all commercial contracts, to be a calendar month.[2] Hence, in the case above supposed, the Bill will, without grace, be payable on the tenth day of February, it being the day on which the month will expire; and no allowance will be made for the fact, that February may or does contain only twenty-eight days.[3] A Bill of Exchange, therefore, dated on the first day of January, and payable six months after date, or after sight, without grace, will be payable on the corresponding day of the sixth month, viz. the first day of July, for then the

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[1] Chitty on Bills, ch. 9, p. 406 (8th edit. 1833); 2 Black. Comm. 141; Lacon *v.* Hooper, 6 Term R. 225; Castle *v.* Burditt, 3 Term R. 623; Catesby's case, 6 Co. Rep. 61; Lang *v.* Gale, 1 Maule & Selw. 111; In the matter of Swinford and Horn, 6 Maule & Selw. 226.

[2] Ante, § 143; Bayley on Bills, ch. 7, § 1, p. 247, 250 (5th edit. 1830); Chitty on Bills, ch. 9, p. 403, 404 (8th edit. 1833); 4 Kent, Comm. Lect. 56, p. 95, note (*b*) (4th edit.); Jolly *v.* Young, 1 Esp. R. 186; Titus *v.* Lady Preston, 1 Str. R. 652. — In America, the computation has generally, but not universally, been by calendar months, and not by lunar months, as well in the construction of statutes, as of common contracts. See 4 Kent, Comm. Lect. 56, p. 95, note (*b*) (4th edit.); Hunt *v.* Holden, 2 Mass. R. 170; Avery *v.* Pixley, 4 Mass. R. 460.

[3] Tassell *v.* Lewis, 1 Ld. Raym. R. 743; 3 Kent, Comm. Lect. 44, p. 102, 103, 104 (5th edit.).

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six months will expire, whatever number of days the intermediate months may contain.

§ 331. But, as all countries do not, even now, use the new style, but some (as, for example, Russia) still continue to use the old style, in the computation of time, it becomes necessary to attend to this circumstance, with reference to Bills drawn in, or upon, foreign countries, which use different styles.[1] Under the

[1] Beawes, Lex Merc. by Chitty, Vol. 1, p. 608 (edit. 1813); Kyd on Bills, p. 7 (3d edit.) — The following historical account of the old and the new style is taken from Dr. Lieber's valuable Encyclopædia Americana, Vol. 2, title, *Calendar*. "From the inaccuracy of the Roman method of reckoning, it appears, that, in Cicero's time, the calendar brought the vernal equinox almost two months later than it ought to be. According to the last letter of the tenth book of Cicero's Epistles to Atticus, this equinox was not yet past, although it was near the end of May, by their calendar. To check this irregularity, Julius Cæsar, on being appointed dictator and pontiff (A. U. C. 707), invited the Greek astronomer Sosigenes to Rome, who, with the assistance of Marcus Fabius, invented that mode of reckoning, which, after him, who introduced it into use, has been called the Julian Calendar. The chief improvement consisted in restoring the equinox to its proper place in March. For this purpose, two months were inserted between November and December, so that the year 707, called, from this circumstance, the year of confusion, contained fourteen months. In the number of days, the Greek computation was adopted, which made it 365¼. The number and names of the months were kept unaltered, with the exception of Quintilis, which was henceforth called, in honor of the author of the improvement, Julius. To dispose of the quarter of a day, it was determined to intercalate a day every fourth year, between the 23d and 24th of February. This was called an intercalary day, and the year in which it took place, was called an intercalary year, or, as we term it, a leap year. This calendar continued in use among the Romans, until the fall of the empire, and throughout Christendom, till 1582. The festivals of the Christian Church were determined by it. With regard to Easter, however, it was necessary to have reference to the course of the moon. The Jews celebrated Easter (i. e., the Passover) on the 14th of the month Nisan (or March); the Christians in the same month, but always on a Sunday. Now, as the Easter of the Christians sometimes coincided with the Passover of the Jews, and it was thought unchristian to celebrate so important a festival at the same time as the Jews did, it was resolved, at

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old style, the course of reckoning is according to the Julian Calendar; but under the new, it is according to

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the Council of Nice, 325, A. D., that, from that time, Easter should be solemnized on the Sunday following the first full moon after the vernal equinox, which was then supposed to take place on the 21st of March. As the course of the moon was thus made the foundation for determining the time of Easter, the lunar cycle of Meton was taken for this purpose; according to which, the year contains 365¼ days, and the new moons, after a period of nineteen years, return on the same days as before. The inaccuracy of the Julian year, thus combined with the lunar cycle, must have soon discovered itself, on a comparison with the true time of the commencement of the equinoxes; since the received length of 365¼ days exceeds the true, by about eleven minutes; so, that, for every such Julian year, the equinox receded eleven minutes, or a day in about 130 years. In consequence of this, in the 16th century, the vernal equinox had changed its place in the calendar from the 21st to the 10th; that is, it really took place on the 10th, instead of the 21st, on which it was placed in the calendar. Aloysius Lilius, a physician of Verona, projected a plan for amending the calendar, which, after his death, was presented by his brother to Pope Gregory XIII. To carry it into execution, the Pope assembled a number of prelates and learned men. In 1577, the proposed change was adopted by all the Catholic princes; and, in 1582, Gregory issued a brief, abolishing the Julian Calendar in all Catholic countries, and introducing, in its stead, the one now in use, under the name of the Gregorian, or reformed Calendar, or the New Style, as the other was now called the Old Style. The amendment consisted in this; 10 days were dropped after the 4th of October, 1582, and the 15th was reckoned immediately after the 4th. Every 100th year, which, by the old style, was to have been a leap year, was now to be a common year, the 4th excepted; that is, 1600 was to remain a leap year, but 1700, 1800, 1900, to be of the common length, and 2000 a leap year again. In this calendar, the length of the solar year was taken to be 365 days, 5 hours, 49 minutes, and 12 seconds. Later observations of Zach, Lalande, and Delambre fix the average length of the tropical year at about 27 seconds less; but it is unnecessary to direct the attention of the reader to the error arising from this difference, as it will amount to a day only in the space of 3000 years. Notwithstanding the above improvement, the Protestants retained the Julian Calendar till 1700, when they also adopted the new style, with this difference, that they assigned the feast of Easter to the day of the first full moon after the astronomical equinox. But this arrangement produced new variations. In 1724 and 1744, the Easter of the Catholics was eight days later than that of the Protestants. On this account, the Gregorian Calendar was finally adopted, 1777, in Germany, under the name of the General Calendar of the Empire, or, as

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the Gregorian Calendar; the difference between the two styles being, at the present time, twelve days; that is to say, twelve days are added to the time reckoned by the old style, to bring the time to the corresponding day of the new style. Thus, for example, if a Bill is dated, in Russia, on the first day of January, 1842, old style, it precisely corresponds to the thirteenth of January, 1842, according to the new style, which is used in America and England, and, perhaps, all the countries of Europe, except Russia;[1] and, conversely, if a Bill is drawn in England, or America, dated on the first day of January, 1842, the corresponding day in the old style, is the twentieth day of December preceding. Hence it is, that, if a Bill be drawn in London, upon St. Petersburg (Russia), dated the first day of January, 1842, new style, (that is, the twentieth day of December, old style,) payable one month after date (excluding all days of grace), it will, if accepted, be payable, not on the first day of February, 1842, but on the twentieth day of January, 1842, for that is the corresponding day, when the month expires, by the old style. On the other hand, if a Bill is drawn in St. Petersburg, dated the first day of January, 1842, on London, payable in one month after date, without grace, it will, if accepted, be payable, not on the first day of February, but on the thir-

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it is now called, the Reformed Calendar, in order that the Catholics and Protestants might celebrate Easter, and, consequently, all the movable feasts, at the same time. England introduced the new style in 1752, and Sweden in 1753. Russia, only, retains the old style, which now differs twelve days from the new."

[1] See Kyd on Bills, p. 7 (3d ed.); Marius on Bills, p. 22, 23, edit. 1794.

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teenth day of February, 1842,[1] and if payable with grace, on the third or last day of grace after that day.

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[1] Bayley on Bills, ch. ch. 7, § 1, 249 (5th edit. 1830); Chitty on Bills, ch. 9, p. 403 (8th edit. 1833); Beawes, Lex Merc. by Chitty, Vol. 2, p. 608 (edit. 1813). — Mr. Chitty says; "When a Bill is drawn at a place using one style, and payable on a day certain, at a place using another, the time, when the Bill becomes due, must be calculated according to the style of the place, where it is payable; because the contract, created by the making of a Bill of Exchange, is understood to have been made at that place, and, consequently, should be construed according to the laws of it. In other works it is laid down, that, upon a Bill, drawn at a place using one style, and payable at a place using another, if the time is to be reckoned from the date, it shall be computed according to the style of the place, at which it is drawn, otherwise, according to the style of the place, where it is payable; and, in the former case, the date must be reduced or carried forward to the style of the place, where the Bill is payable, and the time reckoned from thence. Thus, on a Bill dated the 1st of May, old style, and payable here two months after, the time must be computed from the corresponding day of May, new style, namely, 13th of May; and, on a Bill, dated the 1st of May, new style, and payable at St. Petersburg, two months after date, from the corresponding day of April, old style, namely, 19th of April." Chitty on Bills, ch. 9, p. 403 (8th edit. 1833); Bayley (on Bills, ch. 7, § 1, p. 249, 5th edit. 1830) lays down the latter position in the same language. In the earlier editions of both works, the reverse mode of computation of the time, under the old and new styles, was, by mistake, given. See also Kyd on Bills, ch. 1, p. 7, 8 (3d edit.). Marius, who first published his work on Bills of Exchange in 1651, on this subject says; "A Bil of Exchange dated the second of March, new stile, which is the twentieth of February, old stile, (except in Leape Yeare, which will be then the twenty one of April) payable in London at double usance, will be due the twentieth of April, old stile, and not the twenty second of April, as some do erroneously imagine, who would deduct the ten daies (to reduce the new stile to old stile) at the end of the double usance; and, so they could go as far as the second of May, new stile, and then go backwards ten daies, when of right they should go forwards from the date of the old stile, relating to the place where it is payable, and reckon the double usance from the very date of the Bil, thus; A Bil dated the second of March, new stile, is the twentieth of February, old stile, February having but twenty eight daies, (for the twentieth of February, old stile, is the second of March, new style, even to the very day of the week). So, from the twentieth of February to the twentieth of March is one usance, and from the twentieth of March to the twentieth of April there is another usance; and, so, in like manner, if a Bil of Exchange be dated the

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§ 332. We have already had occasion to take notice of Bills, often drawn upon, or between, the countries of continental Europe, payable at one or more usances,

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tenth of March, new stile, which is the last of February, old stile, payable at treble usance, such a bil would be due the last of May in London, and not the twenty eighth of May, as some do imagine, because February hath but twenty eight daies. Also, if a bil be dated the eighth day of January at Rouen, payable at double usance in London, it will fall due the twenty sixth day of February, and, if from that date payable at treble usance, it will fall due the twenty ninth of March, as is manifest from the almanack or table at the end of this book; for you must alwaies count your usance from the very date of the Bil, as I have made evidently appeare by what hath been before declared concerning usances; and, I have seen divers Bils of Exchange, which have been sent from beyond the seas, wherein the drawers had written the old and new stiles both together, on the date of their bils one above the other, thus;

Amsterdam	adj.	$\frac{3}{13}$	February	$\frac{1654}{55}$	for 200 *ll.* Sterl.
Middleborough	adj.	$\frac{15}{25}$	March	$\frac{1654}{55}$	for 150 *ll.* Sterl.

Adj. $\frac{27 \text{ March}}{6 \text{ April}}$ 1655. In Genoua Dol^rs. 245 *a* 57 *d.*

£58–3–9 *d.* Sterl.

and the like, which is very plaine and commendable in those that do so write, thereby to make things evident to the capacity of the weakest, and to avoid any further disputes thereupon, although in those Bils of Exchange where the old and the new stile are not positively expressed, yet the same thing is intended and meant, and ought to be understood as if particularly set down; for if you have the date in the new stile, you may soon see what date it is in old stile; and I have taken the more pains to make this out to every man's understanding, because, I do perceive that many men for their own advantage, and in their own case, are subject to be byased, and judge amisse; but, I conceive, I have herein so clearely evidenced the truth and reason of my opinion, that it cannot but convince those that are, or have been of a contrary judgment, of their errour and mistake, except they are wilfully blind, and then none so blind; Or that they can give me any better reason for their contrary opinion, and then I will submit unto them; for all Bils of Exchange (as I have said before, and is notoriously known and assented unto by all) which are made payable at usances, must be reckoned directly from the date of the Bill, which if it be new stile and payable in London, or in any other place where they write old stile, the date must first be proved out in the old stile, and then count forward and you cannot mistake."

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the meaning of which has been sufficiently explained.[1] In cases of this sort, the time, when the Bill is payable, depends, of course, upon what is the usance or time of payment, prescribed by the law or usage of the place, upon which the Bill is drawn, and where it is accepted, and is payable.[2] The usance, however, is

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[1] Ante, § 50, 144; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410 (5th edit.); Pothier de Change, n. 139, 140.

[2] Chitty on Bills, ch. 9, p. 404, 405 (8th edit. 1833); Pothier de Change, n. 139; Pardessus, Droit Comm. Tom. 2, art. 1489, 1495, 1498. Mr. Chitty, in this place, says; "The term *usance* is French, and signifies the time, which it is the usage of the countries, between which Bills are drawn, to appoint for payment of them. It has, in another place, been said, that, according to the language of merchants, 'usance' signifies a month. The length of the usance, or time, which it includes, varies, in different countries, from fourteen days to one, two, or even three months after the date of the Bill. Double or treble usance is double or treble the usual time, and half usance is half that time; when it is necessary to divide a month upon an half usance, the division, notwithstanding the difference in the length of the month, contains fifteen days. It has been said, that the court could not take judicial notice of foreign usances, which vary, being longer in one place than another, and, therefore, certainly, the duration must be averred and proved. Savary gives the usances of different countries in his day. Savary, Le Parfait Négociant, Pt. 3, Liv. 1, ch. 4, § 8, p. 816, 817.

A usance between London and	Amsterdam is 1 calendar month after date.		
	America, North, said to be 60 days.		
	Aleppo	sometimes accounted as treble usance,	is 1 calendar month after date.
	Altona	is 1 calendar month after date.	
	Antwerp	1	do. do.
	Bilboa	2	do. do.
	Brabant	1	do. do.
	Bruges	1	do. do.
	Berlin	14 days after acceptance.	
	Cadiz	2 calendar months after date.	
	Constantinople and Smyrna	31 days	do.
	Flanders	1 calendar month	do.
	France	30 days	do.
	Frankfort on the Main	14 days after acceptance.	

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always calculated exclusively of the day of the date of the Bill, exactly as it is in cases, where the Bill is payable in a certain number of days, or months, after date, or after sight.[1] And this remains the modern

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A usance between London and Florence (sometimes accounted as treble usance) 30 days after date.
Genoa is 3 calendar months after date.
Geneva 1 do. do.
Hamburg 1 do. do.
Holland 1 do. do.
Leghorn 3 do. do.
Lisbon 2 do. do.
Lucca, sometimes 3 do. do.
Lisle 1 do. do.
Madrid and all Spain 2 do. do.
Middleburgh 1 do. do.
Milan 3 do. do.
Palermo 3 do. or 90 days do.
Petersburg none.
Portugal 2 calendar months after date.
Paris 1 do. do.
Rotterdam 1 do. do.
Rome 3 do. do.
Rouen 1 do. do.
Spain 2 do. do.
Trieste same as Vienna.
Venice 3 calendar months after date.
Vienna 14 days after acceptance.
West Indies 31 do. do.
Zante 3 calendar months after date.
Zealand 1 do. do.

Usance between Amsterdam and Brabant, France, Flanders, and Holland, or Zealand, is 1 calendar month.

Usance between Amsterdam and Italy, Spain, and Portugal, is 2 calendar months.

Usance between Amsterdam and Frankfort, Nuremberg, Vienna, and other places in Germany, on Hamburg and Breslau, 14 days after sight, 2 usances, 28 days, and half usance, 7 days."

Chitty on Bills, ch. 9, p. 404, 405 (8th edit. 1833). See, also, Beawes, Lex Merc. by Chitty, p. 609, pl. 259 (edit. 1813); 1 Bell, Comm. B. 3, ch. 2, § 4. p. 410 (5th edit.); Pothier de Change, n. 139.

[1] Chitty on Bills, ch. 9, p. 405, 406 (8th edit. 1833); Pothier de Change, n. 13, 15, 139, 140, 172; Sautayra sur Code de Comm. art. 131, 132.

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rule in France, upon the maxim, *Dies termini non computatur in termino.*[1] Hence, if a Bill is drawn on the fourth day of January, payable in ten days, it becomes due on the fifteenth day of January, and not before.[2]

§ 333. But, besides these elements in the computation of the time, at which Bills of Exchange become due and payable, there is another allowance of time, which is of general, although not of universal operation and usage, and is different in different countries.[3] This is, the allowance of what are technically called the days of grace; to which, incidentally, allusion has been already made.[4] These days of grace, which take their name from their being days of indulgence, or respite, granted to the Acceptor for the payment of the Bill, seem to have had their origin at a very early period in the history of negotiable paper. They were, probably, first introduced by the usage of merchants, in the first place, to enable the Acceptor, the more easily to make payments of his acceptances, as they became due, which, as the payments were all to be

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[1] Sautayra sur Code de Comm. art. 131, 132; Pothier de Change, n. 13.

[2] Ibid.

[3] Heineccius on this subject says; "Quamvis vero id tempus vocari soleat tempus fatale solutionis: quibusdam tamen locis etiam elapso illo tempore, quod in cambio expressum est, acceptanti dari solent induciæ aliquot dierum, e. gr., trium, quatuor, quinque, sex, qui vocantur *Respit*-vel *Discretions-Tage*, nec non *Nach*-vel *Ehren-Tage*, de quibus singularem in hac Academia dissertationem scripsit Io. Christoph. Franckius. Hæ induciæ in terris Brandenburgicis sunt trium dierum, *O. C. Brandenb. art.* 24. in Saxonia vero ob fidem mercatorum vacillantem plane sunt abolitæ." By the Code of Russia of 1832, a Bill of Exchange payable so many days or months after date, falls due after the expiration of the last day. Nouguier De Change, Tom. 2, p. 519; Code of Russia, art. 351; Louis. Law Journ. Vol. 1, p. 78 (1842).

[4] Ante, § 155, 170, 177; Chitty on Bills, ch. 9, p. 407 (8th edit. 1833); Heinecc. de Camb. cap. 2, § 13, 14.

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made in gold and silver, might sometimes, from the occasional scarcity of the precious metals, become a matter of no small difficulty and embarrassment; and, in the next place, to point out to the Holder, what time he might reasonably grant to the Acceptor for such payment, without being guilty of laches, or endangering his right of recourse, upon the ultimate non-payment of the Bill by the Acceptor, against the other parties thereto.[1] In both views, the usage was, at first, probably discretionary and voluntary on the part of the Holder, and gradually, from its general convenience and utility, it ripened into a positive right, as it certainly now is.[2]

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[1] Mr. Chief Justice Marshall, in Ogden v. Saunders, 12 Wheat. R. 213, 321, speaking on this subject as applicable to promissory notes says; "The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable, to comply with it; and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the act of the parties. The case cited from 9 Wheat. Rep. 581, is a note discounted in bank. In all such cases the bank receives, and the maker of the note pays, interest for the days of grace. This would be illegal and usurious, if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure, does not arise, until the failure has taken place; and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened."

[2] 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410 (5th edit); Kyd on Bills, ch. 1, p. 9, 10 (3d edit.); Chitty on Bills, ch. 9, p. 407 (8th edit. 1833); Heinecc. de Camb. cap. 2, § 14. — Mr. Kyd (on Bills, ch. 1, p. 9, 3d edit.) gives the old rule or usage, as to days of grace in different countries, thus; "A custom has obtained among merchants, that a person, to whom a Bill

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§ 334. In respect to the allowance, or non-allowance, of days of grace, the rule is, that it is to be gov-

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is addressed, shall be allowed a little time for payment, beyond the term mentioned in the Bill, called days of grace. But the number of these days varies, according to the custom of different places. Great Britain, Ireland, Bergamo, and Vienna, three days; Frankfort, out of the time of the fair, four days; Leipsic, Naumburg, and Augsburg, five days; Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslau, Nuremberg, and Portugal, six days; Dantzic, Konigsberg, and France, ten days; Hamburg and Stockholm, twelve days; Naples eight, Spain fourteeen, Rome fifteen, and Genoa thirty days; Leghorn, Milan, and some other places in Itlay, no fixed number. Sundays and holydays are included in the respite days at London, Naples, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzic, Konigsberg, and France; but not at Venice, Cologne, Breslau, and Nuremberg. At Hamburg, the day, on which the Bill falls due, makes one of the days of grace, but it is not so elsewhere." Mr. Chitty gives the more modern rule, or usage, thus; "The number of these days varies, according to the ancient custom or express law prevailing in each particular country. In the former edition of this work, was given a table of the days of grace allowed in the time of Beawes, but various alterations were introduced by the Code Napoleon, and, therefore, the following table, acknowledged to be the most accurate, is substituted; —

Altona. Sundays and holydays included, and Bills falling due on a Sunday or holyday must be paid, or, in default thereof, protested on the day previous.	12 days.
America,	3 days.
Amsterdam. Abolished since the Code Napoleon.	none.
Antwerp. Ditto.	none.
Berlin. When Bills, including them, do not fall due on a Sunday or holyday, in which case, they must be paid or protested the day previous.	3 days.
Brazil. Rio Janeiro, Bahia, including Sundays, &c., as in the last case.	15 days.
England, Scotland, Wales, and *Ireland.*	3 days.
France. Abolished by the Code Napoleon, Livre 1, tit. 8, § 5, pl. 135; 1 Pardess. 189. Ten days were formerly allowed, Pothier, pl. 14, 15.	none.
Frankfort on the Main. Except on Bills drawn at sight, Sundays and holydays not included.	4 days.
Genoa. Abolished by the Code Napoleon.	none.
Hamburg. Same as Altona.	12 days.
Ireland,	3 days.
Leghorn,	none.
Lisbon and Oporto. 15 days on local, and 6 on foreign Bills; but, if not previously accepted, must be paid on the day they fall due.	6 days, or 15 days.
Palermo,	none.

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erned altogether by the law of the place, where the Bill of Exchange is payable.[1] Thus, for example, if

Petersburg. Bills drawn after date are entitled to 10 days' grace, those drawn at sight, to only 3 days', and those at any number of days after sight, none whatever. But Bills, received and presented after they are due, are, nevertheless, entitled to 10 days' grace. In these days of grace, are included Sundays and holydays, as also the day, when the Bill falls due, on which days they cannot be protested for non-payment, but, on the morning of the last day of grace, payment must be demanded, and, if not complied with, the Bill must be protested before sunset.	10 days, 3, &c.
Rotterdam. Abolished by the Code Napoleon.	none.
Scotland, ...	3 days.
Spain. Vary in different parts of Spain, generally 14 days on foreign, and 8 on inland Bills; at Cadiz, only 6 days' grace. When Bills are drawn at a certain date, fixed or precise, no days of grace are allowed. Bills drawn at sight are not entitled to any days of grace; nor are any Bills, unless accepted prior to maturity.	14 days, but vary.
Trieste. 3 days on Bills drawn after date, or any term after sight, not less than 7 days, or payable on a particular day; but Bills, presented after maturity, must be paid within 24 hours. Sundays and holydays are included in the days of grace, and if the last day of grace fall on such a day, payment must be made, or the Bill protested, on the first following open day.	3 days.
Venice. 6 days, in which Sundays, holydays, and the days, when the bank is shut, are not included.	6 days.
Vienna. Same as Trieste.	3 days.
Wales.	3 days.

Chitty on Bills, ch. 9, p. 407, 408 (8th edit. 1833). Savary gives the rules in different countries, in his time, which may, as a matter of curiosity, and sometimes, also, of practical use, where the days of grace remain unchanged, be useful for consultation; "Par toute la France les protests des Lettres de Change, doivent être faits dans les dix jours après celui de l'échéance; c'est la disposition précise de l'art. 4 du tit. V. de l'Edit du Commerce; et dans les dix jours, l'art. 6 veut que l'on y comprenne ceux de l'échéance et du protest; en quoi il est contraire à l'article 4, qui n'ordonne de faire le protest que dix jours après celui de l'échéance. Depuis il y a eu une Déclaration du Roi du mois de Juin, 1686, conformé à un Arrêt du Conseil du 5 Avril, de la même année, par laquelle Sa Majesté ordonne que les dix jours accordés aux porteurs de Lettres de Change pour les protests, ne seront comptés que du lendemain de l'échéance des Lettres, sans que le jour de l'échéance y puisse être compris; le plus sûr est de ne pas attendre l'extrêmité, puisqu'il est libre au porteur de le faire dès

[1] 1 Bell, Comm. B. 3, ch. 2, § 4, p. 411 (5th edit.).

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the Bill is payable in France, where, by the present Code of Commerce, no days of grace are allowed, the

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le lendemain de l'échéance. La ville de Lyon a un usage particulier pour les Lettres de Change payables l'un de ses quatre paymens, qui est qu'elles soient protestées dans les trois jours suivans non fériés ; c'est-àdire, que comme les payemens des Rois durent tout le mois de Mars, il faut protester dans les trois premiers jours d'Avril non fériés. Les payemens de Pâques durent tout le mois de Juin, il faut protester dans les trois premiers jours non fériés de Juillet. Les payemens d'Août durent tout le mois de Septembre, il faut protester dans les trois premiers jours non fériés d'Octobre. Et les payemens des Saints durent tout le mois de Décembre, il faut protester dans les trois jours de Janvier les Lettres de Change payables dans ces payemens. Cet usage est autorisé par le Réglement du 2 Juin, 1667, homologué par le Roi le 7 Juillet, 1667, et vérifié en Parlement le 18 Mai, 1668. Et l'art. 7 du tit. V. de l'Edit de 1673, déclare qu'il n'y est pas dérogé. A Londres l'usage est de faire le protest dans les trois jours après l'échéance, à peine de répondre de la négligence ; Et il faut encore obeerver que si le troisième des trois jours est férié, il faut faire la protest le veille. A Hambourg de même pour les Lettres de Change tirées de Paris et de Rouen ; mais pour les Lettres de Change tirées de toutes les autres Places il y a dix jours, c'est-à-dire, qu'il faut faire le protest le dixième jour au plus tard. A Venise l'on ne peut payer les Lettres de Change qu'en banque, et le protest faute de payement des Lettres de Change doit être fait six jours après l'échéance ; mais il faut que la banque soit ouverte, parce que lorsque la banque est fermée l'on ne peut pas contraindre l'acceptant à payer en argent comptant, ni faire le protest ; ainsi lorsque les six jours arrivent il faut attendre son ouverture pour demander le payement et faire les protests, sans que le porteur puisse être réputé en faute. La banque se ferme ordinairement quarte fois l'année pour quinze ou vingt jours, qui est environ le 20 Mars, le 20 Juin, le 20 Septembre, et le 20 Décembre ; outre ce, en Carnaval elle est fermée pour huit ou dix jours, et la Semaine Sainte, quande elle n'est point à la fin de Mars. A Milan il n'y a pas de terme réglé pour protester faute de payement ; mais la contume est de différer peu de jours. A Bergame les protests faute de payement se font dans les trois jours après l'échéance des Lettres de Change. A Rome l'on fait les protests faute de payement dans quinze jours après l'échéance. A Ancône les protests faute de payement se font dans la huitaine après l'échéance. A Boulogne et à Livourne il n'y a rien de réglé à cet égard, l'on fait ordinairement les protests faute de payement peu de jours après l'échéance. A Amsterdam les protests faute de payement se font le cinquième jours après l'échéance, de même à Nuremberg. A Vienne en Autriche la coutume est de faire les protests faute de payement le troisième jour après l'échéance. Dans les Places qui sont foires de change, comme Noue, Francfort, Bolzan, et Lintz, les protests faute de

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Bill becomes due at the regular expiration of the time stated on the face of the Bill, and no days of grace are to be allowable.[1] On the other hand, if the Bill is payable in England, then the full days of grace are allowed, according to the law of England; and the like rule prevails as to all other countries.[2] Indeed, it may be laid down as a general rule, that the law of the place, where the Bill is payable, is to govern, not only as to the time, but as to the mode of presentment for payment.[3]

§ 335. Although the days of grace are different in different commercial countries, and are to be computed according to the law of the place, where the Bill is payable,[4] yet, in most, although not in all, of them, the same general rule prevails, that they are to be calculated exclusive of the day, when the Bill would otherwise become due.[5] Thus, for example, if a Bill is drawn in America or England, on the first day of January, payable, in either country, one month after date, the days of grace (which, as we have seen, are three days) will begin on the second day of February, and

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payement se font le dernier jour de la foire. Il n'y a point de Place où le délai de faire le protest des Lettres de Change soit si long qu'à Gênes, parce qu'il est de trente jours, suivant le Chapitre 14 du quatrième Livre des Statuts." Savary, Le Parfait Négociant, Tom. 1, Part 3, Liv. 1, ch. 14, p. 849, 850. See also Heinecc. de Camb. cap. 2, § 13, 14.

[1] Code de Comm. art. 135; Ante, § 155, 177.

[2] Pardessus, Droit Comm. Tom. 5, art. 1489, 1495, 1498; Pothier de Change, n. 155, 172, 187; Chitty on Bills, ch. 9, p. 409 (8th edit. 1833); Kyd on Bills, ch. 1, p. 9 (3d edit.).

[3] Ibid.

[4] Ante, § 155, 170; Story on Conflict of Laws, § 316, 347, 361; Pothier de Change, n. 155; Pardessus, Droit Comm. Tom. 5, art. 1495; Chitty on Bills, ch. 9, p. 406 to 409 (8th edit. 1833).

[5] See Kyd on Bills, p. 9 (3d edit.); Beawes, Lex Merc. Bills of Exchange, pl. 260.

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end on the fourth day of February.[1] On the other hand, if a Bill of Exchange were drawn in America or England on the first day of January, payable, in either country, at thirty days after date, the days of grace would begin on the first day of February, and end on the third day.[2] In other words, in each case, the time

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[1] Ante, § 332; Chitty on Bills, ch. 9, p. 403, 404, 406, 409, 412 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 245, 249, 250 (5th edit. 1830); Pothier de Change, n. 14, 15, 139, 172, 187; Sautayra sur Code de Comm. art. 131, 132; Mitchill v. Degrand, 1 Mason, R. 176; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410, 411 (5th edit.). — Mr. Chitty says; "At Hamburg, the day, on which the Bill falls due, makes one of the days of grace; but it is not so elsewhere." Chitty on Bills, ch. 9, p. 409 (8th edit. 1833); 1 Selywn, Nisi Prius, p. 531, note (10th edit. 1842).

[2] Ante, § 177, 333; Pothier de Change, n. 139, 172; Chitty on Bills, ch. 9, p. 406 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 245 to 247, 249, 250 (5th edit. 1830); Sautayra sur Code de Comm. art 131, 132. — Mr. Chitty says; "When Bills, &c., are payable at one, two, or more months after date or sight, the mode of computing the time, when they become due, differs from the mode of computation in other cases. In general, when a deed or Act of Parliament mentions a month, it is construed to mean a lunar month, or twenty-eight days, unless otherwise expressed; but, in the case of Bills and notes, and other mercantile contracts, the rule is otherwise, and, by custom of trade, when a Bill is made payable at a month or months after date, the computation must, in all cases, be by calendar, and not by lunar months; thus, when a Bill is dated the first of January, and payable at one month after date, the month expires on the 1st of February, and, with the addition of the days of grace, the Bill is payable on the 4th of February, unless that day be a Sunday, and then on the 3d. When one month is longer than the succeeding one, it is said to be a rule not to go, in the computation, into a third month; thus, on a Bill dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and, in the three latter cases, in leap year on the 29th. When the time is computed by days, the day, on which the event happens, is to be excluded." Chitty on Bills, ch. 9, p. 406 (8th edit. 1833). Again, Mr. Chitty (p. 412) adds; "From these inquiries into the mode of calculating time and usances, and days of grace, in relation to Bills, the day of the date of the Bill or note, or, in the case of Bills after sight, the day of acceptance, are always to be excluded, and the usance, or calendar month, or weeks, or days, are to be calculated from, and exclusive of such days; and, with the exception of Hamburg, the days of grace begin the day after the usances or months

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of running of the Bill is calculated exclusive of the day of its date.[1] The same rule would apply to a Bill, drawn payable at a certain number of days after sight; for the time would begin to run, only from the acceptance thereof, and exclusive of that day, and the days of grace would be allowable accordingly.[2]

§ 336. Pothier states the rule of the old French law to be the same, as to the calculation of the days of grace.[3] We have already seen, that, by the modern Commercial Code of France, the allowance of any days of grace is totally abrogated.[4] But still, in France, the time when a Bill becomes due, if it is payable at a certain number of days after its date or after sight, or at one or more usances, if it is accepted, is (as we have seen[5]) always calculated exclusively of the day of

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expire; and, if the last of the days of grace fall on a Sunday, Christmas-day, Good Friday, or legal fast, or thanksgiving-day, the Bill or note is due, and must be presented on the day before. Thus, if a Bill be dated the 2d of November, 1831, and be payable in England, at two months after date, they expired on the 2d of January, 1832; and, adding the three days of grace, the Bill fell due on the 5th of that month, and must be then presented." Ante, § 143, 144, 330.

[1] Ibid.

[2] Bayley on Bills, ch. 7, § 1, p. 244, 248, 250 (5th edit. 1830); Chitty on Bills, ch. 9, p. 406, 409 (8th edit. 1833); Sturdy *v.* Henderson, 4 Barn. & Ald. 592. — Mr. Chitty says; "When a Bill or note purports to be payable so many days after sight, the days are computed from the day the Bill was accepted, or the note presented, exclusively thereof, and not from the date of the Bill or note, or the day the same came to hand, or was presented for acceptance; for the sight must appear in the legal way, which is, either by the parties accepting the Bill, or by protest for non-acceptance. And, in the case of a bank post-bill, which is really a promissory note, and, in case of a note payable after sight, though the Maker has sight of the instrument, when he makes it, yet a distinct and subsequent presentment must afterwards be made, and the time of payment is reckoned from the day of presentment, exclusive thereof." Chitty on Bills, ch. 9, p. 406, 407 (8th edit. 1833); Ante, § 330.

[3] Pothier de Change, n. 13, 139, 172.

[4] Code de Comm. art. 135; Pardessus, Droit Comm. Tom. 2, art. 401.

[5] Ante, § 332.

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the date or the sight of the Bill; so that, if the date, or sight, and acceptance, be on the first day of January, and the Bill be payable in thirty days, it becomes payable on the thirty-first day of January, and not before.[1]

§ 337. In respect to the days of grace, also, another rule, equally important, seems generally, although not universally, to pervade the commercial countries in modern times. It is, that the days of grace are to be all counted consecutively, and in direct succession, without any deduction or allowance, on account of there being any Sundays or holydays, or other non-secular days, intermediate between the first and last day of grace.[2] Thus, if the first day of grace should be on a Saturday, the last day, under our law, would be on Monday, making no allowance whatsoever for Sundays, which, in some other cases, (as we have seen,) as, with reference to the times of giving notice of the dishonor of a Bill, is always excluded from the computation of diligence.[3] The old French law, in like manner, includes Sunday, and other holydays, in the computation of the days of grace.[4]

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[1] Sautayra Comm. sur Code de Comm. art. 131, 132.

[2] Pothier de Change, n. 139; Bayley on Bills, ch. 7, § 1, p. 245 to 250 (5th edit. 1830); Chitty on Bills, ch. 9, p. 406, 410 to 412 (8th edit. 1833); Ante, § 233, 234. — Mr. Chitty says; "In Great Britain, Ireland, (and in Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzic, and Konigsberg, whilst days of grace were allowed in those places,) Sundays and holydays are always included in the days of grace, unless the last; but not so at Venice, Cologne, Breslau, and Nuremberg." Chitty on Bills, ch. 9, p. 411, 412 (8th edit. 1833). In America, the same rule prevails as in England. In America, the 4th of July is treated as a holyday. Cuyler v. Stevens, 4 Wend. R. 566; Ransom v. Mack, 2 Hill, N. Y. Rep. 587, 592; Lewis v. Burr, 2 Cain. Cas. in Error, 195.

[3] Ante, § 233, 234.

[4] Pothier de Change, n. 139, 152.

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§ 338. But, although the days of grace are never protracted by the intervention of Sundays, or any other holydays, yet they are, on the other hand, by our law, liable to be contracted and shortened by the last day of grace falling on a Sunday, or other holyday. For, whenever the last day of grace occurs on a Sunday, or other holyday, the Bill becomes due and payable, not on the succeeding day, but on the preceding day.[1] In

[1] Bayley on Bills, ch. 7, § 1, p. 247, 248 (5th edit. 1830); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410, 411 (5th edit.); Chitty on Bills, ch. 9, p. 410 to 412 (8th edit. 1833); Ransom v. Mack, 2 Hill, N. Y. Rep. 587; Ante, § 233; Homes v. Smith, 2 Appleton, R. 264. — On this subject, Mr. Chitty says; "In this country, at Common Law, if the day, on which a Bill would otherwise be due, falls on a Sunday, or great holyday, as Christmas-day, the Bill falls due on the day before; and, where a third day of grace falls on a Sunday, the Bill must be presented on Saturday, the second day of grace; whereas, otherwise, a presentment on a second day of grace, being premature, would be a nullity. And, by 39 and 40 Geo. III., c. 42, § 1, where Bills of Exchange and promissory notes become due and payable on Good Friday, the same shall, from and after the 1st day of June (1800), be payable on the day before Good Friday; and the Holder or Holders of such Bills of Exchange, or promissory notes, may note and protest the same for non-payment, on the day preceding Good Friday, in like mannner, as if the same had fallen due and become payable on the day preceding Good Friday; and such noting and protests shall have the same effect and operation at law, as if such Bills and promissory notes had fallen due and become payable on the day preceding Good Friday, in the same manner as is usual in cases of Bills and notes coming due on the day before any Lord's day, commonly called Sunday, and before the feast of the Nativity, or Birthday of our Lord, commonly called Christmas-day. So, with regard to fast days, it is enacted, by 7 and 8 Geo. IV., c. 15, § 2, that, from and after the 10th day of April, 1827, in all cases, where Bills of Exchange or promissory notes shall become due and payable on any day appointed by his majesty's proclamation for a day of solemn fast, or a day of thanksgiving, the same shall be payable on the day next preceding such day of fast, or day of thanksgiving; and, in case of non-payment, may be noted and protested on such preceding day; and that, as well in such cases, as in the cases of Bills of Exchange and promissory notes, becoming due and payable on the day preceding any such day of fast, or day of thanksgiving." Chitty on Bills, ch. 9, p. 410, 411 (8th edit. 1833). Bussard v. Levering, 6 Wheat. 102.

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other words, the latest business day, occurring within the days of grace, is deemed the day, on which the Bill is due and payable; and the grace then expires.[1] Thus, if the last day of grace is on Sunday, the Bill is due and payable, and the grace expires, on the preceding Saturday. And, if two holydays should succeed each other, as Sunday, on the twenty-fourth of December, and Christmas, on the twenty-fifth of December, the Bill would be due and payable on the preceding Saturday, the twenty-third of December.[2]

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[1] See Howard *v.* Ives, 1 Hill, N. Y. Rep. 263. — It is said, that a different rule prevails, in respect to contracts not negotiable, and contracts, where no days of grace are allowed; and, therefore, if a common contract falls due on Sunday, the party has until the following Monday to perform it. Salter *v.* Burt, 20 Wend. R. 205, where Mr. Justice Bronson, in delivering the opinion of the Court, said; "This check, having been post-dated, was payable on the day of its date, without any days of grace. Mohawk Bank *v.* Broderick, 10 Wendell, 304; 13 Wendell, 133. It fell due on Sunday, and the question is, Whether the demand of payment was well made on the previous Saturday; or, Whether it should have been made on the following Monday. When days of grace are allowable on a Bill or note, and the third day falls on Sunday, the Bill or note is payable on the previous Saturday. The same custom of merchants, which, as a general rule, allows three days of grace to the debtor, has limited that indulgence to two days, in those cases, where the third is not a day for the transaction of business. But, when there are no days of grace, and the time for payment or performance, specified in the contract, falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday. This question was very fully considered in Avery *v.* Stewart, 2 Conn. R. 69, which was an action on a note, not negotiable, which fell due on Sunday; and the Court held, that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by Gould, J., that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time, mentioned in a contract, for the doing of an act, intervening Sundays are to be counted; but, when the day for performance falls on Sunday, it is not to be taken into the computation. The check was presented before it became payable, and the demand and notice were consequently insufficient to charge the Indorser." 20 Wend. R. 206, 207. But see Kilgour *v.* Mills, 6 Gill & Johns. R. 268.

[2] Bayley on Bills, ch. 7, § 1, p. 247, 248.

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§ 339. The same rule prevails in France; for, if a Bill become payable at a great *fête*, or a fixed holyday, or Sunday, payment is demandable the day before.[1] Pothier seems to have thought, that the old French law allowed some distinction in cases of this sort. If the day of the maturity of the Bill should fall on Sunday, he admits, that a demand might be made on the preceding day; and, if payment be then absolutely refused, the Holder may protest the Bill. But, if the Acceptor should answer, that he would pay the next day, and not refuse absolutely, then the Holder is bound to present it again for payment, on the day of its maturity, although it is Sunday; and, if payment is then made, it is sufficient. If not then made, a second protest should be made.[2] But of this some doubt has been entertained in France. Heineccius lays down the rule, prevailing in Germany, to be, that, in such a case, the demand of payment should be on the next succeeding day. "*Si in diem feriatum incidit solutionis dies, nec acceptans invitus solvere tenetur, nec præsentans solutionem urgere, vel protestationem interponere potest, sed exspectandus est dies sequens.*"[3] And he traces this doctrine back to the time of Justinian, by whose Code, holydays, and days of public festivals, were prohibited from being days for the transaction of secular business.[4]

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[1] Chitty on Bills, ch. 9, p. 411 (8th edit. 1833); Code de Comm. art. 133, 134.

[2] Pothier de Change, n. 140.

[3] Heinecc. de Camb. cap. 4, § 41.

[4] Ibid., note. The passage in the Code is, "Dies festos majestati altissimæ dedicatos, nullis volumus voluptatibus occupari, nec ullis exactionum vexationibus profanari. Dominicum itaque diem ita semper honorabilem decernimus, et venerandum, ut a cunctis executionibus excusetur; nulla quemquam urgeat admonitio; nulla fidejussionis flagitetur exactio;

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§ 340. And respect is paid, not only to the public holydays, and religious fasts and festivals of the country, where the Bill is due and payable, as non-secular days, but also to the religious opinions and usages of the particular sect, to which the Acceptor belongs. A case may occur in England or America, where a Bill may be due and payable, without the allowance of any of the three days of grace. Thus, for example, if the first day of grace should be on Saturday, and Monday should be Christmas-day, and the Acceptor should be a Jew, by whose religious usages abstinence from all secular business is interdicted on Saturdays, the Bill would (it is presumed) be payable on Friday, without any grace whatsoever. For the Jew Acceptor would not be compelled to do business on Saturday; and the laws or usages of the country would not justify a demand on Sunday or Christmas.[1]

§ 341. The reason of all this doctrine seems to be, that, as the allowance of the days of grace is a mere indulgence to the Acceptor, it shall be granted only in cases, where it will not work any extra delay to the

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taceat apparitio; advocatio delitescat; sit ille dies a cognitionibus alienus; præconis horrida vox silescat; respirent a controversiis litigantes, et habeant fœderis intervallum; ad sese simul veniant adversarii non timentes, subeat animos vicaria pœnitudo; pacta conferant, transactiones loquantur. Nec hujus tamen religiosi diei otia relaxantes, obscœnis quemquam patimur voluptatibus detineri. Nihil eodem die sibi vindicet scena theatralis, aut Circense certamen, aut ferarum lachrymosa spectacula; et, si in nostrum ortum, aut natalem celebranda solennitas inciderit, differatur. Amissionem militiæ, proscriptionemque patrimonii sustinebit, si quis unquam hoc die festo spectaculis interesse, vel cujuscunque judicis apparitor prætextu negotii publici, seu privati, hæc, quæ hac lege statuta sunt, crediderit temeranda." Lib. 3, tit. 12, l. 11.

[1] Ante, § 233; Bayley on Bills, ch. 7, § 2, p. 271 (5th edit. 1830); Chitty on Bills, ch. 8, p. 360 (8th edit. 1833); Id. ch. 10, p. 488, 520; Lindo *v.* Unsworth, 2 Camp. R. 602; Heinecc. de Camb. cap. 4, § 41.

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Holder of the Bill; but he shall be entitled to strict payment, at the *punctum temporis* of the Bill. If any other rule were adopted, the Holder would be compelled to lose the use of his money for four days; and thus the period of delay be protracted, to his inconvenience, and, perhaps, injury. Pothier has very justly remarked, that the days of grace are, as the name imports, a mere favor accorded to the Acceptor, *humanitatis ratione*, to distinguish them from the time stated on the face and purport of the Bill.[1]

§ 342. Another question often arises, as to the kinds of Bills, on which days of grace are allowed. In England, days of grace are allowed on all Bills, whether they are payable at a certain time after date, or after sight, or even at sight.[2] As to the latter (Bills payable at sight), there has been some diversity of opinion among the profession, as well as among the elementary writers. But the doctrine seems now well established, both in England and America, that days of grace are allowable on Bills payable at sight.[3] And the same rule has been applied, as, in strict analogy, it should apply, to bank post-notes, payable after sight, for they

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[1] Pothier de Change, n. 139; Chitty on Bills, ch. 9, p. 407, 408 (8th edit. 1833); Heinecc. de Camb. cap. 4, § 13, 14. — Heineccius says; "Quamvis vero id tempus vocari soleat tempus fatale solutionis; quibusdam tamen locis etiam elapso illo tempore, quod in cambio expressum est, acceptanti dari solent induciæ aliquot dierum, e. gr., trium, quatuor, quinque, sex, qui vocantur Respit-vel Discretions-Tage, nec non Nach-vel Ehren-Tage." Heinecc. de Camb. cap. 2, § 14; Ante, § 333, note.

[2] Chitty on Bills, ch. 9, p. 407 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 244, 245 (5th edit. 1830); Bank of Washington v. Triplett, 1 Peters, R. 30.

[3] Chitty on Bills, ch. 9, p. 407, 409 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 249 (5th edit. 1830); 1 Selwyn, Nisi Prius, p. 350, 352 (10th edit. 1842); Dehers v. Harriot, 1 Show. R. 163; Coleman v. Sayer, 1 Barnard. B. K. R. 303; Ante, § 228, and note.

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differ in nothing from ordinary inland Bills of Exchange.[1] The same rule seems to apply to Bills pay-

[1] Chitty on Bills, ch. 9, p. 406, 409 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 244, 245 (5th edit. 1830); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 411 (5th edit.); Brown v. Lusk, 4 Yerger, R. 210. — How would it be on a bank post-note, payable at sight? Mr. Chitty (p. 409, 410), on the subject of Bills payable at sight, says; "With respect to a Bill payable at sight, though, from the very language of the instrument, it should seem, that payment ought to be made immediately on presentment, this does not appear to be so settled. The decisions and the treatises differ on the question, Whether or not days of grace are allowed. In France, Pothier, enumerating the various kinds of Bills, and writing at a time, when days of grace were allowed in France, states, that a Bill, payable at sight, is payable as soon as the Bearer presents it to the Drawee; but, in another part of his work, it appears, that this opinion is founded on the words of a particular French ordinance, which cannot extend to Bills payable in this country; however, he assigns, as a reason, that it would be inconvenient, if a person, who took a Bill at sight, payable in a town, through which he meant to travel, and the payment of which he stands in need of, for the purpose of continuing his journey, should be obliged to wait till the expiration of the days of grace, after he presented the Bill; a reason obviously as applicable to the case of a Bill drawn payable at sight in this, as in any other country; and in France, a Bill payable at a fair, is due the day before the last day of such fair. In Spain, days of grace are not allowed, when Bills are drawn payable at sight, nor, indeed, on any Bill not previously accepted. Beawes, in his Lex Mercatoria, says, that Bills, made payable here at sight, have no days of grace allowed, although it would be otherwise in the case of a Bill made payable one day after sight. Kyd, in his Treatise, expresses the same opinion. But it appears now to be considered as settled, that days of grace are to be allowed. In Dehers v. Harriot (1 Show. 163), it was taken for granted, that days of grace were allowable on a Bill payable at sight. The same doctrine was entertained in Coleman v. Sayer (Barnard. B. K. R. 303). And, in another case, where the question was, Whether a Bill, payable at sight, was included under an exception in the Stamp Act, 23 Geo. III., c. 49, § 4, in favor of Bills payable on demand, the Court held, that it was not; and Buller, J., mentioned a case before Willes, C. J., in London, in which a jury of merchants were of opinion, that the usual days of grace were to be allowed on Bills payable at sight. And in Forbes on Bills (p. 142), the same practice is said to prevail. And Mr. Selwyn, in his Nisi Prius (p. 339, 4th edit.), observes, that the weight of authority is in favor of such allowance. And they were allowed on such Bills at Amsterdam." It seems, that, in Louisiana, if a Bill be payable on a fixed day (as on the first day of March), it is payable on presentment, and no days of grace are allowed. Durnford

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able by instalments, and the days of grace are allowed on the falling due of each instalment.[1] But Bills, payable on demand, are immediately payable on presentment, without allowing any days of grace.[2] And the same rule will apply, where no time of payment is expressed on the face of the Bill; for then, in contemplation of law, it is payable on demand.[3] Foreign Bills of Exchange are rarely drawn payable on demand; but inland Bills are often so drawn. The subject will, therefore, naturally come under our review in a subsequent page.[4]

§ 343. In France, under the old law (for, by the modern Code, as we have seen, no days of grace are allowed[5]), no days of grace were allowed on Bills payable at sight; and Pothier has given strong reasons in support of this construction of the language.[6] But, upon all other Bills, to wit, those payable at a usance, or at a certain number of days after sight or date, the days of grace were allowable.[7] The like rule prevails in Spain; and, probably, also, in most of the countries of continental Europe.[8]

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v. Patterson, 7 Martin, R. 460. This seems to be a peculiar usage, growing out of the law of Spain.

[1] Orridge v. Sherborne, The English Jurist, May 13, 1843, p. 402; S. C. 11 Mees. & Welsb. 374.

[2] Bayley on Bills, ch. 7, § 1, p. 233 to 242 (5th edit. 1830); Chitty on Bills, ch. 9, p. 407 to 410 (8th edit. 1833); Ante, § 231.

[3] Chitty on Bills, ch. 9, p. 410 (8th edit. 1833). See Sutton v. Toomer, 7 Barn. & Cressw. 416.

[4] See Ante, § 228, 231; and Post.

[5] Ante, § 334, 336; Code de Comm. art. 135.

[6] Pothier de Change, n. 12, 172, 198; Code de Comm. art. 130; Chitty on Bills, ch. 9, p. 409 (8th edit. 1833); Ante, § 228, and note.

[7] Pothier de Change, n. 13, 139, 172.

[8] Chitty on Bills, ch. 9, p. 407, 409, 410 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 410, 411 (5th edit.); Heinecc. de Camb. cap. 2, § 13 to 15. Mr. Chitty (p. 407) says; "In most countries, when

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§ 344. Having ascertained the time, when Bills of Exchange are, properly speaking, due and payable, we are naturally led to the consideration of the particular day, when they are to be presented for payment. That is, by our law, (as we have seen,) in all cases, where they are payable at a certain time, the very day, on which they are due, or arrive at maturity.[1]

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a Bill is payable at one or more usances, or a Bill or note is payable at a certain time after date, or after sight, or after demand, it is not payable at the precise time mentioned in the Bill or note, but days of grace are allowed. The days of grace (at Hamburg called respite days) which are allowed to the Drawee, are so called, because they were formerly merely gratuitous, and not to be claimed as a right by the person, on whom it was incumbent to pay the Bill, and were dependent on the inclination of the Holder; they still retain the name of grace, though the custom of merchants, recognised by law, has long reduced them to a certainty, and established a right in the Acceptor to claim them, in most cases of foreign or inland Bills, or notes payable at usance, or after date, or after sight, or after a certain event, or even when expressly made payable on a particular day, or even at sight; but not, when expressly made payable on demand."

[1] Ante, § 325; Bayley on Bills, ch. 7, § 1, p. 247 (5th edit. 1830); Lenox *v.* Roberts, 2 Wheat. R. 373; Mills *v.* Bank of U. States, 11 Wheat. R. 431; Robinson *v.* Bland, 2 Appleton, R. 109; Chitty on Bills, ch. 9, p. 402, 403 (8th edit. 1833); Id. ch. 10, p. 465 to 467; 1 Bell, Comm. B. 3, ch 2, § 4, p. 409, 410 (5th edit.). — Mr. Chitty says (p. 402, 403); "Bills, notes, and checks, when payable at a time certain, must be presented on the very day they fall due; and those, which are not payable on a day certain, but on presentment or demand, must be presented, or, at least, put in circulation for that purpose, within a reasonable time after they have been received, depending on distance, and other circumstances presently noticed. In the first case, a premature presentment, before the instrument falls due, would be wholly inoperative, and a delay in presenting, until even one day after the instrument was at maturity, would discharge all the parties not primarily liable. It was once thought, that the propriety of a presentment for payment, with respect to the time, when it should be made, was, in all cases, a question for the determination of a jury; but the decisions of juries having been found to be very much at variance from each other, and, consequently, to have rendered the Commercial Law, in that respect, very uncertain, it is now settled to be the province of the Court to determine the time, when a presentment ought to be made."

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Any omission, by the Holder, to present it, on that day, for payment, at least, if the presentment be not prevented by accident, or irresistible force, or some inevitable calamity, will discharge and exonerate the Drawer and Indorsers of the Bill from all liability to pay the Bill;[1] for such due presentment is, ordinarily, a condition precedent to their liability, and constitutes an essential ingredient in their contract.[2] The same rule applies to the case of an acceptance *supra protest*; for the Acceptor *supra protest* is (as we have seen) only conditionally liable, in case of a refusal of the Drawee to pay the Bill, upon due presentment of it to him at its maturity, and due notice thereof being given to such Acceptor.[3] But the case of a Drawee, when he accepts the Bill, is not at all changed or affected thereby; for he remains, according to his original contract, absolutely bound for the payment of the Bill at all times after it becomes due.[4]

§ 345. The French Law, in the like manner, requires a demand of payment to be made by the Holder upon the Acceptor on the very day of the maturity of the Bill. This is the positive provision of the present Code of Commerce;[5] and it is in entire conformity

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[1] See Ante, § 234, 280; Chitty on Bills, ch. 9, p. 389, 391, 422 (8th edit. 1833); Id. ch. 10, p. 524.

[2] Ante, § 234, 280; Chitty on Bills, ch. 9, p. 384 to 386 (8th edit. 1833).

[3] Ante, § 121 to 125; Bayley on Bills, ch. 6, § 1, p. 178, 179 (5th edit. 1830); Chitty on Bills, ch. 8, p. 378, 379, 381 (8th edit. 1833); Id. ch. 9, p. 385; Williams *v.* Germaine, 7 Barn. & Cressw. 458, Hoare *v.* Cazenove, 16 East, R. 391; Mitchell *v.* Baring, 10 Barn. & Cressw. 4.

[4] Ante, § 325; Chitty on Bills, ch. 9, p. 384 to 386, 391, 392 (8th edit. 1833).

[5] Code de Comm. art. 161; Locré, Esprit du Code de Comm. Tom. 1, art. 161, p. 502, 503.

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with the antecedent doctrine maintained in France.[1] And this, also, seems to be the rule recognized by Heineccius, as resulting from the general law in Germany.[2]

§ 346. So peremptory is this duty of the Holder, to demand payment on the very day of the maturity of the Bill, that (as we have already seen[3]) even the bankruptcy, or insolvency, or death of the Acceptor before or at the time of its falling due, will not excuse or justify the omission. The same rule equally applies to making a presentment and demand at the proper place where it should be made, and the omission to do so will not be excused by the bankruptcy, insolvency, or death of the Acceptor.[4] In the former cases, the demand may, and should be, made upon the bankrupt or insolvent personally, or at his domicil, or place of business, in the same way and manner, as if he were not bankrupt or insolvent.[5] If his house, or place of business, is shut up, it will not be sufficient to

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[1] Pothier de Change, n. 172 to 174; Savary, Le Parfait Négociant, Tom. 1, Pt. 3, ch. 14, p. 847, 851, 853; Pardessus, Droit Comm. Tom. 5, art. 1497.

[2] Heinecc. de Camb. cap. 4, § 40.

[3] Ante, § 326.

[4] Ante, § 279, 306, 326; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 413 (5th edit.); Chitty on Bills, ch. 9, p. 386 to 389 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 251 (5th edit. 1830); Id. § 2, p. 302; Russell v. Langstaffe, Doug. R. 497, 515; Esdaile v. Sowerby, 11 East. R. 114; Ante, § 230, 279; Crossen v. Hutchinson, 9 Mass. R. 205; Garland v. The Salem Bank, 9 Mass. R. 408; Jackson v. Richards, 2 Caines, R. 343; Barton v. Baker, 1 Serg. & Rawle, R. 334; Sanford v. Dillaway, 10 Mass. R. 52; Farnum v. Fowle, 12 Mass. R. 89; Groton v. Dallheim, 6 Greenl. R. 466; Shaw v. Reed, 12 Pick. R. 132.

[5] Chitty on Bills, ch. 9, p. 386 to 388 (8th edit. 1833); Collins v. Butler, 2 Str. R. 1087; Homes v. Bowes, 16 East, 112; 1 Maule & Selw. 555; Groton v. Dallheim, 6 Greenl. R. 466; Shaw v. Reed, 12 Pick. 132.

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make a demand there; for the Holder ought to make inquiries, where he may be found; and, if, upon reasonable inquiries, the fact can be ascertained, of the place, where he may be found, presentment should be made there.[1] In case of the death of the Acceptor, the Holder should make presentment for payment to the executor or administrator of the deceased, if one has been appointed, and he, or his residence, can be ascertained upon reasonable inquiries; and, if there be no executor or administrator, or he or his place of residence cannot be found, then presentment for payment should be made at the house, or other domicil of the deceased.[2] If the acceptance be by a firm, and one partner dies before the maturity of the Bill, the presentment should be made to the survivors, and not to the personal representative of the deceased.[3] We shall hereafter have occasion to notice other considerations applicable to this part of the subject.

§ 347. The old French law was equally as expressive as ours, that the bankruptcy or insolvency of the Acceptor, at the maturity of the Bill, constitutes no excuse for the want of a due presentment for payment, by the Holder, at that time.[4] The modern Code of Commerce positively declares, that the Holder of a Bill of Exchange, is not dispensed from protesting the

[1] Chitty on Bills, ch. 9, p. 386, 387 (8th edit. 1833); Molloy, B. 2, ch. 10, § 34; Ante, § 233.

[2] Chitty on Bills, ch. 9, p. 389, 401 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 218, 219 (5th edit. 1830); Id. § 2, p. 286; Molloy, B. 2, ch. 10, § 34; Magruder v. Union Bank of Georgetown, 3 Peters, R. 87; Juniata Bank v. Hall, 16 Serg. & Rawle, 157; Ante, § 235; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 413 (5th edit.).

[3] Cayuga County Bank v. Hunt, 2 Hill, N. Y. R. 635.

[4] Pardessus, Droit Comm. Tom. 2, art. 424; Id. Tom. 5, art. 1497; Pothier de Change, n. 147; Savary, Le Parfait Négociant, Tom. 2, Pt. 45, p. 360; Ante, § 319, § 326.

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Bill for the non-payment thereof, either by its having been protested for non-acceptance, or by the death or failure of the Drawee.[1] And it adds, that, in case of the failure of the Acceptor, before the Bill becomes due, the Holder may cause it to be protested, and have his recourse against the other parties to the Bill for payment, or for security for payment.[2] The French Law seems even to go further, and to require, that the demand and protest should be made in cases of such bankruptcy and insolvency, although, by the law of the place, where the Bill is payable, no demand or protest, in such a case, is required.[3] Pardessus puts this as clear, and says, that, if a Bill be drawn in France, payable in a foreign country, it will be necessary, although the law of the place dispenses with a protest in case of such banckruptcy or insolvency, that the Holder should still protest the Bill, under the peril of otherwise losing his recourse against the French Drawer; for, in such a case, the law of France, where the contract between the Drawer and the Payee, or other Holder, was made, is to govern, as to the acts to be done, to entitle the latter to a recovery.[4] And he applies the same rule, as to the remedy of the Holder against the Indorsers, under the like circumstances.[5]

§ 348. If the Bill of Exchange be lost by the Holder before, or at the time when, it becomes due, he will still be bound to demand payment thereof from the Acceptor at its maturity; and a tender should be made of indemnity to the Acceptor, if he should pay the Bill;

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[1] Code de Comm. art. 163; art. 187.
[2] Ibid.; Sautayra sur Code de Comm. art. 163, p. 110; Ante, § 322.
[3] Pardessus, Droit Comm. Tom. 5, art. 1497; Ante, § 177, note.
[4] Ibid.
[5] Ibid. But see Ante, § 176, 177, and note.

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and, if he should refuse, due protest and notice of the non-payment should be given, as in other cases, to the Drawer and Indorsers.[1] But the Acceptor is not, under such circumstances, bound to pay the Bill, if lost, although he may, at his election, do so; for he is entitled, in all cases, to have the Bill delivered up to him upon payment thereof, as a voucher therefor; and the proper remedy for the Holder, in case of a refusal to pay, is in equity, and not at law.[2]

§ 349. But, in addition to the rule already considered, that the presentment for the payment of the Bill must be made on the very day, when it becomes due, another inquiry naturally arises; and that is; At what hours during the day the presentment is proper and allowable? The general answer here (as in cases of presentment for acceptance) is, that it must be presented within reasonable hours during the day.[3] If there be a known usage in the place, that all Bills are to be presented for payment within certain limited hours, the presentment must be made within those hours.[4] If the Bill be payable at a banker's, it must

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[1] Chitty on Bills, ch. 6, p. 288, 289 (8th edit. 1833); Id. ch. 9, p. 391, 398; Marius on Bills, p. 19; Beawes, Lex Merc. by Chitty, Vol. 1, p. 588, 589, pl. 182, 185 (edit. 1813); Thackray v. Blackett, 3 Camp. 164; Smith v. Rockwell, 2 Hill, N. Y. R. 482. Pothier states the same as the rule in France. Pothier de Change, n. 145.

[2] Chitty on Bills, ch 6, p. 289, 291 to 296 (8th edit. 1833); Bayley on Bills, ch. 9, p. 372 to 374 (5th edit. 1830); Hansard v. Robinson, 7 Barn. & Cressw. 90; Pierson v. Hutchinson, 2 Camp. R. 211; S. C. 6 Esp. R. 126; Mayor v. Johnson, 3 Camp. R. 323; Davis v. Todd, 4 Taunt. R. 602; Ex parte Greenway, 6 Ves. 812; Mossop v. Eadon, 16 Ves. 430. In this last case, a distinction was taken between Bills not negotiable, and those, which are negotiable, and indorsed in blank. And in other cases, a like distinction, where the Bills were specially indorsed or awarded. See Chitty on Bills, ch. 6, p. 293, 294 (8th edit. 1833).

[3] Ante, § 328.

[4] Ante, § 236; Bayley on Bills, ch. 7, § 1, p. 224 (5th edit 1830);

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be presented there within the usual banking hours.[1] If payable generally, and presented for payment at the counting-room, or other place of business of the Acceptor, it must be within the usual counting-house hours, or hours of business, or, at all events, while there is some person there, who is authorized to pay, or refuse payment of the Bill.[2] If presented at the dwelling-house of the Acceptor, it must be within the hours, at which the family are up, and the Acceptor may reasonably transact business.[3] If, in either of these cases, there be an omission, on the part of the Holder, of his proper duty, as, if he makes a presentment at a banker's out of banking hours, or at a counting-house out of the usual hours, and when it is shut, or at the dwelling-house, when the family have retired to rest, or before they have risen, and are in a condition to attend to business, the presentment will be a mere nullity, and be without any legal effect.[4] In all these cases the same rule applies, as in cases of presentment for acceptance.[5]

Chitty on Bills, ch. 7, p. 305 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 411, 412 (5th edit.).

[1] Parker *v.* Gordon, 7 East, R. 385; Elford *v.* Teed, 1 Maule & Selw. R. 28; Ante, § 236.

[2] Garnett *v.* Woodcock, 1 Starkie, R. 476; S. C. 6 Maule & Selw. 44; Ante, § 236, 305; Bayley on Bills, ch. 7, § 1, p. 224 to 226 (5th edit. 1830).

[3] Barclay *v.* Bailey, 2 Camp. R. 527; Morgan *v.* Davison, 1 Starkie, R. 114; Triggs *v.* Newnhan, 10 Moore, R. 249; Wilkins *v.* Jadis, 2 Barn. & Adolph. 188; Cayuga County Bank *v.* Hunt, 2 Hill, N. Y. Rep. 635. In this last case, it was said, by the Court, that, except where a Bill or note is due from a bank, the proper hours of business range through the whole day, down to bed-time in the evening. Ante, § 236.

[4] Chitty on Bills, ch. 9, p. 421, 423, 424 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 224 to 226 (5th edit. 1830); Ante, § 228, and note, § 236, 305.

[5] Ante, § 236, 305. — Mr. Chitty says; "In considering the necessity

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§ 350. In respect to presentment for payment, also, it may be here stated, that a distinction has been sometimes suggested between that and presentment for acceptance. In the latter case, it is said, that the presentment should be to the Drawee personally, if practicable, or, in other words, that the Holder should see the Drawee, and ask acceptance of him in person;[1] but, in cases of presentment for non-payment, a

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for a due presentment for acceptance and for payment, and the time, when the same should be made, we have anticipated this inquiry; and it may suffice to observe, that, on principle, perhaps, more exactness and punctuality in a presentment for payment may reasonably be required, than even in a notice of non-payment; because a prompt and regular demand of payment may frequently obtain payment from an Acceptor of a Bill, and Maker of a note, who is in a state of progressive insolvency, when a subsequent application of the same nature would become unavailing; whereas, the loss of a day or more, in giving notice of non-payment, rarely makes any actual difference. The rules, applicable to delay in notice of non-payment, will, in general, apply, and with more force, to delay in due demand of payment. And, even if an hour be lost, the laches will, in some cases, deprive the Holder of all remedy against any party not primarily liable." Chitty on Bills, ch. 9, p. 423, 424 (8th edit. 1833).

[1] Chitty on Bills, ch. 9, p. 400 (8th edit. 1833); Id. ch. 7, p. 305, 306. — On this subject, Mr. Chitty (p. 400) says; "We have seen, that, in making a demand of an acceptance, the party ought, if possible, to see the Drawee personally. But a demand of payment need not be personal; it being sufficient, if it be made at the house of the Acceptor, unless, indeed, it be shut up, and no person there competent to give an answer, and the Acceptor of the Bill, or Maker of the note, has removed, in which case the Holder must endeavor to find out to what place he has removed, and make the presentment there. Where a Note was made payable at Guilford, and the Holder presented it, when due, at two counting-houses there, the Maker then living in London, this was held to be equivalent to a presentment to the Maker himself. If the Drawee has, by his acceptance, appointed a place for payment, the Bill should be presented accordingly, or, in some cases, it may be to his agent, who has been used to pay money for him." See also Buxton *v.* Jones, 1 Mann. & Grang. R. 83. — In Buxton *v.* Jones, 1 Mann. & Grang. R. 83, a Bill of Exchange was presented for payment at the door of a house, where the Drawee was described as living, to a lodger, who was coming from the passage of the house into the street. The Acceptor had removed to another residence, known to the occupier of the house, but not to the lodger; and it was not shown, that

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personal presentment to the Drawee is not necessary. In a modified sense, this may be true, as a matter of prudence and convenience; but there does not seem to be any just foundation for this distinction, as a matter of duty, and not of mere courtesy on the part of the Holder. When, upon a presentment for acceptance, the Drawee does not happen, at the time of calling, to be found at his house or counting-room, but is temporarily absent, and no one is there authorized to give an answer, whether the Bill will be accepted, or not, in such a case, it would seem, that the Holder is not bound to consider it as a refusal to accept, but he may wait a reasonable time for the return of the Drawee; and even waiting and presenting the Bill anew on the next day will not be an unreasonable time, especially as the Drawee has, ordinarily, a right to have the Bill left a day, to enable him to examine and decide, whether he will accept or not.[1] But no such delay to the next day is allowable, if the Acceptor is not at home on the day, when the Bill becomes due; but a demand must then be made, and, if there be no one then ready at the place to pay the Bill, it should be treated as dishonored, and protested for non-payment. However, if, at the moment of calling for payment, the

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he had left there any funds for payment of the Bill. It was held, that the demand of payment was sufficient. On that occasion, the Court said, that it was not necessary to make presentment to the Acceptor personally. If he chose to remove from the house pointed out by his signature to the Bill, as his residence, he was bound to leave sufficient notice on the premises. If the Holder goes to the house of the Acceptor, and finds it shut up, that is a sufficient presentment. See also Hine v. Alleby, 4 Barn. & Adolph. 624. The case of Cheek v. Roper, 5 Esp. R. 175, is cited for the distinction, but it does not support it.

[1] Ante, § 237; Chitty on Bills, ch. 7, p. 306, 311 (8th edit. 1833); 2 Bell, Comm. B. 3, ch. 2, § 4, p. 409 (5th edit.); Bank of Washington v. Triplett, 1 Peters, R. 25; Mitchell v. Degrand, 1 Mason, R. 176.

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Acceptor is out, the Holder is not compellable to treat the case as one of non-payment; but he may wait, and call again, if he shall so choose, at any reasonable hour of the same day; for he has the business hours, or reasonable hours, of the whole day, to demand payment.

§ 351. In the next place, At what place is the presentment for payment to be made? The general rule, as in cases of presentment for acceptance, is, at the city, town, or other place, in which the Acceptor has his home or domicil, or his house of business.[1] If both are in the same city, town, or other place, the presentment may be at either, with the qualification, that it be within reasonable hours.[2] The same rule applies, if the Acceptor has his home or domicil in one city, town, or other place, and his house of business in another. A due presentment at either will be sufficient, and a presentment at both is not required.[3] If the Acceptor has changed his place of domicil, or business, in the intermediate period between the acceptance and the maturity of the Bill, the presentment must be at the new domicil, or new place of business, if, by reasonable diligence and inquiries, it can be found, and it is within the same state.[4] If the Acceptor has ab-

[1] Ante, § 235, 297, 305; Chitty on Bills, ch. 9, p. 398 to 400 (8th edit. 1833); Id. ch. 8, p. 378, 379; Id. ch. 7, p. 305; Mitchell v. Baring, 10 Barn. & Cressw. 4, 9. See Scarlett on the Style of Exchanges, cited in 10 Barn. & Cressw. 11, note; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 412 (5th edit.); Pardessus, Droit Comm. Tom 2, art. 186; Shamburg v. Commagere, 10 Martin, R. 18; Oakey v. Beavois, 11 Louis. R. 489.

[2] Ibid.; Ante, § 235; Chitty on Bills, ch. 7, p. 305 (8th edit. 1833).

[3] Ante, § 236, 305; Chitty on Bills, ch. 7, p. 305 (8th edit. 1833).

[4] Ante, § 305, 308; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 413 (5th edit.); Chitty on Bills, ch. 9, p. 400, 401 (8th edit. 1833); Id. ch. 8, p. 378 to 380; Ante, § 229, 235, 299; M'Gruder v. Bank of Washington, 9 Wheat. R. 598; Anderson v. Drake, 14 Johns. R. 114; Louis. State Insur. Co. v.

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sconded, or his place of residence cannot, upon reasonable inquiries, be found, that will be a sufficient excuse

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Shamburg, 14 Martin, R. 511; Franklin *v.* Verbois, 6 Louis. R. 730.— What inquiries will be deemed reasonable and sufficient, is a point admiting of no positive answer; but must depend upon the circumstances of each particular case. In Ransom *v.* Mack, 2 Hill, N. Y. R. 587, where a notary, ignorant of the residence of A., the first indorser, to whom he was about sending notice of dishonor by the mail, applied to the second Indorser, who designated the post-office at B. as the one, to which a letter to A. should be directed, and it was sent accordingly; it was held sufficient, although A. did not receive that letter, and was accustomed to receive his letters at another post-office nearer to his residence. See also Bank of Utica *v.* Bender, 21 Wend. R. 643; Catskill Bank *v.* Stall, 15 Wend. R. 364; S. C. 18 Wend. R. 466; Bank of Utica *v.* Davidson, 5 Wend. R 587. See Bayley on Bills, ch. 7, § 1, p. 218, 219; Id. ch. 7, § 2, p. 279 to 283 (5th edit. 1830); Chitty on Bills, ch. 10, p. 516, 524, 525 (8th edit. 1833); Ante, § 299, and note. See also Buxton *v.* Jones, 1 Mann. & Grang. 83; Bank of Utica *v.* Phillips, 3 Wend. R. 408; McMurtrie *v.* Jones, 3 Wash. Cir. R. 206; Bateman *v.* Joseph, 12 East, R. 433; McClanahan *v.* Brandon, 13 Martin, R. 321; Chapman *v.* Lipscombe, 1 Johns. R. 294; Reid *v.* Payne, 16 Johns. R. 216; Smyth *v.* Hawthorne, 3 Rawle, R. 335; Freeman *v.* Boynton, 7 Mass. R. 483; Bond *v.* Farnham, 5 Mass. R. 170; Franklin *v.* Verbois, 6 Louis. R. 727; Bank of U. States *v.* Hatch, 6 Peters, R. 250. On this subject, Mr. Chancellor Kent (3 Kent, Comm. Lect. 44, p. 95, 96) says; "If the Bill has been accepted, demand of payment must be made, when the Bill falls due; and it must be made by the Holder, or his agent, upon the Acceptor, at the place appointed for payment, or at his house or residence, or upon him personally, if no particular place be appointed, and it cannot be made by letter through the post-office. But there is a great deal of perplexity and confusion in the cases on this subject, arising from refined distinctions and discordant opinions; and it becomes very difficult to know, what is precisely the law of the land, as to the sufficiency of the demand upon the Maker of the Note, or the Acceptor of the Bill. If there be no particular and certain place identified and appointed, other than a city at large, and the party has no residence there, the Bill may be protested in the city, on the day, without inquiry, for that would be an idle attempt. The general principle is, that due diligence must be used to find out the party, and make the demand; and the inquiry will always be, Whether, under the circumstances of the case, due diligence has been used. The agent of the Holder, in one case, used the utmost diligence, for several weeks, to find the residence of the Indorser, in order to give him notice of the dishonor of the Bill, and then took a day to consult his principal before he gave the notice, and it was held sufficient. If the party has absconded, that will, as a general rule, excuse the demand.

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for non-presentment.[1] If the Acceptor has gone abroad, or left the country, then it will be sufficient to make presentment and demand of payment of his wife, or family, at his house, or at his counting-house, if it is open; or, of any known agent, to whom he has confided his business generally during his absence, or on account of his leaving the country.[2]

§ 352. If, at the time of presentment for payment, the Holder finds, that the dwelling-house, or the place of business, of the Acceptor, is shut up, it is said, that he is entitled to treat the Bill, as dishonored by a refusal of payment.[3] At least, this is true (for there seems some discrepancy in the authorities), if the Holder makes diligent inquiries to find the Acceptor, and he cannot be found.[4] If the Acceptor, between

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If he has changed his residence to some other place, within the same state or jurisdiction, the Holder must make endeavors to find it, and make the demand there; though, if he has removed out of the state, subsequent to the making of the note, or accepting the Bill, it is sufficient to present the same at his former place of residence. If there be no other evidence of the Maker's residence than the date of the paper, the Holder must make inquiry at the place of date; and the presumption is, that the Maker resides, where the note is dated, and that he contemplated payment at that place. But it is presumption only; and, if the Maker resides elsewhere within the state, when the note falls due, and that be known to the Holder, demand must be made at the Maker's place of residence."

[1] Ibid.; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 413 (5th edit); Ante, § 299, 327.

[2] Ibid.; Ante, § 229, 235; Bayley on Bills, ch. 7, § 1, p. 218, 219 (5th edit. 1830); Whittier v. Graffam, 3 Greenl. R. 82. But see Louis. State Insur. Co. v. Shamburg, 14 Martin, R. 511.

[3] Ante, § 327; Hine v. Alleby, 4 Barn. & Adolph. 624; Shed v. Brett. 1 Pick. R. 413; Williams v. Bank of U. States, 2 Peters, R. 96. But see Chitty on Bills, ch. 9, p. 386, 387 (8th edit. 1833); Collins v. Butler, 2 Str. R. 1087. See Pothier de Change, n. 147; Ante, § 299, and note.

[4] Chitty on Bills, ch. 9, p. 386, 387, 400 418 (8th edit. 1833); Collins v. Butler, 2 Str. R. 1087; Bayley on Bills, ch. 7, § 1, p. 218 (5th edit. 1830).

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the time of the Acceptance, and the time of the maturity of the Bill, changes his domicil to another state, or to a foreign country, it is not necessary for the Holder to send it, or present it for payment at the new domicil, in such other state or country; but it will be a sufficient excuse for a non-presentment of the Bill at all, or at least, a presentment at his last domicil in the state, where the acceptance was made, will be sufficient to all intents and purposes.[1]

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[1] M'Gruder *v.* Bank of Washington, 9 Wheat. R. 598; Anderson *v.* Drake, 14 Johns. R. 114; Hepburn *v.* Toledano, 10 Martin, R. 643. — In M'Gruder *v.* Bank of Washington (9 Wheat. R. 599 to 602), Mr. Justice Johnson, in delivering the opinion of the Supreme Court of the United States, said; "At the time of drawing the note, and until within ten days of its falling due, the Maker was a housekeeper in the District of Columbia. But he then removed to the State of Maryland, to a place within about nine miles of the District. The case admits, that neither the Holder of the note, nor the notary, knew of his removal, or place of residence; but the circumstances of his removal had nothing in them to sanction its being construed into an act of absconding. The words of the admission to this point are, that he 'went to the house, where the said Patrick had last resided, and from which he had removed, as aforesaid, in order there to present the said note, and demand payment of the same; and, not finding him there, and being ignorant of his place of residence, returned the said note under protest.' The alternative, in which the judgment of the Court is to be rendered, is not very appropriately stated; but, since the absurdity cannot have entered into the minds of the parties, that, not knowing of the removal, or present abode of the Drawer, the Holder was still bound to follow him into Maryland, we will construe the submission with reference to the facts admitted; and then the question raised is, Whether the Holder had done all, that he was bound to do, to excuse a personal demand upon the Maker. On this subject, the law is clear; a demand on the Maker is, in general, indispensable; and that demand must be made at his place of abode, or place of business. That it should be strictly personal, in the language of the submission, is not required; it is enough, if it is at his place of abode, or, generally, at the place, where he ought to be found. But his actual removal is here a fact in the case, and in this, as well as every other case, it is incumbent upon the Indorsee to show due diligence. Now, that the notary should not have found the Maker at his late residence, was the necessary consequence of his removal, and is entirely consistent with the supposition of his not hav-

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§ 353. If the Bill is drawn upon the Drawee, domiciled in one place, and is payable in another place, and is accepted by him, a presentment should be made for payment at the latter place.[1] Thus, if a Bill is drawn on the Drawees at Liverpool, payable in London, if accepted, the presentment for payment must

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ing made any of those inquiries, which would have led to a development of the cause, why he did not find him there. *Non constat*, but he may have removed to the next door, and the first question would, most probably, have extracted information, that would have put him on further inquiry. Had the house been shut up, he might, with equal correctness, have returned, 'that he had not found him'; and yet, that clearly would not have excused the demand, unless followed by reasonable inquiries. The party must, then, be considered as lying under the same obligations, as if, having made inquiry, he had ascertained, that the Maker had removed to a distance of nine miles, and into another jurisdiction. This is the utmost his inquiries could have extracted, and marks, of course, the outlines of his legal duties. Mere distance is, in itself, no excuse from demand; but, in general, the Indorsee takes upon himself the inconvenience resulting from that cause. Nor is the benefit of the post-office allowed him, as in the case of notice to the Indorser. But the question, on the recent removal into another jurisdiction, is a new one, and one of some nicety. In case of original residence in a State different from that of the Indorser, at the time of taking the paper, there can be no question; but how far, in case of subsequent and recent removal to another State, the Holder shall be required to pursue the Maker, is a question not without its difficulties. We think, that reason and convenience are in favor of sustaining the doctrine, that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law, than their abstract justice. On this point, there is no other rule, that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the Indorser should stand committed, in this respect, by the conduct of the Maker. For his absconding, or removal out of the kingdom, the Indorser is held, in England, to stand committed; and, although from the contiguity, and, in some instances, reduced size of the States, and their union under the General Government, the analogy is not perfect; yet, it is obvious, that a removal from the sea-board to the frontier States, or *vice versâ*, would be attended with all the hardships to a Holder, especially one of the same State with the Maker, that could result from crossing the British channel."

[1] Chitty on Bills, ch. 9, p. 398 to 400 (8th edit. 1833); Ante, § 282.

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be in London, if any particular place is there pointed out, where payment may be demanded. If none is pointed out, and no person, upon due inquiries, can be found, by whom the Bill will be paid; it may be protested in London for non-payment for that very cause.[1] If the Bill has not been accepted by the Drawee, but has been accepted, *supra protest*, by a third person, (who, of course, from what has been already said,[2] is only liable, if the Drawee shall refuse payment upon due maturity of the Bill,) the presentment and demand of payment should be made of the Drawee at Liverpool, and not at London; because there has been no acceptance of the Bill, and, consequently, the Drawee has not authorized any presentment upon him except at his place of residence.[3]

§ 354. If a Bill be drawn payable at either of two places, and accepted accordingly, as, for example, if drawn, payable at Tunbridge, or at London, the Holder has a right, at his election, to present it at either place for payment; and, if not duly paid at the place of presentment, he may protest it, and give notice to the Drawer and Indorsers, and they will be bound thereby; although, if presented at the other place, it would have been duly paid; for, in such a case, all the parties undertake to pay the Bill upon due presentment at either place.[4]

§ 355. If the Bill be made payable at a banker's, or

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[1] Boot *v.* Franklin, 3 Johns. R. 208. See Mason *v.* Franklin, 3 Johns. R. 202.

[2] Ante, § 123, 124; Chirty on Bills, ch. 8, p. 378 (8th edit. 1833); Id. p. 400; Bayley on Bills, ch. 7, § 1, p. 400 (5th edit.).

[3] Mitchell *v.* Baring, 10 Barn. & Cressw. 4, 9, 10.

[4] Beeching *v.* Gower, 1 Holt, N. P. Rep. 313; Chitty on Bills, ch. 9, p. 400 (8th edit. 1833).

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other particular place, and accepted accordingly, it should be presented for payment at that place, at its maturity, otherwise the Drawer and prior Indorsers will be discharged.[1] But the Acceptor will not be discharged, if the presentment is not made on that day, at the banker's, or other designated place; but he will still, according to the general law, remain liable to pay the same, whenever, afterwards, payment shall be demanded there, at least, if he has not sustained any loss or injury by the delay.[2] In England, before the statute 1 and 2 Geo. IV., ch. 78, a presentment and demand of payment at such a place was a condition precedent to the right of the Holder to maintain an action against the Acceptor thereon. But that statute has entirely changed the character of the responsibility of an Acceptor, by providing, that an acceptance, payable at a banker's, or other place, (not saying, "and not otherwise or elsewhere,") shall be deemed a general acceptance of the Bill, to all intents and purposes; so that no presentment or demand of payment at the banker's, or other place, is now necessary, in order to charge the Acceptor. Nay, he will still be liable on the Bill, although the banker, at whose house it was payable, had funds of the Acceptor's in his hands to pay, and afterwards failed, so that the Acceptor lost his

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[1] Ante, § 239, and note; Chitty on Bills, ch. 5, p. 172, 173 (8th edit. 1833);, Id. ch. 7 p. 321 to 323; Id. ch. 9, p. 391 to 393, 396; Bayley on Bills, ch. 1, § 9, p. 29, 30; Id. ch. 6, § 1, p. 172 (5th edit. 1830); Id. p. 199, 200; Id. ch. 7, § 1, p. 219 to 222; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 412, 413 (5th edit. 1830).

[2] Ante, § 239, and note; Rowe v. Young, 2 Brod. & Bingh. R. 165; S. C. 2 Bligh, R. 391; Chitty on Bills, ch. 5, p. 172 to 174 (8th edit. 1833); Id. ch. 7, p. 321 to 323; Id. ch. 9, p. 391 to 400, 424; Rhodes v. Gent, 5 Barn. & Ald. 244.

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funds.[1] But that statute has not changed the antecedent law in respect to the Drawer or Indorsers, who are not bound, unless a presentment has been made at the designated place, on the very day of the maturity of the Bill,[2] and it does not apply at all to Promissory Notes, payable at a particular place.[3]

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[1] Turner v. Hayden, 4 Barn. & Cressw. 1; Chitty on Bills, ch. 5, p. 172, 173 (8th edit. 1833); Id. ch. 7, p. 321 to 323; Id. ch. 9, p. 391 to 400; 1 Bell, Comm. B. 3, ch. 2, § 9, p. 412 (5th edit.); Halstead v. Skelton, 5 Adolph. & Ell. New R. 86. Lord Chief Justice Tindal, in delivering the opinion of the Court of Exchequer Chamber in this case, said; "The statute enacts that, where a Bill is accepted payable at a banker's, without further expression in the acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such Bill; but the meaning of this enactment is, not that, in such a case, presentment at the banker's shall be an invalid presentment, but that, in an action against the Acceptor, presentment to him shall be good, and consequently that it shall be unnecessary to present or to aver presentment at the banker's. A Bill of Exchange drawn generally on a party may be accepted in three different forms; either generally, or payable at a particular banker's, or payable at a particular banker's and not elsewhere. If the Drawee accepts generally, he undertakes to pay the Bill at maturity when presented to him for payment. If he accepts payable at a banker's, he undertakes (since the statute) to pay the Bill at maturity when presented for payment either to himself or at the banker's. If he accepts payable at a banker's and not elsewhere, he contracts to pay the Bill at maturity provided it is presented at the banker's, but not otherwise. Here the Bill was accepted according to the second of these three forms; i. e. payable at a banker's, without any restrictive words; so that presentment at the banker's (though if made it would have been a good presentment) was yet not, as against the Acceptor, necessary. Acceding, therefore, as we do, to the argument of the plaintiff in error, that the Bill must be taken to have been pleaded according to its legal effect, we do not go along with him in the conclusion at which he arrives. For the reasons which we have given, we do not think that, in this case, the legal effect of the Bill, as pleaded, was to render necessary any presentment at the banker's; and the judgment of the Court below will therefore be affirmed."

[2] Gibb v. Mather, 2 Cromp. & Jerv. 254; S. C. 8 Bing. R. 214; Chitty on Bills, ch. 5, p. 172, 173 (8th edit. 1833); Id. ch. 7, p. 321 to 323; Id. ch. 9, p. 391 to 400; Bayley on Bills, ch. 7, § 1, p. 222, 223 (5th edit. 1830); Shaw v. Reed, 12 Pick. R. 132.

[3] Chitty on Bills, ch. 9, p. 397 (8th edit.); Id. ch. 5, p. 174.

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§ 356. In America, a doctrine somewhat (as we have seen) different prevails, if not universally, at least, very generally. The received doctrine, here, seems to be (however difficult it is to maintain it upon principle)[1] that, in respect to the Acceptor, no presentment or demand of payment of a Bill payable at a banker's, or other particular place, need be made, at that place, on the day, when the Bill becomes due, or afterwards, in order to maintain an action against him; but that it is matter of defence on the part of the Acceptor, that he had funds at that place to pay the Bill, which, if true, will exonerate him from the payment of all damages and interest; and if he has been injured, or has sustained any loss, by the neglect of the Holder to demand payment at that place, (as, if the Bill be payable at a bank, and the Acceptor had funds there, and the bank has since failed,) then the Acceptor will be discharged from a liability on the Bill to that extent.[2]

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[1] See 3 Kent, Comm. Lect. 44, p. 97 to 99, and note (4th edit.). — Mr. Chancellor Kent (p. 99) says; "If a Bill of Exchange, though drawn generally, be accepted, payable at a particular place, it is a special, or qualified acceptance, which the Holder is not bound to take; but, if he does take it, the demand must be made at the place appointed, and not elsewhere. This is the plain sense of the contract, and the words, 'accepted, payable at a given place,' are equivalent to an exclusion of a demand elsewhere." The same doctrine is held in Louisiana. Mullen v. Croghan, 15 Martin, R. 424; Gale v. Kemper's Heirs, 10 Louis. R. 208; Warren v. Alnutt, 12 Louis. R. 454.

[2] Ante, § 239, and note; McKeil v. Real Estate Bank, 4 Pike, R. 592; Wallace v. McConnell, 13 Peters, R. 136. — In the opinion of the Court, delivered by Mr. Justice Thompson, the principal English and American authorities are reviewed. In the course of the review, the learned Judge said; "Thus we see, that, until the late decision in the House of Lords, in the case of Rowe v. Young, and the act of Parliament passed soon thereafter, this question was in a very unsettled state in the English courts; and, without undertaking to decide between those

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§ 357. However, be the rule according to the doctrine held in England or in America, it seems clear,

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conflicting opinions, it may be well to look at the light, in which this question has been viewed in the courts in this country. This question came before the Supreme Court of the State of New York, in the year 1809, in the case of Foden and Slater *v.* Sharp (4 Johns. R. 183); and the Court said, the Holder of a Bill of Exchange need not show a demand of payment of the Acceptor, any more than of the Maker of a note. It is the business of the Acceptor to show, that he was ready at the day and place appointed, but that no one came to receive the money; and, that he was always ready afterwards to pay. This case shows, that the Acceptor of a Bill, and the Maker of a Note, were considered as standing on the same footing, with respect to a demand of payment at the place designated. And in the case of Walcott *v.* Van Santvoord (17 Johns. R. 248), which came before the same court in the year 1819, the same question arose. The action was against the Acceptor of a Bill, payable five months after date at the Bank of Utica, and the declaration contained no averment of a demand at the Bank of Utica; and, upon a demurrer to the declaration, the Court gave judgment for the plaintiff. Chief Justice Spencer, in delivering the opinion of the Court, observed, that the question had been already decided, in the case of Foden *v.* Sharp; but, considering the great diversity of opinion among the judges in the English courts, on the question, he took occasion critically to review the cases, which had come before those courts, and shows, very satisfactorily, that the weight of authority is in conformity to that decision, and the demurrer was accordingly overruled; and the law in that State, for the last thirty years, has been considered as settled upon this point. And, although the action was against the Acceptor of a Bill of Exchange, it is very evident, that this circumstance had no influence upon the decision; for the Court say, that, in this respect, the Acceptor stands in the same relation to the Payee, as the Maker of a Note does to the Indorsee. He is the principal, and not a collateral debtor. And in the case of Caldwell *v.* Cassady (8 Cowen, 271), decided in the same Court, in the year 1828, the suit was upon a Promissory Note, payable, sixty days after date, at the Franklin Bank in New York; and the Note had not been presented, or payment demanded, at the bank; the Court said, this case has been already decided by this Court in the case of Wolcott *v.* Van Santvoord. And after noticing some of the cases in the English courts, and alluding to the confusion, that seemed to exist there upon the question, they add; that, whatever be the rule in other courts, the rule in this Court must be considered settled, that, where a Promissory Note is made payable at a particular place on a day certain, the Holder of the Note is not bound to make a demand at the time and

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that, if the Holder has made a demand at the banker's, or other particular place, designated for payment in the

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place, by way of a condition precedent to the bringing an action against the Maker. But, if the Maker was ready to pay at the time and place, he may plead it, as he would plead a tender in bar of damages and costs, by bringing the money into court. It is not deemed necessary to notice very much at length the various cases, that have arisen in the American courts upon this question, but barely to refer to such as have fallen under the observation of the Court; and we briefly state the point and decision thereupon, and the result will show a uniform course of adjudication, that, in actions on Promissory Notes against the Maker, or on Bills of Exchange, where the suit is against the Maker in the one case, and Acceptor in the other, and the Note or Bill made payable at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand of payment was made, in order to maintain the action. But, that, if the Maker or Acceptor was at the place at the time designated, and was ready, and offered to pay the money, it was matter of defence to be pleaded and proved on his part. The case of Watkins *v.* Crouch & Co., in the Court of Appeals of Virginia (5 Leigh, 522), was a suit against the Maker and Indorser, jointly, as is the course in that State, upon a Promissory Note like the one in suit. The Note was made payable, at a specified time, at the Farmer's Bank at Richmond, and the Court of Appeals, in the year 1834, decided, that it was not necessary to aver and prove a presentation at the bank, and demand of payment, in order to entitle the plaintiff to recover against the Maker; but, that it was necessary, in order to entitle him to recover against the Indorser; and the President of the Court went into a very elaborate consideration of the decisions of the English courts upon the question; and to show, that, upon Common Law principles, applicable to bonds, notes, and other contracts for the payment of money, no previous demand was necessary, in order to sustain the action, but that a tender and readiness to pay must come, by way of defence, from the defendant; and, that, looking upon the note as commercial paper, the principles of the Common Law were clearly against the necessity of such demand and proof, where the time and place were specified, though it would be otherwise, where the place, but not the time, was specified; a demand, in such case, ought to be made; and he examined the case of Sanderson *v.* Bowes, to show, that it turned upon that distinction, the note being payable on demand at a specified place. The same doctrine was held by the Court of Appeals of Maryland, in the case of Bowie *v.* Duvall (1 Gill & Johnson, 175); and the New York cases, as well as that of the Bank of the United States *v.* Smith (11 Wheat. 171), are cited with approbation, and fully adopted; and the Court put the case upon the

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acceptance, and payment is refused, he is not bound to make any personal or other demand upon the Ac-

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broad ground, that, when the suit is against the Maker of a Promissory Note, payable at a specified time and place, no demand is necessary to be averred; upon the principle, that the money to be paid is a debt from the defendant, that it is due generally and universally, and will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive or demand it. That it is matter of defence, on the part of the defendant, to show, that he was in attendance to pay, but that the plaintiff was not there to receive it; which defence generally will be in bar of damages only, and not in bar of the debt. The case of Ruggles v. Patten (8 Mass. Rep. 480) sanctions the same rule of construction. The action was on a Promissory Note, for the payment of money, at a day and place specified; and the defendant pleaded, that he was present at the time and place, and ready and willing to pay according to the tenor of his promises, in the second count of the declaration mentioned, and avers, that the plaintiff was not then ready or present at the bank to receive payment, and did not demand the same of the defendant, as the plaintiff, in his declaration, had alleged; the Court said, this was an immaterial issue, and no bar to an action or promise to pay money. So, also, in the State of New Jersey, the same rule is adopted. In the case of Weed v. Houten (4 Halst. N. J. Rep. 189), the Chief Justice says; 'The question is, Whether, in an action by the Payee of a Promissory Note payable at a particular place, and not on demand, but at time, it is necessary to aver a presentment of the note and demand of payment by the Holder, at that place, at the maturity of the note.' And, upon this question, he says; 'I have no hesitation in expressing my entire concurrence in the American decisions, so far as is necessary for the present occasion; that a special averment of presentment at the place is not necessary to the validity of the declaration, nor is proof of it necessary upon the trial. This rule, I am satisfied, is most conformable to sound reason, most conducive to public convenience, best supported by the general principles and doctrines of the law, and most assimilated to the decisions, which bear analogy, more or less directly, to the subject.' The same rule has been fully established by the Supreme Court of Tennessee, in the cases of M'Nairy v. Bell, and Mulhovin v. Hannum (1 Yerger, Rep. 502, and 2 Yerger, Rep. 81), and the rule sustained and enforced, upon the same principles and course of reasoning, upon which the other cases referred to have been placed. And no case, in an American court, has fallen under our notice, where a contrary doctrine has been asserted and maintained. And it is to be observed, that most of the cases, which have arisen in this country, where this question has been drawn into discussion, were upon Promissory

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ceptor at his dwelling-house, or at his place of business, even if he resides in the same town or city; for due demand at the proper place will be sufficient.[1] And the same doctrine will apply to the Drawer and Indorsers of the Bill, if, upon the face of the Bill, it is originally made payable at a banker's, or other particular place designated; for, under such circumstances,

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Notes, where the place of payment was, of course, in the body of the note. After such a uniform course of decisions, for at least thirty years, it would be inexpedient to change the rule, even if the grounds, upon which it was originally established, might be questionable; which, however, we do not mean to intimate. It is of the utmost importance, that all rules relating to commercial law should be stable and uniform. They are adopted for practical purposes, to regulate the course of business in commercial transactions; and the rule here established is well calculated for the convenience and safety of all parties. The place of payment in a Promissory Note, or in an acceptance of a Bill of Exchange, is always matter of arrangement between the parties for their mutual accommodation, and may be stipulated in any manner, that may best suit their convenience. And, when a Note or Bill is made payable at a bank, as is generally the case, it is well known, that, according to the usual course of business, the Note or Bill is lodged at the bank for collection; and, if the Maker or Acceptor calls to take it up, when it falls due, it will be delivered to him, and the business is closed. But, should he not find his Note or Bill at the bank, he can deposit his money to meet the note, when presented; and, should he be afterwards prosecuted, he would be exonerated from all costs and damages, upon proving such tender and deposit. Or, should the Note or Bill be made payable at some place other than a bank, and no deposit could be made, or he should choose to retain his money in his own possession, an offer to pay at the time and place would protect him against interest and costs, on bringing the money into Court; so, that no practical inconvenience or hazard can result, from the establishment of this rule, to the Maker or Acceptor. But, on the other hand, if a presentment of the note, and demand of payment, at the time and place, are indispensable to the right of action, the Holder might hazard the entire loss of his whole debt." 13 Peters, R. 147 to 151. See also Rhodes *v.* Gent, 5 Barn. & Ald. 244. See also 3 Kent, Comm. Lect. 44, p. 97 to 99 (4th edit.).

[1] Chitty on Bills, ch. 6, p. 172, 173 (8th edit. 1833); Id. ch. 7, p. 322, 323; Id. ch. 9, p. 396, 397, 400; Bayley on Bills, ch. 9, p. 399, 400 (5th edit. 1830); De Bergareche *v.* Pillin, 3 Bing. R. 476; Hawkey *v.* Borwick, 1 Younge & Jerv. 376; S. C. 4 Bing. R. 135.

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a presentment and demand of payment at that place is all, that is required by the Bill.[1] But, if the Bill be not so originally made payable at a particular place, then (as we have seen) it will be deemed a qualified acceptance, and the Drawer and Indorsers may or will, according to the general law, be discharged from all liability;[2] although the Acceptor will be bound thereby.[3]

§ 358. Heineccius has stated a very curious rule, as existing in some, if not in all, parts of Germany. It is, that, if a Bill of Exchange be payable by a Christian to a Jew, the presentment should be made, and payment should be demanded at his (the Christian's) house; but, that, if a Jew is to pay a Christian, then the Jew is to pay at the dwelling-house or the lodgings of the Christian, presenting the same. Indeed, if the Jew does not, of his own accord, pay there, a protest may be made for the dishonor. "*Illud quoque notatu dignissimum est, quod, quum Christiani non, nisi domi suæ, solvere teneantur, Judæi solutionem in præsentantis ædibus, vel ejus hospitio, præstare debeant, modo præsentans et ipse Christianæ religioni addictus sit. Si id Judæus non facit ultro, Christianus protestationem interponere potest, si vel maxime nulla præcesserit interpellatio.*"[4] And, if the Acceptor be a Christian, and payment has not been demanded of him at the maturity of the Bill, he may, although there has been no

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[1] Ibid.

[2] Ante, § 239, and note, 240; Rowe v. Young, 2 Brod. & Bing. R. 165; S. C. 2 Bligh, R. 391; Chitty on Bills, ch. 7, p. 322, 323 (8th edit. 1833); Id. ch. 8, p. 315, 316; Bayley on Bills, ch. 6, § 1, p. 196 (5th edit. 1830); Id. ch. 7, § 2, p. 253, 254.

[3] Ante, § 240.

[4] Heinecc. de Camb. cap. 4, § 42.

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previous citation or protest by the Holder, pay the money into Court. "*Si acceptans est Christianus, pecuniam justo tempore a se non exactam, nulla licet prævia præsentantis citatione vel protestatione, in judicio deponere potest. Quin Lipsiæ sufficit, si illam a judice obsignari petat, quamvis eam non deponat, sed obsignatam domum secum reportet.*"[1]

§ 359. In France, it is required by the Code of Commerce, that the acceptance of a Bill of Exchange, payable at another place than that, where the Acceptor resides, should point out the domicil, at which it is to be paid, and where the protest must be made in case of non-payment.[2] But, unless the Bill be originally made payable at that place, the Drawer will not be affected by his want of funds at that place; but will simply be required to show, that he had funds in the hands of the Acceptor.[3]

§ 360. In the next place, as to the person, by whom the presentment for payment is to be made. And here the same general doctrine applies, as in cases of presentment for acceptance.[4] The Holder himself, or his authorized agent, is the proper person to make the presentment for payment; and any person, who is in possession of the Bill, under a blank indorsement, or with an indorsement to himself, will be deemed a Holder for this purpose, although he may, in fact, be only the agent of the real owner.[5] For the agent, under such circumstances, is, as between himself and the

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[1] Heinecc. de Camb. cap. 4, § 43.

[2] Code de Comm. art. 123; Pardessus, Droit Comm. Tom. 1, art. 369.

[3] Pardessus, Droit Comm. Tom. 2, art. 393.

[4] Ante, § 229, 303 to 305.

[5] Chitty on Bills, ch. 9, p. 398, 428 to 430 (8th edit. 1833); Pothier de Change, n. 168, 169.

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Acceptor, at liberty to treat the possession of the Bill as being in him under a legal title, as trustee of the owner; and, therefore, he is entitled to receive payment.[1] If the Holder is dead at the maturity of the Bill, the presentment should be made by his executor or administrator, if any has been appointed.[2] If the Holder has become bankrupt, and assignees have been appointed, the presentment should be made by the assignees.[3] If the Holder is a woman, and she marries before the Bill arrives at maturity, the presentment should be made by her husband, or, at least, if made by her, she should be authorized to act as his agent; and payment, otherwise, would not discharge the Acceptor.[4] Notice, however, as has been already stated, is not indispensable to be given by the Holder, or by an Indorser, entitled to reimbursement; for it will be sufficient, if it is given by any other party on the Bill; and it will then generally enure to the benefit of every one of the other parties, whether he be the Holder, or the Drawer, or an Indorser of the Bill.[5]

§ 361. Pothier lays it down, as the clear result of the French Law, that payment of the Bill, at its maturity, should be made to the true proprietor thereof at that time, or to some person authorized to receive it for him;[6] and, of course, the presentment is governed

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[1] Little *v.* O'Brien, 9 Mass. R. 423; Stirling *v.* Marietta and Susqueh. Trad. Co. 10 Serg. & Rawle, 179; Mauran *v.* Lamb, 7 Cowen, R. 174; Banks *v.* Eastin, 15 Martin, R. 291; Adams *v.* Oakes, 6 Carr. & Payne, 70; Sherwood *v.* Roys, 14 Pick. R. 172.

[2] Chitty on Bills, ch. 9, p. 389, 428, 429 (8th edit. 1833); Pothier de Change, n. 166.

[3] Chitty on Bills, ch. 9, p. 398 (8th edit. 1833); Jones *v.* Fort, 9 Barn. & Cressw. 764; Ante, § 305.

[4] Ante, § 90 to 93.

[5] Ante, § 304.

[6] Pothier de Change, n. 164, 168, 169.

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by the same rule. Hence, if the Bill has passed, by indorsement, to a third person, he is the true proprietor, and the Payee has no longer any right to receive payment.[1] And, if the Payee has assigned a Bill not negotiable by a separate paper, the assignee, upon notice thereof to the Acceptor, is entitled to demand payment thereof; but he has not, as an Indorser has, the full right of propriety on the Bill, and therefore, if the Bill itself be paid to the Payee, or be indorsed and paid to another Indorsee of the Payee, before such notice, the payment is good.[2] In no case, however, is a presentment or payment good, except to some person, who has a competent capacity to receive it, and to administer the property. If, therefore, the Holder should die before the maturity of the Bill, leaving minor children, they are not entitled to payment, but their tutor only. But, if a Bill be made payable by the Drawer, or by an Indorser, to a minor, the payment thereof to him will be good against them, upon the known maxim of law; *Quod jussu alterius solvitur, pro eo est, qua si ipsi solutum esset.*[3] In case of a Bill payable to an unmarried woman, who marries before its maturity, and has thus passed under the marital authority of her husband, payment can only be made to him, if her marriage be known; but, if unknown, then payment to her by the Acceptor, *bonâ fide*, will discharge him.[4]

§ 362. In the next place, as to the person, to whom presentment of the Bill for payment is to be made.

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[1] Ibid.

[2] Pothier de Change, n. 165.

[3] Pothier de Change, n. 166; Dig. Lib. 50, tit. 17, l. 180; Ante, § 84 to 86.

[4] Pothier de Change, n. 167; Ante, § 94 to 97.

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And here the same general rules apply, as in cases of presentment for acceptance.[1] It should be presented to the Acceptor; or, if he be abroad, then at his dwelling-house, or last place of domicil; or, if he has a known general agent at home, it should be presented to such agent.[2] If, at the time of presentment, the Acceptor be dead, it should be made to his executor or administrator, if any is appointed, and his place of residence is known, or can, upon reasonable inquiries, be ascertained.[3] If there is no executor or administrator, it should be made, and payment demanded, at the domicil of the deceased; unless, indeed, the Bill was originally made payable at a particular place; for then it will be sufficient, that there is a presentment at that place.[4] If the Acceptor has become bankrupt, a presentment should still be made to him for payment, in order to charge the Indorsers and Drawer. But so far as respects his own liability, it is not changed by the omission to make a presentment.[5] If the acceptance be by partners, then the presentment should be at their place of business, or at the dwelling-house of either of them.[6] If by persons not partners, then the presentment should be made at the respective dwelling-houses, or

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[1] Ante, § 229, 305.

[2] Chitty on Bills, ch. 7, p. 301 (8th edit. 1833); Id. ch. 9, p. 398 to 401; Id. ch. 10, p. 528, 529; Cromwell *v.* Hynson, 2 Esp. R. 511; Phillips *v.* Astling, 2 Taunt. R. 206; Ante, § 305.

[3] Ante, § 305; Chitty on Bills, ch. 7, p. 307 (8th edit. 1833); Id. ch. 9, p 389, 401; Pothier de Change, n. 146.

[4] Ibid.; Philpot *v.* Bryant, 3 Carr. & Payne, 244.

[5] Ante, § 326.

[6] See Bayley on Bills, ch. 7, § 2, p. 285, 286 (5th edit. 1830); Ante, § 305. — Many of the cases, cited in this section, are decisions upon questions, as to whom, and by whom, notice is to be given of the dishonor of Bills; but the same doctrines seem generally applicable to the case of presentment of Bills.

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places of business, of each Acceptor.[1] If one of the partners, who accepts the Bill, is dead, presentment should be made to the survivors.[2]

§ 363. If there has been an acceptance *supra protest*, then (as we have seen)[3] 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.[4] 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. The like rule governs in the French Law.[5]

§ 364. In the next place, as to the mode of presentment and the demand of payment. If it be personal, or verbal, it should be absolute, and for present actual payment, and not with any offer or agreement for any farther credit.[6] If it be in writing, as may in some cases be proper, where a personal or verbal

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[1] Ante, § 299, and note; 3 Kent, Comm. Lect. 44, p. 105, note (*b*) (5th edit.).

[2] Cayuga County Bank *v.* Hunt, 2 Hill, N. Y. Rep. 635.

[3] Ante, § 125, 126; Id. § 255 to 261; Chitty on Bills, ch. 8, p. 378 (8th edit. 1833); Hoare *v.* Cazenove, 16 East, R. 391; Mitchell *v.* Baring, 10 Barn. & Cressw. 4.

[4] Chitty on Bills, ch. 8, § 3, p. 374, 375 (8th edit. 1833.)

[5] Ibid.; Ante, § 261; Pothier de Change, n. 137, 170.

[6] Chitty on Bills, ch. 9, p. 401, 402 (8th edit. 1833); Bayley on Bills, ch. 9, p. 337, 338 (5th edit. 1830); Gillard *v.* Wise, 5 Barn. & Cressw. 134.

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notice is impracticable, or, under the circumstances, not indispensable, the writing should be expressly, or by implication, equally absolute and direct. Nor should any payment be accepted, which is not an immediate payment in money; and payment by a check or other draft upon a bank or on bankers should be declined.[1]

§ 365. There are certain circumstances, however, which will equally excuse a non-presentment for payment, either at all, or in due time, as a non-presentment for acceptance. Many cases of this sort have already been stated, in considering what will excuse the want of a due presentment of Bills for acceptance.[2] But, as the principles are not exactly coincident throughout, and the illustrations are highly important to be considered in cases of non-presentment for payment, they are here inserted at the hazard of some repetition. In the first place, then, if a due presentment for payment be prevented by inevitable accident, or casualty, or by the general prevalence of a malignant disease, or by superior force, or by war breaking out between the country of the Holder and that of the Acceptor, or by an occupation of the country by an

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[1] Chitty on Bills, ch. 9, p. 401, 402 (8th edit. 1833). — Mr. Chitty says; "The Bill or note should not be left in the hands of the Drawee, or Maker, without immediate actual payment in money; at least, if it be, the presentment is not considered as made, until the money is called for; and, although it has been decided, that neither a Holder, nor a banker, acting as agent, is guilty of neglect, by giving up a Bill to the Acceptor, upon his delivering to them his check on another banker, that doctrine may now be questionable; and most of the London bankers, on presenting a Bill for payment in the morning, leave a ticket, where it lies due, and declaring, that, 'in consequence of great injury having arisen from the non-payment of drafts taken for Bills, no drafts can, in future, be received for Bills, but that the parties may address them for payment to their bankers, or attach a draft to the Bill when presented.'"

[2] Ante, § 307 to 318.

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enemy, or by political events, which obstruct or prohibit the presentment; in all these, and the like cases, the want of such presentment will be excused; and it will be sufficient, if the presentment is made as soon as it can reasonably be made afterwards.[1] The same rule of enlightened justice prevails in France, and is asserted by Pothier and Pardessus in unequivocal language.[2] So, if the Acceptor has absconded, or he cannot be found, or he has no present, known, and fixed domicil, the want of due presentment will be excused.[3]

§ 366. In the next place (as has been already seen),[4]

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[1] Ante, § 234, 280, 308, 309, 327; Chitty on Bills, ch. 9, p. 389, 422, 423 (8th edit. 1833); Id. ch. 10, p. 485 to 488, 522; Barker *v.* Parker, 6 Pick. R. 80; Patience *v.* Townley, 2 Smith, R. 223, 224; Scofield *v.* Bayard, 3 Wend. R. 488; Pardessus, Droit Comm. Tom. 2, art. 426, 434. — Mr. Chitty (p. 422) says; "Provided the party, entitled to a Bill or Note, produce it as soon as the impediment has been removed, and, in the mean time, take 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 afterwards as he is able. So, the occupation of the country by an enemy will constitute an adequate excuse for delay. But a notice of the reason, why the Bill itself cannot be produced, should be given; and a demand of payment should, if possible, be made on the very day the instrument falls due; and, if it be a foreign Bill, it should be duly protested, in case the Drawee should refuse payment. And it would be advisable also to tender an adequate indemnity to the Acceptor or Maker of a Note, and to request him to pay, without his insisting on production of the instrument; after which, he should keep the money ready to pay, when the Bill is produced, and this at his own risk, in case his agent, holding the money, should fail."

[2] Ante, § 234, 280, 308, 309; Pothier de Change, n. 144; Pardessus, Droit Comm. Tom. 2, art. 422.

[3] Ante, § 308, and note, § 309, 327; Chitty on Bills, ch. 10, p. 486 to 488 8th edit. 1833).

[4] Ante, § 321, 322.

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if the Bill be protested for non-acceptance, no presentment or demand for payment is necessary;[1] in which respect it differs from the law of France.[2] And it becomes necessary again to bring under review the question already adverted to in another place,[3] Whether the same rule applies in cases, where the Bill is drawn in one country, and is payable in another country, where the law on this point is essentially different? Thus, for example, if a Bill is drawn in London, payable in Paris in France, and it is indorsed in London, whether there must be a presentment of the Bill for payment at its maturity in Paris, although it has been already presented for acceptance, and protested for non-acceptance, as is required by the law of France; or, whether such a presentment is dispensed with, as to the English Drawer and Indorsers, as is certainly the law of England, applied to ordinary cases of Bills. Upon this point there has been some diversity of judicial opinion. The doctrine seems to have been recently maintained in England (at least in respect to notice), that, in such a case, the law of France is to govern.[4] On the other hand, it has been held in America, that the law of the place, where the Bill is drawn, and where it is indorsed, is to govern exclusively, as to the liabilities and duties of the Drawer and Indorsers respectively. Thus, where a Bill was

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[1] Chitty on Bills, ch. 9, p. 390, 391 (8th edit. 1833); Id. ch. 10, p. 467; Evans *v.* Gee, 11 Peters, R. 80; U. States *v.* Barker's Administrator, 4 Wash. Cir. R. 464; Whitehead *v.* Walker, 9 Mees. & Welsb. 506; Ante, § 321, 322. But see 1 Bell, Comm. B. 3, ch. 2, § 4, p. 409, 410 (5th edit.).

[2] Ante, § 321, 322.

[3] Ante, § 176, 177, and note.

[4] Rothschild *v.* Currie, 1 Adolph. & Ellis, New R. 43; Ante, § 176, 177, and note.

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drawn in a French West India island, payable in France, to the Payee, or order, and it was afterwards indorsed in New York, and, upon presentment to the Drawees in France, acceptance was refused, and no presentment was afterwards made to the Drawees, for payment, at the maturity of the Bill; it was held, that, in respect to the Indorser, in New York, no such presentment for payment was necessary to fix his liability on the Bill; but it was necessary to fix the liability of the Drawer in the French West Indies.[1]

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[1] Aymar *v.* Sheldon, 12 Wend. R. 439. — Mr. Chief Justice Nelson, in delivering the opinion of the Court upon this occasion, said; "The only material question, arising in this case, is, Whether the steps, necessary, on the part of the Holders of the Bill of Exchange in question, to subject the Indorsers, upon default of the Drawees to accept, must be determined by the French Law, or the law of this State? If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed. We have not been referred to any case, nor have any been found in our researches, in which the point, now presented, has been examined or adjudged. But there are some familiar principles, belonging to the Law Merchant, or applicable to Bills of Exchange and Promissory Notes, which we think are decisive of it. The persons, in whose favor the Bill was drawn, were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and, if the rules of law, governing them, were applicable to the Indorsers and Indorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential, even after protest for non-acceptance. No principle, however, seems more fully settled, or better understood, in commercial law, than that the contract of the Indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a Bill, the Indorser being, in almost every respect, considered as a new Drawer. (Chitty on Bills, 142; 3 East, R. 482; 2 Burr. R. 674, 675; 1 Str. R. 441; Selw. N. P. 256.) On this ground, the rate of damages, in an action against the Indorser, is governed by the law of the place, where the indorsement is made, being regulated by the *lex loci contractus*. (6 Cranch, R. 21; 2 Kent, Comm. 460; 4 Johns. R. 119.) That the nature and extent of the liabilities of the Drawer and 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

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Pardessus entirely concurs in opinion with this last decision in New York.[1]

England. In Hix *v.* Brown, 12 Johns. R. 142, the Bill was drawn by the defendant, at New Orleans, in favor of the plaintiff, upon a house in Philadelphia; it was protested for non-acceptance, and due notice given; the defendant obtained a discharge under the insolvent laws of New Orleans after such notice, by which he was exonerated from all debts previously contracted, and, in that State, of course from the Bill in question. He pleaded his discharge here, and the Court say, 'It seems to be well settled, both in our own, and in the English courts, that the discharge is to operate according to the *lex loci*, upon the contract, where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the Bill being drawn upon a person in another State, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as Drawer of the Bill, in consequence of the non-acceptance. The whole contract, or responsibility of the Drawer was entered into, and incurred, in New Orleans.' The case of Peters *v.* Brown, 5 East, R. 124, contains a similar principle. (See also 4 Mass. R. 81; Van Raugh *v.* Van Arsdaln, 3 Caines, R. 154; 1 Cowen, R. 107; 6 Cranch, R. 221; 4 Cowen, R. 512, note.) The contract of indorsement was made in this case, and the execution of it contemplated by the parties, in this State; and it is, therefore, to be construed according to the laws of New York. The defendants below, by it, here engage, that the Drawees will accept and pay the Bill on due presentment, or, in case of their default, and notice, that they will pay it. All the cases, which determine, that the nature and extent of the obligation of the Drawer are to be ascertained and settled according to the law of the place, where the Bill is drawn, are equally applicable to the Indorser; for, in respect to the Holder, he is a Drawer. Adopting this rule and construction, it follows, that the law of New York must settle the liability of the defendants below. The Bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law, that the Holder may have immediate recourse against the Indorser for the default of the Drawee in this respect. (3 Johns. R. 202; Chitty on Bills, 231, and cases there cited.) Upon the principle, that the rights and obligations of the parties are to be determined by the law of the place, to which they had reference in making the contract, there are some steps, which the Holder must take according to the law of the place, on which the Bill is drawn. It must be presented for payment, when due, having regard to the number of days of grace there, as the Drawee is under obligation to pay only according to such calculation; and it is, therefore, to be presumed, that the parties had

[1] Pardessus, Droit Comm. Tom. 5, art. 1488, 1497 to 1499.

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§ 367. But a much more extensive class of cases, where the Holder is excused, notwithstanding his

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reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place, where the contract of the Drawer or Indorser, as the case may be, was made, such being an implied condition. (Chitty on Bills, 93, 217, 266; Bayley on Bills, 28; Story's Conflict of Laws, 298.) The contract of the Drawers in this case, according to the French Law, was, that, if the Holder would present the Bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested, and notice given of the protest, he would give security to pay it, and pay the same, if default was also made in the payment by the Drawee after protest and notice. This is the contract of the Drawers, according to this law, and the counsel for the plaintiffs in error insists, that it is also the implied contract of the Indorser in this State. But this cannot be, unless the indorsement is deemed an adoption of the original contract of the Drawers, to to be regulated by the law governing the Drawer, without regard to the place, where the indorsement is made. We have seen, that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none, of course, is necessary to charge the Indorser. But, if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the Drawer controlling. The above position of the counsel would also be irreconcilable with the principle, that the indorsement is equivalent to a new Bill, drawn upon the same Drawee; for then the rights and liabilities of the Indorser must be governed by the law of the place of the contract, in like manner as those of the Drawer are to be governed by the laws of the place, where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country, in which they were at the time of entering into their respective obligations. I am aware, that this conclusion may operate harshly upon the Indorsers in this case, as they may not be enabled to have recourse over on the Drawers. But this grows out of the peculiarity of the commercial code, which France has seen fit to adopt for herself, materially differing from that known to the Law Merchant. We cannot break in upon the settled principles of our commercial law, to accommodate them to those of France or any other country. It would involve them in great confusion. The Indorser, however, can always protect himself by special indorsement, requiring the Holder to take the steps necessary, according to the French Law, to charge the Drawer. It is the business of the Holder, without such an indorsement, only to take such measures as are necessary to charge those, to whom he intends to look for payment." 12 Wend. R. 442 to 445. See also Ante, § 176, 177, and note, where this subject is

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omission, or laches, to make a due presentment for payment, or any presentment at all, is, as against the Drawer (for it may be, and ordinarily is, otherwise, as to the Indorsers),[1] that the Drawer had no right to draw the Bill; that he had no funds in the hands of the Drawee, or expectation of funds, and there was no promise, or obligation of the Drawee, authorizing the drawing of the Bill; for, in all these cases, as the Drawer can suffer no loss, and the drawing of the Bill may be treated as a deception, or fraud, upon the Payee, or other Holder, the want of due presentment of the Bill is excused.[2] The same rule will apply, if

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discussed. Mr. Chitty holds the same opinion as the Supreme Court of New York. Chitty on Bills, ch. 10, p. 490, 491, 506 (8th edit. 1833); Henry on Foreign Law, p. 220, Appendix.

[1] Ante, § 311, 327; Chitty on Bills, ch. 10, p. 470, and note, 472 to 480 (8th edit. 1833); Wilkes v. Jacks, Peake, R. 202.

[2] Ante, § 311, and note; Bayley on Bills, ch. 7, § 2, p. 294 to 300 (5th edit. 1830); Chitty on Bills, ch. 9, p. 389 (8th edit. 1833); Id. ch. 10, p. 467 to 482; French's Executors v. Bank of Columbia, 4 Cranch, R. 141; U. States v. Barker's Administrators, 4 Wash. Cir. R. 464; Baker v. Gallagher, 1 Wash. Cir. R. 461; Valk v. Simmons, 4 Mason, R. 113; Bickerdike v. Bollman, 1 Term R. 495; Goodall v. Dolley, 1 Term R. 712; Rogers v. Hopkins, 2 Term R. 713; Legge v. Thorpe, 12 East, R. 171; Rucker v. Hiller, 16 East, R. 43. — The same doctrine applies in the case of the omission of making a due presentment, and the case of an omission to give due notice of the dishonor of a Bill to the antecedent parties; and, therefore, the reasons for the latter apply directly to the former. Mr. Chitty, on this subject, says; "The reason, why the law in general requires the Holder to give prompt notice of non-payment by the Drawee of a Bill, or Maker of a Note, is, that the Drawer of the Bill, and Indorser of the Note, may, by such notice, be enabled forthwith to withdraw his effects from the hands of the Drawee or Maker, or to stop those, which were about to be delivered to him, and to suspend any further credit, and that the Drawer and Indorsers may respectively take the necessary prompt measures, against all parties liable to them, to obtain and enforce payment; and, if such prompt notice be delayed, it is a presumption of law, that the Drawer and Indorsers have been prejudiced. Such damage is always, in this country, presumed; and almost the only allowed proof of the negative is, that of the entire want of effects in the hands of the

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the Drawer, having funds in the hands of the Drawee, or of the Acceptor, at the time of drawing the Bill, has withdrawn the same before the dishonor;[1] unless, indeed, under the circumstances, it might properly be presumed, that the Bill would be paid by the Accep-

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Drawee continually, from the time of drawing the Bill, until and after the day it fell due; and this, under such circumstances, as to establish, that the Drawer had no right to expect the Drawee, or any other person, to accept or pay, and that the notice of non-payment would have been of no use to the Drawer, because he could not have sued the Drawee, or any other person, on account of his neglect to pay; nor will any other proof, however clear, that the Drawer had not, in fact, been prejudiced by the want of notice, be admitted. And it is always presumed, until the contrary has been proved, that the Drawer of a Bill had effects in the hands of the Drawee, or had a right to draw upon him for the amount, and that the Indorser, or Assignor, had given value for it, and that each has been prejudiced by the Holder's neglect to give due notice, by the delay in the opportunity of resorting to the prior parties liable to them respectively; for, if due notice had been given to them, they might, by instant solicitation and pressure, perhaps, have obtained payment or security from the Drawee, and a day, or even an hour's delay, in mercantile affairs, will frequently occasion a total non-payment, when, by a prompt notice, payment might have been obtained. This presumption of damage or prejudice having arisen from the laches of the Holder is so strong and uniform, that it is only allowed to be rebutted by one description of proof, namely, that the party, who objects to the want of notice, had no effects in the hands of the Drawee, and that the Bill was for his accommodation, and, consequently, that he had no right to draw, and that the notice of non-payment would have been of no avail to him; and in no other case is evidence admissible to show, that, in truth, the Drawer or Indorser was not prejudiced by the neglect. And, although the Holder may be certain, that he can prove, that the Drawer had no effects in the hands of the Drawee, yet, as there are so frequently exceptions even to that circumstance, constituting any excuse, it would be most imprudent, in any such case, to omit giving a proper notice." Chitty on Bills, ch. 10, p. 467, 468 (8th edit. 1833). See also Id. 477 to 480; Ante, § 311, and note.

[1] Ante, § 313; Chitty on Bills, ch. 10, p. 473 (8th edlt. 1833); Id. 489. But see ch. 9, p. 390; Id. ch. 10, p. 481, 482; Conroy *v.* Warren, 9 Johns. Cas. 259; Valk *v.* Simmons, 4 Mason, R. 113; Orr *v.* Maginnis, 7 East, R. 359; Bayley on Bills, ch. 7, § 2, p. 299, 300 (5th edit. 1830).

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tor, and that the Drawer would stand indebted to him for the same amount.[1]

§ 368. In France, under the old law (as we have already seen), the rule was somewhat different from ours, as to the subject of the want of funds in the hands of the Drawee.[2] In respect to the Drawer, it was necessary, in order to free him from the obligation to pay the Bill, upon its being dishonored, either by non-acceptance, or by non-payment, although there were laches on the part of the Holder in making protest and giving notice to him, that he should prove, that he had made due provision for the payment of the Bill, or that the Drawee was indebted to him to the amount, at the time, when the Bill ought to have

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[1] Bayley on Bills, ch. 7, § 2, p. 296, 299, 300 (5th edit. 1830). — On this subject Mr. Chitty says; "Where a Bill has been refused acceptance or payment, and the Drawer has either stopped or withdrawn the effects from the hands of the Drawee, though he may be, *primâ facie*, discharged by the neglect to give him due notice, it seems, that, in France and America, the Holder might recover from him the amount of such funds, but there is no decision to this effect in this country. The case most like it is that of the Payee and Indorser of a Note, or the Drawer of a Bill, having received money from the Maker of the Note, or Acceptor of the Bill, for the express purpose of paying it, and who has, in that case, been considered liable, to the extent of that money, to be sued for money had and received, although he had not had notice of the dishonor. In such a case as that of Rucker *v.* Hiller, when the Bill was refused acceptance, because the goods did not answer the sample, it should seem unreasonable to allow the Drawer to keep the goods, and not pay the Holder; and, in a work of high authority, it is suggested, that, if the Drawer got back the goods, he would be liable to that extent. But we have seen, that, where the Drawer, apprehending that the Bill would be dishonored, placed other money, which he had of the Drawee's, in the hands of an Indorser, on his undertaking to return it, when he should have been exonerated from the Bill, the neglect of the Holder to give due notice was not excused, because the Drawer having such money in hand, was not justified in applying it in taking up the Bill, unless he had notice of the dishonor." Chitty on Bills, ch. 10, p. 481, 482 (8th edit. 1833).

[2] Ante, § 315.

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been protested, and notice thereof given to him.[1] The same rule seems to have been applied to the Indorsers, in the case of a dishonor for non-acceptance.[2] But Pothier was of opinion, that the Indorsers were not, or ought not to be, held liable, where there had been an acceptance of the Bill, even although the Drawee had no funds of the Drawer in his hands; because the Drawee, by accepting the Bill, admitted himself to be indebted thereby to the Indorsers, to whom it is payable, and, therefore, they might properly be said to have an interest in the debt, and a right of action for it against the Acceptor.[3] It would seem, that the rule of the old law has been somewhat modified or qualified by the present Code of Commerce;[4] for, that, by this Code, the acceptance is *primâ facie* evidence of funds of the Drawer in the hands of the Drawee; and it is full proof thereof in favor of the Indorsers. If the Bill has not been accepted, the Drawer alone is held to prove, in case of a denial, that the Drawee had funds in his hands; and, unless he does so, he will be liable on the Bill, although the protest has not been made at the proper time.[5] This, at least, is the opinion of Pardessus.[6] But there seems to be some obscurity in the Code of

[1] Pothier de Change, n. 157; Jousse, sur l'Ord. 1673, tit. 5, art. 16, p. 108; Code de Comm. art. 115 to 117, 170; Pardessus, Droit Comm. Tom. 2, art. 391 to 393, 435.

[2] Ante, § 315; Pothier de Change, n. 158; Code de Comm. art. 116, 117, 170; Pardessus, Droit Comm. Tom. 2, art. 391 to 393, 435.

[3] Pothier de Change, n. 158; Code de Comm. art. 116.

[4] Ante, § 315; Code de Comm. art. 115 to 117, 120, 170; Pardessus, Droit Comm. Tom. 2, art. 391 to 393.

[5] Code de Comm. art. 117.

[6] Pardessus, Droit Comm. Tom. 2, art. 435.

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Commerce on this subject;[1] and some contrariety of opinion, as to its true interpretation, among the French jurists.[2] If the Bill is originally made payable at another place than the domicil of the Drawee, and accepted accordingly, the Drawer may be obliged to show, that he had funds at that place; but, if the acceptance only point out another place, than the domicil of the Acceptor, as the place of payment, then, the Drawer need only show, that he had funds at the maturity of the Bill, in the hands of the Acceptor.[3]

§ 369. It will not be a valid excuse for non-presentment of the Bill for payment at its maturity, that the Drawer had no funds then in the hands of the Acceptor, if he had an expectation of funds, or, by agreement with the Drawee, he had a right to draw the Bill, or otherwise he had a right to expect the Bill to be paid, or he had some funds in the hands of the Acceptor, when the Bill was drawn, although the balance might vary afterwards, or even be turned into the opposite scale before the maturity of the Bill.[4] The like rule will apply to cases, where the Drawer had effects, at the time of drawing the Bill, in the hands of the Drawee, although he was indebted to the Drawee to a much larger amount.[5] And it may be generally stated, that it will constitute no excuse for the want of a due presentment for payment, that the Acceptor had no funds of the Drawer in his hands at

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[1] Code de Comm. art. 117, 169, 170.

[2] Sautayra, Comm. Code de Comm. art. 117; Ante, § 315.

[3] See Code de Comm. art. 123; Pardessus, Droit Comm. Tom. 2, art. 369, 393.

[4] Orr *v.* Maginnis, 7 East, R. 359; Bayley on Bills, ch. 7, § 2, p. 299, 300 (5th edit. 1830); Ante, § 311.

[5] Blackhan *v.* Doren, 2 Camp. R. 503.

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the maturity of the Bill, if the Drawer, or the Indorsers, who might otherwise be liable thereon, will be entitled, upon taking up the Bill, to sue either the Acceptor, or any other party on the Bill, for the amount due.[1] Thus, if the Bill be drawn for the accommodation of the Acceptor, the Drawer will be entitled to a strict presentment, and notice of the dishonor of the Bill;[2] or, if drawn and accepted for the accommodation of the Payee, or of a subsequent Indorsee, the same rule will equally prevail.[3]

§ 370. The same rule will apply to cases, where the Bill has been accepted for the mere accommodation of the Drawer, and he has undertaken to supply funds to pay it; for, in such a case, there is no pretence to say, that he can suffer, except from his own neglect and laches.[4] And, although, in general, Indorsers are entitled to insist upon a due presentment for payment to the Acceptor, at the maturity of the Bill, when it is a Bill drawn or accepted for the accommodation of the Drawer; yet, if the Bill is drawn and accepted for the accommodation of any particular Indorser, that Indorser will stand in the same predicament, as if he were the Drawer of the Bill, and the

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[1] Bayley on Bills, ch. 7, § 2, p. 297 (5th edit. 1830); Id. p. 306 to 310; Ante, § 312; Ex parte Heath, 2 Ves. & Beames, 240; Cory v. Scott, 3 Barn. & Ald. 619; Norton v. Pickering, 8 Barn. & Cressw. 610; Robinson v. Gibson, 3 Camp. R. 334.

[2] Ex parte Heath, 2 Ves. & Beames, R. 240.

[3] Cory v. Scott, 3 Barn. & Ald. 619; Bayley on Bills, ch. 7, § 2, p. 297 (5th edit. 1830).

[4] Ante, § 300, 301, 310 to 313; Chitty on Bills, ch. 10, p. 468, 469 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 294, 297 (5th edit. 1830); Sharp v. Bailey, 9 Barn. & Cressw. 44; Brown v. Maffey, 15 East, R. 216; Ex parte Heath, 2 Ves. & Beames, R. 240.

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omission to make a due presentment will be excused, as to him, although not as to the other Indorsers.[1]

§ 371. So, if there be an express agreement, either verbal or in writing, between any of the parties to the Bill, to waive, or dispense with, the necessity of a due presentment of the Bill at its maturity, that will, as between themselves, although not as to other parties, constitute a sufficient excuse for non-presentment thereof.[2] But a mere verbal agreement, which may mislead, but does not purport to waive such presentment, will not be available.[3] And equivocal circumstances or agreements will not be deemed any waiver of a due presentment, but the Holder is bound at his peril to make the presentment. Thus, if the Indorser

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[1] Ibid.; Ante, § 310; Chitty on Bills, ch. 10, p. 481 (8th edit. 1833); Id. p. 470, 471; Bayley on Bills, ch. 7, § 2, p. 297 (5th edit. 1830).

[2] Ante, § 317, 320, 327; Chitty on Bills, ch. 10, p. 541 to 546 (8th edit. 1833); Id. ch. 10, p. 484, 485; Pardessus, Droit Comm. Tom. 2, art 436; Fuller v. McDonald, 8 Greenl. R. 213; De Tastet v. Crousillat, 2 Wash. Cir. R. 132; Lane v. Steward, 2 Applet. R. 98.

[3] Free v. Hawkins, 1 Holt, R. 550; Chitty on Bills, ch. 10, p. 466 (8th edit. 1833). Mr. Chitty here says; "Even an express verbal agreement between all the parties to a Bill or Note, that it should not be put in suit, till certain estates had been sold, although it misled, and induced the Holder not to give regular notice of non-payment, when the Bill or Note fell due, constitutes no excuse for such neglect; because, in point of law, no such parol agreement was available to the party, as a defence to an immediate action; so, as it was inoperative for one purpose, it ought not to have any effect, and, therefore, notwithstanding it, notice should have been given. And, although there are some exceptions excusing the omission to give notice, yet they are so qualified, that it is very imprudent in any case to rely on them, and every cautious Holder should, immediately after he has received notice of the dishonor of a Bill or Note, give a separate and distinct notice thereof, not only to his immediate Indorser, but to every other party to the instrument, whether by indorsement, or transfer by mere delivery, or by guarantee, or otherwise responsible for the payment; for, although the want of effects may, in some cases, excuse the neglect, or a notice from any party to a Bill may enure to the use of the Holder, yet these are mere accidents in his favor, on which no prudent person should rely."

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should, upon his indorsing the Bill to a Holder, write over it "Good to A, (the Holder) or order without notice;" this, although it would be a good waiver of notice to the Indorser, would not be a waiver of due presentment of the Bill for payment to the Acceptor.[1]

§ 372. In the next place, if the Bill has been received by the Holder merely as collateral security, and the party delivering it is not either a Drawer or Indorser upon it, or a transferrer of it by delivery, if payable to the bearer, or he has merely caused it to be drawn, or indorsed, or delivered over by a third person, as a security to the Holder, such party will not be deemed entitled to a strict presentment of the Bill at its maturity; nor will he be exonerated from the debt, for which it was delivered as collateral security, unless he can show, that he has actually sustained some damage, or prejudice, by such non-presentment.[2] The same rule will apply to a party, who is a mere Guarantor of the payment of the Bill.[3] The reason of both these decisions is, that the case does not fall within the regular usage and custom of merchants as to Bills of Exchange; and, therefore, the party must bring himself within the rules of law applicable to other ordinary cases of contract; and show some loss,

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[1] Lane *v.* Steward, 2 Applet. R. 98.

[2] Chitty on Bills, ch. 10, p. 467, 474 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 286 to 290 (5th edit. 1830); Ante, § 305, and note, § 310; Post, § 393; Thomas *v.* Breedlove, 6 Mill. Louis. R. 577; Swinyard *v.* Bowes, 5 Maule & Selw. 61; Van Wart *v.* Woolley, 3 B. & Cressw. 439, 445.

[3] Ibid.; Chitty on Bills, ch. 10, p. 529 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 377 (5th edit.); Ante, § 305, and note; Post, § 393; Rhett *v.* Poe, 2 How. Sup. Ct. R. 457; Gibbs *v.* Cannon, 9 Serg. & R. 198; Oxford Bank *v.* Haynes, 8 Pick. 423, 428. See Lee *v.* Dick, 10 Peters, R. 482; Reynolds *v.* Douglas, 12 Peters, R. 497.

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or damage, or prejudice, by the neglect or laches of the Holder.[1] In this respect, our law differs from that of France; for, wherever there is a guaranty upon the Bill by a third person, which is common in France and upon the Continent of Europe, in such a case, the same protest must be made for non-payment, and the same notice given of the dishonor, to the Guarantor, as to the Drawer and Indorsers.[2] But, by the

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[1] Ibid.; Douglas v. Reynolds, 7 Peters, R. 125; S. C. 12 Peters, R. 497; Wildes v. Savage, 1 Story, R. 22; Hitchcock v. Humphrey, The (English) Jurist for May 20, 1843, p. 423; Swinyard v. Bowes, 5 Maule & Selw. 62. — Cases often occur, where there is a general guaranty written on a Bill, either by a person, who is a party to the Bill, or by a third person; and the question has arisen, Whether such a guaranty takes place and may be sued upon by any subsequent Holder of the Bill, where no person in particular is named on the guaranty, to whom it is made. If the guaranty is, in terms, in favor of any Holder, or the bearer, or is, in any other terms, expressed to be negotiable to the Indorsee, or his order, it would seem to be negotiable, and all the rights immediately to pass to every subsequent Holder against the Guarantor. And, if no language of that sort is used, and yet, if no person whatsoever is named, to whom the guaranty is made, then, also, it has been said, that it is equally negotiable, and an action can be brought upon it in the name of any subsequent Holder, who has the title to the Bill itself. But, if a particular person is named on the Bill, to whom alone the guaranty is made, then it is not negotiable, and the right, under the guaranty, belongs exclusively to such person. And it has been further suggested, but it may well be doubted, whether it were founded in law, that, if the guaranty be on a separate paper, and in its terms negotiable, no person but the first Holder can sue thereon. McLaren v. Watson's Executors, 26 Wend. R. 425. See Miller v. Gaston, 2 Hill, N. Y. R. 188; Post, § 455 to 459.

[2] Code de Comm. art. 141, 142, 166 to 471; Pardessus, Droit Comm. Tom. 5, art. 1497; Ante, § 305, and note; Post, § 393 to 395. — The Code of Commerce has the following articles on this subject; "Art. 141. The payment of a Bill of Exchange, independently of the acceptance and the indorsement, may be secured by a written guaranty. Art. 142. This guaranty is given by a third person, on the Bill itself, or in a separate instrument of writing. The person, thus becoming Guaranty, is jointly and severally bound with the Drawers and Indorsers, saving any different stipulations between the parties." In the case of McLaren v. Watson's Executors, Mr. Senator Verplanck, in his elaborate opinion, maintained, that

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French Law, and the foreign law generally, the want of protest and of due notice will not, in any case, affect the rights of the Holder, unless he has suffered some injury or prejudice thereby, and then only *pro tanto*.[1]

§ 373. In like manner, if the Drawer, or an Indorser, after full knowledge of the fact of an omission to make due presentment, promises to pay the Bill, it will amount to a waiver of such presentment, and bind the Promissor to pay the Bill.[2] And such promise may be express, or it may be implied from circumstances.[3] Thus, it has been decided, that a payment of a part, or a promise to pay the whole or part of a bill, or to "see it paid," or an acknowledgment, that "it must be paid," or a promise, that "he will set the matter to rights," or a qualified promise, or a mere unaccepted offer of a composition with other creditors, made, by the person insisting on the want of notice (after he was aware of the laches), to the Holder of a Bill, amounts to a waiver of the consequence of the laches of the Holder, and admits his right of action.[4] But such a promise, made in igno-

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the guaranty of a Bill in New York was equally negotiable in favor of any subsequent Holder, whether it was written on the Bill, or on a separate paper, if it was made generally, not naming any person as Guarantor, or making the guaranty to the Payee, or Indorser, or order. See also Miller *v.* Gaston, 2 Hill, N. Y. R. 188; Ketchell *v.* Burns, 24 Wend. R. 456; Upham *v.* Prince, 12 Mass. R. 14. This subject will be resumed in our subsequent pages, and more fully discussed there. Post, § 455 to 459.

[1] Ante, § 306; Post, § 478, and note; Pothier de Change, 156, 157.

[2] Ante, § 280, 320, and note, 327; Chitty on Bills, ch. 9, p. 390 (8th edit. 1833); Id. ch. 10, p. 533, 540; Stevens *v.* Lynch, 12 East, R. 38; Thornton *v.* Wynn, 12 Wheat. R. 183; Fuller *v.* McDonald, 8 Greenl. R. 213.

[3] Ante, § 280, 320, and note.

[4] Chitty on Bills, ch. 10, p. 533 (8th edit. 1833).—Mr. Chitty has

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rance of the facts, will not be binding, or a waiver of the laches.[1] And, if the promise be a qualified or

added (p. 535, 536); "And, in some of the cases upon this subject, the effect of such partial payment, or promise to pay, has been carried still further, and been considered not merely as a waiver of the right to object to the laches, but even as an admission, that the Bill or Note had, in fact, been regularly presented and protested, and that due notice of dishonor had been given; and this, even in cases, where the party, who paid or promised, afterwards stated, that, in fact, he had not had due notice, &c.; because it is to be inferred, that the part-payment, or promise to pay, would not have been made, unless all circumstances had concurred to subject the party to liability, and induce him to make such payment or promise. Thus, where an Indorsee, three months after a Bill became due, demanded payment of the Indorser, who first promised to pay it, if he would call again with the account, and afterwards said, that he had not had regular notice, but, as the debt was justly due, he would pay it; it was held, that the first conversation, being an absolute promise to pay the Bill, was, *primâ facie*, an admission, that the Bill had been presented to the Acceptor for payment in due time, and had been dishonored, and that due notice had been given of it to the Indorser, and superseded the necessity of other proof to satisfy those averments in the declaration; and that the second conversation only limited the inference from the former, so far as the want of regular notice of the dishonor to the defendant went, which objection he then waived. So, where the Drawer of a foreign Bill, upon being applied to for payment, said, 'My affairs are at this moment deranged, but I shall be glad to pay it, as soon as my accounts with my agents are cleared,' it was decided, that it was unnecessary to prove the averment of the protest of the Bill. And, in an action by the Indorsee against the Drawer of a Bill, the plaintiff did not prove any notice of dishonor to the defendant, but gave, in evidence, an agreement made between a prior Indorser and the Drawer, after the Bill became due, which recited, that the defendant had drawn, amongst others, the Bill in question, that it was over-due, and ought to be in the hands of the prior Indorser, and that it was agreed the latter should take the money due to him upon the Bill by instalments; it was held, that this was evidence, that the Drawer was, at that time, liable to pay the Bill, and dispensed with other proof of notice of dishonor. Again, where, in an action against the Drawer, in lieu of proof of actual notice, the defendant's letter was proved, stating, 'that

[1] Chitty on Bills, ch. p. 390 (8th edit. 1833); Id. ch. 10, p. 538, 539; Bayley on Bills, ch. 7, § 2, p. 291 to 293 (5th edit. 1830); Garland *v.* The Salem Bank, 9 Mass. R. 408; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 422 (5th edit.).

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conditional one, the Holder can recover only by showing, that the qualification or condition has been strictly complied with, or observed.[1]

§ 374. If, before or at the time of the maturity of the Bill, the Drawer or Indorsers have received full security or indemnity for the amount of the Bill,

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he was an accommodation Drawer, and that the Bill would be paid before next Term,' though not saying 'by defendant,' Lord Ellenborough said, 'The defendant does not rely upon the want of notice, but undertakes, that the Bill will be duly paid before the Term, either by himself or the Acceptor. I think the evidence sufficient.'" See also Wood *v.* Brown, 1 Stark. R. 217; Lundie *v.* Robertson, 7 East, R. 231; Gibbon *v.* Coggan, 2 Camp. R. 188; Gunson *v.* Metz, 1 Barn. & Cressw. 193. Mr. Chitty afterwards (p. 539) adds; "The conduct, however, of the party insisting on the want of notice, must, in general, be unequivocal, and his promise must amount to an admission of the Holder's right to receive payment; and, therefore, where a foreigner only said, 'I am not acquainted with your laws, if I am bound to pay it I will,' such promise was not considered a waiver of the objection of want of notice; and it has been considered, that, if the promise were made on the arrest, it shall not prejudice; but this doctrine seems questionable. If an Indorser propose to the Holder to pay the Bill by instalments, and such offer be rejected, he is at liberty afterwards to avail himself of the want of notice. So it was decided, that, if the Drawer or Indorser, after having been arrested, upon being asked, what he had to propose by way of settlement, said, 'I am willing to give my Bill at one or two months,' but which was rejected, this does not obviate the necessity of proving notice; and Lord Ellenborough observed, 'This offer is neither an acknowledgment, nor a waiver, to obviate the necessity of expressly proving notice of the dishonor of the Bill. He might have offered to give his acceptance, at one or two months, although, being entitled to notice of the dishonor of the former Bill, he had received none, and, although upon this compromise being refused, he meant to rely upon this objection. If the plaintiff accepted the offer, good and well; if not, things were to remain on the same footing as before it was made.' But an offer to the Holder of a Bill of a general composition, of so much on the pound on all a party's debts, although not accepted, has been considered as dispensing with proof of notice of dishonor." In the case of Borradaile *v.* Lowe, 4 Taunt. R. 93, it seems to have been thought, that, in case of the Drawer, the waiver might be either express or implied. But, in case of an Indorser, it must be express. There does not seem any solid ground to support such a distinction.

[1] Chitty on Bills, ch. 10, p. 540, and note (8th edit. 1833).

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either on account, or by funds or securities, deposited with them to meet their liability on the Bill upon its dishonor, then, and in that case, as to the party, so having such security, the omission to make due presentment thereof for payment will be excused; for such party cannot, under such circumstances, suffer any real loss.[1] The same rule seems, substantially, incorporated into the Law of France.[2]

§ 375. In this connexion, it may be proper also to state what will not be held a sufficient excuse for laches in the Holder, in making due presentment for payment. Some of the cases under this head have been already considered, in treating of the want of a due presentment of Bills for non-acceptance.[3] But it is important to bring them again under review in this connexion. In the first place (as we have seen), neither the bankruptcy, nor insolvency, nor death of the Acceptor, will constitute any excuse for not making a due presentment.[4] Nor will it constitute any excuse, that the Drawee, although he had effects in his hands, told the Drawer, at the time of the drawing of the Bill, that he should not be able to provide for it;[5] and that the Drawer understood, that he

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[1] Bayley on Bills, ch. 7, § 2, p. 310 (5th edit. 1830); Chitty on Bills, ch. 8, p. 368 (8th edit. 1833); Id. ch. 10, p. 473, 489; Bond *v.* Farnham, 5 Mass. R. 170; Mechanics Bank *v.* Griswold, 7 Wend. R. 165; Barker *v.* Parker, 6 Pick. R. 80; Mead *v.* Small, 2 Greenl. R. 207; Barton *v.* Baker, 1 Serg. & Rawle, 334; Corney *v.* Da Costa, 1 Esp. R. 302; Ante, § 316.

[2] Code de Comm. art. 171; Pardessus, Droit Comm. Tom. 2, art. 435.

[3] Ante, 306, § 318 to 320; 3 Kent, Comm. Lect. 44, p. 104 to 109 (4th edit.).

[4] Ante, § 234, 279, 307, 318, 319, 326; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 421 (5th edit.); Pardessus, Droit Comm. Tom. 2, art. 426.

[5] Bayley on Bills, ch. 7, § 2, p. 304, 305 (5th edit. 1830); Staples *v.* Okines, 1 Esp. R. 332; Ante, § 311.

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should have to provide for it. Nor will it constitute any excuse, that the Drawer or the Indorsers of the Bill became so merely for the accommodation of the Acceptor, and knew him to be insolvent, when the Bill was drawn.[1] Nor will it constitute any excuse, that the Drawer has reason to believe, that the Bill will not be paid at its maturity, and has even promised the Holder, that he will endeavor to provide funds to pay the Bill, whatever may be the effect of such facts in excusing the Holder from giving due notice to him of the dishonor, if the Bill were duly presented and not paid.[2] Nor will a waiver of a right to notice of the dishonor excuse the Holder from making a due presentment of the Bill for payment.[3] Nor, perhaps, will it be any sufficient excuse, that the Drawer has given notice to the Acceptor not to pay the Bill, if presented.[4]

§ 376. In the next place, the fact, that the Drawer or Indorser of a Bill belongs to two firms, one of which firms has signed the Bill, and the other has indorsed it, is no excuse for non-presentment of the same at its maturity; for knowledge of a non-payment is not equivalent to notice of non-payment.[5] So, the fact, that the Acceptor has told the Drawer, before the maturity of the Bill, that he could not take it

[1] Walton *v.* Watson, 13 Martin, R. 347; Nicholson *v.* Gouthit, 2 H. Black. R. 609. See also Chitty on Bills, ch. 10, p. 470, 471, 473 (8th edit. 1833); Bayley on Bills, ch. 7, § 2, p. 297, 308 (5th edit. 1830); Ante, § 311, 312, 314, 316, 369, 370.

[2] Chitty on Bills, ch. 9, p. 390 (8th edit 1833); Bayley on Bills, ch. 7, § 2, p. 305, (5th edit. 1830); Prideaux *v.* Collier, 2 Stark. R. 57.

[3] Berkshire Bank *v.* Jones, 6 Mass. R. 524; Backus *v.* Shipherd, 11 Wend. R. 629.

[4] Chitty on Bills, ch. 9, p. 390 (8th edit. 1833). But Mr. Chitty puts a query. See also Chitty on Bills, ch. 10, p. 484 (8th edit.).

[5] Dwight *v.* Scovill, 2 Connect. R. 654.

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up, and the Drawer must, and that the Acceptor has given money to the Drawer for that purpose, will not excuse the want of a due presentment;[1] nor, that the Drawer, in apprehension of the dishonor of the Bill, has lodged other money of the Acceptor in the hands of the Indorser, upon an undertaking by the Indorser to return it, if he should be exonerated from payment of the Bill.[2] So, the fact, that the Drawer of a Bill is dead at the maturity of the Bill, and that the Indorser is appointed his administrator, is, for the same reason, no dispensation from the necessity of making a due presentment of the Bill for payment at its maturity.[3]

§ 377. The reason of all these decisions turns upon one and the same general principle. The Commercial Law having required a due presentment for payment, and a due notice of dishonor, these acts are to be deemed waived or dispensed with, only when, from the nature or the circumstances of the case, both of them must be unnecessary or immaterial to the Drawer, or the Indorsers, who may be affected thereby.[4] Such a presentment, and such a notice, are, therefore, to be treated as conditions precedent to the liability of the Drawer or Indorsers, belonging to the leading character of the contract; and it is of no consequence, that the Drawer or Indorsers may not have been actually prejudiced thereby.[5] Of course, nothing short of an express or implied agreement, or waiver of

[1] Bayley on Bills, ch. 7, § 2, p. 303 (5th edit. 1830); Baker *v.* Birch, 3 Camp. R. 107.

[2] Bayley on Bills, ch. 7, § 2, p. 304 (5th edit. 1830); Clegg *v.* Cotton, 3 Bos. & Pull. 239.

[3] M'Gruder *v.* Union Bank of Georgetown, 3 Peters, R. 87; Juniata Bank *v.* Hall, 16 Serg. & Rawle, 157.

[4] French's Executor's *v.* Bank of Columbia, 4 Cranch, R. 141.

[5] Bayley on Bills, ch. 7, § 2, p. 302, 303 (5th edit. 1830); Ante, § 311.

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such presentment and notice, ought to bind the Drawer or Indorsers; and such an agreement, or waiver, ought never, in derogation of their admitted rights, to be inferred from doubtful or equivocal acts or circumstances, which are capable of different interpretations.

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CHAPTER XI.

NON-PAYMENT — PROCEEDINGS ON.

§ 378. HAVING considered the rights and duties of the Holder in the presentment of Bills for payment at their maturity, we are next led to the consideration of his obligations and duties in cases of the dishonor of foreign Bills by non-payment, either in whole or in part. And these may be comprised under two heads; (1.) The obligation or duty to make a due protest for non-payment; and (2.) That of giving due notice of the dishonor to the other parties upon the Bill, who may be liable to pay him the amount, in case of its dishonor. These topics have been already discussed at large in the preceding part of this work, when we were considering the obligations and duties of the Holder upon the non-acceptance of the Bill;[1] and, therefore, a very concise summary of them in this place will suffice; since the duties and obligations, in these respects, are, in general, exactly the same in cases of non-payment of foreign Bills, as they are in cases of non-acceptance thereof.

§ 379. In the first place, then, it is ordinarily indispensable, unless excused by some of the circumstances already adverted to,[2] that a protest should be made immediately upon the dishonor, according to the course prescribed by law therefor.[3] And this rule

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[1] Ante, § 273, 296 to 301, 305 to 321.

[2] Ante, § 273 to 284.

[3] Ante, § 273; Pothier de Change, n. 133; Pardessus, Droit Comm.

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prevails not only in the law of England and America, but it seems adopted by all modern commercial nations, with a view to the public policy of having a known uniform proof of the fact of dishonor under the sanction of public authority.[1] The place of the payment of the Bill is that, where the protest is to be made;[2] and the law of that place is to govern, as to the time, and formalities, and acts, of protest.[3] By the law of England, and Scotland, and America, the protest should be made on the last day of grace, where the Bill is due;[4] but by the law of France, and of most, if not of all the nations of continental Eu-

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Tom. 2, art. 417, 420, 424 to 427, 429 to 438; Union Bank *v.* Hyde, 6 Wheat. 572.

[1] Ante, § 273, 274, 277; Pardessus, Droit Comm. Tom. 2, art. 381, 382; Id. Tom. 5, art. 1495; Savary, Le Parfait Négociant, Tom. 1, Part. 3, ch. 14, p. 850, 851; Heinecc. de Camb. cap. 4, § 40; Chitty on Bills, ch. 10, p. 489, 490 (8th edit. 1833).

[2] Ante, § 282.

[3] Ante, § 138, 276, 278, 282, 283; Bank of Rochester *v.* Gray, 2 Hill, N. Y. Rep. 227; Pardessus, Droit Comm. Tom. 5, art. 1495, 1497; Savary, Le Parfait Négociant, Tom. 1, Part 4, ch. 14, p. 851; Pothier de Change, n. 155, 172. — What the protest should contain, and the form thereof, has been already adverted to. Ante, § 276, 277, and note; Pardessus, Droit Comm. Tom. 2, art. 431. See also Cayuga County Bank *v.* Hunt, 2 Hill, N. Y. Rep. 635; Heinecc. de Camb. cap. 4, § 36. Heineccius says; "Fiunt protestationes non quidem ad acta, (quamvis si talis interponatur, illa procul dubio itidem rata esset, censente Zipsel,) sed adhibitis notario et duobus testibus, quibus præsentibus exactor litteras cambiales trassato iterum ad acceptandum offert. Quo facto, negataque acceptatione, notarius declarat, er wolle hiermit wider Trassirern des Vechsels, sowohl wegen nicht erfolgter Bezahlung, als auch wegen alles hieraus entstehenden Schadens, Unkosten, Interesse, Wechsels, und Wieder-Wechsels sollenniter protestiret haben. Super quo actu notarius deinde conficit instrumentum sollemne, idque a se et testibus subscriptum tradit præsentanti domum trassantis remittendum." See also Chitty on Bills, ch. 10, p. 489 to 494, 497, 500 (8th edit. 1833); Code de Comm. art. 173.

[4] Chitty on Bills, ch. 10, p. 508 (8th edit. 1833).

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rope, the protest should be made on the next day, or next business day, after the non-payment.[1]

§ 380. If part payment only is made by the Acceptor, our law requires, that protest should be made, and due notice given, exactly as in other cases, stat-

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[1] Ante, § 278, 283, 290; Code de Comm. art. 153, 162, 172; Pothier de Change, n. 139, 140, 145; Pardessus, Droit Comm. Tom. 2, art. 408 to 410; Id. Tom. 5, art. 1489, 1497, 1498; Heinecc. de Camb. cap. 4, § 41; 1 Savary, Le Parfait Négociant, Part 3, ch. 14, p. 850; Chitty on Bills, ch. 10, p. 508 (8th edit. 1833). — Heineccius says, that the protest may be on the day of a fair, unless specially prohibited by law; but not on a Sunday; "Protestatio hæc, quia non est actus contentiosæ jurisdictionis, et res ita comparata est, ut moram non ferat, diebus etiam feriatis recte interponitur, nisi leges cambiales id diserte prohibeant. Prohibent autem O. C. Brunisuic. art. 41, Norimberg. cap. 2, § 1, Colon. art. 1, Dantisc. art. 18, Brandenburg. art. 24. In O. C. Augustan. cap. 1, § 15. Tantum solis dies excipitur, non autem reliqua festa, si id exigat necessitas." Heinecc. de Camb. cap. 4, § 37, 41. Pothier de Change, n. 140, 142. Pothier says, that Bills, payable at fairs, ought to be protested on the last day of the particular fair, without any allowance of grace. Pothier de Change, n. 142. Heineccius, as to Bills payable at fairs, says; "Si cambia feriarum præsentantur, tunc trassatus aut pure declarat, se litteras non acceptaturum, aut ob defectum aliquem, e. gr., ob nondum acceptas litteras advisorias, acceptationem denegat. Priore casu statim interponenda est protestatio, domumque remittenda, nec opus est, ut exspectetur dies solutionis. Posteriore casu itidem interponitur protestatio, nec tamen ea domum remittitur, nisi finita prima hebdomade nundinarum. Si ergo interea trassatus sese ad acceptationem adhuc offert, protestatio plane rejicienda est." Heinecc. de Camb. cap. 4, § 31. Heineccius adds, that the hour, when demand of payment is to be made on Bills, payable at fairs, is sunset. His language is; "Ut vero salvus sit præsentanti ille regressus, necesse est, ut rite et stato tempore interponatur protestatio; id quod in cambiis feriarum fieri debet ipso solutionis die usque ad vesperam vel solis occasum computando, nisi hora specialis legibus sit definita. Extra nundinas protestatio interponenda circumactis diebus induciarum (nach Ablauf der Respit-Tage), sicubi tales concedantur." Heinecc. de Camb. cap. 4, § 40. The modern Code of Commerce of France (art. 133) declares, that a Bill of Exchange, payable at a fair, becomes payable on the eve of the day (that is, the evening before the last day) appointed for the breaking up of the fair, and on the day, on which the fair is held, if it is not to last longer than one day.

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ing the facts.[1] And this is equally true in the law of France, and in that of other commercial countries.[2] Heineccius says; "*Nec permissum est trassato, loco totius summæ partis solutionem in se recipere, nec præsentans in eo promisso adquiescere debet, sed statim interponere protestationem, quamvis summam oblatam omnino accipere possit.*"[3]

§ 381. In the next place, as to notice of dishonor by non-payment of a Bill of Exchange. This is, in general, and unless under special circumstances, which constitute an excuse or dispensation, such as those already mentioned,[4] indispensable by our law, in order to charge either the Drawer or the Indorsers with the payment of the Bill; and, if any party, who is entitled to notice of the non-payment, has not due notice thereof given or sent to him, he will be discharged from all liability to pay the Bill, although other parties, who have had due notice, may be liable to pay the same. The Holder, therefore, must, in all cases, subject to the exceptions above referred to, give due notice to all the antecedent parties, from whom he means to require payment of the Bill, otherwise they will be discharged.[5] What constitutes due

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[1] Ante, § 240, and note; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 415 (5th edit. 1830).

[2] Ante, § 241. See also Code de Comm. art. 124, 162, 163.

[3] Heinecc. de Camb. cap. 4, § 29.

[4] Ante, § 275, 279, 280; 1 Bell, Comm. B. 3, ch 2, p. 417, 418 (5th edit.); Chitty on Bills, ch. 10, p. 531 (8th edit. 1833).

[5] Chitty on Bills, ch. 10, p. 530, 531 (8th edit. 1833); Ante, § 324, 325. — Mr. Chitty says; "It was once thought, that notice of non-acceptance must, in all cases, be given to the Drawer of the Bill, and demand of payment made of him; or that, in default thereof, the Indorsers would be discharged, notwithstanding they had regular notice; because, for want of notice to the Drawer, the Indorsers were without remedy against him after they had successively taken up the Bill. This opinion, however, so far as

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diligence, seems properly to be a matter of law, where all the facts and circumstances are ascertained.[1]

§ 382. Notice must be given within a reasonable time; and what that time is, must depend upon the circumstances of particular cases.[2] It must also be given in a reasonable mode or manner; and both these considerations may be materially affected by usages in particular places or countries. In general, it may be said, that notice may be given to the Drawer or Indorsers personally (where that is the proper mode) on the same day, that the dishonor takes place, after that event has happened; and by mail of the same day, if that is the proper mode of giving notice.[3] But, in all

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it related to foreign Bills, was overruled in the case of Bomley *v.* Frazier (1 Str. R. 441); and, in its relation to inland Bills, in the case of Heylyn and others against Adamson (2 Burr. 669); and, as to checks on bankers, in Rickford *v.* Ridge (2 Camp. 539); on the principle, that, to require a demand of the Drawer, or prior Indorser, would be laying such a clog upon Bills, as would deter every person from taking them. Besides, the Acceptor is primarily liable, and, as the act of indorsing a Bill is equivalent to making a new Bill, every Indorser thereby separately undertakes, as well as the Drawer, that the Drawee shall honor the Bill, and the Holder may, consequently, immediately resort to him, without calling on any of the other parties; and it is the business of the Indorser, as soon as he has received notice himself, to forward the like notice to the Drawer, and all persons, to whom he means to resort. However, it is advisable for the Holder to give notice to every party, as soon as he can ascertain his residence; for, otherwise, he will be without remedy against him, unless some other party to the Bill has given him notice, in which case such notice may enure to his use." Chitty on Bills, ch. 10, p. 530 (8th edit. 1833).

[1] Rhett *v.* Poe, 2 How. Sup. Ct. R. 457.

[2] Ante, § 284 to 286; 3 Kent, Comm. Lect. 44, p. 104 to 109 (4th edit.); Rhett *v.* Poe, 2 How. S. C. R. 457.

[3] Ante, § 288 to 291, 305; Burbridge *v.* Manners, 3 Camp. 193; Shed *v.* Brett, 1 Pick. R. 401; Corp *v.* M'Comb, 1 Johns. Cas. 328; Bussard *v.* Levering, 6 Wheat. R. 102; Lindenberger *v.* Beall, 6 Wheat. R. 104; Ex parte Maline, 19 Ves. 216; Chitty on Bills, ch. 10, p. 512 to 514 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 415 to 419 (5th edit.);

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cases, where notice is required to be given, it is sufficient, if the notice is personal, that it is given on the day, succeeding the day of the dishonor, early enough for the party to receive it on that day.[1] If sent by the mail, it is sufficient, if it is sent by the mail of the next day, or the next practicable mail.[2] The notice must be personal, or by a verbal or written notice, delivered to the party, entitled to notice, or at his dwelling-house, or place of business, if he lives in or near the town or city, where the dishonor takes place.[3] And, if, by the usage of such city or town, there is a penny-post to carry letters and notices within the city or town, that will be sufficient.[4] If the party, entitled to notice, does not reside in or near the same town or city, personal notice is not necessary; and the notice is sufficient, if sent by the mail, directed to the proper post-office, where he lives, or is accustomed to receive his letters, or to the nearest post-office, if there be none in the town, where he lives.[5] In most cases, also, the notice may be sent by a special messenger, if

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3 Kent, Comm. Lect. 44, p. 104 to 109 (4th edit.); Carter *v.* Burley, 9 New Hamp. R. 556.

[1] Ante, § 288 to 291; 3 Kent, Comm. Lect. 44, p. 104 to 109 (4th edit.).

[2] Ante, § 288 to 290; 3 Kent, Comm. Lect. 44, p. 106 to 108 (4th edit); Carter *v.* Burley, 9 New Hamp. R. 556.

[3] Ante, § 289, 297, 300, 305; Ransom *v.* Mark, 2 Hill, N. Y. Rep. 587; Chitty on Bills, ch. 10, p. 515, 516 (8th edit. 1833).

[4] Ante, § 289, 291; Chitty on Bills, ch. 10, p. 503 to 505 (8th edit. 1833); Ransom *v.* Mark, 2 Hill, N. Y. Rep. 587; 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.).

[5] Ante, § 288, 290, 291, 297, 300; Ransom *v.* Mark, 2 Hill, N. Y. R. 587; Stuckert *v.* Anderson, 3 Whart. R. 116; Weakley *v.* Bell, 9 Watts, R. 213; Chitty on Bills, ch. 10, p. 517, 518 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 107, 108 (4th edit.).

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that be an appropriate mode, and there be no unnecessary delay occasioned thereby.[1]

§ 383. If notice is to be sent to a foreign country, it should go by the next regular packet, if there be any, and there be a reasonable time to send it by that conveyance.[2] If there be no regular packet, then it may be sent by the next convenient and seasonable opportunity, either directly to the port or place, where the notice is to be sent, or as near thereto as practicable.[3] If the usual course is by mail with the foreign country, where the notice is to be sent, that mode of conveyance should be pursued, and the most usual particular route adopted.[4]

§ 384. Where an Indorser receives notice, and is entitled to reimbursement from other parties upon the Bill, he is, in the same manner, bound to give notice of the dishonor, to those parties, within a reasonable time; and the same rule will apply to his case, as to the case of the Holder.[5] And each successive Indorser, receiving such notice, has until the next day to give or send notice to the other parties, to whom he is entitled to look for reimbursement.[6] If an Indorser receives notice of the dishonor earlier than the law positively requires, but still a valid notice, as for ex-

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[1] Ante, § 290, 291, 295; Chitty on Bills, ch. 10, p. 518, 519 (8th edit. 1833); 3 Kent, Comm Lect. 44, p. 106, 107 (4th edit.). As to what constitutes a sufficient notice where the parties reside in different States, see Rhett v. Poe, 2 How. Sup. Ct. R. 460.

[2] Ante, § 286, 298; Chitty on Bills, ch. 10, p. 505 (8th edit. 1833).

[3] Ante, § 286, 298.

[4] Ante, § 287.

[5] Ante, § 291, 292, 294; Chitty on Bills, ch. 10, p. 520, 521 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 108, 109 (4th edit.).

[6] Ante, § 294; Chitty on Bills, ch. 10, p. 519, 520 (8th edit. 1833); Carter v. Burley, 9 New Hamp. R. 556.

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ample, by the mail, or otherwise, on the very day of the dishonor, still he must send notice of the dishonor to the other parties, to whom he means to have recourse, by the next day's mail, or the next practicable mail after he has received the notice.[1]

§ 385. So, too, in all cases, where notice is required, or is to be given, either by the Holder, or by any other party to the Bill, if he receives that notice upon a Sunday, or other holyday, he is not bound to attend to it upon that day, for it is not deemed a day of business; but the case is to be treated, exactly as if it had been received on the next succeeding business day.[2] If he receives the notice on the day before Sunday or any other holyday, it will be sufficient to send notice to the other antecedent parties on the Bill, on the day next succeeding the Sunday or other holyday.[3] The same rule applies to Jews, and other persons, who, according to the rules of their sect, treat particular days as devoted to religious services.[4]

§ 386. In respect to the place, where the notice is to be sent, similar considerations apply, as in cases of non-acceptance. If the party, entitled to notice, has changed his domicil, after he became a party to the Bill, notice should be sent to his new domicil, if it is known, or if, by reasonable diligence and inquiry, it can be ascertained;[5] and, if the notice goes by mail, it should be directed and go to the post-office of the town, in which he now dwells, or to the post-office

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[1] Carter *v.* Burley, 9 New Hamp. R. 556.

[2] Ante, § 293, and note; Chitty on Bills, ch. 10, p. 519, 520 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 106, 107 (4th edit.).

[3] Ante, § 293, and note.

[4] Ante, § 300.

[5] Ante, § 297.

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(if known), where he is accustomed to receive his letters, or to the nearest post-office, if there be none in the town.[1]

§ 387. If the residence, or place of business, of the party, entitled to notice, is unknown, and cannot, by reasonable diligence and inquiry, be found, then the Holder will be excused from giving notice.[2] If notice is to be given to a partnership, notice to either of the partners will be sufficient.[3] And where both the Drawer and Acceptor are either general partners or special partners in the adventure of which the Bill constitutes a part, notice of the dishonor of the Bill need not be given to the Drawer.[4] But, if notice is to be given to two joint Drawers or Indorsers, not partners, each of them is entitled to notice.[5]

§ 388. In respect to the person, by whom notice of the dishonor is to be given, it is sufficient, if it be given by the Holder, or by his agent, or by any person, who is a party to the Bill entitled to reimbursement.[6] But a notice, given by a mere stranger, is a nullity. The notary public, who presents the Bill for payment, and protests it for the non-payment, is sufficiently authorized by his character and employment to give notice, on behalf of the Holder, to any of the other parties on the Bill.[7] But neither a notary, nor any

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[1] Ante, § 289; Stuckert v. Anderson, 3 Whart. R. 116; Fitler v. Morris, 6 Whart. R. 402; Weakley v. Bell, 9 Watts, R. 213.

[2] Ante, § 299.

[3] Ibid.

[4] Rhett v. Poe, 2 How. Sup. Ct. R. 457.

[5] Ibid.

[6] Ante, § 303, 304; Chitty on Bills, ch. 10, p. 525 to 527 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 419, 420 (5th edit.); Miers v. Brown, 11 Mees. & Wels. R. 372.

[7] Bank of Cape Fear v. Seawell, 2 Hawks, R. 560; Bank of Rochester

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other agent, is absolutely bound, at least, so far as the other parties to the Bill are concerned, to give notice, except to his principal, the Holder; and, that done, it will be sufficient.[1] When the presentment is made by a notary, or other agent of the Holder, he will be treated, as to the other parties to the Bill, as a Holder, so that he will be entitled, like any other Holder, to a whole day, to give notice to his principal of the dishonor; and notice to the other parties, by the principal, on the next day after the principal himself has received notice, will be sufficient.[2] If the Holder is dead, notice of the dishonor should be given by his executor or administrator, if there be any duly appointed.[3] If the Holder becomes bankrupt, notice should be given by his assignees, if any be appointed; otherwise, by the bankrupt himself.[4]

§ 389. As to the persons, to whom notice is to be given. This, of course, includes all the persons, who are parties to the Bill, and are entitled to reimbursement from other parties, upon payment of the Bill.[5] If any of those persons are dead, notice should be given to their executors or administrators.[6] If any of them are bankrupt, notice should be given to them and to their assignees, if any are appointed; other-

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v. Gray, 2 Hill, N. Y. Rep. 227. See also Fitler *v.* Morris, 6 Whart. R. 402.

[1] Bank of Rochester *v.* Gray, 2 Hill, N. Y. Rep. 227; Bank of U. States *v.* Davis, 2 Hill, N. Y. Rep. 451.

[2] Ante, § 292; Chitty on Bills, ch. 10, p. 521, 522 (8th edit. 1833).

[3] Ante, § 308; Chitty on Bills, ch. 9, p. 389, 401 (8th edit. 1833).

[4] Ante, § 305.

[5] Ante, § 305; Chitty on Bills, ch. 10, p. 528 to 533 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 420 (5th edit. 1830).

[6] Ante, § 305.

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wise, to the bankrupts themselves.[1] If they are partners, notice to either partner is sufficient.[2] If they are joint Drawers or Indorsers, and not partners, then notice should be given to both.[3] If one partner is dead, notice should be given to the survivor.[4] But notice to a Guarantor of the non-payment of the Bill does not seem to be indispensable, although it may, in most cases, be highly expedient; for, if the Guarantor sustains any damage, or loss, or prejudice, by the want of notice, he will be exonerated, *pro tanto*, from payment of the Bill.[5]

§ 390. As to the form of the notice, the same rule prevails in cases of the non-payment of Bills, as applies to cases of Promissory Notes, and to non-acceptance of Bills; no particular form or language is indispensable.[6] But it will be sufficient, if, by express terms, or by natural or necessary implication from the language used, it contains, in substance, a true description of the Bill, an assertion of due presentment and dishonor of the Bill, and that the Holder, or other person, looks to the party, to whom the notice is sent, for indemnity and reimbursement.[7]

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[1] Ibid.; Chitty on Bills, ch. 8, p. 369 (8th edit. 1833); Id. ch. 10, p. 529, 531.

[2] Ante, § 305; Bayley on Bills, ch. 7, § 2, p. 285 (5th edit. 1830); Chitty on Bills, ch. 10, p. 531 (8th edit. 1833).

[3] Ante, § 305; Chitty on Bills, ch. 10, p. 532 (8th edit. 1833); Shepard *v.* Hawkey, 1 Connect. R. 368; Bank of Chenango *v.* Root, 4 Cowen, R. 126.

[4] Ante, § 305; Cayuga County Bank *v.* Hunt, 2 Hill, N. Y. Rep. 635.

[5] Ante, § 305, and note; Chitty on Bills, ch. 10, p. 474, 475, 531 (8th edit. 1833).

[6] Ante, § 301; Chitty on Bills, ch. 10, p. 501, 502 (8th edit. 1833); 3 Kent, Comm. Lect. 44, p. 108, 109 (4th edit.).

[7] Ante, § 301, 303; Bayley on Bills, ch. 7, § 2, p. 256 (5th edit. 1830); Solarte *v.* Palmer, 7 Bing. R. 530; S. C. on Appeal, 8 Bligh, R. (N. S.)

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A copy of the protest need not, although it is often sent, accompany the notice of the dishonor; and

874; 1 Bing. New Cas. 194; Ransom *v.* Mark, 2 Hill, N. Y. Rep. 587; Mills *v.* Bank of United States, 11 Wheat. R. 431; Shed *v.* Brett, 1 Pick. R. 401; Sanger *v.* Stimpson, 8 Mass. R. 260; Bank of United States *v.* Carneal, 2 Peters, R. 543; Reedy *v.* Seixas, 2 John. Cas. 337; Smith *v.* Whiting, 12 Mass. R. 6; Bank of Cape Fear *v.* Seawell, 2 Hawkes, R. 560; Chitty on Bills, ch. 10, p. 501 (8th edit. 1833); Furze *v.* Sharwood, 2 Gale & David. R. 116; Robson *v.* Curlewis, 1 Carr. & Marsh. R. 378; S. C. 2 Adolph. & Ell. New R. 421; Gilbert *v.* Dennis, 3 Metc. R. 495; King *v.* Bickley, 2 Gale & David. R. 131; S. C. 2 Adolph. & Ell. New R. 419; Boulton *v.* Welsh, 3 Bing. New Cas. 688; Furze *v.* Sherwood, 2 Adolph. & Ell. New R. 388; S. C. 2 Gale & David. R. 116. In this last case Lord Denman, in delivering the opinion of the Court, reviewed the principal authorities, (which are certainly not easily reconcileable); and said, "Lord Mansfield, after observing, in the case of Tindal *v.* Browne (1 T. R. 167), that certainty is of the highest importance in mercantile transactions, proceeded to settle the question there raised, whether the notice of dishonor was in point of law too late. The whole Court affirmed that proposition, and more than once set aside a verdict founded on the opposite assumption. Nothing more was required for the decision. But Mr. Justice Willes took a second objection; and Mr. Justice Ashhurst a third. 'Notice' (said his Lordship), (Judgment of Ashurst, J.), 'means something more than knowledge; because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does not intend to pay, but' (it ought to be farther said) 'that he (the holder) does not intend to give credit. In the present case there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to resort to the indorser.' This is repeated with great approbation by Buller J., (and see Esdaile *v.* Sowerby, 11 East, R. 114.) Near forty years after, the sufficiency of notice of dishonor was canvassed in an action between Hartley *v.* Case (4 B. & C. 339), decided by Lord Tenterden at Nisi Prius. It ran thus; 'I am desired to apply to you for the payment of the sum of 150*l.* due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place.' The report says, 'The Lord Chief Justice was of opinion that as this letter did not apprize the party of the fact of dishonor, but contained a mere demand of payment, it was not sufficient, and the plaintiff was nonsuited.' After argument on a rule for setting aside the nonsuit, his Lorship said, 'There is no precise form of words necessary to be used in giving notice of dishonor, but the language used must be such as to convey notice to the party what the bill is, and that payment

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it will be sufficient, if it is proved to have been made, and is produced, if the dishonor is controverted.[1]

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of it has been refused by the acceptor. Here the letter in question did not convey to the defendant any such notice; it does not even say that the bill was ever accepted. We, therefore, think the notice was insufficient' The short judgment, in which the whole Court concurred, comprising Bayley, Holroyd, and Littledale, Js., is perfectly correct in its statement of the fact and the law, and has the merit of adhering closely to the point raised in argument. It has never been questioned by any judicial authority. The same learned Chief Justice was afterwards called upon to decide on the sufficiency of the following notice; 'A bill for 683*l*., drawn by' A. upon B. C., 'and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to, gentlemen, your very obedient servants,' J. and S. P. Here was no statement of the dishonor, the presentment, or the acceptance. If any notice of the dishonor as a distinct fact is necessary, this document is plainly worthless. It was so holden by Lord Tenterden; but, from the magnitude of the sum and the importance of the question, his Lordship suggested that a bill of exceptions might be tendered. This was done, and the case (Solarte *v.* Palmer, 1 Cro. & Jac. 417; S. C. 1 Tyrwh. 371; 7 Bing. R. 530) brought by writ of error into the Exchequer Chamber, when, as might have been expected, the Lord Chief Justice delivered a unanimous judgment that Lord Tenterden's direction to the Jury was right, and the notice insufficient. It was, however, thought right to bring the matter before the House of Lords, where the late Mr. Justice Park delivered the opinion of all the Judges present (nine in number) to the same effect. Thus, without one dissentient voice, the Judges of all the Courts on these different occasions concurred with Lord Tenterden in holding express notice of the fact of dishonor to be necessary; the only point on which he had given an opinion. This was the celebrated case of Solarte *v.* Palmer, (8 Bligh, N. S. 874; S. C. 1 New Ca. 194.) The Lord Chief Justice in the Exchequer Chamber laid down this rule, that 'The notice of dishonor' 'should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount.' Park, J., when delivering the Judges' opinion to the Lords, omits the latter clause, and merely says that 'such a notice ought, in express terms, or by necessary implication, to convey full information that the bill had been dishonored.' This decision, therefore, did not turn upon or require any allusion to the doctrine of Ash-

[1] Ante, § 302; Chitty on Bills, ch. 10, p. 498, 499 (8th edit. 1833).

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§ 391. It may be proper here, also, to repeat the remark already made, that the law of the place, where

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hurst and Buller, Js., in Tindal *v.* Brown, (1 T. R. 167,) on the necessity of stating that the holder looks to the party addressed, and does not give credit to any other person. But much controversy has arisen on the branch of the notice, as to which the Lord Chief Justice and Park, J. agree, requiring notice of dishonor in express terms, or by necessary implication; and hence the task of examining all the decisions is imposed upon us. In Grugeon *v.* Smith, (6 A. & E. 499,) this Court held the dishonor of a bill to be sufficiently notified by the phrase 'the bill is this day returned with charges.' A few days after, but without being aware of this decision, the Court of Common Pleas, in Boulton *v.* Welsh, (3 New Ca. 688,) held the notice insufficient where it said 'the promissory note' 'became due yesterday, and is returned to me unpaid;' the Lord Chief Justice there observing that he did not see how it was 'possible to escape from the rule established by the two decided cases, without resorting to such subtle distinctions as would make the rule itself useless in practice. The rule requires that, either expressly or by necessary inference, the notice shall disclose that the bill or note has been dishonored.' Upon which we will merely observe, in passing, that there is no necessary difference of opinion between the two courts, as Parke, B. supposed in Hedger *v.* Steavenson, (2 M. & W. 799.) The Common Pleas might have held, that 'returned with charges' did necessarily imply presentment and dishonor. And it does not follow for anything we said that we might not have thought 'returned to me unpaid' insufficient. But the case of Hedger *v.* Steavenson, (2 M. & W. 799,) brought the Court of Exchequer into direct collision with the Common Pleas, not indeed on the sufficiency of the notice (for it was not identical in the two cases), but on the principle of deciding. The note, &c., 'is returned unpaid,' was the form which the Common Pleas held wrong. The same form, with the addition of 1*s.* 6*d.* for noting, the Exchequer held right; and Parke, B., (2 M. & W. 805,) while submitting to the authority of Solarte *v.* Palmer, (In Exch. Ch. 7 Bing. 530; 2 Cro. & J. 417; 1 Tyrwh. 371. In Dom. Proc. 8 Bligh. N. S. 874; 1 New Ca. 194,) excepts to the reasons given for the judgment, and the language in which they are couched, and doubts whether he could go so far as to say, that 'it ought to appear upon the face of the instrument "by express terms or necessary implication, that the bill was presented and dishonored";' thinking it 'enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him.' He remarks, however, that, even if the rule were properly laid down in those words, it ought to receive a more liberal construction than the Common Pleas appeared to have adopted, in which sentiment Barons Bolland and Alderson agreed, having been two

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the Bill is drawn, regulates the right, and time, and mode, and place of notice to be given to the Drawer;

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of the Judges consulted by the Lords when Park, J. promulged their opinion there. The next case in order of time is Houlditch *v.* Cauty, (4 New Ca. 411.) There the general doctrine was discussed; and the Lord Chief Justice declared his adherence to Boulton *v.* Welsh, (3 New Ca. 688), but distinguished the case then before him. The sufficiency of the written notice was not directly in question; for it had been followed by a verbal communication between the plaintiff and defendant. Strange *v.* Price (10 A. & E. 125) followed. This Court there held it insufficient to 'inform Mr. James Price' 'that Mr. John Betterton's acceptance 87*l.* 5*s.* is not paid.' *A fortiori*, the Common Pleas would have agreed with us. I do not believe that the Exchequer would have differed. In Easter term, 1840, doubts springing from the same fruitful source were stirred in the Court of Common Pleas (Messenger *v.* Southey, 1 M. & G. 76), and the Exchequer, (Lewis *v.* Gompertz, 6 M. & W. 399); the former condemning, the latter supporting, the notice in those respective cases; but the forms were so entirely different that the judgments given might have been consistently formed by either Court. But Messenger *v.* Southey (1 M. & G. 76) shews a great relaxation of the rigor of the rule laid down in the Exchequer Chamber and House of Lords, on the part of the Lord Chief Justice, who admits that Grugeon *v.* Smith (6 A. & E. 499,) might have been well decided by force of the words 'returned with charges,' and possibly Hedger *v.* Steavenson (2 M. & W. 799,) also, because the notice declared the bill to have been 'returned unpaid.' But these are the very words which were held insufficient under the operation of the rule in Boulton *v.* Welsh, (3 New Ca. 688), a case decided by the Common Pleas, reluctantly, from deference to what was decided in Solarte *v.* Palmer, (In Exch. Ch. 7 Bing. 530; 1 Cro. & Jac. 417; 1 Tyrwh. 371. In Dom. Proc. 8 Bligh. N. S. 874; 1 New Ca. 194), and which can hardly be now deemed a satisfactory authority. Upon the whole, it is to be feared that none of the rules for construing this branch of the instrument designed to be a notice of dishonor will be found capable of very general application. The advantage of clear and certain rules, where it can be secured, is indeed inestimable. Perhaps Lord Mansfield never conferred so great a benefit on the commercial world, as by his decision of Tindal *v.* Brown (1 T. R. 167), where his perseverance compelled them, in spite of themselves, to submit to the doctrine of requiring immediate notice as a matter of law. But in the matter in hand we can scarcely hope to attain such a rule. For, if we are to refer the question to a reasonable intendment, and what a man of business would naturally conclude from the words, we can hardly decide it without the intervention of a Jury, whose opinions will naturally vary with the circumstances of each case; and, if, on the other hand, the

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and, that the law of the place, where any indorsement has been made, in like manner, regulates the right,

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Court must decide on examination of the document according to legal and grammatical rules of interpretation, we shall frequently give it a sense in which neither party could ever have understood it. If we adopt the middle course, requiring at least a necessary implication, but qualifying these words by Lord Eldon's comment in Wilkinson *v.* Adam, (1 Ves. & B. 422, 466, cited by Parke, B. in Hedger *v.* Steavenson, 2 M. & W. 805,) we have just seen that (if the reports be accurate) the same eminent Judge who gave them one sense in Boulton *v.* Welsh, (3 New Ca. 688), may admit them to be susceptible of a sense directly opposite in Hedger *v.* Steavenson (2 M. & W. 799). This rule, however, was recommended by great authority, twice asserted by the Court of Exchequer, not repudiated by the Court of Common Pleas. Perhaps it goes no farther than to require that the Court must see that, by some words or other, notice of dishonor has been given. We have entirely excluded the supposition that the mere fact of making a communication respecting the non-payment of the bill at the proper season can extend the meaning of the words conveying notice of dishonor. This exists in almost every case; and, as one can hardly conjecture any other motive for giving the information, so the party addressed can hardly fail to infer that it is given in order to fix him with liability. Yet no one disputes that the fact must be stated, the notice of dishonor plainly given. But, if this be done, we may now enquire, Where is the authority establishing the position of Ashhurst and Buller, Js. (unnecessary for the case before them), that the notice must also tell the party addressed that he looks to him for payment? If not, why send the notice? True; he may have some other reason for informing the party addressed of the dishonor, while looking elsewhere for his money. But, unless he tells him this, the receiver of such a notice cannot but be certain that the sender means to call upon him for payment. The protest, for which notice was substituted, has no such clause, but begins and ends with the history of the dishonored bill, including the protest itself. Where notice has been given by another party than the holder, there may be good sense in requiring that it shall be accompanied by a direct demand of payment, or a statement that it will be required of the party addressed; but in no case has the absence of such information been held to vitiate a notice in other respects complete, and which has come directly from the holder. Nothing now remains but to declare our opinion on the several forms of notice set forth in the special verdict. And the second, of July 11th (count 6, and plea 15); the third, July 20th (count 9, and plea 24); the fourth, July 13th (count 11, and plea 31); the fifth, September 11th (count 12, and plea 35); the sixth, September 25th (count 13, and plea 44); and the eighth, September 25th (count 13, and plea 38); we think bad, because

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and time, and mode, and place of the notice to be given to such Indorser.[1] This proceeds upon the general principle, that the obligation, character, extent, and conditions of every contract are to be governed by the law of the place, where it is entered into, and is to be executed.[2] And, in cases of Bills, the Drawer engages to pay upon due presentment, and due protest and notice of the dishonor of a Bill, according to the law of the place, where he draws it; and the Indorser, in like manner, according to the law of the place, where he indorses the Bill.[3]

§ 392. And here the circumstances, which will or will not excuse the neglect to make a due protest, and giving due notice thereof to the parties, entitled to notice, of the dishonor and non-payment of the Bill, would naturally come under our review. But they are, in general, the same as will ordinarily excuse or not excuse the want of due presentment of the Bill for acceptance or for non-payment; and, therefore, it is sufficient, to refer to those heads in the pre-

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they contain no notice of dishonor according to any of the decisions, or within any of the rules. Consistently with all that is set forth, the plaintiff, either from ignorance or inadvertence, or because he may really have looked to another, may have abstained altogether from presenting any one of these bills. But this amount reduces the plaintiff's claim below the defendants' set-off. Our judgment must then be for the latter, even on the supposition that it would be against them on all the important general points that have been raised." King *v.* Bickley, 2 Adolph. & Ell. New R. 419; Miers *v.* Brown, 11 Mees. & Welsb. 372; Stockman *v.* Parr, 11 Mees. & Welsb. 309.

[1] Ante, § 157, 176, 177, and note, 285, 296, 366; Pardessus, Droit Comm. Tom. 5, art. 1497.

[2] Ibid.

[3] Ibid. — This subject was fully discussed in the note to Ante, § 176, 177. The case of Rothschild *v.* Currie (1 Adolph. & Ellis, New Rep. 43) is, however, to the contrary. See Pardessus, Droit Comm. Tom. 5, art. 1498.

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ceding pages, for complete information on the subject.[1] To the cases already stated, however, it may be added, that no notice whatsoever is necessary to be given to a Drawer, at whose house the Bill is payable; for it affords presumptive proof, that the Bill has been drawn and accepted for his sole accommodation, and that he is to provide funds for its due payment at its maturity. This presumption, however, may be repelled by proof, that the Drawee really had effects in the hands of the Acceptor, and that it was to be paid by the latter.[2] Nor is notice necessary to the Drawer or an Indorser of a Bill, of its non-payment, if he is one of the firm, which accepted the Bill;[3] for the law imputes to him a full notice of the dishonor, from his relation to the firm.[4]

§ 393. In cases of the guaranty of Bills of Exchange, and in cases where Bills of Exchange are taken by the Holder as collateral security for another debt, the same principles apply as to his duty to make due protest, and to give due notice of the dishonor thereof to the Drawer and Indorsers thereof, in order to bind them, as apply to the ordinary cases of Bills possessed by the Holder, as owner, solely on his own

[1] Ante, § 257, 279, 281, 307 to 320, 326; Chitty on Bills, ch. 10, p. 524, 533 to 541 (8th edit. 1833); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 421 to 424, 427 to 431 (5th edit.); 3 Kent, Comm. Lect. 44, p. 110 to 114 (4th edit.).

[2] Ante, § 370; Chitty on Bills, ch. 5, p. 174 (8th edit. 1833); Id. ch. 10, p. 469, 470; Sharp v. Bailey, 9 Barn. & Cressw. 44.

[3] Ante, § 305, note; Gowan v. Jackson, 20 Johns. R. 176.

[4] Chitty on Bills, ch. 10, p. 531 (8th edit. 1833); Porthouse v. Parker, 1 Camp. R. 82; Alderson v. Pope, 1 Camp. R. 484. See also Jacaud v. French, 12 East, R. 317, 322, 323; Bignold v. Waterhouse, 1 Maule & Selw. 259; Bayley on Bills, ch. 7, § 2, p. 285 (5th edit. 1830). As to notice to an Indorser or Guarantor, see Rhett v. Poe, 2 How. Sup. Ct R. 457.

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account, and for their full value. But between the Holder himself and the Guarantor of a Bill, and also between the Holder himself and the party from whom he receives a Bill as collateral security, the effect of an omission to make due protest or give due notice, is very different from the effect of the omission between the Drawer and Indorsers and himself. In the latter case the Drawer and Indorsers are ordinarily discharged from all liability to pay the same. But in the former cases the Guarantor, and the giver of the collateral security, are not discharged by the omission, unless they have sustained some loss or damage thereby, and then only *pro tanto* to the extent of the loss or damage.[1] The French Law (as we have seen[2]), in cases of guaranty, requires the protest and notice of the dishonor to be given to the parties, who guaranty Bills, in the same manner, and within the same time, as they are required in cases of Drawers and Indorsers of such Bills.[3] And in each class of cases the same consequences follow from the neglect of due protest and notice, that the parties entitled thereto are not discharged thereby, unless they have sustained some injury or prejudice, and then only *pro tanto*.[4] The general provisions of that law may deserve, therefore, to be stated at large.

§ 394. By the old law of France, the Holder was allowed fifteen days to give notice to the Drawer or the Indorsers of the dishonor of the Bill by non-pay-

[1] Ante, § 305, and note § 372; Post, § 478, and note.

[2] Ante, § 322, 372; Post, § 394, 395, 478; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 425, 426 (5th edit.).

[3] Ante, § 322, 333, note, 372; Post, § 478; Code de Comm. art. 142, 160 to 172. See also Savary, Le Parfait Négociant, Tom. 1, Pt. 3, Liv. 1, ch. 14, § 14 to 28, p. 849, 850.

[4] Ante, § 306, 372, 478, and note; Pothier de Change, n. 156, 157.

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ment; and he was bound to pursue them in guaranty within that time, if they lived within the distance of five leagues; and, if they lived beyond it, then he was allowed two months to give notice to the parties resident in England, Flanders, and Holland, three months to the parties in Italy, Germany, and the Swiss Cantons, four months to the parties in Spain, and six months in Portugal, Sweden, and Denmark.[1] The language of the Article, that the Drawer and the Indorsers shall be pursued in guaranty (*seront poursuivis en garantie*), would seem to import, that it should be by a judicial proceeding, and that only. But Pothier informs us, that a different construction was put upon the Article by the usage of merchants; and it was held, that, although the Holder might proceed by a judicial act, yet it was sufficient to protest the Bill, (which was deemed to be the commencement of a pursuit in guaranty,) and to give notice of the dishonor, in writing, within the proper period, to the Drawer and Indorsers.[2] And the like course, as to notice, was to be followed by any Indorser, who had received notice, in respect to the antecedent Indorsers and the Drawer, within the like periods.[3] The modern Code of Commerce has adopted regulations of a similar nature, varying, however, somewhat as to the periods of notice; but, in substance, embracing similar principles.[4] The same law (as we have just seen)

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[1] Jousse, sur l'Ord. of 1673, art. 13, p. 105; Pothier de Change, n. 148, 152.

[2] Pothier de Change, n. 148 to 151.

[3] Pothier de Change, n. 153.

[4] Code de Comm. art. 164 to 168; Sautayra, sur Code de Comm. art. 164 to 168, p. 111 to 113; Pardessus, Droit Comm. Tom. 2, art. 429 to 437. — These Articles are as follows; "The Holder of a Bill of Exchange, protested for non-payment, may pursue his remedies against the sureties,

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applies to Guarantors of Bills, who, upon the face of the Bill, and ordinarily, make themselves liable, and sign a declaration of guaranty, at the foot or bottom

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either individually against the Drawer and each of the Indorsers, or jointly against the Indorsers and Drawer. The same right exists for each of the Indorsers, in regard to the Drawer, and all the preceding Indorsers. If the Holder would pursue his remedy individually against his immediate Indorser, or the Drawer, in case the Bill came directly from him, he must give him notice of the protest, and, in default of reimbursement, commence his suit against him within fifteen days from the date of the protest, if the said Indorser or Drawer reside within the distance of five myriameters (ten leagues, equal to about twenty-five miles). This period of delay with respect to the Indorser or Drawer, domiciled at a greater distance than five myriameters from the place, where the Bill of Exchange was payable, shall be increased one day for every two and a half myriameters exceeding the five before mentioned. In case of the protest of Bills of Exchange drawn in France, and payable out of the continental territory of France in Europe, the remedy against the Drawers and Indorsers, residing in France, must be pursued within the following periods, to wit; Two months for Bills payable in Corsica, in the island of Elba, or of Capraja, in England, and in the countries bordering on France. Four months for those payable in the other states of Europe. Six months for those payable in the ports of the Levant, and on the northern coasts of Africa. A year for those payable on the western coasts of Africa, as far as, and including, the Cape of Good Hope, and in the West Indies. Two years for those payable in the East Indies. These periods of delay are allowed in the same proportions, for pursuing the remedy against the Drawers and Indorsers residing in the French possessions situated out of Europe. The above-mentioned delays, of six months, a year, and two years, are allowed to be doubled in time of maritime war. If the Holder pursue his remedy against the Indorsers and the Drawer jointly, he is allowed, with respect to each of them, the period of delay determined by the preceding articles. Each of the Indorsers has the right of pursuing the same remedy, either individually or jointly, within the same periods of delay. In respect to them, the time allowed begins to run from the day after the service of judicial citation. After the expiration of the above-mentioned periods of delay, for the presentment of a Bill of Exchange at sight, or at one or more days, or months, or usances, after sight, for the protest for non-payment, for the action against the sureties, the Holder of a Bill of Exchange is barred of all rights against the Indorsers." Code de Comm. art. 164 to 168. See also Chitty on Bills, ch 10, p. 507, 508 (8th edit. 1833); Ante, § 296.

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of the Bill, which is called, upon that account, *Garantie par un aval.*[1]

§ 395. The same usage, as to guaranty of Bills, exists in other parts of the continent of Europe, under the same name; and it may be by a writing, either at the foot or bottom of the Bill, or on a separate paper; the obligations of which, however, are somewhat different; for, when the guaranty is at the foot of the Bill, the Holder is entitled, against the Guarantor, to the same right to the summary remedy on Bills, or *Processus Cambialis*, which Holders have *jure cambiali.* But, if written on a separate paper, then the Holder is entitled only to the common action upon a contract against the Guarantor.[2] Heineccius, on this subject, says; *Sunt et fidejussiones quædam, cambiis quodam modo similes, et quæ plerumque cambio, tamquam obligationi principali, accedunt. Id vero fit dupliciter. Aut enim quis fidejubet separatim, tradito instrumento fidejussionis, et tunc juri cambiali adversus fidejussorem non est locus; aut in ipsis litteris cambialibus fidejussio latitat, et tunc fidejussor convenitur processu cambiali. Vocari hæc fidejussio solet Avallum, idque fit sola subscriptione litterarum cambialium, ab uno conscriptarum; tunc enim primus est debitor; reliqui pro fidejussoribus habentur. Multum ergo interest inter avallum et obligationem correalem, quæ potissimum in cambiis propriis locum habet, quaque tenentur, qui se in solidum in cambio obligarunt. Fidejussor enim, si debitor principalis solvendo est, tantum in sub-*

[1] See Ante, § 372, 393; Post, § 455 to 459; Pardessus, Droit Comm. Tom. 2, art. 394 to 398; Pothier de Change, n. 50, Savary, Le Parfait Négociant, Tom. 1, Pt. 3, Liv. 1, ch. 14, § 1, 30, 31, 38, p. 847, 851, 853.

[2] Post, § 455 to 459.

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sidium; Correus in solidum principaliter tenetur, sive alter Correus solvendo sit, sive non sit, quamvis uno solvente alter liberetur. Si singulari instrumento quis fidejusset, is tantum ex jure communi tenetur, adeoque ordinario tantum processui locus est. Sin in ipso cambio facta est fidejussio, is, qui avallo se obstrinxit, jure cambiali conveniri potest. Perinde vero est, sive quis pro trassante, sive pro remittente, sive pro indossante, sive pro acceptante, denique fidejubeat. Omnibus enim obligationibus fidejussionem securitatis caussa accedere posse, ex ipso jure communi satis notum est. Quoties pro indossante fit fidejussio, opus tantum est subscriptione fidejussoris, adeoque et tunc fit Avallum.[1]

§ 396. Hitherto we have spoken of cases, where there has been an acceptance and non-payment by the original Drawee of the Bill. But, in cases, where there has been an acceptance *supra protest*, the like demand of payment must be made of the original Drawee at the maturity of the Bill, and the like protest and notice of the dishonor by non-payment, be given to the Acceptor *supra protest*, in like manner, and under the like circumstances, as they are by law required to be given to the Drawer or Indorsers; otherwise, the Acceptor, *supra protest*, will be discharged.[2] And, where, upon such protest and notice, the Acceptor *supra protest* pays the Bill, he should, according to the custom of merchants, declare, before a notary, that he does so pay it, *supra protest;* and he should give notice, accordingly, to those parties on

[1] Heinecc. de Camb. cap. 3, § 26 to 29; Id. cap. 6, § 10.

[2] Ante, § 123 to 126, 255, 261, 363; Chitty on Bills, ch. 8, p. 381, 382 (8th edit. 1833); Id. ch. 10, p. 542 to 544; Williams *v.* Germaine, 7 Barn. & Cressw. 468; Hoare *v.* Cazenove, 16 East, R. 391; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 424, 425 (5th edit.).

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the Bill, for whose honor he accepted it.[1] In such a case, the Acceptor *supra protest* will be entitled to recourse to, and reimbursement from, the particular parties, for whom he has accepted and paid the Bill.[2] If the Acceptor *supra protest* refuses to pay the Bill, then the Holder should cause it again to be protested for such non-payment, and due notice thereof given to the parties interested, as in other cases.[3] In general, the French and the foreign law agree with ours in these particulars, as to the proceedings of the Holder and the Acceptor, in cases of acceptance *supra protest*.[4] But Pothier thinks a protest by the Acceptor *supra protest*, upon payment of the Bill, is unnecessary and useless.[5]

§ 397. Having thus considered the duties of the Holder upon the presentment of a Bill for payment, and the dishonor thereof by non-payment by the Acceptor, and also by the Acceptor *supra protest*, let us now consider the rights of the Holder, supposing, that he has entitled himself, by a due course of proceedings, to a recourse against the other parties to the Bill. The Holder, under such circumstances, is entitled, by our law, to a full reimbursement and recompense of all the damages, sustained by him by reason of the dishonor, against all the other parties to the Bill, according to

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[1] Chitty on Bills, ch. 8, p. 382 (8th edit. 1833); Id. ch. 10, p. 342 to 344; Ante, § 124, 256, 257, 261; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 424, 425 (5th edit.).

[2] Ante, § 124, 125; Pardessus, Droit Comm. Tom. 2, art. 441.

[3] Ibid.

[4] Pothier de Change, n. 113, 114, 170, 171; Jousse, sur l'Ord. 1673, art. 3, p. 73 to 75; Code de Comm. art. 126 to 128, 158, 159; Pardessus, Droit Comm. Tom. 2, art 405 to 408; Heinecc. de Camb. cap. 6, § 9, and note.

[5] Pothier de Change, n. 114.

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their respective liabilities, as Acceptors, or Drawers, or Indorsers, or Guarantors, of the Bill.[1] We say, according to their respective liabilities, which is, of course (as we have seen), to be ascertained by the law of the place, or country, where their respective contracts are made, and by which they are to be expounded and governed.[2] The Acceptor is liable, according to the law of the place or country of acceptance; the Drawer, according to that of the place or country, where the Bill is drawn; the Indorsers and Guarantors, by the law of the place or country, where the indorsements or guaranties, respectively, were made or entered into.[3] So that the parties do not, in all cases, incur the same, or an equal responsibility; for the Drawer and Indorsers of foreign Bills are ordinarily liable for damages, to a far greater extent than the Acceptor.

§ 398. In respect to the Acceptor, he is not, upon non-payment of the Bill, ordinarily, liable to the Holder for any thing more than the principal sum, and the expenses of the protest, and interest thereon from the time of the maturity of the Bill, and not liable for reëxchange.[4] But, if the Acceptor has expressly or impliedly agreed, with the Drawer, or with any Indorser, for a valuable consideration, to pay the Bill at

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[1] 3 Kent, Comm. Lect. 44, p. 115, 116 (4th edit.).

[2] Ante, § 164, 176, 177, and note, 285, 321, 391; Chitty on Bills, Part 2, ch. 6, p. 661 (8th edit. 1833).

[3] Ibid.

[4] Chitty on Bills, part 2, ch. 6, p. 661 to 666, 668, 669 (8th edit. 1833); Woolsley *v.* De Crawford, 2 Camp. R. 445; Napier *v.* Schneider, 12 East, R. 420. But Mr. Bayley thinks he ought to be held liable, where he has effects. Bayley on Bills, ch. 9, p. 353, and note (5th edit. 1830); Id. ch. 10, p. 456, note 85; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 407 (5th edit.).

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its maturity, and has failed so to do, and the Drawer or Indorser has been compelled to take up the Bill, and pay damages, and other expenses necessarily incurred thereby, he may, perhaps, be compellable fully to indemnify the Drawer or Indorser for all the damages and expenses, so paid by him on account of the breach of his contract.[1]

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[1] Riggs *v.* Lindsay, 7 Cranch, R. 500. — Mr. Bayley uses language upon this point, which shows, that, under such circumstances, he thought the Acceptor bound to pay the reëxchange. He says; "It has been said, that the Acceptor is not liable for reëxchange, and that his contract cannot be carried further than to pay the sum specified in the Bill, together with legal interest, where interest is due; but, if, by his breach of contract, the expense of reëxchange be actually incurred, ought he not to pay it?" Bayley on Bills, ch. 9, p. 353 (5th edit. 1830); Id. ch. 10, p. 456, note (85,) where he adds; "And it seems reasonable, that he should be liable to all parties, where he has effects, and to all excepting the Drawer, where he has not." Id. ch. 10, p. 456, note. In Francis *v.* Rucker, Ambler, R. 672, Lord Camden allowed the Drawer of a Bill, which had been drawn in pursuance of orders of the Acceptors, to prove his debt, including reëxchange against the Acceptors, who had become bankrupt. The same point was decided in Ex parte Hoffman, 1 Cook's Bank. Law, 173; S. C. cited 1 Deacon, Bank. Law, ch. 9, § 15, p. 263. See also Ex parte Moore, 2 Bro. Ch. R. 597. Pothier goes farther, and holds, that, in all cases, the Acceptor ought to pay to the Holder, or proprietor of the Bill, not only the principal sum, but interest, the expenses of the protest, and also the reëxchange; in like manner as the Drawer is bound to pay the like amounts, as an incident to his contract created by the acceptance. Pothier de Change, n. 115 to 117. Jousse positively affirms this doctrine, and, in so doing, he follows the doctrine of Savary. He says; "Lorsque celui sur qui la lettre est tirée était débiteur du tireur au temps du Protêt, ce dernier a son recours contre lui pour tous les frais de Protêt, voyage et autres, qu'il est obligé de payer; pourvu néanmoins que celui sur qui la lettre est tirée eût mandé auparavant au tireur qu'il pouvait tirer sur lui, ou que le tireur lui eût remis provision à cet effet avant l'échéance de la lettre, ou que ce dernier l'eût acceptée; mais ce recours cesse d'avoir lieu si le tireur avait tiré sa lettre sur l'autre, quoique son débiteur, sans lui en avoir auparavant donné l'ordre. C'est ainsi que le pense Savary en son Parfait Négociant, partie 3, livre 1, ch. 16, page 859, 886. La raison qu'en donne cet Auteur, c'est que ce serait donner occasion à des tromperies qui ruineraient entièrement le commerce, parce qu'un Banquier ou Négociant à qui il est dû de l'argent pour prêt, ou vente de marchandises par un autre Négociant, n'a pas droit

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§ 399. In respect to the Drawers and Indorsers of Bills of Exchange, which have been dishonored, either by non-acceptance, or by non-payment, they are ordinarily liable to the Holder for the principal sum, and interest, and the damages, and expenses, incurred by the dishonor.[1] These damages may,

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de tirer une lettre de change sur ce dernier sans son consentement; mais s'il veut être payé de sa dette, il a les voies ordinaires de se pourvoir en justice, pour obtenir une Sentence de condamnation contre son débiteur, en vertu de laquelle il le contraindra au paiement. Ce sentiment de Savary n'est pas sans difficulté." Jousse, Comm. sur l'Ord. 1673, tit. 6, art. 4, p. 140, 141. Mr. Bell says; "But it has been questioned, Whether the Acceptor's estate is liable to a claim for reëxchange. The foreign jurists seem to hold the claim good against the Acceptor. It is not a demand, which naturally arises against the Acceptor by the *porteur*, for his proper recourse is against the Drawer. But, as the Drawer will, on answering that demand, have his claim against the Acceptor, provided he have funds in his hands, for indemnification, it does not appear, that any bar would lie to a claim by the *porteur* against the Acceptor's estate, in the case of the Drawer becoming bankrupt; for it seems to be implied, in the nature of the Acceptor's engagement to this peculiar sort of instrument, that he is tacitly bound for the common mercantile damage arising from its dishonor. In England, however, there are cases denying to the Bill-holder a claim for reëxchange against the Acceptor, and restraining the remedy to a claim against the Drawer. And these will certainly deserve very great attention, when such a question shall arise in Scotland." 1 Bell, Comm. B. 3, ch. 2, § 4, p. 407 (5th edit.). But see Napier *v.* Schneider, 12 East, R. 420, where an opinion seems to have been incidentally suggested against the allowance of reëxchange in case of an Acceptor. To the same effect is Woolsley *v.* De Crawford, 2 Camp. R. 440.

[1] Chitty on Bills, ch. 9, p. 433 (8th edit. 1833); Id. ch. 10, p. 532; Id. Pt. 2, ch. 8, p. 668; Bayley on Bills, ch. 9, p. 352, 353 (5th edit. 1830); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 404 to 407 (5th edit.); 3 Kent, Comm. Lect. 44, p. 115 to 120 (4th edit.).—Mr. Bayley says; "The only incidental expense, in the case of the person, who made the presentment, is the charge of the noting and protest; in the case of any antecedent party, that of the return of the Bill or note must be added. Upon a foreign Bill, the reëxchange forms a part of the expense of the return; and let the Bill be returned through ever so many hands, the Drawer is liable for the reëxchange upon each return. And the Drawer is liable for the reëxchange, and every other expense arising from the non-acceptance, or non-payment, notwithstanding the dishonor of the Bill was expressly ordered by the

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according to the laws of different countries, vary in their amount, and in the mode of ascertaining them. But the same general principles of the Law Merchant pervade the systems of most, if not of all, commercial nations in modern times, founded upon a large and comprehensive equity. The principal sum is, of course, ascertained by its true or par value at the place of the acceptance or payment. The damages, in the absence of any positive or customary rule, are ascertained by the rate of reëxchange between the country, where the Bill is accepted, and the country, where the Bill is drawn, in the case of the Drawer; and between the former and the country, where the Bill is indorsed, in the case of the Indorser. The interest is allowed according to the law of the place, where the money is due and ought to be paid; and the expenses are the ordinary charges of protesting the Bill, and other incidental expenditures.[1] If the

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country, on which it was drawn." Bayley on Bills, ch. 9, p. 352, 353 (5th edit. 1830); Bank of U. States *v.* U. States, 2 How. Sup. Ct. R. 711.

[1] Mr. Chitty, speaking upon this subject, says; "The rate of interest allowed in this country, is £5 per cent. per annum, as well in courts of equity as at law. But, when a higher rate of interest is allowed in a foreign country, it may be recovered here, and in India it is not always limited to £12 per cent. In an action against the Drawer of a foreign Bill of Exchange, dishonored here by non-acceptance, where the plaintiff is allowed a per centage, as of £10 per cent. in name of damages, he is only entitled to interest from the day the Bill ought to have been paid; but, where there is no such allowance for damages, the plaintiff is entitled to interest from the day the Bill was dishonored for non-acceptance. And, in a late case, upon a Bill drawn in Bermuda, on England, which ought to have been paid in England, the plaintiff recovered 7½ interest, being the rate of interest at Bermuda. We have before suggested, that it may be expedient to limit the amount of interest, as well as reëxchange, and expenses, by the express terms of the Bill. The only expense, which the Holder of a Bill, at the time it became due, can be put to by the dishonor of it, is, that of the charge for noting and protesting; and he cannot de-

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Bill has been, in part, paid by the Acceptor, the reëx-

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mand more, of any of the parties to the Bill, than a satisfaction for that expense. But a party, who has been obliged to pay the Holder, in consequence of the Acceptor's refusal, frequently is put to other expenses by the return of the Bill, such as reëxchange, postage, commission, and provision. An Indorser of a Bill, having had an action brought against him by the Indorsee, is not entitled to recover from the Acceptor the cost incurred in such action, unless there was an express and collateral contract of indemnity. Reëxchange is the expense incurred by the Bill being dishonored in a foreign country, in which it was payable, and returned to the country, in which it was made or indorsed, and there taken up; the amount of it depends on the course of the exchange between the countries, through which the Bill has been negotiated. It is not necessary for the plaintiff to show, that he has paid the reëxchange; it suffices, if he were liable to pay it; but, if the jury find, that there was not, at the time, any course of reëxchange between the two foreign places, then no reëxchange is recoverable. It appears not to be decided, whether any exchange or reëxchange can be allowed between this and an enemy's country. It is said, that the relative abundance or scarcity of money, in different countries, is what forms the exchange between those countries. In the drawing of Bills on a foreign country, the value of money in that country is the first thing to be inquired into; thus, for instance, supposing 71,000 livres tournois are worth £603. 19*s*. 10*d*. English money sterling, and that an English merchant has sold goods of the value of £603. 19*s*. 10*d*. to a Frenchman, who wishes to pay him for the same by a Bill of Exchange payable in France, the Bill must, of course, be drawn for 71,000 livres tournois; if, at the time the Bill is due, the exchange is in favor of France, and, consequently, the value of 71,000 livres tournois exceeds that of £603. 19*s*. 10*d*. English money, and the Bill be returned to this country, and the Drawer, or an Indorser, be called on to take it up, he may (as in the case of Mellish *v*. Simeon) be obliged to pay £309. 4*s*. 5*d*. more than the amount of the Bill, which sum forms what is called the reëxchange, and is the difference between the draft and re-draft. It appears, that the Drawer of a Bill is liable for the whole amount of the reëxchange, occasioned by the circuitous mode of returning the Bill through the various countries, in which it has been negotiated, as much as for that occasioned by a direct return, although payment of the Bill were expressly prohibited by the laws of the country, on which it was drawn. But the Acceptor is not liable for reëxchange; for his contract cannot be carried further than to pay the sum specified in the Bill, together with legal interest, where interest is due. We have before suggested the expediency of limiting the amount of reëxchange either on the Bill or indorsement. Where A. deposited a sum of money at the banking-house of B. in Paris, for which B. gave him his note payable in Paris, or, at the choice of the bearer, at the Union

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change, and interest, and damages, are to be deducted, *pro tanto*.[1]

Bank in Dover, or at B.'s usual residence in London, according to the course of exchange upon Paris, and, after this note was given, the direct course of exchange between London and Paris ceased altogether, having been, previously to its total cessation, extremely low, and the note was, at a subsequent period, presented for acceptance and payment at the residence of B. in London, at which time there was a circuitous course of exchange on Paris, by way of Hamburg, it was holden, that A. was entitled to recover on the note according to such circuitous course of exchange upon Paris, at the time, when the note was presented. Between this country and India, it is not customary to make a distinct charge of re-exchange; but it has been the constant course, with respect to Bills for payment of pagodas in the East Indies, and returned protested, to allow at the rate of 10*s*. per pagoda, and 5 per cent. after the expiration of thirty days from the notice to the defendant of the Bill's dishonor, which includes interest, exchange, and all other charges; and, by an arrangement entered into, in 1822, between certain persons connected with the East India trade, 25 per cent. appears to have been considered a proper sum. But that arrangement could, of course, only bind the parties to it." Chitty on Bills, Pt. 2, ch. 6, p. 665 to 668 (8th edit. 1833). The commissions, also, of an agent, to whom the Bill has been indorsed, to obtain payment, is sometimes allowed. It is called, in the French Law, *Provision*. With respect to *provision*, it is said by Pothier, that it is usual for the Holder of a Bill to allow his agent, to whom he indorses it for the purpose of receiving payment for him, a certain sum of money called "provision," at the rate of so much per cent., to recompense him, not only for his trouble, but also, if such agent be a banker, for the risk he runs of losing the money, which he is obliged to deposit with his correspondents in different places, for the purpose of repaying his principal the amount of the money received on the Bills. And it is said, that one half per cent. is not an unreasonable allowance, whether the agent be a banker or not. The charges above enumerated are the only legal ones; nor can any extraordinary loss, not necessarily incidental, which the Holder, or other parties, may be put to by travelling, or by some advantageous engagement being delayed, or defeated, by the want of punctual payment, be in any case legally demanded. But, where it is necessary, or more convenient, for the Holder to send notice of dishonor by other conveyances than the post, he may send a special messenger, and he may recover the reasonable expenses incurred by that mode of giving notice. Chitty on Bills, Pt. 2, ch. 6, p. 670 (8th edit. 1833).

[1] Chitty on Bills, Pt. 2, ch. 6, p. 669, 670. Mr. Chitty here says; "In a late case, a question arose upon the subject of damages, as to the sum to be allowed, as the damages upon the dishonor and protest of a Bill. It appeared in evidence, that, upon the dishonor of a Bill drawn in

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§ 400. By Reëxchange, in the commercial sense here alluded to, is meant, the amount, for which a Bill can be purchased in the country, where the acceptance is made, drawn upon the Drawer or Indorser in the country, where he resides, which will give the Holder of the original Bill a sum exactly equal to the amount of that Bill at the time, when it ought to be paid, or, when he is able to draw the reëxchange Bill, together with his necessary expenses, and interest; for that is precisely the sum, which the Holder is entitled to receive, and which will indemnify him for its non-payment.[1] Now, this rate of Reëxchange, exactly like

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Demerara, upon England, and sent back dishonored and protested, £25 per cent. was considered to be the amount of the loss; and the plaintiff accordingly claimed damages at that rate, upon the whole amount of the Bill of £500. It appeared, however, upon further examination, that the Bill had not been sent back protested for the whole amount, and that the usual practice, in such cases, was (to which some of the special jury pledged their own knowledge), to retain the dishonored Bill in this country, and send a protest to Demerara, where, upon arrival of the protest, security was demanded of, and given by, the Drawers, and that the whole of the loss from the dishonor was not incurred, unless the Bill, in the result, was not paid. It appearing, in the present instance, that the Bill had been retained in this country until £400 had been paid, and, that, ultimately, it had been sent back protested and dishonored to the amount of £100 only, no more than £25 damages were allowed in that respect."

[1] 3 Kent, Comm. Lect. 44, p. 115, 116 (4th edit.). — Mr. Chancellor Kent, in this place, says; "The engagement of the Drawer and Indorser of every Bill is, that it shall be paid at the proper time and place; and, if it be not, the Holder is entitled to indemnity for the loss arising from this breach of contract. The general Law Merchant of Europe authorizes the Holder of a protested Bill immediately to re-draw from the place, where the Bill was payable, on the Drawer or Indorser, in order to reimburse himself for the principal of the Bill protested, the contingent expenses attending it, and the new exchange, which he pays. His indemnity requires him to draw for such an amount, as will make good the face of the Bill, together with interest from the time it ought to have been paid, and the necessary charges of protest, postage, and broker's commission, and the current rate of exchange at the place, where the Bill was to be demanded or payable, on the place, where it was drawn or negotiated. The law

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the rate of the original Bill of Exchange, varies in different countries, and at different times in the same country, and, therefore, it becomes a variable quantity.[1]

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does not insist upon an actual re-drawing, but it enables the Holder to recover what would be the price of another new Bill, at the place, where the Bill was dishonored, or the loss on the reëxchange; and this it does, by giving him the face of the protested Bill, with interest, and the necessary expenses, including the amount, or price, of the reëxchange. But the Indorser of a Bill is not entitled to recover of the Drawer the damages incurred by the non-acceptance of the Bill, unless he has paid them, or is liable to pay them. Nor is the Acceptor liable for the extra charges on the reëxchange. He is only chargeable for the sum specified in the Bill, with interest according to the rate established at the place of payment. The claim for the reëxchange is against the Drawer, who undertakes to indemnify the Holder, if the Bill be not paid." S. P. Kingston v. Wilson, 4 Wash. Cir. R. 310, 316.

[1] Pothier (De Change, n. 64) gives the following account of reëxchange; "Pour savoir ce que c'est que ce rechange, il faut observer que celui, à qui la lettre a été fournie, peut, en cas de refus de paiement de la lettre, après avoir fait son protêt, prendre d'un banquier du lieu, où la lettre était payable, une somme d'argent pareille à celle portée par la lettre, qui n'a pas été acquittée, et donner à ce banquier, en échange de l'argent, qu'il reçoit de lui, une lettre de change de cette somme tirée à vue sur celui, qui lui avait fourni la sienne, ou sur quelque autre personne. Si, pour avoir cet argent en échange de cette lettre, il a payé à ce banquier un droit de change, parce que l'argent alors gagnait sur les lettres, ce droit de change, qu'il a payé à ce banquier pour avoir l'argent dont il avait besoin, est ce qu'on appelle le rechange, dont il doit être remboursé par celui, qui lui a fourni la lettre, dont on lui a refusé le paiement. Celui, à qui la lettre a été fournie, pour pouvoir se faire rembourser de ce rechange, est tenu de justifier, par des pièces valables, qu'il a pris de l'argent dans le lieu auquel la lettre, qui lui a été fournie, était tirée. L'intérêt de ce rechange ne lui est dû que du jour de la demande." See also Pardessus, Droit Comm. Tom. 2, art. 437 to 440; Jousse, Comm. sur l'Ord. 1673, tit. 6, art. 4, p. 139 to 141; Code de Comm. art. 177, 178; Heineccius de Camb. cap. 4, § 45. Heineccius says; "Per cambium intelligitur ipsa summa, quæ solvenda erat, nec tamen soluta est. Recambium (Ricambio), quod vocant den Wieder-Rück-Gegen-Wechsel, in eo consistit, quod præsentans, non acceptatis litteris cambialibus, a tertio mutuam sumit pecuniam, et pro ea litteras cambiales trassat ad trassantem. Quum vero id sine impendiis fieri nequeat, damnum illud omne repetitur sub nomine recambii." See also 1 Bell, Comm. B. 3, ch. 2, § 4, p. 404 to 406 (5th edit.).

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§ 401. The subject is exceedingly well illustrated in a case, where a Bill was drawn in London upon Lisbon in Portugal, and was there dishonored by non-payment, and the Holder afterwards brought a suit against an Indorser, who had indorsed it in London, and had received due notice of the dishonor; and the question, for the consideration of the Court, was, whether any, and what rate of damages ought to be allowed to the Holder for reëxchange? Upon that occasion, the following clear exposition of the subject was stated by the counsel for the plaintiff; "Then the nature of the transaction, which gives rise to the question of Exchange and Reëxchange, is this; A merchant in London draws on his debtor in Lisbon a Bill in favor of another, for so much, in the currency of Portugal, for which he receives its corresponding value, at the time, in English currency; and that corresponding value fluctuates, from time to time, according to the greater or lesser demand there may be, in the London market, for Bills on Lisbon, and the facility of obtaining them. The difference of that value constitutes the rate of exchange on Lisbon. The like circumstances and considerations take place at Lisbon, and constitute, in like manner, the rate of exchange on London. When the Holder, therefore, of a London Bill, drawn on Lisbon, is refused payment of it in Lisbon, the actual loss, which he sustains, is not the identical sum, which he gave for the Bill in London, but the amount of its contents, if paid at Lisbon, where it was due, and the sum, which it will cost him to replace that amount upon the spot, by a Bill upon London, which he is entitled to draw upon the persons there, who are liable to him upon the former Bill. That cost, whatever it may be, con-

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stitutes his actual loss, and the charge for reëxchange. And it is quite immaterial, whether, or not, he in fact re-draws such a Bill on London, and raises the money upon it in the Lisbon market. His loss, by the dishonor of the London Bill, is exactly the same, and cannot depend on the circumstance, whether he repay himself immediately by re-drawing for the amount of the former Bill, with the addition of the charges upon it, including the amount of the reëxchange, if unfavorable to this country at the time; or, whether he wait till a future settlement of accounts with the party, who is liable to him on the first Bill here. But that party is, at all events, liable to him for the difference; for, as soon as the Bill was dishonored, the Holder was entitled to re-draw. That, therefore, is the period to look to. It ought not to depend on the rise or fall of the Bill market, or exchange afterwards; for, as he could not charge the increased difference, by his own delay in waiting till the exchange grew more unfavorable to England, before he re-drew; so, neither could the party here fairly insist on having the advantage, if the exchange happened to be more favorable, when the Bill was actually drawn. Where reëxchange has been recovered on the dishonor of a foreign Bill, it has not been usual to prove, that, in fact, another Bill was re-drawn. If the quantum of damage is not to be ascertained by the existing rate of exchange at the time of the dishonor, the rule will become extremely complex for settling what is to be paid on the Bill between different Indorsees, each of whom takes it at the value of the exchange, when he purchased it. If, then, the amount of the reëxchange between the two countries, at the time of the dishonor, be the true measure of damage, which the Holder at Lisbon was

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entitled to receive from his Indorsee in England; and that reëxchange consists of the amount of a Bill on London, which would put the Holder of the dishonored Bill in the same situation, as if he had received the contents of it, when due, in Lisbon; it cannot make any difference, whether the exchange between Lisbon and London, at the time, were carried on directly, or through the medium of other places. The more circuitous and difficult it was, the greater would be the loss of the Holder by the dishonor."[1]

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[1] De Tastet *v.* Baring, 11 East, R. 265, 269 to 271. — The doctrine may be farther practically illustrated by another case, which has actually passed into judgment. It was as follows; On the 9th of July, 1793, two Bills of Exchange were drawn by Simeon in London, on Boyd & Co. in Paris, one for 35,000, the other for 36,000 livres tournois, amounting together to £603 19*s.* 10*d.* sterling, according to the rate of exchange between London and Paris of 6½*d.* for the French crown of three livres, and payable to the order of Mellish & Co., who indorsed them in London to Feysset & Co. at Amsterdam. Feysset & Co. indorsed them to Meryolet at Amsterdam, and Meryolet to Androine at Paris. When they were presented for acceptance, Boyd & Co. refused to accept them, but promised, that they should be paid, when they became due. In the mean time, the French Convention passed a decree, prohibiting the payment of any Bills drawn in any of the countries at war with France, and, of course, the Bills in question were not paid. In consequence of this, they were sent back by Androine to Meryolet at Amsterdam, protested for non-acceptance and non-payment, and, at the same time, Androine drew another Bill on Meryolet for the amount of them, at the rate of 18½ groots for the French crown of three livres, for the reëxchange between Paris and Amsterdam, together with the ordinary charges, which Bill Meryolet paid, and was reimbursed by Feysset & Co., by compromise between them, at the rate of 18 groots for the French crown, amounting to £905 13*s.* 9*d.* sterling, for which sum, together with charges at Amsterdam, and the reëxchange between that place and London, making in the whole £913 4*s.* 3*d.* sterling, Feysset & Co. drew a Bill on Mellish & Co., which they paid, and took back the former Bills, on which they brought the present action against Simeon, the Drawer, and recovered a verdict for the whole sum of £913 4*s.* 3*d.* And now Le Blanc, Serjeant, moved for a new trial on the ground, that the defendant was not liable for the loss on the reëxchange. It is true, he said, that the Drawer of a Bill of Exchange undertakes, by the

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§ 402. In respect to reëxchange, if there be a direct commercial intercourse between the country, where the acceptance and payment are to be made, and the country, where the Drawer lives, the rate of that reëxchange is the proper amount to be allowed to the Holder.[1] But if, owing to political events, or com-

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act of drawing it, that the Drawee shall be found in the place, where he is described to be, and shall have effects in his hands, but the undertaking does not extend to the case of a prohibition to accept or pay the Bill, imposed by the law of a foreign country, in which the Drawee resides. When a person takes a Bill, circumstanced as this was, he must submit to the laws of that country. There was no default in the Drawer; he therefore cannot, in justice, be liable for more than the sum he originally received for the Bills, with interest, and the expenses of protesting them. Lord Chief Justice Eyre. — I see no distinction between this case and the common one of a Bill being refused payment. The Drawer must pay for all the consequences of the non-payment, and the loss on the reëxchange seems to me to be part of the damages arising from the contract not being performed. I thought, indeed, at the trial, that it might be a question, Whether the Drawer were liable for the reëxchange occasioned by the circuitous mode of returning the Bills through Amsterdam; but the jury decided it. Buller, J. — What is the engagement of the Drawer of a Bill of Exchange? He undertakes, that the Bill shall be paid, when due. If it be not paid, it is not necessary for the Holder to inquire, for what reason it is not paid, and if the Holder has been guilty of no default, the Drawer is answerable for the amount of the Bill; and, if he is liable for the Bill, he must also be liable for the reëxchange, which is a consequence of the Bill not being paid. Heath, J., of the same opinion. He, who undertakes for the act of another, undertakes that it shall be done at all events. Mellish *v.* Simeon, 2 H. Black. R. 378, 379.

[1] Jousse. Comm. sur l'Ord. 1673, tit. 6, art. 4, p. 139, 140. — Jousse, on this occasion, said; "Si le porteur de la lettre protestée, qui a été obligé de prendre de l'argent, au lieu de fournir une lettre de change sur celui, dont la lettre a été protestée, ou dans le même lieu, en fournissait sur une autre place, où le change fut plus considérable, que celui de l'endroit, d'où est venue la lettre protestée, il ne paraît pas que le porteur de la lettre protestée pût exiger le rechange sur le pied du second change; car c'est une maxime, prise des premières règles de l'équité, que toutes les fois que le porteur d'une lettre de change protestée peut prendre son dédommagement à moins de perte et de dommage pour le tireur de cette lettre d'une façon que d'une autre, ce dernier n'est obligé de rembourser le rechange que de la façon, qui produit le moins de dommage pour lui. D'où il suit,

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mercial embarrassments, or otherwise, there be no such direct intercourse, then the Drawer is bound to pay the whole amount of the reëxchange occasioned by a circuitous mode of transmitting and negotiating the Bill in the various countries, through which it must pass, or be negotiated, in order to reach its proper destination, or to obtain the sum due to the Holder. In this way, the Drawer may, under peculiar circumstances, be burdened with successive reëxchanges, if there arises a necessity of drawing different Bills in the different countries, through which the negotiation is to be accomplished.[1] Such events are rare, and, in the present state of the commerce of the world, can scarcely occur, but in cases of war, or sudden revolutions.

§ 403. Nay, as it should seem, if there have been successive indorsements of the original dishonored Bill, in different countries, the Holder may draw, by way of reëxchange, upon the last Indorser, and he upon the next, and so each Indorser upon the antecedent party, and thus the Drawer be compelled to pay all these accumulated reëxchanges upon the demand of the last Indorser, or party, who has paid them on the

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qui toutes les fois, qu'il y a un commerce ordinaire et réglé entre la place où la lettre de change devait être payée, et le lieu d'où elle est tirée, v. g. entre Paris et Lyon, il y a moins de perte pour le tireur que le rechange soit pris à Paris pour Lyon, que s'il était pris pour une autre Ville, comme pour Londres, ou Amsterdam; et par conséquent le tireur d'une lettre de change tirée de Lyon, payable et protestée à Paris, ne doit que le rechange de Paris à Lyon, et ce serait une injustice de l'obliger à le rembourser d'une autre manière."

[1] Ante, § 399, 400, 401, and note; Chitty on Bills. Pt. 2, ch. 6, p. 668 (8th edit. 1833); Id. ch. 9, p. 438; Id. ch. 10, p 532; Mellish v. Simeon, 2 H. Black. R. 378; Pollard v. Herries, 3 Bos. & Pull. 335; Bayley on Bills, ch. 9, p. 354, 355 (5th edit. 1830); 1 Bell, Comm. B. 3, ch. 2, § 4, p. 405, 406 (5th edit.).

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redraft upon himself.[1] Upon the same ground, it may be said, that each Indorser is liable to his immediate Indorsee, in the like manner; since every Indorser is, as to the subsequent parties, to be treated as a new Drawer. The same rule is laid down by Pardessus as the modern law of France.[2] But, in all these cases, the Holder, and so each antecedent Indorsee, as against the prior parties, can only avail himself of one satisfaction by reëxchange, and is not entitled to any accumulation of reëxchange against several and distinct Indorsers, or against the Drawer and an Indorser also.[3] But in no event is the Drawer, or any Indorser, bound to pay any reëxchange, or accumulated reëxchange, by circuitous negotiations through different countries, excepting when it is authorized and allowed by the law of the country, where the Bill was drawn, or where it was indorsed by the Indorser.[4]

§ 404. The old law of France provided, in like manner, for the reimbursement or indemnity of the Holder, in case of a dishonor of a Bill by non-payment, by entitling him to reëxchange, and interest, and postage, and commissions, and the expenses of protesting the Bill, as well as other incidental expenses.[5] But then, the Drawer was made liable only

[1] Mellish *v.* Simeon, 2 H. Black. R. 378; Chitty on Bills, Pt. 2, ch. 6, p. 666 to 668 (8th edit. 1833); Bayley on Bills, ch. 9, p. 352 to 354 (5th edit. 1830).

[2] Pardessus, Droit Comm. Tom. 2, art. 438, 445; Id. Tom. 5, art. 1498.

[3] Chitty on Bills, Pt. 2, ch. 6, p. 669 (8th edit. 1833); Pardessus, Droit Comm. Tom. 2, art. 439.

[4] Ante, § 400, 401, and note; Code de Comm. art. 179; Pardessus, Droit Comm. Tom. 2, art. 438, 445; Id. Tom. 5, art. 1498, 1499, 1500.

[5] Ante, § 400, 401, and note; Pothier de Change, n. 64; Jousse, Comm. sur l'Ord. 1673, art. 4 to 7, p. 139 to 144.

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for the reëxchange, in the place, where the payment ought to have been made, and not for that in other places, where the Bill had been negotiated, unless an express authority to negotiate it in other places was given by the Bill.[1] And, in like manner, the Indorsers were liable for such reëxchange, only in the places, where they had indorsed the Bill, or it had been negotiated, according to their order.[2]

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[1] Jousse, Comm. sur l'Ord. 1673, art. 5, 6, p. 141 to 143. — Jousse, after citing the Article, says, in his Commentary; "Ainsi quand même une lettre de change revenue à Protêt aurait été négociées dans plusieurs Villes du Royaume, ou même hors du Royaume, comme si une Lettre de change tirée de Paris sur Lyon avait été négociée à Bordeaux, à Amsterdam, etc. néanmoins le tireur ne sera tenu de payer que le rechange de Lyon à Paris, et non les changes et rechanges dûs pour les négociations faites dans les autres Villes; les autres rechanges seront dûs par les donneurs d'ordre, chacun en droit soi pour les ordres qu'ils auront donnés. Autrement ce serait une chose désavantageuse au commerce, si une simple lettre de change, qui aurait été négociée sans la participation du tireur, et pour le seul avantage du porteur, venant à être protestée, on pouvait obliger ce tireur à payer autant de rechanges qu'il se trouverait d'ordres sur sa lettre. C'est-à-dire, que si la lettre tirée de Paris sur Lyon a été négociée, v. g. de Paris à Bayonne, et ensuite de Bayonne à Amsterdam, et enfin d'Amsterdam à Lyon, le porteur de la lettre payable à Lyon, après le Protêt, n'aura son recours pour le paiement du contenu en la lettre, et pour le rechange, que contre le Négociant ou Banquier d'Amsterdam qui a passé l'ordre à son profit, celui d'Amsterdam contre celui de Bayonne qui lui a passé l'ordre, celui de Bayonne contre celui de Paris, et celui de Paris contre celui de Lyon qui est le tireur et qui lui a fourni la lettre. Ainsi soit que les changes soient plus hauts ou plus bas dans chacunes de ces Villes, néanmoins le tireur ne devra que le prix du rechange de Lyon à Paris." And, again; "Ainsi dans une lettre tirée de Paris sur Lyon, si le tireur donnait pouvoir par la lettre, ou par un écrit particulier d'en disposer, v. g. pour Amsterdam, et que cette lettre revînt à Protêt, ce tireur serait tenu envers celui à qui la lettre a été fournie, du rechange de Lyon à Amsterdam, et de celui d'Amsterdam à Paris, ce qui est une suite de la condition qui s'est faite entr'eux. Il en est de même du cas où le pouvoir de négocier est indéfini; car alors il sera dû autant de rechanges par le tireur, qu'il y a de lieux différents sur lesquels la lettre a été négociée."

[2] Ibid.

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§ 405. The modern law of France does not, in its main provisions, substantially differ from the old law. The Holder, upon the dishonor by non-payment, has an election, either to receive from the antecedent parties to the Bill the amount expressed therein, with interest from the protest for non-payment, and the expenses thereof; or, if he prefers it, the restitution of the sum to obtain the Bill of Exchange; or, if he prefers it, he has a right to redraw from the place, where the Bill is payable, upon the Drawer, or the Indorsers, another Bill of Exchange (Reëxchange, or, as it is usually called in the French Law, *Retraite*), for the amount of the principal sum of the protested Bill, and interest from the date of the protest, the expenses of the protest, and the other lawful expenses, such as commissions, or brokerage, or journeys, when requisite to obtain payment, and the necessary stamp duties, and postage; provided these expenses do not exceed what of right are demandable. The proof of these charges is established by an account (*un compte de retour*), which ought to be annexed to the Bill of reëxchange, and to contain the name of the person on whom the reëxchange is drawn, and it ought also to state what is the rate of exchange, at which the new Bill (the reëxchange) has been negotiated.[1] The

[1] Pardessus, Droit Comm. Tom. 2, art. 437; Code de Comm. art. 177 to 186; Locré, Esprit du Code de Comm. Tom. 1, art. 177 to 186, and Comment. p. 536 to 555. — I have followed in substance the text of Pardessus, a good summary of which is given in Chitty on Bills, ch. 10, p. 541 (8th edit. 1833). The articles of the Code of Commerce on this subject are as follows; "Reëxchange results from the act of redrawing. Redrawing is, when the Holder of a Bill protested draws another Bill on the Drawer, or one of the Indorsers, of the former Bill, to reimburse himself for the principal of the Bill protested, his expenses, and the new exchange, which he pays. Reëxchange is regulated, with respect to the

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reëxchange, as to the Drawer, is regulated by the rate of exchange at the place, where the Bill is payable, upon the place, where the Bill was drawn; and as to the Indorsers, by the rate at the place, where the Bill was payable, upon the place, where they respectively made their indorsements.[1]

§ 406. Heineccius lays down the general doctrine, that, upon the dishonor of the Bill by non-payment, the Holder is entitled to reëxchange, the charges of protest, interest, commissions, and brokerage, all of which are included under the general name of damages.

Drawer, by the current rate of exchange at the place, where the Bill was payable, on the place, whence it was drawn. It is regulated, with respect to the Indorsers, by the rate of exchange at the place, where the Bill has been remitted or negotiated by them, on the place, where the reimbursement is to be effected. The Bill redrawn is accompanied with the return account. The return account contains the amount of the Bill protested, the expenses of protest, and other lawful charges, such as banker's commission, brokerage, stamp duties, and postage of letters. It mentions the name of the person, on whom the Bill for reimbursement is drawn, and the rate of exchange, at which it is negotiated. It is certified by an exchange agent. In places, where there are no exchange agents, it is certified by two merchants. It is accompanied with the Bill of Exchange protested, the protest, or a certified copy of it. In case the Bill for reimbursement be drawn on one of the Indorsers, it is accompanied, besides, with a certificate, attesting the course of exchange, at the place, where the Bill protested was payable, on the place, whence it was drawn. There can be made only one return account on the same Bill of Exchange. This return account is reimbursed from Indorser to Indorser, and, finally, by the Drawer. The reëxchanges cannot be accumulated. Each Indorser, as well as the Drawer, is charged with only one. Interest on the principal of the Bill of Exchange, protested for non-payment, is due from the date of the protest. Interest on the expenses of protest, reëxchange, and other lawful charges, is due only from the day of judicial demand. No reexchange is due, if the return account be not accompanied with the certificates of an exchange agent, or of merchants, as prescribed in article 181." Code of Commerce, art. 177 to 186, in Rodman's Translation.

[1] Pardessus, Droit Comm. Tom. 2, art. 438; Code de Comm. art. 179; Locré, Esprit du Code de Comm. art. 179, Tom. 2, p. 538, 539; Pardessus, Droit Comm. Tom. 5, art. 1498 to 1500; Ante, § 176, 177, note, and § 321, note.

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Quum ergo, uti paullo ante diximus, rite interpositæ protestationis is effectus sit, ut jus protestantis conservet; consequens est, ut, ea facta, præsentans adversus eum, a quo cambium habet, regressum habeat ratione sortis, usurarum, damnorum, et impensarum; ea vero neglecta, vel plane omissa, regressus iste omnino cessat. Id quod tamen ad alias personas, quam contrahentes, porrigi non potest, si in litterarum commercio paullo fuerint negligentiores.[1]

§ 407. In some countries, in order to avoid the inconveniences, arising from the fluctuations of exchange and reëxchange, and the difficulty, in many instances, of ascertaining what is the true rate, and whether it should be direct or circuitous in certain cases, a usage has prevailed, and sometimes provision has been expressly made by statute, to allow a certain fixed sum in lieu of damages and reëxchange. Thus, for example, in Massachusetts, the old rule, founded upon usage, (which has since been modified by statute,) was, to allow, upon all foreign Bills drawn upon England, and probably, also, upon any part of Europe, ten per cent. as damages, in lieu of reëxchange.[2] In New York,

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[1] Heinecc. de Camb. cap. 4, § 34; Id. § 44 to 48.

[2] Grimshaw *v.* Bender, 6 Mass. R. 157, 161, 162. — On this occasion, Mr. Chief Justice Parsons, in delivering the opinion of the Court, said; "The next question concerns the rule, by which damages are assessed in actions upon foreign Bills of Exchange, sued here against the Drawer. According to the Law Merchant, uncontrolled by any local usage, the Holder is entitled to recover the face of the Bill, and the charges of the protest, with interest from the time, when the Bill ought to have been paid, and also the price of reëxchange, so that he may purchase another good Bill for the remittance of the money, and be indemnified for the damage arising from the delay of payment. But he cannot claim the ten per cent. of the Bill, which it is here the usage to pay. But the rule of damages, established by the Law Merchant, is, in our opinion, absolutely controlled by the immemorial usage in this State. Here, the usage is, to allow the

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the old rule, founded also upon usage, used to be (for it has been changed by statute,) to allow twenty per cent. damages, in lieu of reëxchange, upon all Bills drawn upon England or any part of Europe.[1] In Pennsylvania, the old rule used to be, to allow twenty per cent. damages in lieu of reëxchange, upon all Bills drawn upon England, or any part of Europe, under a statute passed in 1700.[2] This statute has since been

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Holder of the Bill the money, for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on those sums from the time, when the Bill should have been paid; and the further sum of one-tenth of the money, for which the Bill was drawn, with interest upon it from the time, when payment of the dishonored Bill was demanded of the Drawer. But nothing has been allowed for reëxchange, whether it is below, or at par. This usage is so ancient, that we cannot trace its origin; and it forms a part of the Law Merchant of the Commonwealth. Courts of law have always recognised it, and juries have been instructed to govern themselves by it, in finding their verdicts. This usage also governs in actions against the Indorsers of foreign Bills; and, by a reasonable analogy, must in this case be conformed to, although, in form, the defendants appear to be Acceptors. For, in fact, the intention of the parties was, that the Acceptors, as the original debtors, should, in this way, be holden to remit the money, which they owed to London, where it was to be paid. The origin of this usage was probably founded in the convenience of avoiding all disputes about the price of reëxchange, and to induce purchasers to take their Bills, by a liberal substitution of ten per cent., instead of a claim for reëxchange. And such is the course of exchange between this State and England, that the usage is generally favorable to the Holders of dishonored Bills, and tends to discourage the drawing of Bills by persons, who have no funds to meet them. Conformably to this usage, the plaintiff in this case is entitled to the money mentioned in the Bill, reduced to our currency at par, which, together with the expenses of protest, he shall receive with Massachusetts interest, from the time the Bill was payable to the present time; and to these items let there be added one-tenth of the Bill, with the like interest on it, from the time payment of the Bill was demanded of the defendants, and refused, to this time." The statute of Massachusetts, of 4th of March, 1826, ch. 177, first altered this rule; and the Revised Code of 1835, ch. 33, prescribes the rule now in force in Massachusetts.

[1] Hendricks *v.* Franklin, 4 Johns. R. 119; Graves *v.* Dash, 12 Johns. R. 17.

[2] Francis *v.* Rucker, Ambler, R. 672; Hendricks *v.* Franklin, 4 Johns. R. 119.

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superseded by more recent enactments.[1] In Virginia, the statute rule is, or was, in like cases, to allow ten per cent. damages, in lieu of reëxchange.[2]

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[1] 3 Kent, Comm. Lect. 44, p. 116, 117 (4th edit.).

[2] Slacum v. Pomery, 6 Cranch, 221; 1 Virg. Revised Code, ch. 77, § 1, p. 113; Bayley on Bills, ch. 9, p. 383, note (*o*), (by Phillips and Sewall, Amer. edit. 1836.) — Mr. Chancellor Kent has stated the present rules existing in many of the American States, in 3 Kent, Comm. Lect. 44, p. 116 to 121 (4th edit.). He says; "In this country, a different practice from that of reëxchange was introduced, while we were English Colonies, and it has continued to this day. Our usages, on this subject, form an exception to the Commercial law of Europe. In New York, the rule had uniformly been, to allow twenty per cent. damages, on the return of Foreign Bills protested for non-acceptance or non-payment; and the damages were computed on the principal sum, with interest on the aggregate amount of the Bill and damages, from the time, that notice of the protest was duly given to the Drawer or Indorser. The mercantile usage was, to consider the twenty per cent. an indemnity for consequential damages, and to require the Bill to be paid at the rate of exchange at the time of return, or a new Bill to be furnished upon the same principles. But the Supreme Court considered the twenty per cent. to be in lieu of damages in case of reëxchange, and the demand, with that allowance, was to be settled at the par of exchange. This doctrine was overturned by the Court of Errors, and the Holder was held to be entitled to recover, not only the twenty per cent. damages, together with interest and charges, but also the amount of the Bill, liquidated by the rate of exchange, or price of Bills on England, or other place of demand in Europe, at the time of the return of the dishonored Bill, and notice to the party to be charged; and this rule was subsequently followed in the courts of law. The rate of damages on Bills drawn and payable within the United States, or other parts of North America, was subsequently, in 1819, regulated in New York by statute, and the damages fixed at five, or seven and a half, or ten per cent., according to the distance or situation of the place, on which the Bill was drawn. But, by the new Revised Statutes, which went into operation on the 1st of January, 1830, the damages on Bills, foreign and inland, were made the subject of a more extensive regulation. They provide, that, upon Bills drawn or negotiated within the State, upon any person, at any place within the six States east of New York, or in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, the damages to be allowed and paid, upon the usual protest for non-acceptance or non-payment, to the Holder of the Bill, as purchaser thereof, or of some interest therein, for a valuable consideration, shall be three per cent. upon the

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§ 408. In England, also, in particular cases, artificial rules of the same sort have been adopted, either by contract or usage. Thus, in the commerce between

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principal sum specified in the Bill; and upon any person at any place within the States of North Carolina, South Carolina, Georgia, Kentucky, and Tennessee, five per cent.; and upon any person in any other State or Territory of the United States, or at any other place on, or adjacent to, this continent, and north of the equator, or in British or foreign possessions in the West Indies, or elsewhere in the Western Atlantic Ocean, or in Europe, ten per cent. The damages are to be in lieu of interest, charges of protest, and all other charges incurred previous to, and at the time of, giving notice of non-acceptance or non-payment. But the Holder will be entitled to demand and recover interest upon the aggregate amount of the principal sum specified in the Bill, and the damages, from the time of notice of the protest for non-acceptance, or notice of a demand and protest for non-payment. If the contents of the Bill be expressed in the money of account of the United States, the amount due thereon, and the damages allowed for the non-payment, are to be ascertained and determined, without reference to the rate of Exchange existing between New York and the place, on which the Bill is drawn. But, if the contents of the Bill be expressed in the money of account, or currency of any foreign country, then the amount due, exclusive of the damages, is to be ascertained and determined by the rate of exchange, or the value of such foreign currency, at the time of the demand of payment. The laws and usages of the other States vary essentially on the subject of damages on protested Bills. In some cases, the regulations of States approximate to each other, while in others, they are widely different. In some cases, the law or rule is unlike, but the result is nearly similar; while, between other States, the result varies from four and a half to fifteen per cent. In Massachusetts, the usage was to recover the amount of the protested Bill, at the par of exchange, and interest, as in England, from the time payment of the dishonored Bill was demanded of the Drawee, and the charges of the protest, and ten per cent. damages in lieu of the price of exchange. But this rule has been changed, by statute, in 1825, 1835, and 1837; and Bills drawn or indorsed in that State, and payable without the limits of the United States, and duly protested for non-acceptance or non-payment, are now settled at the current rate of exchange and interest, and five per cent. damages; and, if the Bill be drawn upon any place beyond the Cape of Good Hope, twenty per cent. damages. The rate of damages in Massachusetts, on inland Bills, payable out of the State, and drawn or indorsed within the State, and duly protested for non-acceptance or non-payment, is two per cent. in addition to the contents of the Bill, with interest and costs, if payable in any other

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England and India, it is not customary to make a distinct charge of reëxchange; but it has been the constant course, with respect to Bills for payment of

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New England State, or New York; and three per cent., if payable in New Jersey, Pennsylvania, Delaware, and Maryland; and four per cent., if payable in Virginia, District of Columbia, North Carolina, South Carolina, or Georgia; and five per cent., if payable in any other of the United States, or the Territories thereof. The rule of damages in Connecticut, on Bills returned protested, and drawn on any person in New York, is two per cent. upon the principal sum specified in the Bill; in New Hampshire, Vermont, Maine, Massachusetts, Rhode Island, New York (city of New York excepted), New Jersey, Pennsylvania, Delaware, Maryland, Virginia, or Territory of Columbia, three per cent.; in North Carolina, South Carolina, Ohio, or Georgia, five per cent.; in any other part of the United States, eight per cent. upon such principal sum, and to be in lieu of interest and all other charges, and without any reference to the rate of exchange. In Rhode Island, the rule formerly was, according to the Revised Code, in 1776, on Bills returned from beyond sea, protested for non-acceptance or non-payment, ten per cent. damages, besides interest and costs. In Pennsylvania, the rule, for a century past, was twenty per cent. damages, in lieu of reëxchange; but by statute, in 1821, five per cent. damages were allowed upon Bills drawn upon any person in any other of the United States, except Louisiana; if on Louisiana, or any other part of North America, except the Northwest Coast and Mexico, ten per cent.; if on Mexico, the Spanish Main, or the islands on the coast of Africa, fifteen per cent.; and twenty per cent. upon protested Bills on Europe, and twenty-five per cent. upon other foreign Bills, in lieu of all charges, except the protest, and the amount of the Bill is to be ascertained and determined at the rate of exchange. In Maryland, the rule, by statute, is fifteen per cent. damages, and the amount of the Bill ascertained at the current rate of exchange, or the rate requisite to purchase a good Bill of the same time of payment, upon the same place. In Virginia and South Carolina, the damages, by statute, are fifteen per cent. The damages on Bills, drawn in the State of Alabama, on any person resident within the State, are ten per cent.; and on any person out of it, and within the United States, are fifteen per cent.; and on persons out of the United States, twenty per cent. on the sum drawn for, together with incidental charges and interest. In Louisiana, in 1838, the rate of damages, upon the protest for non-acceptance or non-payment of Bills of Exchange, drawn on, and payable in foreign countries, was declared by statute to be ten per cent.; and in any other State in the United States, five per cent., together with interest on the aggregate amount of principal and damages. On protested Bills, drawn and pay-

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pagodas in the East Indies, and returned protested, to allow at the rate of ten shillings per pagoda, and five per cent. after the expiration of thirty days from the

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able within the United States, the damages include all charges, such as premiums, and expenses, and interest on those damages, but nothing for the difference of exchange. In North Carolina, by statute, in 1828, damages on protested Bills, drawn or indorsed in that State, and payable in any other part of the United States, except Louisiana, are six per cent.; payable in any other part of North America, except the West India Islands, ten per cent.; payable in South America, the African Islands, or Europe, fifteen per cent.; and payable elsewhere, twenty per cent. In Kentucky, the damages on Foreign Bills, protested for non-acceptance or non-payment, are ten per cent. The damages in Tennessee, by statute, in 1830, on protested Bills, over and above the principal sum, and charges of protest, and interest on the principal sum, damages, and charges of protest from the time of notice, are three per cent. on the principal sum, if the Bill be drawn upon any person in the United States; and fifteen per cent, if upon any person in any other place or State in North America, bordering on the Gulf of Mexico, or in the West Indies; and twenty per cent., if upon a person in any other part of the world. These damages are in lieu of interest, and all other charges, except the charges of protest, to the time of notice of the protest, and demand of payment. The damages in Georgia, by statute, in 1827, on Bills drawn on a person in another State, and protested for non-payment, are five per cent.; and on foreign Bills, protested for non-payment, are ten per cent., together with the usual expenses and interest, and the principal to be settled at the current rate of exchange. The damages in Indiana and Illinois, on foreign Bills, are ten per cent.; and on Bills drawn on any person out of the State and within the United States, are five per cent. in addition to the costs and charges. In Mississippi, the damages on inland Bills protested for non-payment, are five per cent.; if drawn on any person resident out of the United States, ten per cent. In Missouri, the damages on Bills of Exchange, drawn or negotiated within the State, and protested for non-acceptance or non-payment, as against the Drawer and Indorser, are four per cent. on the principal sum; if drawn on any person out of the State, but within the United States, ten per cent.; if out of the United States, twenty per cent.; the same rate of damages as against the Acceptor on non-payment. The inconvenience of a want of uniformity in the rule of damages, in the laws of the several States, is very great, and has been strongly felt. The mischiefs to commerce, and perplexity to our merchants, resulting from such discordant and shifting regulations, have been ably, justly, and frequently urged upon the consideration of Congress; and the right of Congress to

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notice to the defendant of the Bill's dishonor, which includes interest, exchange, and all other charges; and by an arrangement, entered into in 1822, between certain persons connected with the East India trade, twenty-five per cent. appears to have been considered a proper sum. But that arrangement could, of course, only bind the parties to it.[1] And it seems, that, upon Bills, drawn in the West Indies upon England, the rate of damages is ten per cent. in lieu of reëxchange.[2]

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regulate, by some uniform rule, the rate and rule of recovery of damages upon protested foreign Bills, or Bills drawn in one State upon another, under the power in the Constitution, 'to regulate commerce with foreign nations, and among the several States,' and the expediency of the exercise of that right, have been well, and, I think, conclusively shown, in the official documents, which have been prepared on that subject." See also Mr. Phillips's and Mr. Sewall's edition of Bailey on Bills, ch. 9, p. 383, note (*p*), (Amer. edit. 1836). The mode of adjustment of the amount due upon Bills of Exchange differs, as we have seen, in New York, from the rule adopted in Massachusetts. In New York, the principal of the Bill is ascertained by the rate of exchange, and is included in the computation. In Massachusetts, the par of exchange is taken. 3 Kent, Comm. Lect. 44, p. 117 (4th edit.); Grimshaw *v.* Bender, 6 Mass. R. 157, 161.

[1] Ante, § 399, and note; Chitty on Bills, Pt. 2, ch. 6, p. 668 (8th edit. 1833); Bayley on Bills, ch. 9, p. 354, 355 (5th edit. 1830); Auriol *v.* Thomas, 2 Term R. 52.

[2] Ante, § 399, and note; Chitty on Bills, Pt. 2, ch. 6, p. 665, 666 (8th edit. 1833); Gantt *v.* Mackenzie, 3 Camp R. 51.

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CHAPTER XII.

PAYMENT, AND OTHER DISCHARGES OF PARTIES TO BILLS OF EXCHANGE.

§ 409. HAVING thus ascertained the rights and duties of the Holder against the antecedent parties to Bills, upon dishonor by non-payment thereof at maturity, let us now pass to the consideration of the Payment of Bills, and of other Discharges, which will extinguish the rights and demands of the Holder, or of other parties, who would otherwise be entitled to the benefit thereof.

§ 410. In the first place, as to payment by the Acceptor. It is obvious, from what has been already said, that it is his primary duty to pay the Bill, and, by his due payment thereof, he discharges all the other parties thereto from liability on the Bill, either as Drawers, or Indorsers, or Guarantors, if the payment is rightfully made by him to the Holder, without any knowledge of any infirmity in the title of the latter, and, if the names of the parties on the Bill, through whom the Holder derives his title, are genuine, and not founded upon forgeries.[1] But there may be infirmities of various sorts, which may make a payment by the Acceptor, to the Holder, no discharge or extinguishment of the claim against him, founded on his acceptance and payment thereof.

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[1] Chitty on Bills, ch. 9, p. 425, 426 (8th edit. 1833); Bayley on Bills, ch. 8, p. 318 to 323 (5th edit. 1830); Pardessus, Droit Comm. Tom. 2, art. 399, 401; Pothier de Change, n. 168, 169.

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§ 411. Let us consider some of these infirmities, which may or may not affect the title of the Holder, and the duties and obligations of the Acceptor. First, then, if the signature of the Drawer is forged, and the Bill is accepted by the Acceptor, he will be bound thereby to pay the same to a *bonâ fide* Holder, having no notice of the forgery; 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 such a Holder, admits its genuineness, and is not permitted to dispute it afterwards, although he can have no recourse against the Drawer for any reimbursement for his payment.[1] This doctrine proceeds upon the intelligible ground, first, that the Drawee, before he accepts, is bound, as a matter of duty, to ascertain, whether the signature of the Drawer is genuine or not; and next, that, where one of two innocent persons must suffer, he, who has caused a misplaced confidence, or has misled another, or has omitted his duty, shall suffer, rather than the other party.[2] The same doctrine applies to an Acceptor *supra protest*, as to the signatures of the parties, for whose honor he accepts.[3]

§ 412. But it is said, that the like doctrine does not apply to the Acceptor in the case of a forgery of the signature of the Payee, or of any other Indorser, be-

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[1] Ante, § 113, 262; Chitty on Bills, Pt. 1, ch. 7, p. 336, 337 (8th edit. 1833); Id. Pt. 2, ch. 5, p. 625, 628, 629, 635; Bayley on Bills, ch. 8, p. 318 to 320 (5th edit. 1830); Price *v.* Neale, 2 Burr. R. 1354; Smith *v.* Mercer, 6 Taunt. R. 76; Bank of U. States *v.* Bank of Georgia, 10 Wheat. R. 333; Levy *v.* Bank of U. States, 1 Birm. R. 27.

[2] 1 Story on Eq. Jurisp. § 386, 387.

[3] Bayley on Bills, ch. 10, p. 320 (5th edit. 1830); Wilkinson *v.* Johnstone, 3 Barn. & Cressw. 428.

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cause the Acceptor is not presumed to know their signatures, or to vouch for their genuineness.[1] And it makes no difference in this particular, whether the indorsement is on the Bill at the time of the acceptance or not.[2] Neither does the acceptance admit the signature of the Drawer, when he is an Indorser also, although the Bill is payable to the Drawer's order, and his signature, as Drawer, is admitted.[3] Nor does the acceptance admit the authority of an agent to indorse a Bill in the name of the Drawer, although the Bill is drawn by the same agent, in the name of his principal, by procuration.[4] The same reason prevails in each of these cases; for the acceptance admits only the genuineness of the Drawer's signature and that of his agent, and his competency and authority to draw; but the act of indorsement is very different from the act of drawing, and may not have been contemporaneous, and the Acceptor looks only to the signature of the Drawer.[5] The distinction between these cases is certainly very nice, and perhaps does not stand upon a very satisfactory ground, where the indorsement is on the Bill at the time, when it is accepted. It seems, however, well established. But every Indorser, by indorsement of a Bill, admits the genuineness of the signature of the Drawer, and his ability to draw the

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[1] Ante, § 113, 262, 263, 264; Bayley on Bills, ch. 11, p. 464, 465 (5th edit. 1830); Smith *v.* Chester, 1 Term R. 654; Carrick *v.* Vickery, Doug. R. 630.

[2] Ibid.

[3] Bayley on Bills, ch. 11, p. 465 (5th edit. 1830); Robinson *v.* Yarrow, 7 Taunt. R. 455; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. Rep. 287.

[4] Ibid.; Bayley on Bills, ch. 8, p. 321 to 324 (5th edit. 1830).

[5] Smith *v.* Chester, 1 Term R. 654.

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Bill, and also the signature and ability of every antecedent Indorser.[1]

§ 413. Secondly. If the Holder, before or since the acceptance, has become bankrupt, and the fact is known to the Acceptor, payment by him to the Holder will be invalid, and not binding upon the assignees.[2] So, if the Acceptor knows, that the Holder is a mere Agent, and that his authority has been revoked;[3] but if he does not know of the revocation, then the payment is good.[4] If the Holder is dead, but his death is unknown, payment to his agent, previously appointed, will, according to Pothier, be valid, although the death operates as a revocation of the authority of the agent.[5] But it may be doubtful, whether, according to our law, the payment, in such a case, would not be treated as a nullity; since the agent's power is absolutely gone by the death of his principal, and the receipt by him, for his principal, is a receipt by a person, who acts without title or authority.[6] But the death of the Drawer, or of an Indorser, is no objection to the payment of a Bill by the Acceptor, where the party is a Holder for value.[7] Indeed, it may be laid down, as a general rule, that the Acceptor is bound to

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[1] Ante, § 111, 225, 262, 263; Bayley on Bills, ch. 11, p. 462, 463 (5th edit. 1830); Lambert v. Pack, 1 Salk. R. 127, 1 Ld. Raym. 483; Critchlow v. Parry, 2 Camp. R. 182.

[2] Chitty on Bills, ch. 9, p. 426 to 428, 430 (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 136, 137 (5th edit. 1830); Id. ch. 8, p. 314, 315.

[3] Chitty on Bills, ch. 9, p. 425, 426 (8th edit. 1833).

[4] Pothier de Change, n. 168.

[5] Ibid.; Story on Agency, § 470 to 473, 491 to 494.

[6] See Story on Agency, § 495 to 499.

[7] Chitty on Bills, ch. 7, p. 309 (8th edit. 1833); Id. ch. 9, p. 425, 426; Bayley on Bills, ch. 8, p. 314, 315 (5th edit. 1830); Tate v. Hilbert, 2 Ves. jr. 115, 116; Hammonds v. Barclay, 2 East, R. 227, 235, 236; Cutts v. Perkins, 12 Mass. R. 206.

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pay the Bill only to the real owner thereof, or to his agent or representative, if he knows the true state of the facts.[1] But a payment made by the Acceptor, by mistake, to a person, who has no title, may, under certain circumstances, be no exoneration of the Acceptor, although he has no knowledge of the actual state of the facts. Thus, by our law, if the owner or Holder be dead, a payment to a person, who assumes to be his personal representative, will not be valid, even if the fact, that he is not so, is unknown to the Acceptor.[2] So, payment made to a single woman, who is the Holder of the Bill, after her marriage, will not, it should seem, exonerate the Acceptor, according to our law, even if the Acceptor does not know of her marriage, although it may be different in the foreign law.[3] But payment of a Bill to a minor, to whom it is expressly made originally payable, or made payable by indorsement, will be valid, if he has no guardian, or if he has a guardian, and that fact is unknown; but, if the fact of guardianship be known, a valid payment can only be made to the guardian.[4]

§ 414. Pothier admits, that payment to a minor, having a tutor, and taking the Bill by devolution, upon the death of his parent, is not good, unless it has been turned to his profit; but that payment ought to be

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[1] Chitty on Bills, ch. 9, p. 428, 429 (8th edit. 1833); Pothier de Change, n. 164 to 168; Pardessus, Droit Comm. Tom. 2, art. 399; Bayley on Bills, ch. 8, p. 314, 315 (5th edit. 1830).

[2] Chitty on Bills, ch. 9, p. 428 (8th edit. 1833).

[3] Chitty on Bills, ch. 6, p. 225 (8th edit. 1833); Id. ch. 9, p. 428; Bayley on Bills, ch. 5, § 2, p. 135 (5th edit. 1830); Id. ch. 8, p. 315; Pothier de Change, n. 158; Scaccia, de Comm. § 2, Gloss. 5, p. 384, n. 340.

[4] Chitty on Bills, ch. 9, p. 428 (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 136, 137 (5th edit. 1830); Id. ch. 8, p. 315; Pothier de Change, n. 166, 168.

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made to his tutor. But, if the Bill be payable to the minor, he holds, that payment made to him is good, as against the Drawer, according to the maxim, *Quod jussu alterius solvitur, perinde est ac si ipsi solutum esset.*[1] He holds the same rule to be true, where a Bill is payable to a single woman, who afterwards marries, if her marriage is unknown to the Acceptor; but, if known, he can safely pay only to the husband.[2] If a Bill be payable to A. or order, for the use of B., payment should be made to A., or to his order, and not to B., who is merely the *cestui que trust.*[3]

§ 415. However, in ordinary cases, where a Bill is genuine in all respects, and with a genuine indorsement in blank by the proper owner or Holder, the possession of it is sufficient to entitle the person producing it, to receive payment thereof. For such possession is *primâ facie* or presumptive evidence, that he is the proper owner or lawful possessor of the Bill.[4] And, indeed, if this doctrine did not prevail, the Acceptor would, in many cases, pay at his peril, where the true owner or Holder is unknown to him; and endless embarrassments would grow out of the negotiations of Bills, which, in a vast variety of cases, pass by mere delivery from hand to hand, where there is a blank indorsement by the lawful owner or Holder thereof. It is, therefore, for the security of all persons, that the rule is adopted, to prevent innocent

[1] Pothier de Change, n. 166; Dig. Lib. 50, tit. 17, l. 180.

[2] Pothier de Change, n. 166.

[3] Chitty on Bills, ch. 9, p. 428 (8th edit. 1833); Bayley on Bills, ch. 5, § 2, p. 134 (5th edit. 1830); Evans *v.* Cramlington, 2 Vent. R. 307, Skinner, R. 264.

[4] Chitty on Bills, ch. 9, § 2, p. 425, 428, 429 (8th edit. 1833); Ante, § 193, 194; Bank of U. States *v.* U. States, 2 How. Sup. Ct. R. 711; Dugan *v.* U. States, 3 Wheat. R. 172.

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Holders from being compelled to establish their titles before the Acceptor will be bound to pay the Bill; and they may be *bonâ fide* purchasers and Holders by mere delivery, without the knowledge, or means of knowledge, of the persons, through whose hands the Bill has passed by delivery, after such a blank indorsement.

§ 416. Hence it is, that, if the Acceptor pays a Bill, which has been indorsed in blank, and is afterwards lost or stolen, and then gets into the hands of a *bonâ fide* Holder, for a valuable consideration, the payment to such Holder will be perfectly valid, and protected by law.[1] But, if paid under circumstances, which establish a want of good faith on the part of the Acceptor, the payment will be nugatory.[2] It was formerly thought, that, if payment was made to a Holder under circumstances of suspicion, or which might properly put the Acceptor upon further inquiry, that would take away his right to be protected by such payment.[3] This doctrine has been since qualified, and, indeed, overruled, as having a direct tendency to obstruct the negotiation of all Bills payable to Bearer, or negotiated by delivery after a blank indorsement, since their circulation would be materially affected thereby, if not, in a great measure, stopped.[4] But the reasonable doctrine, now established, is, that nothing short of

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[1] Chitty on Bills, ch. 9, p. 429, 430 (8th edit. 1833); Pothier de Change, n. 168; Bayley on Bills, ch. 5, § 2, p. 130, 131 (5th edit. 1830); Id. ch. 12, p. 524, 531; Anon. 1 Ld. Raym. 738; Miller *v.* Race, 1 Burr. R. 452; Grant *v.* Vaughan, 3 Burr. R. 1516.

[2] Ibid.

[3] Chitty on Bills, ch. 9, p. 429, 430 (8th edit. 1833); Bayley on Bills, ch. 12, p. 524 to 531 (5th edit. 1830).

[4] Down *v.* Halling, 4 Barn. & Cressw. 330; Gill *v.* Cubitt, 3 Barn. & Cressw. 466; Ante, § 193, 194.

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fraud, not even gross negligence, if unattended with *mala fides*, on the part of the Acceptor, or other party paying a Bill, will invalidate the payment, so as to take away the rights founded thereon.[1]

§ 417. In order to make a payment by the Acceptor good and binding upon all the other parties to the Bill, it should be made at the maturity of the Bill, and not before; for, although, as between the real and *bonâ fide* Holder and the Acceptor, the payment, whenever made and however made, will be a conclusive discharge from the obligation of the Bill; yet, as to third persons, it may be far otherwise; for payment means payment in due course, and not by anticipation.[2] If, therefore, the Acceptor should pay a Bill of Exchange, before it is due, to any Holder, who should afterwards, and before its maturity, indorse or pass the same to any subsequent *bonâ fide* Indorsee or other Holder, the latter would still be entitled to full payment thereof from the Acceptor, at its maturity; for payment of the Bill, before it becomes due, is no extinguishment of the debt as to such persons.[3] The same doctrine prevails in the French Law;[4] and it will apply to the case, where the Holder is a mere agent of the real owner, and his authority has been countermanded before the Bill is due;[5] and, *a fortiori*, where

[1] Crook *v.* Jadis, 5 Barn. & Adolph. 909; Backhouse *v.* Harrison, 5 Barn. & Adolph. 1098; Goodman *v.* Harvey, 4 Adolph. & Ellis, 870; Usher *v.* Rich, 10 Adolph. & Ellis, R. 784; 1 Selw. Nisi Prius, Dig. p. 347 (10th edit. 1842).

[2] Chitty on Bills, ch. 9, p. 428, 431 (8th edit. 1833); Burbridge *v.* Manners, 3 Camp. R. 193.

[3] Chitty on Bills, ch. 6, p. 286 (8th edit. 1833); Bayley on Bills, ch. 8, p. 326 (5th edit. 1830), citing De Silva *v.* Fuller, MSS.; Marius on Bills, p. 31.

[4] Pardessus, Droit Comm. Tom. 2, art. 401.

[5] Marius on Bills, p. 31; Bayley on Bills, ch. 8, p. 326 (5th edit. 1830).

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the Bill is presented and paid to a *malâ fide* Holder, before it is due.

§ 418. Cases sometimes occur, where the money, or current coin, for which the Bill is drawn, and in which it is payable, is depreciated at the place of payment, between the time of the drawing of the Bill and the payment thereof; and, in such cases, the question has been made, Whether the value should be paid, as it was at the time, when the Bill is drawn, or when it is payable. And it has been held, that it is to be paid according to the value at the time when the bill was drawn.[1] Pardessus holds the same doctrine upon principles of international law, and comity, and justice, insisting that the Payee, in the case stated, looks solely to the value of the money or the Bill, at the time, when it is drawn, and bargains for that same value from the Acceptor.[2]

§ 419. Payment should ordinarily be made in money or coin by the Acceptor, according to its true value and denomination in the Bill, and the Holder is not bound to accept anything but such money or coin, at its true and proper value.[3] Where the Holder receives a promissory note or bill in payment of a debt, it is not an absolute but conditional payment only, unless otherwise agreed by the parties; but it only suspends the right to recover the original debt until the credit has expired.[4] If the Holder be a mere agent, he has no right to accept payment in goods, in lieu of money,

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[1] Chitty on Bills, ch. 9, p. 433 (8th edit. 1833). — Quære, Whether there might not be grounds to contend, that the Acceptor was bound only for the value at the time of his acceptance?

[2] Pardessus, Droit Comm. Tom. 5, art. 1495.

[3] Chitty on Bills, ch. 9, p. 433 (8th edit. 1833).

[4] Sayer *v.* Wagstaff, 5 Beavan, R. 415.

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unless specially authorized so to do.[1] If the Holder accepts a draft or check on a bank or a banker, in payment of the Bill, it has been said, that he is not obliged to give up the Bill, before payment of the draft or check, and, if he does, the Drawer and the Indorsers are discharged thereby.[2] If the Holder accepts such draft or check, it will, ordinarily, discharge the Drawer and Indorsers,

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[1] Ibid.; Howard *v.* Chapman, 4 Carr. & Payne, R. 508.

[2] Chitty on Bills, ch. 9, p. 433, 434 (8th edit. 1833); Marius on Bills, p. 21, 22. See also Hansard *v.* Robinson, 7 Barn. & Cressw. 90. — Mr. Chitty (p. 433, 434) says; "Payment is frequently made by a draft on a banker; in which case, if the person, receiving the draft, do not use due diligence to get it paid, the person, from whom he received it, and every other party to the Bill, will be discharged, but not otherwise, unless the Holder expressly agreed to run all risks; for a banker's check is not money." From this language it might be inferred, that, if the Holder took a draft on a banker, and presented it in due time, and it was dishonored, the Drawer and Indorsers, as well as the Acceptor, would still remain liable on the Bill. There is no doubt, that the Acceptor will. But, upon principle, the Drawer and Indorsers would be discharged; for, by their contract, payment should be made on the day of maturity, and in money. From a subsequent passage (p. 434) it would seem, that Mr. Chitty did not mean to inculcate a different opinion. He there says; "When payment is made by the Drawee giving a draft on a banker, Marius advises the Holder not to give up the Bill until the draft be paid. Formerly the usage in London was otherwise when the Drawee was a respectable person in trade; and in one case it was decided, that a banker having a Bill remitted to him to present for payment, was not guilty of negligence in giving it up upon receiving from the Acceptor a check upon another banker for the amount payable the same day, although such check be afterwards dishonored; but in a subsequent case it was considered, that, the Drawer and Indorsers of a Bill would be discharged by the Holder's taking a check from and delivering up the Bill to the Acceptor, in case the check were not paid; because the Drawer and Indorsers have a right to insist on the production of the Bill, and to have it delivered up on payment by them. If the Holder of a draft on a banker receive payment thereof in the banker's notes instead of cash, and the banker fail, the Drawer of the check will be discharged. But if a creditor, on any other account than a Bill of Exchange, is offered cash in payment of his debt, or a check upon a banker, from an agent of his debtor, and prefer the latter, this does not discharge the debtor, if the check is dishonored, although the agent fails, with a balance of his principal in his hands to a much greater amount."

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but it will operate, as to himself, as a conditional payment only; that is, if, upon presentment, the check is duly paid by the bank or banker. But, if the draft or check is not presented for payment within a reasonable time by the Holder, and then the bank or banker fails, the Holder himself must bear the loss.[1] If the Holder receives bank-notes of a bank in payment, then the Drawer and Indorsers are discharged, and the Acceptor, also, if the bank had not then failed, although it should afterwards fail, and become utterly insolvent.[2] But if the bank has actually then failed, although unknown to both parties, the payment will not be deemed valid in the bank-notes of such bank, unless the party receiving them has agreed to run the risk of their dishonor or of the insolvency of the bank.[3]

§ 420. Where payment is duly made by an Acceptor, if he has not any funds of the Drawer, or other person for whose accommodation he accepts the Bill, he will be entitled to recover the amount from the Drawer, or other party, for whose accommodation he has made the acceptance. But a case has been put, where a Bill is drawn by A. and B., and both sign the Bill, A. as principal, and B. as surety, Whether the Acceptor, upon payment of the Bill, if he is a mere accommodation Acceptor without funds, has a right to recover the amount from A. and B., or from A. only. It has been held that he is entitled to recover from A.

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[1] Bayley on Bills, ch 7, § 1, p. 236 to 244 (5th edit. 1830); Id. ch. 9, p. 364 to 369; Chitty on Bills, ch. 9, p. 434 (8th edit. 1833); Ante, § 109, and note; Ward v. Evans, 2 Ld. Raym. 930; Vernon v. Boverie, 2 Show. R. 296.

[2] Ibid.; Ante, § 111, and note, § 223, and note; Fogg v. Sawyer, 9 New Hamp. R. 365.

[3] Fogg v. Sawyer, 9 New Hamp. Rep. 365; Ante, § 225, and note.

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only; although it was admitted, in the same case, that the Payee, and every other Indorser, might hold both A. and B. responsible to them as joint Drawers.[1] But it may be doubted, whether this doctrine is sound, for A. and B. must be both taken to be Drawers of the Bill, as to all parties; and the Acceptor may have been induced to accept the Bill, quite as much as the Payee or other Indorser to take it, because B. thereby became liable to him, as surety for its due payment, in the character of a joint Drawer.[2]

§ 421. The Acceptor may also, where he stands in the apparent relation to the Drawer of a mere accommodation Acceptor on the Bill, discharge the Drawer from liability to him for the payment thereof, if, in point of fact, he has made arrangements with the real parties, for whose benefit the Bill has been drawn by the Drawer, by which, in contemplation of receiving funds from them, he has agreed to accept and pay the Bill, and he has, in fact, received such funds before and at the maturity of the Bill, but has applied them to other purposes. Under such circumstances, the Acceptor is held bound to apply the funds in discharge of such accommodation Drawer, unless they have been specially appropriated, by the proper owners thereof, to different purposes.[3]

§ 422. In respect to the Drawer and Indorsers, who are liable to the Holder, upon the dishonor of the Bill, it is obvious, that the debt of the Acceptor is not extinguished by their payment of the Bill; and unless he be a mere accommodation Acceptor for them,

[1] Griffith v. Read, 21 Wend. R. 502.

[2] See Brander v. Phillips, 16 Peters, R. 121; Chitty on Bills, ch. 9, p. 449 (8th edit. 1833).

[3] Brander v. Phillips, 16 Peters, R. 121.

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or some one of them, the same rights will remain against him in their favor, which the Holder himself had. If he be a mere accommodation Acceptor, then, as to the party, for whom he has given such accommodation, he will stand discharged; but not as to any other parties on the Bill. Where an antecedent Indorser duly pays the Bill to the Holder, he thereby discharges all the Indorsers subsequent to his own indorsement; but those before it will still remain bound to him.

§ 423. But every Indorser, who is called upon to take up a Bill, by the Holder, should perfectly assure himself, not only, that the party applying for payment is the true and lawful Holder of the Bill, but, also, that there have not been any laches, either by such Holder, or by any other party, which will affect the merits of the claim against him; for, if there have been such laches, by which the prior parties on the Bill have been discharged, any Indorser, who shall unnecessarily pay the Bill, will not thereby revive the liability of the prior parties, or be entitled to recover against them.[1] Thus, if a Bill has been refused acceptance or payment, and due notice thereof has not been given by the Holder, or other party to the Bill, so as to bind the antecedent parties, payment by any subsequent Indorser, who has not received due notice, will not revive the liability of the antecedent parties, but they will remain discharged.[2] So, if the prior parties have not received due notice of the dishonor of the Bill, and a subsequent Indorser shall pay it to

[1] Chitty on Bills, ch. 9, p. 426 (8th edit. 1833). See Konig v. Bayard, 1 Peters, R. 262.

[2] Ibid.; Roscoe v. Hardy, 12 East, R. 434.

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the Holder, from which payment he is exonerated by the Holder's laches, in giving him notice a day too late, such payment will not bind the prior parties; for he has no right, by such payment, to place them in a worse situation, than they would otherwise have been.[1] The same rule will apply to payments by an Acceptor *supra protest*, where there has not been a due presentment thereof to the original Drawee at the maturity of the Bill, or a due protest thereof, if presented, or due notice thereof to him before his payment; for, under such circumstances, he is not bound to pay the Bill; and the antecedent parties, who might otherwise be bound, will be discharged thereby from all liability.[2]

§ 424. In the next place, let us consider, what other acts of the Holder will constitute a good discharge of the Drawers and Indorsers of a Bill, and of other persons who are collaterally liable therefor. In respect to the Acceptor, what has been already said of the cases where he is discharged from his acceptance by operation of law, or by an agreement with the Holder, or by a release, or by any other extinguishment of the debt, will generally apply here, in cases of non-payment of the Bill, after acceptance.[3] But, in respect to the other parties, other and very different considerations may arise.

§ 425. First, then, the Drawer and the Indorsers will be discharged by any valid agreement between the Holder and the Acceptor, founded upon a valuable

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[1] Turner v. Leach, 4 Barn. & Ald. 451.

[2] Chitty on Bills, ch 8, p. 378 to 381 (8th edit. 1833); Hoare v. Cazenove, 16 East, R. 398; Mitchell v. Baring, 10 Barn. & Cressw. 4; Konig v. Bayard 1 Peters, R. 250.

[3] Ante, § 265 to 272; Chitty on Bills, ch. 9, p. 426 (8th edit. 1833).

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consideration, in which the Drawer and Indorsers respectively do not concur, whereby time is given to the Acceptor for payment of the Bill after it is due, or payment is postponed to a future time, although the Drawer and Indorsers have been fixed by due presentment, protest, and notice thereof.[1] For, otherwise, in every such case, the Drawer and Indorsers would, without their concurrence, be held liable for a period beyond the terms of their contract, and might suffer damage thereby.[2] The rule may be laid down in more broad

[1] Chitty on Bills, ch. 9. p. 441 to 444, 451, 452 (8th edit. 1833): Bayley on Bills, ch. 9, p. 338, 339 (5th edit. 1830); English v. Darley, 2 Bos. & Pull. 61; Gould v. Robson, 8 East, R. 576; Clarke v. Devlin, 3 Bos. & Pull. 365; Smith v. Beckett, 13 East, R. 187; Hubbly v. Brown, 16 Johns. R. 70; Wood v. Jefferson County Bank, 9 Cowen, R. 190; Brown v. Carr, 7 Bing. R. 508; Nolte v. His Creditors, 19 Martin, R. 9; Bank of U. States v. Hatch, 6 Peters, R. 250; Nobdell v. Niphler, 4 Miller, Louis. R. 294; Millandon v. Arnous, 15 Martin, R. 598.

[2] Ibid.; The general grounds of this doctrine are well stated by Mr. Chief Justice Best, in delivering the opinion of the Court in Philpot v. Briant (4 Bing. R. 717, 719, 720, 721). His language is; "A creditor, by giving further time of payment, undertakes, that he will not, during the time given, receive the debt from any surety of the debtor, for the instant that a surety paid the debt he would have a right to recover it against his principal. The creditor, therefore, by receiving his debt from the surety, would indirectly deprive the debtor of the advantage that he had stipulated to give him. If the creditor had received from his debtor a consideration for the engagement to give the stipulated delay of payment of the debt, it would be injustice to him, to force him to pay it to any one before the day given. If, to prevent the surety from suing the principal, the creditor refuses to receive the debt from the surety, until the time given to the debtor for payment by the new agreement, the surety must be altogether discharged, otherwise he might be in a situation worse than he was in by his contract of suretyship. If he be allowed to pay the debt at the time, when he undertook that it should be paid, the principal debtor might have the means of repaying him. Before the expiration of the extended period of payment, the principal debtor might have become insolvent. A creditor, by giving time to the principal debtor, in equity, destroys the obligation of the sureties; and a court of equity will grant an injunction to restrain a creditor, who has given further time to the principal, from bringing an

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and general terms, that the Holder's discharging, or giving time to, any of the parties on a Bill, will be a discharge of every other party, who, upon paying the Bill, would be entitled to sue the party, to whom such discharge, or time, has been given.[1] If the party discharged, or to whom time is given, be a mere accommodation party, it has been said, that the rights of the

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action against the surety. This equitable doctrine, courts of law have applied to cases arising on Bills of Exchange. The Acceptor of a Bill of Exchange is considered as the principal debtor; all the other parties to the Bill are sureties, that the Acceptor shall pay the Bill, if duly presented to him, on the day it becomes due, and, if he does not then take it up, that they, on receiving notice of its non-payment, will pay it to the Holder. If the Holder gives the Acceptor further time for payment, without the consent of the Drawer or Indorsers, he discharges them from all the liability, that they contracted, by becoming parties to the Bill; but delay, in suing the Acceptor, will not discharge the Drawer or Indorsers, because such delay does not prevent them from doing what, on receiving notice of non-payment by the Acceptor, they ought to do; namely, pay the Bill themselves. The time of payment must be given by a contract, that is binding on the Holder of the Bill; a contract, without consideration, is not binding on him; the delay in suing is, under such a contract, gratuitous; notwithstanding such contract, he may proceed against the Acceptor, when he pleases, or receive the amount of the Bill from the Drawer or Indorsers. As the Drawer and Indorsers are not prevented from taking up the Bill, by such delay, their liability is not discharged by it; to hold them discharged, under such circumstances, would be to absolve them from their engagements, without any reason for so doing. In the case of the partners of the Arundel Bank *v.* Goble, which is to be found in a note to Chitty on Bills (p. 296), and the accuracy of which note is proved by my Brother's report to us, of what passed at the trial of the cause before him, that point is decided. The Acceptor applied to the Holders for indulgence of some months; they, in reply, wrote to the Acceptor, informing him, that they would give him the time that he required, but that they should expect interest. On a motion for a new trial, the Court of King's Bench held, that, as no fresh security was taken from the Acceptor, the agreement of the plaintiffs to wait was without consideration, and did not discharge the Drawer. This is a stronger case than the present. In our case, there is no agreement for any particular time, nor any consideration for the giving the time, that was given to the Acceptor."

[1] Bayley on Bills, ch. 9, p. 338, 339, (5th edit. 1830); Sargent *v.* Appleton, 6 Mass. R. 85.

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Holder against the party, for whose accommodation the Bill was drawn, indorsed, or accepted, will not be varied by such discharge or giving time; for such party does not sustain any injury thereby.[1] But this doctrine has been thought to be open to much question, and can scarcely, in the present state of the authorities, be deemed to be settled law.[2] However this may be, the general doctrine as to the effect of giving time has been imported from Courts of Equity into Courts of Law, as a fit and proper rule to govern in commercial contracts of this nature.[3] although it is unknown in other cases of contract at the Common Law;[4] and it certainly has much intrinsic justice to recommend it.

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[1] Bayley on Bills, ch. 9, p. 338, 339, 340, (4th edit. 1830).

[2] See Post, § 432, and note.

[3] 1 Story, Eq. Jurisp. § 324 to 326; 2 Story, Eq. Jurisp. § 883; Samuell *v.* Howarth, 3 Meriv. 272; Oakeley *v.* Pasheller, 10 Bligh, R. 548. See also the cases collected in Pitman on Principal and Surety, ch. 5, p. 157, 171 to 187, where the principal authorities are collected. Combe *v.* Woolfe, 8 Bing. R. 156. See also Boultbee *v.* Stubbs, 18 Ves. 20.

[4] See Pitman on Principal and Surety, ch. 5, p. 182 to 187; Davey *v.* Prendergrass, 5 Barn. & Ald. 187. — In this case, Lord Tenterden said; "Looking at the nature of the security in this case, it is impossible to say, that the sureties sustained any prejudice by what has taken place; for, if the first £100 was not paid, immediate execution might have issued, and it could not have been set aside. The ground, however, of my opinion in this case, is, that general rule of the Common Law, which requires, that the obligation, created by an instrument under seal, shall be discharged by force of an instrument of equal validity. The operation of that rule is, indeed, sometimes such, as to make it imperative upon a court of equity to interpose and grant relief; but it by no means follows, that the rule of law is to be broken down, because a court, having jurisdiction of another kind, will interpose, where there is a particular case, in which the rule of law may be found to operate harshly. There is great objection to a court of law taking upon itself to act as a court of equity, because they have not the means of doing that full and ample justice, which the particular case may require. We ought not, therefore, to interpose in a matter, which seems peculiarly to belong to the jurisdiction of a court of equity. If a parol agreement is entered into, to give time to the parties, supposing it not the case of a surety, but simply the case of a common bond, conditioned

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§ 426. But the qualifications of the rule are important to be considered. The agreement must be clear, that further time is to be given for payment to the Acceptor or other party; it must be without the concurrence of the other parties; and it must also be founded upon a valid and valuable consideration. If either fact fail to be made out in proof, there is an end of the defence; for an agreement, without a valuable consideration to support it, is void; and mere acquiescence, or delay, without an agreement, is but a passive operation, and rests solely in the pleasure of the Holder, who is not bound to active measures, after the other parties to the Bill are fixed by due notice.[1] So,

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for payment of money at a certain day, it will not prevent the party from proceeding at law immediately, whatever the consideration for the delay may be. And, if that be so, how can the giving of time to a third person, by such an agreement, prevent the obligee of the bond from proceeding at law against the surety? There may, indeed, be such a consideration for the agreement, as may induce a court of equity to direct, that the party shall not proceed to enforce his remedy at law. But a parol agreement of this nature can never operate to control the obligation of this bond in a court of law. The decisions, which have taken place in the courts of equity, in cases of this nature, have always, as I understand them, proceeded on the notion, that, at law, the thing prayed for could not be done. Bills of Exchange stand upon a very different footing; there the Law Merchant operates, and the courts of law decide upon them with reference to that law. Guaranties for the payment of debts are not, in general, instruments under seal, and there is no strict technical rule, which, as to them, prevents a court of law from looking to the real justice of the case."

[1] Chitty on Bills, ch. 9, p. 442 to 444, 446, 447 (8th edit. 1833); Philpot *v.* Briant, 4 Bing. R. 717; McLemore *v.* Powell, 12 Wheaton, R. 554; Crawford *v.* Millspaugh, 13 Johns. R. 87; 1 Story, Eq. Jurisp. § 324 to 326; 2 Story, Eq. Jurisp. § 883; Price *v.* Edmonds, 10 Barn. & Cressw. 578; Burrill *v.* Smith, 7 Pick. R. 291; Wild *v.* Bank of Passamaquoddy, 3 Mason, 505. — Upon this subject, Mr. Chitty says; "There is no obligation of active diligence, on the part of the Holder, to sue the Acceptor or any other party, and he may be passive, and forbear to sue, as long as he chooses; but he must not so agree to give time to the Acceptor, as to preclude himself from suing him, and suspend his remedy against him,

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also, if the other parties concur in granting the delay, and in the agreement for that purpose, they can have no ground to complain, that it is to their injury; for *Volenti non fit injuria*.[1] The same rule will prevail, as it seems, if, in making the discharge, the Holder expressly reserves all his rights against the Indorsers, or other parties to the Bill.[2]

§ 427. So, if, in point of fact, the Holder allows time to the Acceptor, upon a valid and obligatory agreement; still, if, under all the circumstances, there is, and can be, no delay beyond what is definitely al-

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in prejudice of the Drawer and Indorsers. This rule is founded on the principle, that the Holder, by entering into a binding engagement to give time to the Acceptor, renders him less active in endeavoring to satisfy the Bill, than he probably would otherwise be, if he continued liable to an immediate action, at the suit of the Holder; besides, if a Holder agrees to give indulgence for a certain period of time, to any one of the parties to a Bill, this takes away his right to call upon that party for payment before the period expires; and not only to call upon him, but on all the intermediate parties; for, otherwise, if he were to oblige them to pay the Bill, they could immediately resort against the very person, whom the Holder has indulged, which would be inconsistent with his agreement, and a fraud upon him. In courts of equity, the now settled doctrine is, that giving time to a principal, without the concurrence of a surety, discharges the latter; and, if the obligee of a bond with a surety, without communication with the surety, take notes from the principal, and give further time, the surety would, in some cases, be discharged, though he would not be so at law (except in the case of bail), for a specialty is not discharged by a mere simple contract." Chitty on Bills, ch. 9, p. 442, 443 (8th edit. 1833); Id. p. 445, 446.

[1] Bayley on Bills, ch. 9, p. 340, 341 (5th edit. 1830); Suckley v. Furse, 15 Johns. R. 338; Oxford Bank v. Lewis, 8 Pick. R. 457; Forster v. Jurdison, 16 East, R. 105; Stevens v. Lynch, 12 East, R. 38; Brien v. Maynard, 17 Johns. R. 58; Gloucester Bank v. Worcester, 10 Pick. R. 528; Parsons v. Gloucester Bank, 10 Pick. R. 533; Smith v. Hawkins, 6 Connect. R. 444; Chitty on Bills, ch. 9, p. 448, 449 (8th edit. 1833); Clarke v. Devlin, 3 Bos. & Pull. 363.

[2] Stewart v. Eden, 2 Caines, R. 121; Nichols v. Norris, 3 Barn. & Adolph. 41, note; Tombeckbee Bank v. Stratton, 7 Wend. R. 429; Bailey v. Baldwin, 7 Wend. R. 289. See Bedford v. Deakin, 2 Barn. & Ald. 210; Solly v. Ellerman, 2 Brod. & Bing. 38.

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lowed by law to the party, it will not vary or affect the rights of the Holder. Thus, for example, if the Acceptor is sued, and a *Cognovit* is taken for the sum, payable at as early a day as judgment can otherwise be obtained in the suit, the other parties to the Bill will not be thereby exonerated.[1] So, if the Holder takes security for the payment of the Bill, from the Acceptor, but without any agreement for delay, or any further allowance of time, that will not exonerate the other parties.[2]

§ 428. The question may also arise, Whether the giving of time by the Holder to one joint Drawer, or Indorser, or Acceptor, will discharge the other joint parties to the Bill. Upon the same principle, as that which is applied to the case, where the Holder covenants not to sue one joint contractor, it would seem, that it will not be a discharge; for it is a mere personal contract with him, for the breach of which a remedy may lie by him alone, but it will not be equivalent to a release. So, it seems, that, where several persons are jointly and severally liable upon a contract, the giving of time to one, or proceeding in a suit against one, even to judgment, but without any satisfaction, will be no discharge of the other.[3] Indeed, it has been

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[1] Chitty on Bills, ch. 9, p. 447, 448 (8th edit. 1833); Fentum *v.* Pocock, 5 Taunt. R. 192; Price *v.* Edmonds, 10 Barn. & Cressw. 578; Lee *v.* Levi, 4 Barn. & Cressw. 390; Hallet *v.* Holmes, 18 Johns. R. 28.

[2] Pring *v.* Clarkson, 6 Barn. & Cressw. 14; Bedford *v.* Deakin, 2 Starkie, R. 178; Suckley *v.* Furse, 15 Johns. R. 338; Twopenny *v.* Young, 3 Barn. & Cressw. 208; Bayley on Bills, ch. 9, p. 369 (5th edit. 1830); Chitty on Bills, ch. 9, p. 445 (8th edit. 1833); Lumley *v.* Musgrave, 4 Bing. New Cas. 9; Mohawk Bank *v.* Van Horne, 7 Wend. R. 117; Bailey *v.* Baldwin, 7 Wend. R. 289.

[3] See U. States *v.* Cushman, 2 Sumn. R. 310, 426; Lechmere *v.* Fletcher, 1 Cromp. & Mees. R. 623; Pothier on Oblig. n. 271, 272; Price *v.*

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thought, that it will make no difference, in such a case, at law, whatever might be the case in equity, (upon which some doubt may be entertained,) that one of the joint parties upon the Bill, is, in fact, a surety for the other; at all events, if he is not stated to be so upon the face of the Bill; for, under such circumstances, as to the Holder, he may and should be treated as a joint principal, without any reference to his actual relation to the other joint contractor, since he chooses to place himself in that predicament, as jointly liable, as principal, upon the Bill.[1]

§ 429. Secondly. When and under what circumstances will a release given by the Holder to one party upon the Bill, discharge the other parties thereto? A discharge, or release, by the Holder, to any party upon the Bill, will not discharge the antecedent parties, who are liable to him for the debt, but will only discharge the subsequent parties; since the antecedent parties are in no wise injuriously affected, as to their rights, by the discharge.[2] And it will make no difference in such case, that the party, sought to be charged, has signed the Bill for the mere accommodation of

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Edmonds, 10 Barn. & Cresw. 578. But see Hall *v.* Wilcox, 1 Mood. & Rob. 58.

[1] Ibid. But see Pitman on Principal and Surety, p. 167 to 192, where the principal authorities are collected. Mayhew *v.* Crickett, 2 Swanst. R. 185; Post, § 432.

[2] Chitty on Bills, ch. 9, p. 443, 444, 450 to 453 (8th edit. 1833); 1 Selw. Nisi Prius, Abridg. p. 362 to 365 (10th edit. 1842); Bayley on Bills, ch. 9, p. 338 to 344 (5th edit. 1830); Smith *v.* Knox, 3 Esp. R. 46; English *v.* Darley, 2 Bos. & Pull. 62; Claridge *v.* Dalton, 4 Maule & Selw. 232; Hayling *v.* Mulhall, 2 W. Black. R. 1235; Bank of Ireland *v.* Beresford, 6 Dow, R. 234; Bank of U. States *v.* Hale, 6 Peters, 250; Abal *v.* Holmes, 3 Miller, Louis. R. 351; Lynch *v.* Reynolds, 16 Johns. R. 41; Brown *v.* Williams, 4 Wend. R. 360; White *v.* Hopkins, 3 Watts & Serg. 99.

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the party discharged, if the fact was unknown to the Holder, and his relation to the Bill would not otherwise exonerate him.[1] Therefore, a release to a Payee of the Bill will not discharge the Drawer or the Acceptor.[2] A release of the Drawer will not discharge the Acceptor.[3] The same rule will apply to cases where the Holder discharges the Guarantor of the Bill; for, in such a case, the party, for whom the guaranty is given, will still remain liable.[4] And here, again, the same doctrine prevails, as in cases of giving time to a party, that a release to the party primarily liable

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[1] Bayley on Bills, ch. 9, p. 338 to 344 (5th edit. 1830); Harrison *v.* Constadd, 3 Barn. & Adolph. R. 36; Carstairs *v.* Rolleston, 5 Taunt. R. 551; Nichols *v.* Norris, 3 Barn. & Adolph. R. 41, note; Walker *v.* Bank of Montgomery, 12 Serg. & Rawle, 382; Sargent *v.* Appleton, 6 Mass. R. 85.

[2] Bayley on Bills, ch. 9, p. 342 to 344 (5th edit. 1830); Brown *v.* Williams, 4 Wend. R. 360; Claridge *v.* Dalton, 4 Maule & Selw. 226; Collett *v.* Haigh, 3 Camp. R. 281. — Mr. Justice Bayley, in Claridge *v.* Dalton (4 Maule & Selw. 226, 232), speaking on this subject, said; "Then, as to the second point, Whether the defendant is discharged by the indulgence given to Quarton, the case of English *v.* Darley (2 Bos. & Pull. 61) established, that, if the Holder agree to give indulgence, for a certain period of time, to any one of the parties to a Bill, this takes away his right to call on that party for payment before the period expires, and not only to call upon him, but upon all the intermediate parties; for, otherwise, if he were to oblige them to pay the Bill, they would immediately resort against the very person, whom the Holder has indulged, which would be inconsistent with his agreement. Therefore, if he give time to the Payee, he cannot call on the Indorsers. But this rule does not apply to a party lower down on the Bill; as, if the fifth Indorsee were to give time to the last Indorser for six months, proposing, in the mean while, to endeavor to get payment from the Indorsers lower down on the Bill, this might well be done; yet, according to the argument for the defendant, all the prior Indorsers would be discharged by the indulgence given to a subsequent Indorser."

[3] White *v.* Hopkins, 3 Watts. & Serg. 99. The release of the Drawer is not a discharge of the Acceptor, without satisfaction or payment of the debt. *A fortiori*, the taking of a note for part of the amount from the Drawer is not any discharge of the Acceptor.

[4] Tombeckbee Bank *v.* Stratton, 7 Wend. R. 429.

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on the Bill, (as is the Acceptor,) will not discharge the other parties thereto, if the Holder, upon such release, expressly reserves all his rights against those parties.[1]

§ 430. Upon similar grounds, if the Holder of a Bill compound with the Acceptor, or with an Indorser, without the Assent of the Drawer, or other subsequent parties, he thereby releases them from their liabilities, if the Acceptor or prior Indorser would otherwise be liable over to them; for there is a material distinction between taking a sum of money in part satisfaction of a debt, as in the case of a dividend by compulsion of law under a commission of bankruptcy, or a discharge under an insolvent act, and the voluntarily taking a sum in satisfaction of such debt, where the party has an option to refuse less than the whole, but compounds with the Acceptor, or a prior Indorser, and thereby releases and deprives all other parties to the Bill of the right of resorting to him.[2] Perhaps it is questionable, even if the Holder has the consent of the other parties, that he may accept the composition, and hold them liable, without resorting to the compounding creditor, whether he will not still be deprived of his remedy against them, if the composition operates as a release of the debt, inasmuch as it will be a fraud upon the other creditors, if they have supposed, that they had contracted with each other on equal terms.[3] On the

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[1] Stewart v. Eden, 2 Caines, R. 121; Burrill v. Smith, 7 Pick. R. 291; Gloucester Bank v. Worcester, 10 Pick. R. 528; Tombeckbee Bank v. Stratton, 7 Wend. R. 429.

[2] Chitty on Bills, ch. 9, p. 454 (8th edit.); Lynch v. Reynolds, 16 Johns. R. 41.

[3] Chitty on Bills, ch. 9, p. 454, 455 (8th edit. 1833); Ex parte Wilson, 11 Ves. 410; Lewis v. Jones, 4 Barn. & Cressw. 506; English v. Darley, 2 Bos. & Pull. 61; Ex parte Smith, 3 Bro. Ch. R. 1; Howden v. Haigh, 11 Adolph. & Ell. 1033.

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other hand, the Holder's compounding with, or releasing, the Drawer will not discharge the Acceptor of a Bill, although he has accepted it for the accommodation of the Drawer, unless it is expressly so stipulated.[1]

§ 431. Thirdly. A release, by the Holder, of one joint Drawer, or Indorser, or Acceptor, whether they are parties or not, will discharge all the joint parties; for such a release is a complete bar to any joint suit, and no separate suit can be maintained in such a case. In short, when the debt is extinguished, as to one, it discharges all, whether the parties intended it or not.[2] The like rule applies to cases, where a satisfaction has been made by any one joint Drawer, or Indorser, or by any one partner in two firms, where each firm is bound upon the Bill.[3] So, the taking of the separate

[1] Chitty on Bills, ch. 9, p. 456 (8th edit. 1833); Maltby *v.* Carstairs, 7 Barn. & Cressw. 735.

[2] Chitty on Bills, ch. 9, p. 449, 450 (8th edit. 1833); Bayley on Bills, ch. 9, p. 342 to 344 (5th edit. 1830); 1 Story, Eq. Jurisp. § 112; Westcott *v.* Price, Wight. Rep. 220; Nicholson *v.* Revill, 4 Adolph. & Ellis, 675; Stirling *v.* Forrester, 3 Bligh, 575; Cheetham *v.* Ward, 1 Bos. & Pull. 630; Brooks *v.* Stuart, 10 Adolph. & Ellis, R. 854; American Bank *v.* Doolittle, 14 Pick. 123; Averill *v.* Lyman, 18 Pick. 346; Tuckerman *v.* Newhall, 17 Mass. R. 581; Goodnow *v.* Smith, 18 Pick. R. 414, 415; Wiggin *v.* Tudor, 23 Pick. 434; Carnegie *v.* Morrison, 2 Metc. R. 381; Ward *v.* Johnson, 13 Mass. R. 148; Rowley *v.* Stoddard, 7 Johns. R. 207; Harrison *v.* Close, 2 Johns. R. 448.

[3] Bayley on Bills, ch. 9, p. 322 (5th edit. 1830); Jacaud *v.* French, 12 East, R. 317; Pothier on Oblig. n. 261, 274; 1 Story, Eq. Jurisp. § 112; Nicholson *v.* Revill, 4 Adolph. & Ell. 675. In this case Lord Denman, in delivering the judgment of the Court, said; "We give our judgment merely on the principle laid down by Lord Chief Justice Eyre in Cheetham *v.* Ward, (1 B. & P. 630), as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is a discharge of all. For we think it clear that the new agreement made by the plaintiff with Samuel Revill, to receive from him 100*l.* in full payment of one of the three notes and in part payment of the other two, before they became due, accompanied with the erasure of his name from those two notes, and followed by

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security of one partner, by the Holder, in discharge of the joint debt, will discharge the other partners.[1] But a mere agreement with one partner to give him time, taking his exclusive security for the payment of a Bill, although founded upon a valuable consideration, will not discharge the other partners, if it be with an express reservation of the rights of the Holder against the partnership, for the payment of the Bill.[2] *A fortiori* an agreement, not founded upon any valuable consideration, to take one partner, as debtor for the whole debt, due by the partnership, will not exonerate the latter.[3] Neither will a covenant, not to sue one joint contractor or partner on the Bill, operate as a discharge of the other co-contractors or partners; for this is a

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the actual receipt of the 100*l.*, was in law a discharge of Samuel Revill. This view cannot perhaps be made entirely consistent with all that is said by Lord Eldon in the case Ex parte Gifford, (6 Ves. jun. 808), where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was not presented to his mind in its simple form; and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debtee might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord Eldon used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favor of the defendant." See also French *v.* Price, 24 Pick. R. 13; Hammatt *v.* Wyman, 9 Mass. R. 138.

[1] Bedford *v.* Deakin, 2 Barn. & Ald. 210, 216; Evans *v* Drummond, 4 Esp. R. 89; Reed *v.* White, 5 Esp. R. 122.

[2] Chitty on Bills, ch. 9, p. 449 (8th edit. 1833); Bedford *v.* Deakin, 2 Barn. & Ald. 210; Lodge *v.* Dicas, 3 Barn. & Ald. 611; David *v.* Ellice, 5 Barn. & Cressw. 196; Pitman on Principal and Surety, p. 181, 182, where the cases are collected; Crawford *v.* Millshaugh, 13 Johns. R. 87.

[3] Lodge *v.* Dicas, 3 Barn. & Ald. 611. See also David *v.* Ellice, 5 Barn. & Cressw. R. 196; Perfect *v.* Musgrave, 6 Price, R. 111.

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mere personal covenant, and does not, like a release, extinguish the debt.[1]

§ 432. But it has been said, that it would be otherwise, in case of a release of any party to the Bill, who is the real principal in the transaction, if the other party is merely an accommodation party for him, such as an accommodation Drawer, or Indorser, or Acceptor, and that fact is known to the Holder, when he takes the Bill; for then the Holder must know, that he thereby discharges the party ultimately bound to pay the Bill.[2] But this doctrine has been denied, upon other occasions to be correct, at least, where it reverses the actual situation of the parties upon the face of the Bill itself; as, if the Acceptor be an accommodation Acceptor for the Drawer or Indorser, and the Holder gives time to the Drawer or Indorser, without the knowledge of the Acceptor; or, if there are joint Acceptors, and one is, in fact, a surety for the other, but it is not so stated on the face of the Bill or acceptance; for, in such case, such Acceptor holds himself out to the Holder, as primarily liable to the Holder for the debt, and that resort may primarily be had to him for payment, and the Holder may, therefore, insist upon that liability, as the result of the instrument, so far as regards his own rights, notwithstanding his knowledge, that the Acceptance is a mere accommodation for the Drawer, or the Indorsers, or the Acceptors. Indeed,

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[1] Chitty on Bills, ch. 9, p. 449 (8th edit. 1833); Dean *v.* Newhall, 8 Term R. 168; Twopenny *v.* Young, 3 Barn. & Cressw. 208; Mallet *v.* Thompson, 5 Esp. R. 178.

[2] Chitty on Bills, ch. 9, p. 451 to 453 (8th edit. 1833); Laxton *v.* Peat, 2 Camp. R. 185. This case has been often questioned, and sometimes denied. But there are other cases to the same effect. Colcott *v.* Haigh, 3 Camp. R. 281; Hall *v.* Wilcox, 1 Mood. & Rob. 58; Post, § 433.

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in either case, the Acceptor cannot be treated as a mere surety, but as a primary debtor; and, in the latter case, the Acceptors, upon the face of the Acceptance, both contract as principal debtors.[1] The point, however, in the present state of the authorities, may be still deemed open to controversy.[2]

§ 433. Fourthly. Parties, who are mere accommodation parties, and are known to be such by the Holder, will under certain circumstances, be discharged by a discharge of the party, for whose accommodation they became parties to the Bill, especially where they do not fall under the predicament stated in the last preceding section.[3] Thus, where both Acceptor and Indorser are parties to the same Bill, for the sole accommodation of the Drawer, each being fully cognizant of all the facts, and the Indorser, upon a dishonor of the Bill and due notice, takes it up, and then the

[1] Fentum *v.* Pocock, 5 Taunt. R. 192; Perfect *v.* Musgrave, 6 Price, R. 111; Bank of Ireland *v.* Beresford, 6 Dow, Rep. 234; Carstairs *v.* Rolleston, 5 Taunt. R. 551; Parke, J., in Price *v.* Edmonds, 10 Barn. & Cressw. 578, and Lord Tenterden, in Yallop *v.* Ebers, 1 Barn. & Adolph. R. 698. See Pitman on Principal and Surety, p. 183, note; Ex parte Glendenning, Buck, R. 517; Clarke *v.* Willson, 3 Mees. & Welsb. 208; 1 Selw. Nisi Prius, 363 to 366; Nicholson *v.* Revill, 4 Adolph. & Ellis, 675; Brown *v.* Carr, 7 Bing. R. 508, 515; Combe *v.* Woolfe, 8 Bing. R. 150, 160. The question has also come before some of the American Courts, and it has been held, that the parties are bound by the character, which they assume upon the face of the Bill; if, by that, they are liable, as primary debtors, or as principal debtors, then, as to the Holder, they are bound, as such; and his knowledge at the time, when he takes the Bill, that they are, or either of them are, accommodation parties, will not vary the case. Bank of Montgomery County *v.* Walker, 9 Serg. & Rawle, 223; S. C. 12 Serg. & Rawle, R. 382. The authorities were examined at large in this case, and the reasoning in Fentum *v.* Pocock (5 Taunt. R. 192) adopted. See also Hunt *v.* Bridgham, 2 Pick. R. 581; Oxford Bank *v.* Lewis, 8 Pick. R. 458; Commercial Bank *v.* Cunningham, 24 Pick. 270, 275.

[2] Ibid.

[3] Chitty on Bills, ch. 9, p. 450 to 452 (8th edit. 1833); Ante, § 432.

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Drawer, becoming insolvent, assigns his property for the benefit of his creditors, and thereby provides a preference and indemnity for the Indorser against his liability on the Bill, and the Assignee has sufficient funds in his hands to pay the whole debt, if the Indorser becomes a party to the assignment, he will thereby release the Acceptor; for it is the same, as if the Indorser had the funds in his own hands for the payment of the Bill.[1] So, a person, who becomes the Holder, by taking up a Bill for the honor of an Indorser, if he afterwards claims the debt from the Acceptor, who has become bankrupt or insolvent, and he is active in procuring his discharge, will thereby exonerate such Indorser, for his conduct amounts to a voluntary discharge of the Acceptor from the debt, and a satisfaction of the Bill.[2]

§ 434. The rule has been sometimes laid down, as we have already seen, much more broadly, and it has been held, that a discharge of mere accommodation parties, whether they are Drawers, or Indorsers, or Acceptors of the Bill, will, in no case, extinguish or vary the rights of the Holder, as to the principal party, for whom they have signed the accommodation paper.[3] The reason assigned for this doctrine, is, that the principal party is not, in his rights or interests, prejudiced or affected thereby, since, if the accommodation parties had paid the Bill, they would have been

[1] Bradford v. Hubbard, 8 Pick. R. 155.

[2] Lynch v. Reynolds, 16 Johns. R. 41.

[3] Chitty on Bills, ch. 9, p 450 to 452, 454 (8th edit. 1833); Bayley on Bills, ch. 9, p. 342, 343, 344 (5th edit. 1830); Clarke v. Noel, 3 Camp. 411; Hill v. Read, Dowl. & Ryl. N. P. Rep. 26; Laxton v. Peat, 2 Camp. R. 185; Colcott v. Haigh, 3 Camp. R. 281; Sargent v. Appleton, 6 Mass. R. 85; Murray v. Judah, 6 Cowen, R. 484; Ante, § 425, 432; Story on Promis. Notes, § 418.

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entitled to recover the amount from such principal party; and it can make no difference to him, whether he pays his own debt to the Holder, or to the accommodation parties.[1] But the doctrine is certainly open to no inconsiderable doubt; and the authorities are in conflict with each other. There seems a strong inclination in the more recent authorities to the doctrine, that the rights of all the parties to the Note are, in respect to the Holder and his acts, governed by precisely the same rule, whether the Note be one for the accommodation of any of the parties, or not.[2]

§ 435. If the Acceptor has become bankrupt, the Holder will not, by proving his debt under the bankruptcy against the Acceptor, discharge either the Drawer or the Indorsers from their antecedent liability to him for the amount due on the Bill, after a deduction of the sum which he may receive as dividends out of the bankrupt's estate; for there, the discharge of the Acceptor is, by act and operation of law, independent of the consent of the Holder, who remains merely passive; whereas, a voluntary discharge by the Holder is his own personal, spontaneous act, and can have no effect, but by his consent and approval.[3]

§ 436. The receiving of part payment from any one of the parties upon a Bill, after they are all absolutely fixed with liability to pay the same, will not discharge the other parties thereon, unless, indeed, it be accompanied by some other circumstances impairing the

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[1] Ibid.; Ante, § 425.

[2] See Ante, § 430; Story on Prom. Notes, § 418.

[3] Ante, § 428, 432; Chitty on Bills, ch. 9, p. 454 (8th edit. 1833); Bayley on Bills, ch. 9, p. 346 (5th edit. 1830); English *v.* Darley, 2 Bos. & Pull. 62; Longdale *v.* Parry, 2 Dowl. & Ryl. 337; Stock *v.* Manson, 1 Bos. & Pull. 286; Pothier de Change, n. 179.

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rights of the Holder against them; such, for example, as giving time or a release to the party primarily liable, or accepting him as the exclusive debtor, upon a valid consideration.[1]

§ 437. In some respects, the French Law, upon the point, what acts will discharge the Acceptor or other parties from payment of the Bill, coincides with our law, and, in others, it differs from it. But the French Law does not appear to have pursued throughout the principles, to the same extent, as they are in ours. By the French Law, according to Pothier, (and it does not seem changed since his day,) the Drawer and Indorsers are exonerated from all liability upon the Bill, when the Holder has acquitted or discharged the Acceptor from payment of the whole Bill.[2] And if the discharge is for a part, then they are only exonerated *pro tanto*. This doctrine, however, so far as it respects the Drawer, is to be understood with this qualification, that the Acceptor had, at the time of the discharge, funds in his hands, belonging to the Drawer; for if he then had no funds of the Drawer in his hands, he is deemed a mere accommodation Acceptor, and the Drawer will still remain liable for the sum due upon the Bill, if the previous dishonor thereof by the Acceptor has been duly notified to him.[3] But the In-

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[1] Chitty on Bills, ch. 9, p. 442, 451, 452 (8th edit. 1833); Bayley on Bills, ch. 9, p. 343 (5th edit. 1830); Gould *v.* Robson, 8 East, R. 580; Walwyn *v.* St. Quintin, 1 Bos. & Pull. 652; Ayrey *v.* Davenport, 5 Bos. & Pull. 474; English *v.* Darley, 2 Bos. & Pull. 61; Bank of U. States *v.* Hatch, 6 Peters, R. 250; Lobdell *v.* Nipliler, 4 Miller, Louis. R. 294; Sargent *v.* Appleton, 6 Mass. R. 85; James *v.* Badger, 1 Johns. Cas. 131; Ruggles *v.* Patten, 8 Mass. R. 480; Hunt *v.* Bridgham, 2 Pick. R. 581. See Pothier de Change, n. 176 to 179.

[2] Pothier de Change, n. 176 to 179.

[3] Pothier de Change, n. 178.

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dorsers will, in all cases, be exonerated by a discharge of the Acceptor, whether he has funds of the Drawer in his hands, or not; because, if the Holder could recover against them, they would have a right to recover over against the Acceptor to the like extent.[1] The same rule also prevails, as with us, where the Acceptor is discharged for the whole, or for a part, or has time allowed him, by mere operation of law, (as in cases of insolvency and bankruptcy,) that the Holder, being merely inactive, is compelled to submit to such discharge, or giving of time, and, therefore, he is not restrained thereby from the full exercise of all his rights against the Drawer and Indorsers.[2]

§ 438. In respect to the Drawer, Pothier holds, that the discharge of him, by the Holder, from all liability on the Bill, will not discharge the Acceptor, unless he be a mere accommodation Acceptor; for, in the latter case, if the Acceptor should be called upon to pay, he would have his recourse over against the Drawer, and thereby the discharge to the Drawer would be defeated.[3] But such a discharge of the Drawer would, for the same reason, discharge the Indorsers, since they would have a like recourse over against the Drawer, upon payment of the Bill.[4]

§ 439. In respect to Indorsers, Pothier farther holds, that a discharge of any one of the Indorsers, by the Holder, if it be purely personal, will not discharge any antecedent Indorser, or the Drawer, or the Acceptor; because the right of the Holder against them is upon several contracts and credits, and, therefore, he may

[1] Ibid.
[2] Pothier de Change, n. 179; Ante, § 435.
[3] Pothier de Change, n. 180, 181.
[4] Pothier de Change, n. 182.

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discharge one, and retain his claim against the others.[1]

§ 440. Thus far, the French Law seems to recognize the same principles as the law of England and America. But there are other modes of extinguishing the liability of parties, recognized by the law of France, which are not adopted in England or America. Thus, for example, by the law of France, Compensation (that is, what we should call a right of set-off,) is allowed to be an extinguishment of a Bill of Exchange; so, that, if the Acceptor, or the Drawer, or an Indorser, who is liable to pay the Bill, is, at the time, when his liability has absolutely attached, a creditor of the Holder, to the amount of the Bill, or a part thereof, he has a right, in a suit against him, to oppose that amount, in compensation of the Bill, against the Holder; for it is treated as equivalent to a payment *pro tanto*.[2] So true is this, that a compensation, which one joint party is entitled to oppose to the claim of the Holder, will avail for and discharge all.[3]

§ 441. Another mode of extinguishment, familiarly known in the French Law, and, also, in our law, is, by a Novation, which is a substitution of a new debt for an old one; as, for example, the substitution of a new Bill in lieu of, and taking up, the old Bill. Pothier lays it down as unquestionable, that a Novation operates as a clear extinguishment, and is equally as applicable to Bills of Exchange, as it is to other ordinary contracts.[4]

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[1] Pothier de Change, n. 183.

[2] Pothier de Change, n. 184 to 188.

[3] Pothier on Oblig. by Evans, n. 274.

[4] Pothier de Change, n. 189; Pothier on Oblig. by Evans, n. 546 to 564.

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§ 442. Another mode of extinguishment, known in the French Law, is, by what is technically called Confusion, by which is meant, the concurrence of two qualities in the same subject, which mutually destroy each other.[1] This may occur in several ways; as, for example, where the creditor becomes the heir of the debtor, or the debtor the heir of the creditor, or either accedes to the title of the other by any other mode of transfer.[2]

§ 443. A doctrine, nearly analogous, prevails in the English Law in the former case, (although not in the latter), and may well be designated as taking effect by merger. Thus, if the creditor appoints his debtor to be his executor, that operates, at law, as a release or extinguishment of the debt.[3] And the law is the same, where the creditor appoints one of several joint or joint and several debtors to be his executor; for the executor cannot sue himself.[4] But, by the English Law, this extinguishment operates only, where there are other assets of the creditor to pay all his debts; for, if there be not other assets, then the creditors of the testator have a right to payment out of the debt, as a part of the assets.[5] In case of the appointment of the debtor as administrator of the creditor's estate, as it is the mere act of law, and not of the creditor himself, the debt is not extinguished.[6] And in equity,

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[1] Pothier on Oblig. by Evans, n. 605, 606.

[2] Pothier on Oblig. by Evans, n. 606 to 609; Pothier de Change, n. 190, 276.

[3] Freakley *v* Fox, 9 Barn. & Cressw. 130.

[4] Williams on Executors, Pt. 3, B. 3, ch. 11, § 9, p. 937 to 946 (2d edit.); Freakley *v.* Fox, 9 Barn. & Cressw. 130. See Pothier on Oblig. by Evans, n. 276.

[5] Ibid.

[6] Ibid.

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in England, the same rule prevails, even in the case of executors, who are treated as having, in fact, paid the debt, by adding it to the assets.[1] In case of the appointment, by a debtor, of his creditor, to be his executor, no such merger or extinguishment takes place; unless the executor receives assets sufficient to pay the debt, and there be a right to appropriate the same to that purpose, and then he is presumed so to do.[2]

§ 444. The distinction is, perhaps, more nominal than real, between the French Law and the English Law; for, when it is said, that, where the creditor becomes the heir of the debtor, his debt is extinguished, it is to be understood that he is not only executor or administrator of the estate, but that he is the sole heir of the property, subject to other debts. And hence, if he accepts the executorship with the benefit of an inventory, no such confusion is introduced; because, it is said, that the beneficiary heir, and the succession, are then deemed different persons, and their respective rights are not confounded.[3] Accordingly, Pothier says; In order to induce a confusion of the debt, the characters, not only of debtor and creditor, but of sole debtor and sole creditor, must concur in the same person. If a person, who was only creditor for part, becomes sole heir of the debtor, it is evident, that the confusion and extinction can only take place, with respect to the part, for which he is creditor. *Vice versâ*, if the creditor of the whole becomes heir of the debtor

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[1] Ibid.; Carey *v.* Gooding, 3 Bro. Ch. R. 111; Berry *v.* Usher, 11 Ves. 90; Simmons *v.* Guttridge, 13 Ves. 262.

[2] Ibid.; Woodward *v.* Lord Darcey, Plowd. R. 185; Wankford *v.* Wankford, 1 Salk. R 305.

[3] Pothier on Oblig. by Evans, n. 606 to 608.

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for part, the confusion only takes place with respect to that part. It is equally evident, that, if the creditor is only one of several heirs to the debtor of the whole, the confusion and extinction only takes place in respect of the part, for which he is heir, and for which he is liable to all the other debts of the succession; the demand continues to subsist against the others, as to the parts, for which they are respectively liable to the debts of the deceased.[1]

§ 445. Pothier illustrates the principles of the French Law, by stating, that the amount due by a Bill of Exchange is extinguished by confusion, when the Holder becomes the pure and simple heir of the Acceptor; and *vice versâ*, when the Acceptor becomes the pure and simple heir of the Holder; or, when a third person becomes the pure and simple heir of both. And this turns upon the ground of the maxim, *Aditio hæreditatis pro solutione cedit.*[2] And this is also the established rule in the Roman Law.[3] The like extinguishment applies in favor of the Drawer and Indorsers, by the Acceptor's becoming the heir; for his is the principal obligation, and, when that is extinguished, the collateral obligations are also extinguished.[4]

§ 446. In respect to a release, or discharge, by the Holder, of one joint debtor, how far it will discharge the others, Pothier holds the following doctrine; That the release of the creditor to one of the debtors would also liberate the others, if it appeared, that the creditor intended thereby to extinguish the debt as to the whole. If it appeared, that his intention was only to

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[1] Pothier on Oblig. by Evans, n 612.
[2] Pothier de Change, n. 190; Dig. Lib. 46, tit. 3, l. 95, § 2.
[3] Dig. Lib. 46, tit. 3, l. 95, § 2.
[4] Pothier de Change, n. 191.

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extinguish the debt, as to the part, for which the person, to whom he gave the release, was liable to his co-debtors, and to discharge that one personally from the residue of the debt, the debt would still continue to subsist, as to the residue, against the co-debtors.[1]

§ 447. In cases of a demand of payment of a Bill of Exchange from the Acceptor, or other party there-

[1] Pothier on Oblig. by Evans, n. 275. — Pothier adds; "If the creditor, in the discharge, which he gave to his co-debtor, expressly declared, that he intended only to discharge the person of the particular debtor, and to retain his claim against the others; could he, by virtue of this declaration, require the whole from the other debtors, without deducting the part of him, who was discharged? I think he could not; the several debtors would not have bound themselves *in solido*, but would only have engaged for their own respective parts, if they had not considered, that, on paying the whole, they should have recourse against the others; and that, for this purpose, they would be entitled to a cession of the actions of the creditor for the other parts. It is only under the tacit condition of having this cession of actions, that they are obliged, *in solido*; and, consequently, the creditor has no right to demand from any of them the payment of the whole, without such cession. In this case, the creditor having put it out of his power to cede his action against the debtor, whom he has discharged, and, consequently, having incapacitated himself from performing the condition, upon which he has a right to demand the whole, it follows, that he cannot demand the whole from each of them. When there are several debtors *in solido*, and the creditor discharges one of them, can he proceed against each of the others *in solido*, subject only to a deduction of the share of the one, who is discharged, and of that proportion, to which the one, who is discharged, would be liable, as between themselves, for the share of any of the others, who were insolvent? For instance, supposing that I had six debtors *in solido*, that I discharged one, that there remained five, of whom one is insolvent; can I only proceed against each of the others for their sixth part? Or may I proceed against each of those, who are solvent, for the whole, subject only to the deduction of the sixth, for which the person discharged was originally bound, and of his share in the portion of the one, who had become insolvent? I think I should be well founded in doing so, for the debtor, against whom I proceed, cannot claim from me any other deduction, than the amount of what he loses by not having a cession of actions against the one, whom I have discharged. Now, the cession of actions against him would only give a right of repetition as to his portion, and a right of contribution in respect to the share of the insolvent." Pothier on Oblig. n. 275, by Evans.

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to, the question may arise, Whether he is bound to pay, unless the bill is produced and delivered up to him. It is obvious, that, if the Bill is not produced, and delivered up, when it is paid, that the Acceptor may, in case of its having been lost or transferred, and coming into the possession of a *bonâ fide* Holder, before its maturity, be liable to pay the same a second time; and he can have no positive security against such liability. At law, no such security can be required to be given. A Court of Equity, however, may, where the Bill is asserted to be lost, give relief to the Holder; but, then, it is always upon the terms, that he shows satisfactory proofs to establish the loss, and gives good security, for the re-payment of the money, if the Acceptor shall be compelled to pay the same again to another Holder.[1] Still, this is imposing some hardship upon the Acceptor, as he may be obliged to contest the rights of the Holder in a second suit, and the evidence, by which he can resist payment, may, in the mean time, be greatly changed by the witnesses to the supposed prior loss being dead, or having removed, and their place of residence being unknown; so that, without any default on his own part, he may be subjected to expensive and protracted litigation, in order to avoid a double payment; and, in the mean time, the original Holder, to whom he had paid the amount, as well as his sureties, may have become insolvent.

§ 448. Upon this account, the doctrine has been lately established in England, although formerly there was much diversity of opinion upon the subject, that

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[1] Macartney *v.* Graham, 2 Sim. R. 285; Davies *v.* Dodd, 1 Wilson, Exch. R. 110.

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no recovery whatsoever can be had at law upon a lost Bill of Exchange, which is negotiable (although it might be otherwise, if not negotiable;)[1] and, that the Acceptor is not bound to pay the Bill, unless it is produced and delivered up to him at the time of the payment; nor will an offer of indemnity affect his case at law, upon the ground, that the Acceptor, upon payment of the Bill, has a right to the possession of it for his own security, and as his own defence, and discharge *pro tanto*, in his account with the Drawer.[2] The like rule prevails, and seems always to have prevailed, in France; and, indeed, is so manifestly in coincidence with mercantile convenience and security, that it would be no matter of surprise, to find it the rule in

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[1] Mossop *v.* Eadon, 16 Ves. 430; Pintard *v.* Tackington, 10 Johns. R. 104; Bayley on Bills, ch. 9, p. 369, 370, 372, 373 (5th edit.); Chitty on Bills, ch. 6, p. 291 (8th edit).

[2] Bayley on Bills, ch. 9, p. 371 to 373 (5th edit. 1830); Chitty on Bills, ch. 6, p. 291, 292, 295; Id. ch. 9, p. 456 to 458 (8th edit. 1833); Hansard *v.* Robinson, 7 Barn. & Cressw. 90; Davies *v.* Dodd, 4 Taunt. R. 602; Ex parte Greenway, 6 Ves. 812; Wain *v.* Bailey, 10 Adolph. & Ellis, 616; Poole *v.* Smith, Holt, N. Prius, R. 145; Thomson on Bills, ch. 3, § 5, p. 323 (2d edit); Mossop *v.* Eadon, 16 Ves. 430. In this last case the note was not negotiable. Powell *v.* Roach, 6 Esp. R. 76. Lord Tenterden, in delivering the opinion of the Court in Hansard *v.* Robinson (7 Barn. & Cressw. 90, 94, 95), said; "Upon this question, the opinions of Judges, as they are to be found in the cases quoted at the bar, have not been uniform, and cannot be reconciled to each other. It is not necessary to advert again to the cases. Amid conflicting opinions, the proper course is, to revert to the principle of these actions on Bills of Exchange, and to pronounce such a decision as may best conform thereto. Now the principle, upon which all actions are founded, is the custom of merchants. The general rule of the English Law does not allow a suit by the Assignee of a chose in action. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What, then, is the custom in this respect? It is, that the Holder of the Bill shall present the instrument, at its maturity, to the Acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the Bill. The Acceptor, paying the Bill, has a right to the possession of the instrument for

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all the other maritime nations of Continental Europe.[1] The like rule has been applied in England to cases,

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his own security, and as his voucher and discharge, *pro tanto*, in his account with the Drawer. If, upon an offer of payment, the Holder should refuse to deliver up the Bill, can it be doubted, that the Acceptor might retract his offer, or retain his money? And, if this be the right of an Acceptor, ready to pay at the maturity of the Bill, must not his right remain the same, if, though not ready at that time, he is ready afterwards? and, can his right be varied, if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher and his discharge toward the Drawer, remain unchanged. As far as regards his voucher and discharge toward the Drawer, it will be the same thing, whether the instrument has been destroyed or mislaid. With respect to his own security against a demand by another Holder, there may be a difference. But how is he to be assured of the fact, either of the loss or destruction of the Bill? Is he to rely upon the assertion of the Holder, or to defend an action at the peril of costs? And if the Bill should afterwards appear, and a suit be brought against him by another Holder, a fact not absolutely improbable in the case of a lost Bill, is he to seek for the witnesses to prove the loss, and to prove, that the new plaintiff must have obtained it after it became due? Has the Holder a right, by his own negligence, or misfortune, to cast this burden upon the Acceptor, even as a punishment for not discharging the Bill on the day it became due? We think the custom of merchants does not authorize us to say, that this is the law. Is the Holder, then, without remedy? Not wholly so. He may tender sufficient indemnity to the Acceptor, and, if it be refused, he may enforce payment thereupon in a court of equity." Whether the like rule prevails, when a Bill has been destroyed, and proof of its destruction is made, as, for example, of its being consumed by fire, seems to have been thought more doubtful. But, in such a case, the situation of the Acceptor, as to the importance of possessing the voucher to establish his claim against the Drawer, as well as his own personal security, may require the rule to be strictly adhered to. What evidence can the Acceptor have, that the evidence of the destruction is not false, by mistake, or design? See Bayley on Bills, ch. 9, p. 369 to 372 (5th edit. 1830); Pierson *v.* Hutchinson, 2 Camp. R. 211; Rolt *v.* Watson, 4 Bing. R. 273; Anderson *v.* Robson, 2 Bay, R. 495; Swift *v.* Stevens, 8 Connect. R. 431. See also Stat. 9 & 10 Will. 3, ch. 17, § 3.

[1] Ibid.; Code de Comm. art. 151, 152; Jousse, Comm. sur. l'Ord. 1673, tit. 5, art. 18, 19, and Comment.; Pardessus, Droit Comm. Tom. 2, art. 408, 410, 411; Thomson on Bills, ch. 3, § 5, p. 319 to 323 (2d edit.); Nouguier de Change, Tom. 1, p. 335 to 341; Story on Promissory Notes,

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where a Bill, payable to the Bearer (as is commonly the case with bank notes) is divided and transmitted by the post, and one half is lost, and the other arrives safe; and the Holder is held not entitled to recover at law, upon the half, which he possesses; for the other half may have passed, or be proved to have passed, into the hands of another *bonâ fide* Holder.[1]

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§ 111; Heineccius de Camb. cap. 6, § 11. — Heineccius says; "Elegans quæstio est, an, amissis litteris cambialibus, ipsum debitum cambiale exspiret? Id quod merito negatur. Quodsi debitor fateatur, se cambiales litteras dedisse, judex illum per exsequutionem cambialem adigere protest ad solvendum, modo actor prius cautionem de futurâ indemnitate præstiterit. Sin vero neget reus, probatione, adeoque processu ordinario opus est: victus tamen reus exsequutione cambiali ad solvendum compellitur."

[1] Bayley on Bills, ch. 9, p. 369 to 374 (5th edit.); Chitty on Bills, ch. 6, p. 285, 291, 295 (8th edit.); Thomson on Bills, ch 3, § 5, p. 323 (2d edit.); Story on Promissory Notes, § 111; Mayor *v.* Johnson, 3 Camp. R. 324; *Contra*, Bullett *v.* Bank of Pennsylvania, 2 Wash. Cir. R. 172; Martin *v.* The Bank of the U. States, 4 Wash. Cir. R. 253; Hinsdale *v.* Bank of Orange, 6 Wend. R. 378; Patton *v.* State Bank, 2 Nott & McCord, R. 464; See Mossop *v.* Eadon, 16 Ves. 430 But this case is distinguishable, as the note was not negotiable and was payable on demand. See also Chitty on Bills, ch. 6, p. 291, note *b*, N. B. (8th edit.); Id. 295. — Mr. Bayley (p. 374) says; "If a Bill or note transferable by delivery be cut in halves, and half be lost, the Holder cannot sue at law upon the other half. Payment at law cannot be enforced unless the entire instrument be produced, or unless there be proof that the entire instrument, or whatever part of it is wanting, has been destroyed." Mr. Chitty (p. 285) says; "In remitting bank notes or bank post bills, it is expedient to divide them, and send them by different conveyances; and it should seem, that if one part should be lost, stolen or misapplied, no person but the real owner can acquire a right to or lien upon the same, however *bonâ fide* his conduct may have been, because, as the instrument was not perfect when he received the same, he had no right to rely on the authenticity of the transaction, and can look only to the party from whom he received it; and the real owner may recover from him the half in an action of trover, if it be withheld after demand; though he could not recover from the Acceptor or Maker without producing both the halves, and being able to give them up." Mr. Thomson (p. 323) says; "The remedies in England, on the loss or destruction of Bills and notes, are different in some respects from those already mentioned. 1. It seems to be settled, that, if a Bill or note is destroyed, and, even

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§ 449. In America there has been some diversity of judgment, whether a suit is maintainable at law upon a lost Bill, against the Acceptor, or not. In some States, the doctrine has been maintained in the affirm-

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though lost, if it is not negotiable, which Bills and notes are not in England, unless payable to order, or if it is specially indorsed by the payee, or has never been indorsed, the creditor may maintain action on it at Common Law against any of the previous parties, and secondary evidence, similar to what is received with us in a proving of the tenor, will be admitted to establish its contents. There is also an action at law on a Bill against a party who wrongfully withholds it, as against an Acceptor refusing to redeliver it, because he cannot found an objection to the creditor's right on his own misconduct. It has been farther suggested, that there may be an action at law, even on a Bill or note which has been lost when blank indorsed, if lost after the term of payment; because, in that case, any Holder would be liable to the exception pleadable against the previous Holder, viz. that he had recovered. But the better opinion seems to be, that no party to the Bill should be thus subjected, without indemnity, to the risk of a future action by a *bonâ fide* Holder of the lost Bill, seeing he cannot answer such an action without undertaking to prove that the Bill was lost after the term of payment. In such a case, therefore, there would probably be no remedy in a Court of Law. For, 2dly, although it seems to be doubted, whether Courts of Law have not, in some cases, the power of adjusting the terms of an indemnity against the reappearance of a lost instrument, yet this is the proper function of courts of equity. No action at law, therefore, can be maintained, even with an offer of indemnity, on a Bill or note blank indorsed, and, consequently, payable to the bearer, when it has been lost on or before the term of payment, and may thus be sued on again by a third party. The same rule has been enforced, in some cases, when the instrument was lost after the term of payment, and after action was brought on it. It has been even carried so far, that, in a case where a bank note payable to the bearer was sent in two separate parts by post, and one of them was stolen, it was held that an action at law could not be maintained on the remaining half, unless by producing the entire note, or proving that half was destroyed, seeing that any party getting the other half would have an equally good right of action on it, whereby the defendant might be liable to two actions at once. But it appears, that the two Holders would not, in this case, be in the same situation, since the one would instruct the *casus amissionis* of that part which was lost, whereas (according to the suggestion of a learned author,) any party taking the lost part, while he knew nothing of the other, must be held to do it at his own risk, and could not be considered as having the same rights with a Holder of the full notes. It does not, therefore, appear that the

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ative,[1] in others, it has been held in the negative.[2] In others, again, it has been held that the Holder is entitled to recover at law, provided he executes a suitable instrument of indemnity.[3] Which doctrine will ultimately prevail in America, it is not for the Commentator to conjecture. But it may be said, with great confidence, that it will be difficult to overturn, upon satisfactory grounds, the reasoning of Lord Tenterden, already referred to, in favor of the negative.[4]

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debtor was in danger of a second claim from this party, though he had paid the note to the original owner."

[1] Meeker *v.* Jackson, 3 Yeates, R. 442; Lewis *v.* Peytavin, 16 Martin, R. 4; Miller *v.* Webb, 8 Louis. R. 516; Bullet *v.* Bank of Pennsylvania, 2 Wash. Cir. R. 172; Hinsdale *v.* Bank of Orange, 6 Wend. R. 378.

[2] Rowley *v.* Ball, 3 Cowen, R. 303; Kirby *v.* Sisson, 2 Wend. R. 550; Smith *v.* Rockwell, 2 Hill, N. Y. R. 482. — See Morgan *v.* Reintzel, 7 Cranch, 275; Renner *v.* Bank of Columbia, 9 Wheat. R. 581.

[3] Story on Promissory Notes, § 111.

[4] Ante, § 448, and note. The reasoning in favor of maintaining a suit at law upon a lost Bill or note is very fully given by Mr. Justice Washington in delivering the opinion of the Court in Martin *v.* Bank of U. States, (4 Wash. Cir. R. 253, 255). He there said; "The principles upon which this Court decided the case of Bullet *v.* The Bank of Pennsylvania (2 Wash. Cir. R. 172) were, that a bank, or any other, promissory note, is the evidence of a debt due by the maker to the holder of it, and nothing more. It is also the highest species of evidence of such debt, and in fact the only proper evidence, if it be in the power of the owner of the note to produce it. But if it be lost or destroyed, or by fraud or accident has got into the possession of the maker, the owner does not thereby lose his debt, but the same continues to exist in all its rigor, unaffected by the accident which has deprived the owner of the means of proving it by the note itself. The debt still existing, the law, which always requires of a party that he should produce the best evidence of his right of which the nature of the thing is capable, permits him, where such better evidence is lost or destroyed, or not in his power, to give inferior evidence, by proving the contents of the lost paper; and if this be satisfactorily made out, he is entitled to recover. If the evidence be not lost, but is merely impaired by accident, or even by design, if such design be not to injure the maker or to cancel the debt, the principle of law is the same. Cutting a bank note into two parts does not discharge the bank from the debt, of which the note was but the evidence, nor does it even impair the evidence itself, if, by uniting the parts,

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But, when we come to the case of the Indorser, or the Drawer, who is called upon to pay the Bill, in default

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the contents of the entire note can be made out. If one of the parts should be lost or destroyed, the debt would be no more affected than if the entire parts had been lost or destroyed. The evidence is impaired indeed, not by the act of cutting the note, but by the same accident which would have affected the entire note, had that been lost. In both cases, the owner must resort to secondary evidence, and is bound to prove that the note did once exist, that it is lost or destroyed, and that he is the true, *bonâ fide* owner of the debt. If one part only of the note be lost, the difficulty which the real owner has to encounter in proving his right to the debt is diminished. For if the entire note be lost, the owner of it at the time of the accident may not be entiled to the debt of which it was the evidence, at the time he demands payment, because the note, passing from hand to hand by bare delivery, may have been found, and have got into the possession of a *bonâ fide* Holder. But against the real owner of one half of the note, there cannnot possibly be an opposing right. The finder, or robber of the other half part cannot assert a right to the debt, because he cannot prove that he came fairly to the possession of the evidence of it. I speak judicially, when I say that he cannot prove that fact, because he cannot do it without the aid of perjury, which the law does not presume, and can in no instance guard against it.

the lost half note gets fairly into the hands of a third person, he takes it with notice that there may be a better title in the possession of the other half, and consequently he looks for indemnity to the person from whom he received the half part, if it should turn out that he was not the real owner of the entire note. It is impossible, therefore, that the bank can be legally called upon to pay the note twice; and if the officers of the institution suffer themselves to be imposed upon by insufficient or false evidence, by which means the bank is brought into this predicament, she must abide the loss as being occasioned by an error of judgment in the officers of the bank, or their want of due caution. The law cannot adapt its provisions to every possible case that may occur, and it therefore proceeds from necessity upon general principles applicable to all cases. If upon any other ground than fraud, or perjury, the maker of the lost note may by possibility be twice charged, the law will not expose him to that risk by relieving the asserted owner of it; not because there may be imposition in the case, or because the debt ought not to be paid; but because the proof that the claimant is the real owner of the debt is defective; for it by no means follows, that, because the lost note did belong to him, that it may not then be the property of some other person. A court of law therefore will, in such a case, dismiss the parties from a forum which has no means of securing the maker of the note against a double charge, and leave him to one where those who ask of it equity will be compelled to do equity. The case then resolves itself very much into a question of jurisdiction. For it is quite clear that

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of payment by the Acceptor, it will be difficult to find any solid reason, upon which the Holder can be entitled to recover against either of them, without the Bill being produced, upon the mere parol proof of the loss of it; since the Indorsers and Drawer may or must thereby be put to great embarrassment in making out their own title against the Acceptor, or against other parties liable to them, without the production of the Bill. What right can the Holder have, to shift upon them the burthen of proving the loss of the Bill? Or, what adequate means can they have of preserving and commanding all the proof for future use, in case of future litigation? The English doctrine must, under such circumstances, apply to the Drawer and Indorsers with double propriety and force.[1]

§ 450. The legal effect of a payment of the Bill by the Acceptor, or by any other party, is easily deduci-

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the real owner of a debt, the evidence of which is lost, is entitled to supply the want of the better evidence by that which is secondary, and this rule of evidence is the same in equity as at law. But whether the application for relief shall be in the one court, or in the other, must depend upon the particular case, and its fitness for the one jurisdiction or the other. Many difficulties were stated by the defendant's counsel, to which the practice of cutting the notes and transmitting them by mail, exposes banking institutions in identifying the part of a note when produced for payment. That these difficulties do in a measure exist, must be admitted. But the bank knows that there can be but one owner of the note, and who that one is, must be satisfactorily proved, to entitle him to payment of it. The bank has a just right to call for such proof; and if it be truly and faithfully given, there can be no risk in paying it. The possessor of the other half part of the note, as already observed, by whatever means he acquired it, can never oblige the bank to pay the money over again to him. But after all, the rule of law does not rest upon this circumstance. The maker of the note is bound to pay to the person who proves himself to be the legal owner of it; and the difficulties complained of, are not greater than those which attend most litigated questions."

[1] See Chitty on Bills, ch. 9, p. 285, 291, 299 (8th edit. 1833); Id. ch. 10, p. 532; Bayley on Bills, ch. 9, p. 369 to 373 (5th edit. 1830).

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ble from the considerations already suggested.[1] The payment is valid as to third persons, only when it is made *bonâ fide*, without any knowledge of facts, which justly impair or destroy the rights of the Holder. If, therefore, payment is made under circumstances, in which the party is under no legal liability to pay, as, for example, by an Indorser, who has not received due notice, it is at his own risk; and he can, ordinarily, have no recourse over to other persons, who might have been liable, if the payment had been valid and obligatory.[2] So, also, payment of a Bill, where the indorsement, under which the Holder claims, is a forgery, will not justify the party paying; but the real owner of the Bill will be entitled to recover the amount.[3] And, indeed, it may be laid down as a general rule, that payment of a forged Bill will have no effect to charge other parties therewith, who, if it had been genuine, would have been liable therefor, unless they have given currency to the Bill by adopting, or passing, or accepting it as genuine.[4]

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[1] Chitty on Bills, ch. 9, p. 458 (8th edit. 1833).

[2] Chitty on Bills, ch. 9, p. 426, 458 to 464 (8th edit. 1833).

[3] Ibid.; Bayley on Bills, ch. 8, p. 318 to 323 (5th edit. 1830); Id. ch. 11, p. 463, note, 484.

[4] Ibid. — Upon this subject, Mr. Chitty says; "With respect to payment, by mistake, of Bills or notes, where there has been forgery, the decisions and opinions have been contradictory. It seems, however, clear, on principle, as well as authority, that a Drawee of a Bill, or a banker acting for his customer, cannot, in case he pays a Bill, where the Drawer's signature has been forged, or, where the sum has been fraudulently enlarged, without the fault of the Drawer, debit the Drawer with the sum so paid, without his authority, or recover the amount from him. But, there are many conflicting decisions upon the question, Whether the party paying shall be allowed to recover back the money from the person, whom he has inadvertently paid. It has been contended, that, if the party paid was a *bonâ fide* Holder, ignorant of the forgery, then he ought not to be obliged to refund, under any circumstances, although he could not have enforced

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§ 451. When, and under what circumstances, in case of a forgery, a person, who is a party to a Bill,

payment, and although he had immediate notice of the forgery, because the Drawee was bound to know the handwriting of the Drawer, and the genuineness of the Bill; and because the Holder, being ignorant of the forgery, ought to have the benefit of the accident of such payment by mistake, and not to be compelled to refund. But, on the other hand, it may be observed, that the Holder, who obtained payment, cannot be considered as having altogether shown sufficient circumspection; he might, before he discounted, or received the instrument in payment, have made more inquiries as to the signatures, and genuineness of the instrument, even of the Drawer or Indorsers themselves; and, if he thought fit to rely on the bare representation of the party, from whom he took it, there is no reason, that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when, by an immediate notice of the forgery, he is enabled to proceed against all other parties, precisely the same as if the payment had not been made, and, consequently, the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems, that, of late, upon questions of this nature, these latter considerations have influenced the Court in determining, whether or not the money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that, upon attempting to reconcile them, they are not so contradictory, as might, on first view, have been supposed. It has been decided, that a Drawee, who had accepted, and afterwards paid a Bill, and, after waiting a considerable time, upon discovering that the Drawer's name was forged, could not recover back the amount, for there, by his acceptance, he gave credit to the Bill, and thereby induced the plaintiff to take it, and he also delayed giving notice of the forgery. So, in another case, where bankers paid a forged acceptance, supposed to have been made by their customer, and payable at their bank, but did not discover or give notice of the forgery to the party they had paid, for a week afterwards, it was held, that such delay precluded them from recovering back the amount, because thereby the means of resorting, with effect, to the prior parties, was prejudiced, if not defeated; but the Court were not unanimous in that decision; Chambre, J., being of opinion, that the case came within the general rule, of money, paid under a mistake of facts, being recoverable back, and that, therefore, the defendant was liable to refund; and Dallas and Heath, Justices, thinking otherwise, on the ground, that it was the plaintiffs' duty to know their customer's hand, before they paid the Bill; and Gibbs, C. J., being the only judge, who put the case on the true ground, namely, the plaintiffs' delay in giving notice of the forgery, and having thereby destroyed the defendant's remedy over." Chitty on Bills, ch. 9, p. 463, 464 (8th edit. 1833). See also Salem Bank *v.*

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either as Drawer, Indorser, or Acceptor, and who pays it to a *bonâ fide* Holder, will be entitled to recover back the money from such Holder, has been a matter of much discussion. If he is the Acceptor, and the forgery be of the name of the Drawer, he is not, (as we have seen[1]) entitled to recover back the money; because, by his acceptance, he admits, in favor of the Holder, its genuineness. If the indorsement, under which the Holder claims, is forged, the Acceptor is not bound to pay the Bill; and, if he does, the real owner is still entitled to recover the amount, as well from the Holder, as from the Acceptor.[2] If an Indorser pays the Bill under a forged indorsement of the name of a prior Indorser, or of the Drawer, he cannot recover back the money from any subsequent Indorsee, to whom he pays it, because his indorsement admits the genuineness of the antecedent indorsements, as well as the signature of the Drawer of the Bill.[3] But, if the person paying the Bill is no party thereto, but pays it for the Acceptor, or for an Indorser, whose name is forged, supposing it to be genuine, there it seems, that if he discovers thè forgery, and gives notice thereof on the same day to the Holder, he may recover back the money. But, if he does not discover it, or give notice until the next day, then he is not entitled to recover back the money from the Holder; because it

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Gloucester Bank, 17 Mass. R. 1; U. States Bank *v.* Bank of Georgia, 10 Wheat. R. 333; Levy *v.* U States Bank, 1 Binn. R. 27. See also Bayley on Bills, ch. 8, p. 325, 326 (5th edit. 1830); Id. ch. 11, p. 484.

[1] Ante, § 113, 262, 448; Price *v.* Neal, 3 Burr. R. 1354.

[2] Ante, § 262, 448; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. R. 287.

[3] Ante, § 111, 225, 262, 263, 264, 413.

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may vary the rights of the Holder, as to giving notice to the antecedent parties upon the Bill.[1]

[1] Wilkinson *v.* Johnston, 3 Barn. & Cressw. 428; Cocks *v.* Masterman, 9 Barn. & Cressw. 902; Smith *v.* Mercer, 6 Taunt. R. 76. — Lord Tenterden, in delivering the opinion of the Court in Wilkinson *v.* Johnston, 3 Barn. & Cressw. 435 to 437, after commenting on the case of Price *v.* Neal, and Smith *v.* Mercer, said; "Now, if we compare the facts of the present case, with those of the two cases before mentioned, we shall find some important difference. The plaintiffs were not the Drawees or Acceptors of the Bills, nor the agents of any supposed Acceptor. They discovered the mistake in the morning of the day they made the payment, and gave notice thereof to the defendants in time to enable them to give notice of the dishonor to the prior parties, which was accordingly given. The plaintiffs were called upon to pay for the honor of Heywood & Co., whose names appeared on the Bills among other Indorsers. The very act of calling upon them in this character, was calculated, in some degree, to lessen their attention. A Bill is carried, for payment, to the person, whose name appears as Acceptor, or as agent of an Acceptor, entirely as a matter of course. The person presenting very often knows nothing of the Acceptor, and merely carries or sends the Bill according to the direction, that he finds upon it; so that the act of presentment informs the Acceptor or his agent of nothing more than that his name appears to be on the Bill as the person to pay it; and it behoves him to see, that his name is properly on the Bill. But, it is by no means a matter of course to call upon a person to pay a Bill for the honor of an Indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent, for whose honor the payment is asked, is actually on the Bill. The person thus called upon ought certainly to satisfy himself, that the name of his correspondent is really on the Bill; but still, his attention may reasonably be lessened by the assertion, that the call itself makes it upon him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own, but begins, at least, with the person, who thus calls upon him. And though, where all the negligence is on one side, it may, perhaps, be unfit to inquire into the quantum, yet, where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake, into which he may, by his own prior mistake, have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, whilst the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches. Further, it is not easy to reconcile the opinion of some of the judges in Smith *v.* Mercer, with the prior judgment of the same court in Bruce *v.* Bruce. That was the case of a victualling Bill, of which the sum was altered and enlarged, and, in this alteration, the forgery

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§ 452. Considerations similar to those, which respect the payment of a Bill, when it is made by the

consisted. The whole sum was paid at the victualling office, when the Bill was presented by the Bank of England; but, the forgery being discovered, the bank paid back the difference, and then called upon their customer, the plaintiff, who repaid the bank, and brought his action against the defendant, from whom he had received the Bill in its altered state. Now, if the payment of the whole sum, at the victualling office, could not, by law, be rescinded, on the ground of mistake, the refunding of part by the bank, and afterwards by the plaintiff, was an act done in their own wrong, and consequently not binding upon the defendant, nor giving a right of action against him. We think the present case approaches in principle nearer to that of Bruce *v.* Bruce, than to either of the other two. We think the payment, in this case, was a payment by mistake, and without consideration, to a person not wholly free from blame, and who ought not, therefore, in our opinion, to retain the money, unless the act of drawing the pen through the names of the other Indorsers will have the effect of discharging them, and thereby deprive the defendants of their rights to resort to them." In Cocks *v.* Masterman (9 Barn. & Cresw. 902, 907), Mr. Justice Bayley, in delivering the opinion of the Court, said; "This was an action brought by Cox & Co., bankers, in London, to recover a sum of money paid by them to the defendants, on the ground, that they, having paid the money in mistake, and ignorance of the facts, were entitled to recover it back. The Bill was presented the 24th of May, the day on which it became due. The plaintiffs paid it, not knowing, that it was not the genuine acceptance of Sewall & Cross. On the following day it was discovered, that the acceptance was a forgery, and the plaintiffs, on that day, gave notice to the defendants. It was insisted, that the plaintiffs were not entitled to recover, because they, being bankers, ought, before they paid the Bill, to have satisfied themselves, that the acceptance was genuine. On the other hand, it was said, that the plaintiffs, having given notice of the forgery to the defendants on the day next after the Bill had been paid, were entitled to recover back the money, on the ground, that they had paid the money under a mistaken supposition, that the acceptance was the genuine acceptance of Sewall & Cross, and the case of Wilkinson *v.* Johnston was relied on. That case differs from the present in one material point, namely, that the notice of the forgery was given on the very day, when payment was made, and so as to enable the defendant to send notice of the dishonor to the prior parties on that day. In this case, we give no opinion upon the point, Whether the plaintiffs would have been entitled to recover, if notice of the forgery had been given to the defendants on the very day, on which the Bill was paid, so as to enable the defendants, on that day, to have sent notice to other parties on the Bill. But we are all of opinion, that the Holder of a Bill is entitled to know, on the day, when

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original Acceptor, generally apply, when a payment is made by an Acceptor *supra protest*. When, and under what circumstances, he is liable to pay the Bill, and when, and under what circumstances, a payment by him is justifiable, or not, so as to give him a right of recourse over against the other parties, for whose honor he accepts and pays the Bill, are considerations, which have been, in a great measure, already discussed under the head of Acceptances *supra protest*.[1] But, if the Drawee should accept the Bill, and yet, when it becomes due, should refuse to pay it, and it should be duly protested, any person may in like manner pay it *supra protest*, as if he had accepted it *supra protest*, and it had been dishonored and protested when due.[2] If, however, he pays the Bill, when, under the circumstances, he is not bound so to do, he cannot entitle himself to any such recourse. But, if he has rightfully and properly paid the Bill, he may recover the amount from any one or more of the persons, for whose honor he has accepted and paid the Bill, or from any other of the antecedent parties on the Bill, who are liable to such persons, for whose honor the pay-

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it becomes due, whether it is an honored or dishonored Bill; and that, if he receive the money, and is suffered to retain it during the whole of that day, the parties, who paid it, cannot recover it back. The Holder, indeed, is not bound by law (if the Bill be dishonored by the Acceptor), to take any steps against the other parties to the Bill, till the day after it is dishonored. But he is entitled so to do, if he thinks fit; and the parties, who pay the Bill, ought not, by their negligence, to deprive the Holder of any right or privilege. If we were to hold, that the plaintiffs were entitled to recover, it would be in effect saying, that the plaintiffs might deprive the Holder of a Bill of his right to take steps against the parties to the Bill, on the day, when it becomes due."

[1] Ante, § 123 to 125, 235 to 263, 344, 363, 396, 397, 411.

[2] Pothier de Change, n. 113; Nouguier de Change, Tom. 1, p. 345, 346.

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ment is made.[1] Thus, if the Acceptor *supra protest*, for the honor of the last Indorser pays the Bill, he thereby acquires a right to recover the amount against such Indorser, and all antecedent parties on the Bill, who are liable to him. But, if he accepts and pays for the honor of the first Indorser, he has no remedy over for the amount against any subsequent Indorser, although he has against such Indorser and the Drawer, and, in certain cases, against the original Drawee, also, if he is liable to the Drawer.[2]

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[1] Ante, § 124, 125.

[2] Ibid.; Pardessus, Droit Comm. Tom. 2, art. 441; 1 Bell, Comm. B. 3, Pt. 1, ch. 2, § 5, p. 401 (5th edit.).

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CHAPTER XIII.

GUARANTY OF BILLS, AND LETTERS OF CREDIT.

§ 453. We have thus gone over the principal doctrines applicable to foreign Bills of Exchange. There remain certain topics, which are, in some measure, connected therewith, and are of a kindred nature, upon which some remarks have already been incidentally made, but which deserve a more direct, although a brief, exposition and recapitulation in this place.[1] These topics are, first, the Guaranty of Bills of Exchange; and, secondly, Letters of Credit, authorizing persons to draw Bills, on the faith of such Letters. These are equally applicable to cases of Foreign, and cases of Inland, Bills of Exchange; but they are more frequent in the former cases.

§ 454. In respect to the former, (the Guaranty of Bills,) it is well known, and in much use, in cases of foreign Bills, in France, and other parts of Continental Europe. In France, it is known by the name of *Aval*; and in Germany, at least, when a Latin appellation is affixed to it, by the name of *Avallum*.[2] This guaranty is usually placed at the bottom of a Bill of Exchange, from which circumstance it is said to de-

[1] Ante, § 216, 372, 394, 395.

[2] Ante, § 215, 394, 395; Pothier de Change, n. 50; Pardessus, Droit Comm. Tom. 2, art. 394; Code de Comm. art. 141, 142; Heinecc. de Camb. cap. 3, § 26 to 29; Id. cap. 6, § 10; Chitty on Bills, ch. 6, p. 272, 273 (8th edit. 1833); Id. ch. 7, p. 352, 353.

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rive its name;[1] and sometimes it is written upon a separate paper.[2]

§ 455. The effect, in France, and other foreign countries, of this *Aval* or Guaranty, subscribed at the bottom of the Bill, is, that it binds the Guarantor *in solido*, and subjects him to the like obligations, as the party on the Bill, for whom he has given it, at least, unless there is some different stipulation made by the parties, and also entitles him to the like rights, as the same party.[3] It amounts, therefore, in effect, to a guaranty, that the party, for whom it is given, shall perform all the obligations, which the Bill itself imports, on his part.[4] The usual manner of accomplishing this purpose is, that the name of the Guarantor is preceded by the words "*pour Aval.*"[5] But this is not indispensable, for any equivalent form will do; and even the name of the Guarantor alone, written in

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[1] Ante, § 215, 394, 395. — Merlin gives this derivation under the word *Avalage*, *Avaleson*, *Avalison*, in his Répertoire de Jurisprudence. His language is; "Ces Termes, qui sont synonymes, viennent de l'ancien mot *Aval*, qui veut dire en bas. Ils signifient littéralement *descente*."

[2] Ante, § 215, 394, 395; Pothier de Change, n. 50; Pardessus, Droit Comm. Tom. 5, art. 395; Code de Comm. art. 142; Savary, Le Parfait Négociant, Tom. 1, Pt. 3, Liv. 8, p. 205; Id. Tom. 2, Parere, 14, p. 94; Heinecc. de Camb. cap. 6, § 10, 11.

[3] Pardessus, Droit Comm. Tom. 2, art. 394, 397; Savary, Le Parfait Négociant, Tom. 1, Pt. 1, Liv. 3, ch. 8, p. 205; Heinecc. de Camb. cap. 3, § 26, 27; Ante, § 372, 394, 395.

[4] Savary says; "Ce mot d'Aval signifie *faire valoir la lettre ou billet*, c'est-à-dire, les payer en cas qu'ils ne soient acquittés; c'est proprement une caution, car il n'est pas le principal preneur, n'y ayant que celui, qui tire la lettre, ou qui fait le billet au profit d'une autre personne, qui reçoit les deniers; de sorte que ceux qui souscrivent, ou qui donnent leur aval sur les lettres et billets, sont obligés avec les tireurs et faiseurs de billets." Savary, Le Parfait Négociant, Tom. 1, Pt. 1, Liv. 3, ch. 8, p. 205; Jousse, Comm. sur l'Ord. 1673, art. 33, p. 131 to 133.

[5] Pardessus, Droit Comm. Tom. 2, art. 396; Jousse, Comm. sur l'Ord. 1673, art. 33, p. 131, 132.

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blank, may, if that is the usage, bind the party as a Guarantor, where it is clear, that he is not liable as an Indorser on the Bill.[1]

[1] Ibid.; Savary, Le Parfait Négociant, Tom. 2, Parere 14, p. 94; Heinecc. de Camb. cap. 3, § 26, 27. — Savary says; "Il faut remarquer, qu'il y a une grande différence entre les signatures en blanc, qui se mettent au dos des lettres de change, et les avals; car les signatures en blanc ne produisent que deux effets; l'un pour remplir au-dessus les ordres en faveur de quelqu'un, ainsi qu'il vient d'être dit; et l'autre pour y remplir le reçu, lorsque les Porteurs de lettres reçoivent leur argent de ceux sur qui elles sont tirées; et les avals ne sont que des cautionnemens, qui pour l'ordinaire se mettent au bas des signatures de ceux, qui tirent les lettres de change, pour la plus grande sûreté de ceux au profit de qui elles sont tirées; et celui qui met son aval au bas d'une lettre de change, et non au dos d'icelle, n'y met pas seulement sa simple signature, mais il y met ces mots qui la précedent, 'pour aval,' ou 'pour servir d'aval,' ou ce seul mot, 'aval;' de sorte que celui, qui met son aval au bas de la lettre de change, est obligé solidairement avec le tireur envers celui au profit duquel elle est tirée, et envers tous ceux auxquels les ordres auront été passés à leur profit, de payer le contenu en icelle lettre, en cas qu'elle ne soit remboursée par les tireurs, lorsqu'elle revient à protest. On doit observer aussi, que l'usage n'est plus de mettre l'aval au bas de la signature de celui, qui tire une lettre de change, parce que les Cambistes ont trouvé, qu'il nuisoit à la négociation des lettres. La raison en est; premièrement, parce que l'aval étant mis au bas de la lettre, fait douter de la solvabilité du tireur, et qu'il n'est pas bien en ses affaires; ainsi cela peut donner atteinte à son crédit. Secondement, parce qu'on s'est apperçu par les inconvéniens qui en sont arrivés, que ceux qui mettent leurs avals au bas des lettres étoient des personnes de néant et sans biens, et qu'ainsi c'étoit un piège, qu'on tendoit au Public pour plus facilement négocier les lettres de change, et qui ne produisent aucun bon effet. De sorte que pour ces raisons l'usage de mettre les avals au bas des lettres de change est aboli. Quoique l'usage de mettre les avals au bas des lettres de change soit aboli, ainsi qu'il vient d'être dit, néanmoins on ne laisse pas d'en donner pour la sûreté de ceux, qui n'ont pas bonne opinion de la solvabilité des tireurs; mais c'est au bas des copies des lettres de change, par lesquels avals ceux, qui les donnent promettent de rembourser à ceux au profit de qui sont tirées les sommes contenues en icelles, au cas qu'elles ne soient pas acquittées par ceux sur qui elles sont tirées, ou que revenant à protest elles ne soient point remboursées par les tireurs. Or, l'intention de l'Ordonnance n'est que d'empêcher les Courtiers de donner leurs avals de la manière ci-dessus expliquée. En effet, on ne peut pas dire qu'en donnant leurs avals au bas de la copie des lettres de change qu'ils négocient pour les Gens d'affaires, ou pour les grandes Compagnies, elles n'ayent pas autant de force et de vertu pour l'obligation soli-

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§ 456. It follows, from what has been said, that, in the French and Foreign Law, this contract of *Aval*, or Guaranty, when on the face of the Bill, is, in the absence of any restrictive or controlling words, an agreement, partaking of the character of the Bill itself, and is negotiable, and passes to, and gives the same rights to the Holder of the Bill as if it were made personally to himself, and subjects him to the like obligations.[1] And this quality is, beyond question, highly important to the true value, and easy circulation, and free credit, of Bills of Exchange. The like rule seems to prevail among the German Civilians; and it probably also prevails among the nations of Continental Europe generally; and it is fully recognized in the law of Scotland.[2]

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daire que leurs simples signatures en blanc au dos des lettres de change; et on ne peut pas dire aussi qu'en donnant par les Courtiers leurs avals au bas de copie des lettres, qu'ils ayent fait le commerce du Change, puisque les avals ne sont que de simples cautionnemens, qui ne préjudicient en aucune manière au Public; au contraire cela lui peut être de quelque utilité." Savary, Le Parfait Négociant, Tom. 2, Parere 14, p. 94.

[1] Pardessus, Droit Comm. Tom. 2, art. 397; Savary, Le Parfait Négociant, Pt. 1, Liv. 3, ch. 8, p. 205; Heinecc. de Camb. cap. 3, § 26 to 28.

[2] Heinecc. de Camb. cap. 3, § 26 to 29; Id. cap. 6, § 10; 1 Bell, Comm. B. 3, ch. 2, § 4, p. 376 (5th edit.); McLaren *v.* Watson's Executors, 26 Wend. R. 425, 442 to 444, Mr. Senator Verplanck's opinion. In his elaborate opinion, it is, among other things, said; "Bills of Exchange are negotiable according to the 'custom of merchants;' and 'the law of merchants, and the law of the land,' said Lord Mansfield, 'are the same.' Promissory notes are made negotiable by statute, which declares, that they shall have the same effect, and be negotiable in like manner as inland Bills of Exchange, according to the custom of merchants. Now, the custom of merchants, as to Bills of Exchange, is not merely the local, mercantile, habitual, and ordinary usage of England, but it was, and is, that of the civilized commercial world; Bills of Exchange having, as all our text-writers (Blackstone, Kent, and others) inform us, grown into use originally on the Continent of Europe, and passed over, with the extension of commerce, into England. The Continental Law, and custom of merchants,

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§ 457. Whether, under our law, a like negotiable quality belongs to the like guaranty upon the face of

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accompanied the usage into that country, from which we have obtained alike the usage and the law. Thence it is, that the work of Pothier, 'On the Contract of Exchange,' or negotiable paper, is of authority, and is cited in England as to the mere technical and arbitrary usages of that law; and, as well as the other and greater works of that learned and philosophical jurist upon the general principles of contracts, 'is alike law at Orleans and at Westminster Hall.' The custom of general proffers or undertakings of guaranty of negotiable paper, intended to accompany the paper, has not become very common in England, so as to give rise to litigation in the courts, as I find no decision there either expressly affirming or denying their effect in the hands of subsequent Holders. But the validity of the usage seems to be taken for granted in the modern case, already cited, of Phillips *v.* Bateman, 16 East, R. 356, where a separate advertisement of guaranty of notes of a bank, in doubtful credit, would have been allowed to have been valid and binding, had it not been for other legal difficulties. On the Continent of Europe, such a practice of guaranty is well known. This guaranty of negotiable paper is called *aval* by the French, and *avallum* by the German civilians. The present French Code of Commerce declares, that the payment of a Bill of Exchange, independently of the acceptance and indorsement, may be secured by a guaranty (*par un aval*). This guaranty is given by a third person, either on the Bill itself, or by a separate writing. (Code de Comm. Liv. 1, tit. 8, § 141, 142.) The person, thus guarantying, is bound in the same manner as the Drawer and Indorser. The same article is found in the code of Napoleon's own time, regulating the law of the then French Empire, and it is still in this respect as it was before, the law of Belgium, Holland, and a large part, if not all, of Italy and Germany. It was, indeed, but the declaring and recognising the former law of Germany as it is found in Heineccius's Elementa Juris Cambialis, and of France, as expounded by Savary and Pothier. This last oracle of Continental Commercial Law says, that the guaranty may be either special, of acceptance, or of a particular indorsement, or general, which last gives to the Holder the same right of action, which any party may have against the Drawer. The strict form he states to be, the writing or signing upon the Bill itself; but he adds, that 'an experienced merchant informs him, that guaranties (*avals*), in this form, are scarcely any longer in use; and that they were commonly made by a separate writing (*par un billet separe*).' (Pothier, Contrat de Change, part 2, § 50.) The same custom, and the same legal rule, prevail also in Scotland, where the Law Merchant, as to negotiable paper, is so closely assimilated to that prevailing in England, that the decisions of Westminster Hall on that subject are familiarly cited as authority in the courts and the books. Mr. Bell, in his Commentaries on the Law of Scotland, 1 Comm. 376, after stating the

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the Bill, so as to give the Holder a complete legal right thereto, as well as to the Bill, has been a question

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question, 'Whether the indorsation of a Bill, which has been guarantied by a separate letter, accompanied by delivery of the letter of guaranty, will give the same right as if the letter itself were a negotiable instrument,' adds, that, 'it is generally held by bankers, that, when they thus acquire a right to the guaranty, they are entitled to payment from the surety, as if the letter had been originally addressed to themselves,' and that, in conformity with this understanding, it had been so adjudged in the highest court of judicature. He, indeed, criticises the ground of the decision, but the case of Sir W. Forbes *v.* McNab, decided by the Lords of Sessions, which he cites and states, recognises the usage, and sanctions its legal effect. I, therefore, think it probable, that this 'custom of merchants' has passed over to us from our early Dutch colonists, or, perhaps, more recently, from Scotch and French merchants settled among us, without having first travelled hither through the courts or the counting-houses of England. The custom of a general and indefinite guaranty, either on the note or Bill, or on a separate paper referring to it, is well known to be common among our men of business in this State, and it is with the understanding of its passing with the note. If this were merely a local custom here, it could not control or contradict the settled law of the land; but it rather appears to be a part of the universal custom of merchants, as to negotiable paper, in ordinary use here, as well as on the Continent of Europe; but which, not having been equally common in practice in England, has never received the positive sanction of any adjudication there. I submit these views of history, and authority, bearing on this question, to the consideration of those members of the Court, who may not be satisfied to rest their decision solely upon the application of those great principles of the doctrine of contracts to the stipulation of guaranty, upon which I mainly rely." Mr. Bell, in his Commentaries (Vol. 1, p. 376, 5th edit.), says; "It has been questioned, Whether the indorsation of a Bill, which has been guarantied by a separate letter, accompanied by delivery of the letter of guaranty, will give to the Indorsee the same right, as if the letter itself were a negotiable instrument, passing without any latent qualification. It is generally held by bankers, that, when they thus acquire right to the guarantee, they are entitled to demand payment from the surety, as if the letter had originally been addressed to themselves; and this has been adjudged by the Court of Session in reliance on such understanding. Before the point can be held established, a much more deliberate inquiry must be made into the usage; if, indeed, any usage can establish a point against the principles of law, which this seems to be. It may be, that the very design of expressing the guaranty by letter, instead of indorsing the Bill, is to preserve to the writer the full benefit of his remedy against the person, to whom the letter is addressed; and it is

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of considerable discussion.[1] It has been said, by a distinguished elementary writer, that, even in cases, where a valid engagement of guaranty has been made, that a Bill of Exchange or note shall be paid, it is effectual only between the original parties to it, and not transferable at law, or in equity, or in bankruptcy.[2] But this language is quite too general; for it is very certain, that the party, to whom the guaranty is originally made, may, in equity, assign his right to the Holder, at the same time, that he assigns the Bill, and thereby vest in him the equitable, although not the legal, title thereto. The language should further be understood to be limited to cases, where the guaranty, if it is on the face of the Bill, is, by its very terms, confined to the original party, to whom it is given; and the language does not, certainly it ought not to be, extended to cases, where, by its very terms, the guaranty is to such party, and to his order, or to the bearer, or to any person, who shall subsequently become the Holder; for there does not seem to be any ground, or principle, in our law, which will, in such a case, limit the right, contrary to the avowed intention of the parties, to the first or original Guarantee.[3] On the con-

anomalous at once to confer on such an engagement the privileges of an indorsible and negotiable instrument, and yet not to give to the Grantor of it the benefit of that strict negotiation, which is the counterpart of the privileges of Bills."

[1] See Chitty on Bills, ch. 6, p. 272, 273 (8th edit. 1833); Upham v. Prince, 12 Mass. R. 14; Miller v. Gaston, 2 Hill, N. Y. R. 188; Ketchell v. Burns, 24 Wend. R. 456; Lequeer v. Prosser, 1 Hill, N. Y. R. 256; S. C. in Err. 4 Hill, N. Y. R. 420.

[2] Chitty on Bills, ch. 6, p. 273 (8th edit. 1833).

[3] See Phillips v. Bateman, 16 East, R. 355; Walton v. Dodson, 3 Carr. & Payne, 163; McLaren v. Watson's Executors, 26 Wend. R. 425, 430; S. C. 19 Wend. R. 557. But see L'Amoureaux v. Hewitt, 5 Wend. R. 307; Adams v. Jones, 12 Peters, R. 207, 213; Springer v. Hutchinson, 1 Appleton, R. 359, is contra.

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trary, there would seem to be very urgent reasons, why it should be deemed equivalent to a continued promise, upon a valid consideration to every successive Holder for a valuable consideration, *toties quoties*, that the Guarantor promises the like guaranty to him personally.

§ 458. There is great weight of authority for the maintenance of this doctrine, as well upon general principles, as upon the usage of the commercial world. And, with a view to the convenience, and the security of merchants, as well as the free circulation and credit of negotiable paper, it would seem, that such a guaranty, upon the face of a Bill of Exchange, not limited to any particular person, but purporting to be general, without naming any person whatsoever, or purporting to be a guaranty to the Payee, or his order, or to the bearer, ought to be held, upon the very intention of the parties, to be a complete guaranty to every successive person, who shall become the Holder of the Bill.[1] Nay, the doctrine has been pressed farther, and it has been maintained with great ability and cogency of reasoning, that such a guaranty upon a separate paper, ought to be held negotiable in the same manner, and to the same extent, in favor of each successive Holder of the Bill, as if it were upon the face of the original Bill.[2]

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[1] McLaren *v.* Watson's Executors, 26 Wend. R. 425; S. C. 19 Wend. R. 557, 566. See also Walton *v.* Dodson, 3 Carr. & Payne, 162; Bradley *v.* Carey, 3 Greenl. R. 233; Adams *v.* Jones, 12 Peters, R. 207. But see L'Amoureaux *v.* Hewitt, 5 Wend. R. 307; Miller *v.* Gaston, 2 Hill, N. Y. R. 188; Upham *v.* Prince, 12 Mass. R. 14; Adams *v.* Jones, 12 Peters, R. 207, 213; Ante, § 372, and notes, 215, 394, 395.

[2] Adams *v.* Jones, 12 Peters, R. 207, 213; Walton *v.* Dodson, 3 Carr. & Payne, 163; Bradley *v.* Carey, 3 Greenl. R. 233, 234. See also the opinion of Mr. Senator Verplanck, in McLaren *v.* Watson's Executors,

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§ 459. In respect to Letters of Credit, which are in common use in our commerce with foreign countries,

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26 Wend. R. 425. — Mr. Senator Verplanck's opinion (*ubi supra*) contains a very masterly review of the whole subject, both when the guaranty is upon a Bill, and when it is upon a separate paper. He says; "The next point is one, the decision of which must materially affect and regulate daily commercial usage in respect to loans and discounts. The original defendant guaranties the payment of an indorsed note, made for accommodation. The guaranty is written on a separate paper, and describes the note, with which it bears contemporaneous date. It is general in its terms; not being a stipulation with any named person, but is in the broad and very common form, 'I hereby guaranty the payment' of the note, which it then describes. It is now maintained, that such a guaranty, being a promise in writing, naming no Promisee, can take effect only as a special contract with the first person, who, on the faith of it, becomes the Holder of the note; and, as no contract, or mere chose in action, is negotiable, except such as fall within the definition of promissory notes, or Bills of Exchange, this guaranty, it is argued, is strictly a personal contract between the Guarantor and the Acceptor of the guaranty only, and it, therefore, cannot be transferred, so as to be enforced in the name of any subsequent party. The special contract of warranty, therefore, between Watson and Frye, did not accompany the note as appurtenant to it, and negotiable with it, when it was indorsed to the plaintiff. The Supreme Court, on this point, intimate the opinion, that, had the guaranty been written on the note, it might have been treated as a mere indorsement, by striking out the special words, and leaving barely the indorsed name; but they hold, that a separate guaranty of a negotiable note or Bill, does not, like an acceptance or indorsement, run with its principal, but must end where it began, like a bond, or other chose in action. This intimation of the distinction between the effect of an indorsed guaranty, which may be converted into an ordinary indorsement, by striking out words, and that of a stipulation of guaranty, written on a separate paper, seems to be in contradiction to the decision of the same court, in a former case. In L'Amoureaux *v.* Hewitt, 5 Wendell, R. 307, they are expressly placed on the same ground. It was there held, that an indorsed guaranty could not be stricken out, and converted into a bare indorsement, but, that every guaranty is a special contract with the person first receiving it, and can be enforced only in his name. 'The defendant,' said Chief Justice Savage, 'was liable upon his guaranty, not as an Indorser, but as the party to a special contract, which might have been written on a separate piece of paper, as well as on the back of the note.' If these views of the nature of the contract of general guaranty of the payment of Bills or notes be correct, and, if there be no positive rule or custom of the Law Merchant, giving effect to guaranties of notes or Bills, so as to make them pass with the paper to which they relate, then I do not

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it may be stated, that a Letter of Credit (sometimes called a Bill of Credit) is an open letter of request,

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see how, upon the principles of our law, as to the assignment of choses in action, we can resist the conclusion, that such a contract does not go beyond the first taker of the paper, but can be enforced only in the name of the actual Guarantee. Let us, however, examine, what is the real undertaking, or promise of such a Guarantor. A guaranty, according to its derivative and essential meaning, is the warranty of some act or debt of another. It is an undertaking, that the engagement or promise of some other person shall be performed. In its legal and commercial sense, it is an undertaking to be answerable for the payment of some debt, or the due performance of some contract or duty by another person, who himself remains liable for his own default. Such a warranty may be either of a prior debt, or previously subsisting contract, or it may be for the due discharge of some future debt or contract, between the original party and some other person, who may give him credit. In the first case, our law, which enforces no contract not supported by some consideration, requires, that there be some good consideration received by the Guarantor. In the other case, where the Guarantor holds out his engagement of secondary liability as an inducement to any one, who may, upon the faith of that promise, give credit in any way to a third person, if there be no special consideration of benefit received and acknowledged by the Guarantor, as there often is, yet, the same consideration of debt or damage, which supports the claim against the principal in default, equally applies to, and supports, the right of action against the Guarantor. This rests upon the familiar principle, that a sufficient consideration for any contract may be either an actual benefit to the party promising, or else some prejudice, damage, suspension of right, or possibility of loss, to the party, to whom the promise is made or proffered, and by reason of his acceptance thereof. 3 Burr. R. 1663, per Yates, J., whose definition is adopted in 1 Williams's Saunders, 211, note 2. See also Jones *v.* Ashburnham, 4 East, R. 455; 12 Wendell, R. 381. With whom, then, may such a contract be made? Of course it may, as in other contracts, be made with a specifically named or described individual, to whom the promise and undertaking, to become answerable for a third person, is addressed. Such an offer, or promise, to any specified individual, to become liable for the debt or acts of another, when it is accepted, by giving the credit or trust thus guarantied, is complete, and it can only be enforced by, or in the name of, the original party giving credit on such guaranty. When the default occurs, the promise, to make good that default, becomes binding, and, like other choses in action, except notes and Bills, t is confessedly not negotiable, or transferable in law, so as to give a right of action, in his own name, to the new Holder. But such a contract of warranty may also be offered and perfected, without any individual being named in the stipulation or promise of guaranty. It may be made, as many

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whereby one person (usually a merchant or a banker) requests some other person or persons to advance

other contracts are made, by a general offer to any one, who may accept the terms, and, in such case, the offer, when accepted, binds the Promissor. Such is the ordinary case of a contract made by effect of an advertisement, or public notice, as, to pay a certain price for materials, wheat, wood, &c., delivered at a specific place or time. So, too, as was said by the Chancellor, Cobham *v.* Upcott, 5 Viner, Abr. 527, cited in Fell on Guaranties, 44, 'If a man make offers of a bargain, and then write down and sign them, and another person take them up, and proffer his Bill, that will be a sufficient agreement to take the case out of the statute.' The validity and obligation of such a promise or undertaking, proffered to all the world, and accepted by an individual, grow out of the very nature of a contract, as well as the daily usage and necessities of life and business. There is no need of authority to show, that the same rule must apply to the similar offer of guaranty. But there is no want of express authority on that head. Thus, as remarked by Judge Cowen, 'In Phillips *v.* Bateman, 16 East, R. 355, it was not denied, that a public promise by advertisement to guaranty the notes of a bank, upon which there was a run, would bind the promissor, and subject him to action at the suit of those, who should forbear to press the bank, provided a consideration had been duly expressed, and an intent had appeared so to pay, although no one could be named.' So, again, in Walton, assignee, *v.* Dodson, 3 Carr. & Payne, 163, it was held of a guaranty, without address to any person; 'Such a guaranty will enure to the benefit of those, to whom, or for whose use, it was delivered.' Again, in one of the courts of our own country, where the guaranty was in a letter to the person, for whose benefit it was to be used, and was only a general undertaking to be answerable for his purchases to a certain amount, the Court considered it as a guaranty, which, by its plain intendment, might be offered to any one, and accepted by any one. 'The contract, according to its legal intent, is proffered to any one, who was the vendor of such goods as the purchaser wanted.' Bradley *v.* Carey, 3 Greenl. R. 233. In every such case, the undertaking of guaranty, though general in its offer, becomes, when accepted, definite and binding between the Guarantor and the person acting or trusting upon his credit. But, when thus made definite and conclusive, the same broad principle of the law must still apply, that rights of action, not made negotiable by statute, or the special custom of merchants, can only be enforced in the name of the direct party to the contract. What distinction, then, exists between the ordinary commercial guaranty, as, of a credit for goods purchased, and a guaranty of a negotiable Bill or note? There is a clear and manifest difference in the substance of the contract or undertaking itself, in regard to the parties, to whom the guaranty is proffered, and by whom it may be accepted, although it is still governed by the same general legal principles.

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moneys, or give credit, to a third person, named therein, for a certain amount, and promises, that he will

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The ordinary mercantile guaranty of a debt, or a purchase, or a credit, is a stipulation to become liable for another, for some specific debt or debts, not negotiable in the hands of a creditor, and which he cannot pass away. When the debt is contracted on such a guaranty, the primary liability can go no further than the first parties; and, therefore, there is no promise, or undertaking, held out by the Guarantor, to any other person, to give a subsequent credit. Not so as to the undertaking or offer made by a guaranty of payment of negotiable paper. That is a positive undertaking and promise to become liable for its due payment, in case of the default of the original parties, and this offer is held out to every person, who may, on the faith of it, become the legal Holder of such paper. It is a promise, or undertaking, held out to a second, third, or fourth Indorsee, as much as to the first Holder; and the last of these, who advances his money upon such a guaranty, looks as much as the first to the promise of the Guarantor. The offer is of an indefinite number of successive guaranties, whilst, in the case of a guaranty of payment for goods bought on credit, the offer, though it may be general in its address, is only of some specific transaction, which becomes final as to the parties, when the offer is accepted. The guaranty may not be negotiable in itself as a separate contract, but it is a collateral promise to any and each, in his turn, of the persons known or unknown, who may give credit to a negotiable note, coupled with such a guaranty. But, as it can be enforced only by the Holder, who is entitled to receive payment from the parties to the note itself, there can be no breach of such an undertaking, or any cause or ground of action, in respect to any one, who, after having made himself a party to the contract, parts with the note, and ceases to be entitled to its payment. I cannot imagine any reason of justice, policy, or legal authority, for giving legal effect to a contract of guaranty for any future credit to another, proffered in writing to any person indiscriminately, who will give such credit, which does not equally apply to the remote Holder of a note or Bill, who has taken it after successive intermediate Holders, but still upon the faith of the original guaranty. He also guaranties the payment of a note, by the very use of those words; and, in their common, as well as their legal meaning and understanding, holds forth this undertaking or engagement. 'I promise to any person, who may, upon the faith of this promise, become, by purchase, discount, or otherwise, the *bonâ fide* Holder of this note, to pay the same, in case of its not being duly paid when at maturity.' The consideration may be either some specific payment, security, or benefit to the Guarantor, or it may be merely the value of the note paid at his request, and on his credit, to the person, for whose benefit the guaranty is made and intended. In the present case, the consideration is the value of the note, acknowledged in the guaranty itself to have been received, and shown in evidence to have

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repay the same to the person advancing the same, or accept Bills, drawn upon himself for the like amount. It is called a general letter of credit, when it is addressed to all merchants, or other persons in general, requesting such advance to a third person; and it is called a special letter of credit, when it is addressed to a particular person by name, requesting him to make such advance to a third person.[1]

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been paid in cash, at the request of the Guarantor, to Tuthill, the last Indorser, at the date of the guaranty. The whole contract and transaction, when analyzed, is briefly this; Watson, as an inducement to, and in consideration of, Frye's advancing, at his request, to Tuthill, the value of a certain note, upon the security of that indorsed note, and his guaranty, undertakes and promises, for the benefit of Frye, to any person, who shall afterwards take and hold the note, to be liable for the payment of the same, if not duly paid at maturity. Now, it seems plain to me, upon the common principles of the law of contracts, applied to the nature of this transaction, and of its terms, and the obvious understanding of the stipulation itself, that such a guaranty of negotiable paper can be enforced by, and in the name of, any subsequent Holder of such paper, who has taken it on the good faith of an accompanying guaranty, whether written on the back of the note, or upon a separate paper." See another citation from the same opinion, Ante, § 456, note. See also 1 Bell, Comm. B. 3, ch. 2, § 4, p. 371 to 374 (5th edit.).

[1] Com. Dig. *Merchant*, F. 6; Marius on Bills, p. 35, 36; Molloy, de Jure Marit. B. 2, ch. 10, § 36; Bouvier's Law Dictionary, "Letter of Credit"; 3 Chitty on Comm. Law, 336, 337. Mr. Hallam, in his work on the Middle Ages (Vol. 4, ch. 9, Pt. 2, p. 255, note, Amer. edit. 1821), has remarked, that, "There were three species of paper credit in the dealings of merchants: 1. General letters of credit, not directed to any one, which are not uncommon in the Levant: 2. Orders to pay money to a particular person: 3. Bills of Exchange regularly negotiable. Boucher, t. ii. p. 621. Instances of the first are mentioned by Macpherson about 1200, p. 367. The second species was introduced by the Jews about 1183, (Capmany, t. i. p. 297,) but it may be doubtful whether the last stage of the progress was reached nearly so soon. An instrument in Rymer, however, of the year 1364, (t. vi. p. 495,) mentions literæ cambitoriæ, which seem to have been negotiable Bills; and by 1400 they were drawn in sets, and worded exactly as at present. Macpherson, p. 614, and Beckman, Hist. of Inventions, vol. iii. p. 430, give from Capmany an actual precedent of a Bill dated in 1404."

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§ 460. Marius gives the following description of Letters of Credit, of both sorts, and of their use and obligation. "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 thereby bind myself for to be accountable and answerable for the same, to be repaid according to the Bill or Bills of Exchange, which, upon 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 therefore 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,

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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." And again; "Now, in the general letter of credit, he that writes it doth make use of his credit for his own account and concernments in his way of trade, and, therefore, there need no more than his letter of credit to make him liable to repay what shall be so furnished. But, in the particular letter of credit, he that writes the letter, doth it not to make use of the moneys himself, or to be employed for his own use, but for the use and accommodation of some other man, at whose request he is willing, and doth write his letter of credit; and, therefore, it is very expedient and ordinary for him, at whose entreaty the letter is written, at the writing, and upon receipt thereof, to give security by bond, or otherwise, unto the merchant, that gives the letter of credit, for repayment unto him, his executors, or assigns, of all such moneys as shall be received by virtue of the said letters of credit; for the merchant, by his letter, stands sufficiently bound to his correspondent; and, therefore, it is no more but reason, that he, for whom the letter is granted, should give (as it were) his counterbond for repayment. The Bills of Exchange, which are to be made for moneys taken up by letters of credit, do run in the ordinary form of Bills of Exchange."[1]

§ 461. This language would seem to be sufficiently explicit to establish the doctrine, that general letters of credit partake of a negotiable quality, and, accord-

[1] Marius on Bills, p. 36, 37. See also Jousse, sur l'Ord. 1673, tit. 5, Prelim. p. 66.

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ing to the usage of merchants, are treated as a direct promise to repay the advance, or to accept and pay the Bill, which shall be drawn upon the advance, where the letter purports such a promise to repay, or accept and pay the Bill. There does not seem to be any ground to doubt, that the letter of credit is an available promise in favor of the person, who makes the advance upon the faith of the letter, if the letter is specially addressed to him. But it has been made a question, whether, if the letter of credit is a general one, addressed to any person or persons generally, without any other designation, the person making the advance upon the faith thereof, is entitled to a punctual performance of the promise contained therein, from the person signing the letter, as a floating contract, designed to circulate as a direct promise, in the nature of a negotiable security, for the benefit of any party, advancing funds on the faith thereof; or whether the remedy exclusively lies between the original party, writing the letter, and the party, to whom, and for whose immediate use it was given.

§ 462. The question does not appear to have been positively decided, or, indeed, to have been elaborately discussed in England.[1] But, in America, it has come

[1] It seems, however, to have arisen in England, as may be gathered from the following note to the case of The Company of Feltmakers *v.* Davis, 1 Bos. & Pull. 101, note (*c*). It is there said, "In Marchington *v.* Vernon and others, Sittings at Guildhall, Trin. 27 Geo. III. B. R., which was assumpsit on a Bill of Exchange, by the Holder against the defendants (assignees of the Drawee), who had given a promise to the Drawer, that they would honor the Bill, Buller, J. said; Independent of the rules, which prevail in mercantile transactions, if one person makes a promise to another for the benefit of a third, that third person may maintain an action upon it. See Comb. R. 219; 8 Mod. R. 117; also Dutton *v.* Pool, 1 Vent. R. 318, 332, cited and relied on by Lord Mansfield in Martyn

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under judicial examination and decision in various cases. In the Supreme Court of the United States, the doctrine has been directly affirmed, on several occasions, that the Letter-writer is positively and directly bound to any party making the advance upon the faith of the Letter; and that it applies not only to cases, where the Letter of Credit purports, on its face, to be addressed, generally, to any person or persons whatsoever, who should make the advance, but also in cases, where the Letter of Credit is addressed solely to the person, to whom the advance is to be made, and merely states, that the person, signing the same, will become his surety for a certain amount, without naming any person to whom he will become security, if it is obviously to be used to procure credit from some third person, and the advance is made upon the faith of the Letter by such third person.[1] And it has been further held, that, if the engagement be, to accept and pay any Bills, not exceeding a limited amount, drawn by the person, to whom, and for whose benefit, the advance is to be made; in such a case, the person, taking such Bills, and making the advance upon the faith thereof, if the promise of the Letter-writer cannot be treated as a positive acceptance of such Bills, is entitled to treat it as a direct promise to himself to accept and pay such Bills, which promise he may enforce, accordingly, in an action in his name, founded upon such a Letter of Credit, against the writer thereof.[2]

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v. Hinde, Cowp. R. 443." But see Molloy, B. 2, ch. 10, § 36, which is directly in point.

[1] Lawrason *v.* Mason, 3 Cranch, R. 492; Boyce *v.* Edwards, 4 Peters, R. 121; Adams *v.* Jones, 12 Peters, R. 207, 213; Ante, § 459 to 461.

[2] Ante, § 459 to 461; Boyce *v.* Edwards, 4 Peters, R. 121. See also Wildes *v.* Savage, 1 Story, R. 22, 26, 27; Coolidge *v.* Payson, 2 Wheat. R. 66; Ogden *v.* Gillingham, 1 Baldwin, R. 45; Bradley *v.* Carey,

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§ 463. Mr. Bell, in his learned Commentaries, has given his own opinion, as to the nature and operation

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3 Greenl. R. 234; Adams v. Jones, 12 Peters, R. 207, 213.—This subject was discussed at large in the Circuit Court of the United States, in a very recent case, which is not yet in print; and the following extract from the opinion of the Court may, therefore, be useful. The case arose upon a Letter of Credit given in Boston, Massachusetts, by the agent of Messrs. Wiggin, of London, to certain persons in Boston, who were about to send a ship to India, authorizing them or their agent, who should go out in the ship, to draw Bills on them in London, for a certain amount of money, and promising to accept the Bills drawn in India, in pursuance of the Letter of Credit. The Bills were accordingly drawn in India, and, when presented in London, were refused acceptance. In the mean time, the Boston merchants had failed. The Bills were taken by the Payees in India, upon the faith of the Letter of Credit; and the Payees brought a suit in Boston, and attached property of the London Drawees. Two questions were made at the argument; 1. Whether the law of England, or the law of Massachusetts, was to govern, as to the liability of the defendants to the plaintiffs upon the Letter of Credit. 2. Whether the action, which was founded on a promise to accept the Bills, supposed to arise in favor of the Payees from the Letter of Credit was maintainable; or, Whether the action was unmaintainable by the plaintiffs for want of privity between them and the defendants, the Drawees. On these questions, the Court said; "There are two questions properly arising upon the state of facts presented to this Court. The first is, Where is the contract of the defendants to be deemed to be made? Or, in other words, Is it, as to its obligation, construction, and character, to be governed by the law of Massachusetts, where it was signed and executed by the agent of the defendants? Or, is it to be deemed a contract made in England, where the acceptance was to be made; in which case, it is to be governed, in the like particulars, by the law of England, assuming that law to differ from the law of Massachusetts? The second question is, Whether a promise, contained in a Letter of Credit, written by persons, who are to become the Drawees of Bills drawn under it, promising to accept such Bills, when drawn, which Letter, although addressed to the persons, who are to be the Drawers of the Bills, is designed to be shown to any person or persons whatsoever, to induce them to advance money on, and take, the Bills, when drawn, will be an available contract in favor of the persons, to whom the Letter of Credit is shown, who advance money, and take the Bills on the faith thereof, or is void for want of privity between them and the persons writing the Letter of Credit. I cannot say, that I entertain any serious doubts as to either question. As to the first, the Letter of Credit was executed in Boston, by the agent of the defendants, with full authority for the purpose; and it is,

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of Letters of Credit, in the following expressive language. "Letters of Credit, strictly speaking, are

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to all intents and purposes, the same, in legal effect, as if it had been there personally signed by the defendants themselves. S. P. Bell *v.* Bruen, 1 How, S. Ct. 169. It then created an immediate contract in Boston between the parties, and it is to be governed, as to its obligation, construction, and character, by the law of Massachusetts, and not by the law of England; if, indeed, there be any distinction between them on this subject, which I am very far from believing there is. The contract was clearly valid and binding by the law of Massachusets. It is true, that the contract is, to accept Bills drawn on the defendants in London, and, of course, the acceptance is there to be made. But that does not make it less obligatory upon the defendants to fulfil their promise to accept, although the acceptance, in order to be valid, must be made according to the requirements of the English Law. Suppose a like Letter of Credit were executed in Boston, to accept Bills payable in Paris in France, where an acceptance, to be binding, must be in writing (although, by our law, it may be verbal), there can be no doubt, that, unless there was a written acceptance in Paris, no remedy could be had upon any Bill drawn in pursuance of the Letter of Credit, as an accepted Bill. But there is as little doubt, upon principles of international law and public justice, that, in such a case, the contract, being made in Massachusetts, and being valid by the laws thereof, would be, and ought to be, held valid in all judicial tribunals throughout the world, and enforced equally in France, in England, and America, as a subsisting contract, the breach of which would entitle the injured party to complete redress for all the damage sustained by him. The case of Carnegie *v.* Morrison (2 Metc. R. 381), is directly in point, upon this very question; and I entirely concur in that decision. The second question, is one, upon which, until I heard the present argument, I did not suppose, that any real doubt could be raised, as to the law, either in England or America. I cannot but persuade myself, that the doctrine of both countries, as far as this question is concerned, is coincident, notwithstanding the opinions of the learned counsel, which have been brought to the notice of the Court upon the present occasion (and for which, certainly, I feel an unaffected respect and deference), and which assert, that the English doctrine denies all redress, under the circumstances, to the Holder of the Bills, and confines the whole remedial redress to an action between the Drawers and the Drawees of the Bills, upon the ground, that there is a want of privity between the Drawees, and the person, who takes the Bills as purchaser or Holder. The case of Marchington *v.* Vernon, cited in a note to 1 Bos. & Pull. 101, before Mr. Justice Buller, seems to me fully to support the contrary doctrine. Assuming, however, that there is a total want of privity between the parties in the present suit, the conclusion, to which

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mandates, giving authority to the person addressed to pay money, or furnish goods, on the credit of the wri-

these learned jurists have arrived, may be admitted fairly to follow as a result of the doctrine of the Common Law, although I entertain great doubt, whether, under such circumstances, a Court of Equity would not, and ought not, to administer complete relief, as a case of constructive fraud upon third persons. But my difficulty is, in the assumption, that, in the present case, there is no privity of contract between the plaintiffs and the defendants. It appears to me, that this is an inference not justly deducible from the facts; and I know of no authority, in English jurisprudence, which countenances, far less any, which establishes it, under circumstances like the present. On the contrary, I have understood, and always supposed, that, in the commercial world, Letters of Credit, of this character, were treated as in the nature of negotiable instruments; and that the party, giving such a letter, held himself out to all persons, who should advance money on Bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the Bills. And I confess myself totally unable to comprehend, how, upon any other understanding, these instruments could ever possess any general circulation and credit in the commercial world. No man ever is supposed to advance money upon such a Letter of Credit, upon the mere credit of the party, to whom the Letter is given; and I venture to affirm, that no man ever took Bills on the faith of such a Letter, without a distinct belief, that the Drawee was bound to him, to accept the Bills, when drawn, without any reference to any change of circumstances, which might occur in the intermediate time between the giving of the Letter of Credit and the drawing of the Bills under the same, of which the Holder, advancing the money, had no notice. Any other supposition would make the Letter of Credit no security at all, or, at best, a mere contingent security; and the money would, in effect, be advanced mainly upon the credit of the Drawer of the Bills, which appears to me to be at war with the whole objects, for which Letters of Credit are given. Let me state one or two cases to illustrate the doctrine, which, it seems to me, is applicable to Letters of this sort. Suppose the present Letter of Credit had contained an express clause, by which the defendants should directly promise any and all persons, who should advance money, and take Bills on the faith thereof, that they would accept and pay the Bills so drawn in their favor. Can there be any doubt, that the promise would be available in favor of the persons making such advances, and create a direct privity of contract between them and the person, who gave the Letter of Credit? If there would be no doubt in such a case, then, it seems to me, that the circumstances of the present case, and, indeed, of all cases of Letters of Credit, of a similar character, do, naturally and necessarily, embody an implied promise to the same extent, and, there-

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ter. They are generally made use of for facilitating the supply of money, or goods, required by one going

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fore, ought to be governed by the same rule; for there can, in the intendment of the law, be no just distinction between cases of an express promise, and cases of an implied promise, applicable to transactions of this sort. Again; suppose, when the plaintiffs were about to advance their money on their Bills, with the Letter of Credit before them, a partner, or authorized agent, of the firm of Wiggin & Co., had stood by, and said, Take these Bills on the faith of this Letter of Credit, and our house will duly accept and pay them; and, upon the faith of that statement, the money was advanced, and the Bill was taken; could there be a doubt, that there would be a privity of contract directly created between the plaintiffs and the defendants, and that they might, by law, compel them to accept and pay the Bills, or indemnify them for the breach thereof? And yet, stripped of its mere external form, that is the very case before the Court. The Letter of Credit was drawn to be carried abroad, and to be shown to any person or persons, who would advance funds thereon to the Drawers; and it imported, that, if any persons, to whom it was shown, should advance the money, and take the Bills, on the faith thereof, the defendants would accept and pay the Bills. Their Letter of Credit spoke this language to all the world, as expressively as if they had stood by, and repeated it by their agent. Take the case of the common Letter of Guaranty, where the Guarantor says, in general terms, in a paper addressed to A. B., the party, for whose benefit it is given; 'I hereby guaranty to any person, advancing money, or selling goods, to A. B., not exceeding £100, the payment thereof, at the expiration of the credit, which shall be given therefor.' Can there be a doubt, that any person, making the advances, or selling the goods, upon the faith of the Letter, is entitled to treat the paper as containing a direct and immediate promise to himself, to guaranty the payment, notwithstanding it is addressed to A. B.? In the commercial world, as far as I know, no doubt has as yet ever been entertained on this subject; and yet, transactions of this sort are of every day's occurrence, especially, where the person, by whom the advance is to be made, is uncertain or unknown. The case of Adams *v.* Jones (12 Peters, R. 207, 213) is in point to show, that such a guaranty, in such general terms, will bind the Guarantor in favor of any person, who shall trust the party upon the faith and credit of the guaranty. There is no pretence, in such a case, to say, that there is not a sufficient consideration for the promise or obligation; for the consideration need not be immediately for the benefit of the Guarantor; but it will be sufficient, if there be a valuable consideration moving from the Guarantee, at the request of the Guarantor, in favor of a third person, for whom the benefit is designed. It is like the common case, where one man, for a valuable consideration of forbearance, or otherwise, undertakes to pay

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to a distance or abroad, and avoiding the risk and trouble of carrying specie, or buying Bills to a greater

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the debt of another. The question is not of gain to the promissor, but of loss, or detriment, or delay, on the part of the promissee. Lord Mansfield's whole reasoning, in the case of Pillans *v.* Van Mierop (3 Burr. R. 1663), treats it as a clear case of a sufficient consideration; that it is a mercantile transaction; and that the very nature of it imports an undertaking, to the persons taking the Bills, to honor them. Lord Mansfield went further in that case, and held, that the agreement to accept amounted to an actual acceptance in favor of the party, upon the ground, that he advanced the money, and drew the Bill, upon the faith of the prior negotiations and promise. Mr. Justice Yates, in the same case, said, that 'Any damage to another, or suspension, or forbearance of a right, is a foundation for an undertaking, and will make it binding, although no actual benefit accrues to the party undertaking.' He added: 'Now, here, the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs.' In the case at bar, a benefit did, in fact, accrue to Wiggin & Co.; for, in no other way could they have received the interest and advances intended to be obtained by their grant of the Letter of Credit. In Pierson *v.* Dunlop (Cowper, R. 571, 573), and in Mason *v.* Hunt (1 Doug. R. 297), Lord Mansfield took notice of the true distinction between cases, where a promise enures solely between the parties, and where it enures in favor of a third person also. 'It has been truly said, as a general rule, (was his language,) that the mere answer of a merchant to the Drawer of a Bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances, which may induce a third person to take the Bill by indorsement. But, if there are such circumstances, it may amount to an acceptance, although the answer be contained in a letter to the Drawer.' The cases of Johnson *v.* Collings (1 East, R. 98), and Clarke *v.* Cock (4 East, R. 56), do not, in any manner, shake the propriety of this doctrine, as to its creating a privity of contract between the parties, whether it amounts to an acceptance or not; and Mr. Justice Le Blanc, in both cases, expressly recognised Lord Mansfield's doctrine, as containing the true limitations and distinctions, which ought to govern in all cases of this sort. In the case of Johnson *v.* Collings, as well as in the case of Miln *v.* Prest (4 Camp. R. 393), the promise to accept had not been shown to the party taking the Bill, and, therefore, the Bill was not taken on the faith thereof. Nor, indeed, had it been even authorized, to be shown to the party; which constitutes the striking difference between such a promise and a Letter of Credit; the Letter being, *ex vi termini*, designed to be shown, if necessary, to obtain the very credit or advances from a third person. Lord Mansfield, indeed, guarded himself on this very point, and said, not, that it always does create an acceptance, but that it may do so. Now, if it would, in

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amount than may be required. The debt, which arises on such a Letter, in its simplest form, when com-

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any case, create an acceptance, *a fortiori*, it would create a privity of contract, founded upon the promise to accept; for the latter must, in all cases, constitute the foundation of the former. In none of these cases was the point presented exactly under the view, in which it now comes before this Court. In neither of them was there a Letter of Credit designed to circulate, and thus to preserve credit to the Bills, which should be drawn. And not one word, in the reasoning of any of these cases, hints at any suggestion, that a Letter of Credit, in its commercial sense, would not create such a privity, if it was intended to be shown and used to induce any third person to advance money on the Bills. If the question were entirely new, I confess, that I should not entertain the least doubt, that, according to the known course of mercantile transactions upon Letters of Credit of this sort, the giver and the receiver intended them to be a circulating medium of credit for the receiver; and that the promise to accept should be an obligatory contract with any and every person, who should advance money on the Bills on the faith thereof. The language of Lord Mansfield, in Mason *v.* Hunt (1 Doug. R. 297, 299), is exceedingly strong for this purpose. 'There is no doubt (said he), that an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the Drawer. If one man, to give credit to another, makes an absolute promise to accept his Bill, the Drawer, or any other person, may show such promise upon the exchange, to get credit; and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances, which might subsist between the Drawer and the Acceptor. But an agreement to accept is still but an agreement; and, if it is conditional, and a third person takes the Bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions.' Now, it is impossible to read this language, and not to feel, that, if the case were one of a Letter of Credit, designed by the parties to be used upon the exchange, it would necessarily create a privity of contract between the party advancing his money, and the Drawee, binding upon the latter. In short, the contract would be a contract, not with the Drawer alone, but with any party, who should advance the money on the faith of the Letter. See S. P. Com. Dig. Merchant, F. 3, which cites Mar. 36, Ma. 71, 76. I have seen no case in England, which shakes, much less which overturns, this doctrine. And, if there were, I should pause a great while before I could bring my mind to desert the clear judgment of that great judge, Lord Mansfield, never excelled as a judge in the administration of commercial jurisprudence, upon a question of such plain equity and justice, in favor of any other and subsequent adjudication by other minds. I consider a

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plied with, is between the mandatory and mandant; though it may be so conceived as to raise a debt also

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Letter of Credit, drawn, like the present, for purposes of a general nature, to be equivalent, in import and intention, to the following language; 'Take this Letter of Credit, show it to any person whatsoever, and I promise any person, who shall, on the faith thereof, advance you money on Bills drawn within the scope thereof, that I will accept and pay those Bills.' I confess myself unable to perceive, upon any grounds of the Common Law, or of common sense and justice, why such a circulating promise should not be obligatory. But, be the English doctrine as it may be, the present case must be governed, not by that law, but by the Commercial Law of America, where the contract was entered into. And it is perfectly clear, at least, in the jurisprudence, which is enforced in the Supreme Court of the United States, that a Letter, written within a reasonable time, either 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 afterwards takes the Bill on the credit of the Letter, a virtual acceptance, binding upon the person, who makes the promise. This was expressly so held by the Supreme Court, in Coolidge *v.* Payson (2 Wheat. R. 66, 75), and has been fully recognised and established by that Court in every subsequent case, which has arisen on the subject, and especially in Schimmelpennick *v.* Bayard (1 Peters, R. 284), and Boyce *v.* Edwards, (4 Peters, R. 111). Now, it is plain, that, if such a promise becomes, as it were, a circulating promise to accept the Bill, when drawn in favor of, and to any party, who shall take the Bill upon the faith of such promise, and operates as an acceptance of the Bill, it must be, because the promise to accept, in such a case, is a promise by intendment made to the party, who takes the Bill; and then, at his election, it may be treated as an acceptance, or as a promise to accept. This, therefore, alone, would establish the point of a privity of contract between the party giving the Letter of Credit, and the party advancing the money, and taking the Bill on the credit thereof; and it is manifestly founded on a sufficient consideration. Now, I know of no just or reasonable ground, upon which a distinction can be maintained between an implied acceptance, in favor of the person, who makes advances, and takes the Bill under such circumstances, and a promise to accept the Bill. In each case it enures as a direct contract with the party, founded upon the intent and the object of the Letter of Credit, or the written promise; and he has, and ought to have his election, either to treat it as a positive acceptance, or as a promise to accept made directly to him, through the open Letter of Credit addressed to him, either specially or generally, for that purpose. Such is the doctrine, which, for many years, I have constantly supposed to be well established in the practice of the commercial world, and, therefore, never questioned in courts of justice; and, upon

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against the person, who is supplied by the mandatory. 1. Where the letter is purchased with money by the

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this very doctrine, my judgment proceeded in the recent case of Baring v. Lyman (1 Story, R. 397, 414, 415). It does not, however, rest upon my single opinion; but it has been fully recognised by the Supreme Court of the United States. In Townsley v. Sumrall (2 Peters, R. 170, 181), the Court said; 'If a person undertake, in consideration, that another will purchase a Bill already drawn, or to be thereafter drawn; and, as an inducement to the purchase, to accept it, and the Bill is drawn and purchased upon the credit of such promise, for a sufficient consideration; such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and, having a sufficient consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence, that the direct consideration moves to a third person, as, in this case, to the Drawer of the Bill; for it moves from the purchaser, and is his inducement for taking the Bill. He pays his money upon the faith of it, and is entitled to claim a fulfilment of it. It is not a case falling within the objects or the mischiefs of the Statute of Frauds. If A. says to B., 'Pay so much money to C., and I will repay it to you,' it is an original, independent promise; and, if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration, moving between the immediate parties to the contract. Damage to the Promissee constitutes as good a consideration, as benefit to the Promissor. In cases, not absolutely closed by authority, this Court has already expressed a strong inclination not to extend the operation of the Statute of Frauds, so as to embrace original and distinct promises, made by different persons at the same time, upon the same general consideration. Then, again, as to the consideration, it can make no difference in law, whether the debt, for which the Bill is taken, is a pre-existing debt, or money then paid for the Bill. In each case, there is a substantial credit given by the party to the Drawer, upon the Bill, and the party parts with his present rights at the instance of the Promissee, whose promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the Drawer. Under such circumstances, there is no substantial distinction, whether the Bill be then in existence, or be drawn afterwards. In each case, the object of the promise is to induce the party to take the Bill upon the credit of the promise; and, if he does so take it, it binds the Promissor. The question, Whether a parol promise to accept a non-existing Bill amounts to an acceptance of the Bill, when drawn, is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance.' In Boyce v. Edwards (4 Peters, R. 111, 121 to 123), the Court held, that,

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person wishing for the foreign credit; or, is granted in consequence of a check on his cash account; or,

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if, in the particular case, by reason of the Bill to be drawn not being definitely described, in the manner limited by the case of Coolidge *v.* Payson (2 Wheat. R. 75), the promise to accept would not operate as an acceptance of the Bill in favor of the party receiving it, still, it would operate as a promise to him to accept the Bill, when drawn, and thus be equally available for him. The language of the Court, upon that occasion, was; 'The rule, laid down in Coolidge *v.* Payson, requires the authority to be pointed to the specific Bill or Bills, to which it is intended to be applied, in order, that the party, who takes the Bill upon the credit of such authority, may not be mistaken in its application.' And again; 'The distinction between an action on a Bill, as an accepted Bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence, necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular Bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all Bills coming fairly within the scope of the promise. Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon the Bill. For all practical purposes, in commercial transactions in Bills of Exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of the Bills; and this has led judges frequently to express their dissatisfaction, that the rule had been carried as far as it has; and their regret, that any other act, than a written acceptance on the Bill, had ever been deemed an acceptance. As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others, who may take Bills upon the credit of such promise, they are equally secure, and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the Bill itself.' The case of Adams *v.* Jones (12 Peters, R. 207, 213) is equally explicit to show, that a written promise, made to one person, may enure as a promise in favor of another person, who gives credit on the footing of that promise, where the terms of the Letter are such as prove, that it was intended to be shown, and to produce that very credit. The case of Carnegie *v.* Morrison (2 Metc. R. 381, 395, 396) is also an authority to the same purpose; and, indeed, it runs on all fours with the present case. It is unnecessary for me to add, that my own judgment is persuasively governed by these decisions, not merely as authorities (although that would be a decisive ground), but upon principle, as tending to further and establish commercial confidence, and to give that sanctity, circulation, and faith to Letters of Credit, which constitute the very foundations, upon which they

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procured on the credit of securities lodged with the person, who grants it; or, in payment of money due by him to the Payee; the Letter is, in its effects, similar to a Bill of Exchange drawn on the foreign merchant. The payment of the money by the person, on whom the letter is granted, raises a debt, or goes into

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were first built, and by which alone they can be sustained in the business of modern commerce. My judgment, therefore, is, that the plaintiff is entitled to recover the amount of the damages sustained by the refusal of the defendants to accept the Bill in controversey. What should those damages be? Should they cover all the money actually paid upon the protested Bills by the plaintiffs; including reëxchange, together with interest, or should the reëxchange be excluded? It is clear, that the Acceptor is not, ordinarily, bound to any Holder to pay reëxchange, upon his refusal to pay the Bill; but only to pay the principal and interest. But, here, the Drawees (the defendants) have promised to accept and pay the Bill upon a sufficient consideration; and I do not perceive any ground why the defendants should not be bound to indemnify the plaintiffs against all losses, including reëxchange, which have been the natural and necessary consequence of their refusal to perform their contract made with the plaintiffs. The defendants are not sued as Acceptors; but as special contractors, who have broken their contract; by which breach the plaintiffs have been compelled to pay the very moneys including reëxchange, which they now seek to recover back. It seems to me, that they are entitled to the full amount paid by them, and interest upon the same from the time when it was paid. The interest should be the interest of the place, where the money was payable by the plaintiffs, and, of course, where they were to be reimbursed. The case of Riggs *v.* Lindsay (7 Cranch, R. 500) seems to me a clear and satisfactory authority, that the plaintiffs are entitled to a full reimbursement of all the sums paid by them, including reëxchange. This also appears to have been the opinion of Mr. Justice Bayley, in his work on Bills of Exchange. (Bayley on Bills, ch. 9, p. 353, 5th London edit. 1830; Id. Amer. edit. p. 380). It was also directly affirmed by Lord Camden, in Francis *v.* Rucker (Ambler, R. 272). Pothier holds, that the Acceptor is, in all cases, bound to pay the reëxchange to the Holder, in the same manner as the Drawer would be (Pothier de Change, n. 117), which is carrying the rule beyond what our law seems to justify. (Napier *v.* Schneider, 12 East, R. 420; Woolsey *v.* De Crawford, 2 Camp, R. 445). For these reasons, I am of opinion, that the whole damages, and costs, and expenses paid by the plaintiffs, including reëxchange, with interest, are to be included in the judgment for the plaintiffs."

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account between him and the writer of the Letter; but raises no debt to the person who pays on the Letter, against him, to whom the money is paid. 2. Where not so purchased, but truly an accommodation, and meant to raise a debt against the person accommodated, the engagement generally is, to see paid any advances made to him, or to guarantee any draft accepted, or Bill discounted; and the compliance with the mandate, in such case, raises a debt both against the writer of the Letter, and against the person accredited."[1]

[1] 1 Bell, Comm. B. 3, ch. 2, § 4, p. 371 (5th edit.).

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CHAPTER XIV.

INLAND BILLS.

§ 464. HITHERTO our attention has been principally addressed to cases of Foreign Bills of Exchange; and the rules and doctrines applicable to them, are, generally, applicable, to the same extent, and in the same manner, to Inland Bills of Exchange. There are some differences, which it is essential to bring to the notice of the reader; and there are some doctrines, which are more familiarly known, and more frequently applied to cases of Inland Bills, than to cases of Foreign Bills, and are, therefore, peculiarly illustrative of the general subject. We shall, therefore, here, bring under review some of these differences and these doctrines, in a brief and summary manner.

§ 465. Inland Bills, as has been already suggested, are those, which are drawn at one place, and payable at another place, in one and the same country, the Drawer and Drawee being both resident therein.[1] It is not sufficient, that the two places be under the same general sovereignty; but they must be also within the same territorial jurisdiction, and governed by the same identical jurisprudence and laws. Thus, England, and Ireland, and Scotland, are all under the same general sovereignty; and yet, a Bill, drawn by the Drawer, resident in one of these countries, upon the Drawee, resident in another of these countries, is

[1] Ante, § 22; Bayley on Bills, ch. 1, § 8, p. 26 (5th edit. 1830).

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a Foreign Bill, and not an Inland Bill.[1] So a Bill, drawn by a Drawer, resident in one of the States, composing the United States, upon the Drawee, resident in another of the United States, is a Foreign Bill, and not an Inland Bill.[2]

§ 466. Inland Bills were, probably, well known and in use in the countries of Continental Europe, at a period nearly as early as the introduction of Foreign Bills; as the convenience, if not the necessities, of commerce between different but distant parts of the same country, would often require such a facility. Certain it is, that they were in use upon the Continent of Europe, much earlier than in England; and the old writers upon the subject speak of Bills of Exchange in terms equally applicable to Inland and Foreign Bills.[3]

§ 467. In England, Inland Bills of Exchange appear to have been of a comparatively modern origin, and probably were not in general existence or use until the reign of Charles the Second.[4] Lord Holt, in a case in the reign of Queen Anne, said, that he remembered, when actions upon Inland Bills did first begin.[5] Upon their first introduction, their validity and operation were very much restricted; and the very custom between two or more places, where they were used, was essential to be stated in the declaration of every action brought thereon; and they were limited to cases where both parties were merchants.[6] This

[1] Ante, § 22; Mahoney v. Ashlin, 2 Barn. & Adolph. 478.

[2] Ante, § 23; Buckner v. Finley, 2 Peters, R. 586.

[3] Jousse, Comm. sur l'Ord. 1673, tit. 5, Introd. p. 58 to 67; Id. tit. 5, art. 5, p. 89; Pothier de Change, n. 6, 7, 10, 15, 16; Id. n. 30.

[4] Chitty on Bills, ch. 1, p. 13, 14 (8th edit. 1833).

[5] Buller v. Creps, 6 Mod. R. 29.

[6] Ante, § 71; Chitty on Bills, ch. 1, p. 14 (8th edit. 1833).

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very fact sufficiently shows, how slow was their adoption and progress, and how reluctant the Common Law was, in supporting or encouraging them.[1] Even when their validity and operation, if made payable to a party or order, was established, it was thought, that, if made payable to the bearer, they were not negotiable.[2] These niceties have, however, for a great length of time, been done away, and Inland Bills now generally stand, in England and America, upon the same grounds as Foreign Bills, as to their negotiability and operation, and responsibility, and the rights and duties of the parties thereto, subject to an exception, which will be immediately stated. In England, they have been put upon the firm footing of Foreign Bills of Exchange, by the Statutes of 9 and 10 Will. III. ch. 17, and 3 and 4 Ann. ch. 9,[3] the principal provisions of which have been practically adopted in America.

§ 468. The principal exception, to which allusion has been already made, is, that Inland Bills need not, upon being dishonored for non-acceptance, or non-payment, be protested by the Holder; whereas, in cases of Foreign Bills, a protest is (as we have seen) ordinarily indispensable.[4] Notice of the dishonor of

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[1] Chitty on Bills, ch. 1, p. 14 (8th edit. 1833).

[2] Ibid.

[3] 2 Black. Comm. p. 467.

[4] Ante, § 273, 277, 281; Chitty on Bills, ch. 1, p. 14; Id. ch. 8, p. 364, 365; Id. ch. 10, p. 499 to 501; Id. Pt. 2, ch. 2, p. 592 (8th edit. 1833); Kyd on Bills, ch. 7, p. 142, 143 (3d edit); Brough v. Parkings, 2 Ld. Raym. 992; S. C. 6 Mod. 80; 1 Salk. 131; Young v. Bryan, 6 Wheat. R. 146; Union Bank v. Hyde, 6 Wheat. R. 572. Mr. Kyd on this subject, says; "The principal difference between Foreign and Inland Bills of Exchange, at Common Law, seems to have been this. A protest for non-acceptance or non-payment of a Foreign Bill was, as it still is, essentially necessary, to charge the Drawer, on the default of the Drawee; nothing, not even the principal sum, could, or can at this time, be recovered against

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Inland Bills is, however, equally required to be given by the Holder, in the same manner, and with the like promptitude, as in cases of the dishonor of Foreign Bills, in order to charge the antecedent parties.[1] But, although no protest is required, to preserve and protect the rights of the holder on an Inland Bill; yet the Statutes of 9 and 10 Will. III. ch. 17, and of 3 and 4 Ann. ch. 9, authorize the Holder of an Inland Bill of Exchange, expressed to be for value received, and payable at a certain number of days, or weeks, or months, after the date thereof, if dishonored by non-acceptance, or accepted in writing, and dishonored by non-payment at maturity, to be protested therefor; and, in default of such protest, the Holder is not entitled to recover the costs, damages, and interest, which shall accrue thereby.[2] These statutes, however, af-

him without a protest; no other form of notice having been admitted, by the custom of merchants, as sufficient. But Inland Bills, having been introduced at a late period, in imitation of Foreign ones, did not immediately adopt all their incidents; simple notice, within a reasonable time, of the default of the Drawee, was held sufficient to charge the Drawer; but it does not appear, that, in any instance, they were favored with the solemnity of a protest; the disadvantage arising from thence was this, that notice entitled the Holder to recover only the sum in the original Bill." Kyd on Bills, p. 142.

[1] Chitty on Bills, ch. 1, p. 14 (8th edit. 1833); Id. ch. 8, p. 364, 365; Id. ch. 10, p 499, 500; Id. Pt. 2, ch. 2, p. 592; Kyd on Bills, ch. 7, p. 142 (3d edit.); Leftley *v.* Mills, 4 Term Rep. 170; Brough *v.* Parkings, 2 Ld. Raym. 992; S. C. 6 Mod. 80; 1 Salk. 181.

[2] Kyd on Bills, ch. 7, p. 142 to 145 (3d edit.); Windle *v.* Andrews, 2 Barn. & Ald. 696, 700, 701; Chitty on Bills, ch. 8, p. 364, 365 (8th edit. 1833). Mr. Kyd (on Bills of Exchange, ch. 7, p. 146 to 152 (3d. edit.) has given, at large, the constructions, which have been put by the courts, upon these obscure and ill-worded statutes, as well as the doubts entertained thereon; and, probably, protests upon these statutes are more rarely resorted to than they otherwise would be, on account of the particular limitations and restrictions of the statutes and acts, required to be done, to entitle the Holder to recover such interests and costs. In the case of Windle *v.* Andrews, 2 Barn. & Ald. R. 696, 700, Mr. Justice Bayley

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ford only cumulative remedies, and do not impose an absolute necessity on the Holder, even in respect to the particular descriptions of Bills stated therein, to protest the same upon such dishonor. In case of his neglect or omission to make such protest, he loses his costs and damages upon the Bill;[1] but he is entitled to recover his principal, and also interest, upon the Bill, without such protest.[2] In Holland, in France,

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said; "There is no instance of a protest on an Inland Bill of Exchange being given in evidence; and yet it is every day's practice to allow interest." — See Chitty on Bills, ch. 8, p. 364, 365 (8th edit. 1833); Id. ch. 10, p. 500, 501, where Mr. Chitty says, that a protest on an Inland Bill is, in practice, seldom made.

[1] Brough *v.* Parkings, 2 Ld. Raym. 992; S. C. 6 Mod. R. 80; 1 Salk. R. 131.

[2] Windle *v.* Andrews, 2 Barn. & Ald. 696; Lumley *v.* Palmer, 2 Strange, R. 1000; Chitty on Bills, ch. 8, p. 364, 365 (8th edit. 1833); Id. ch. 10, p. 499 to 501. In the Report of Brough *v.* Parkings, in 6 Mod. 80, Lord Holt is made to say; "The statute never meant to destroy the action for want of a protest, but only to deprive the party from recovering interest and costs upon an Inland Bill against the Drawer, without notice of non-payment by protest; for, before the statute, there was this difference between Foreign Bills and Inland Bills of Exchange; if a Bill were foreign, one could not resort to the Drawer, for non-acceptance or non-payment, without a protest, and reasonable notice thereof; but, in case of Inland Bills, there was no occasion for a protest; but, if any prejudice happened to the Drawer by the non-payment of the Drawee, and that for want of notice of non-payment, which he, to whom the Bill was made, ought to give, the Drawer was not liable; and the word 'damages,' in the statute, was meant only of the damages, that the party is at, in being longer out of his money, by the non-payment of the Drawee, than the tenor of the Bill purported, and not of damages for the original debt; and the protest was ordered for the benefit of the Drawer; for, if any damages accrue to the Drawer for want of a protest, that shall be borne by him, to whom the Bill is made; and, if no damages accrue to him, then there is no harm done to him. A protest is only to give formal notice, that the Bill is not accepted, or, if accepted, that it is not paid; and if, in such case, the damage amount to the value of the Bill, there shall be no recovery, but otherwise he ought not to lose his debt; but that ought to appear, either in evidence upon *non assumpsit*, or by special pleading. The act is very obscurely and doubtfully penned, and we ought not, by construction upon such an act, to take away a man's right."

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and, as it seems, generally on the Continent of Europe, protests are made, and are required to be made, upon Inland Bills, as well as upon Foreign Bills of Exchange.[1]

§ 469. Another difference was, at one time, strongly insisted upon between Foreign and Inland Bills of Exchange. It was, that, although upon Foreign Bills the Holder had a right to demand payment at any reasonable hour of the day, and protest the Bill, if not paid, when payment was so demanded; yet, that it was otherwise as to Inland Bills, for, in respect to the latter, the like rule prevailed as in other contracts at the Common Law, that the Acceptor, or party to pay, had the whole day for the payment and discharge thereof.[2] But this doctrine is now abandoned, and the reasonable doctrine established, that a demand of payment may be made at any reasonable hour of the day of the maturity of an Inland Bill, and that, if it be then dishonored, the Holder may give notice thereof on the same day, to the antecedent parties, and is not bound to wait until the next day.[3]

§ 470. Inland Bills of Exchange, when payable at a certain time, at or after sight, or after date, are entitled to the ordinary days of grace.[4] But, when they are payable on demand, as is commonly the case, no days of grace are allowed; and they are immediately

[1] 1 Bell, Comm. B. 3, ch. 2, § 4, p. 413, 414 (5th edit.).

[2] Chitty on Bills, ch. 9, p. 432 (8th edit. 1833); Leftley v. Mills, 4 Term Rep. 170; Hayns v. Birks, 3 Bos. & Pull. 602.

[3] Chitty on Bills, ch. 9, p. 432 (8th edit. 1833); Ex parte Moline, 1 Rose, R. 303; S. C. 19 Ves. 216; Burbridge v. Manners, 3 Camp. R. 193.

[4] Ante, § 342 · Chitty on Bills, ch. 9, p. 406, 407, 409, 410 (8th edit. 1833).

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payable upon presentment.[1] But the question often arises, At and within what time presentment should be made by the Holder to the Acceptor for payment? The answer is, Within a reasonable time; otherwise, the Drawer and Indorsers will be exonerated from all liability, although the Acceptor will still remain liable.[2] What is a reasonable time is in some measure dependent upon the particular circumstances of the case.[3] There are several classes of cases, with reference to which the rule, as to reasonable time, may be, and, indeed, ordinarily is, applied with very different modifications and qualifications. It may be useful to illustrate some of them in this place.

§ 471. In the first place, then, let us suppose the case of an Inland Bill, drawn in a town or city, on a Drawee in the same town or city, and payable to a third person, or his order, on demand. At and within what time should such a bill be presented to the Drawee for payment? The established rule is, that, if it is held by the Payee, it need not be presented for payment upon the same day, on which it was received; but it will be sufficient to present it on the next succeeding business day for payment, within the usual business hours, or at any other seasonable time of the

[1] Ante, § 342; Bayley on Bills, ch. 7, § 1, p. 234 (5th edit. 1830); 1 Bell, Comm. B. 3, ch. 2, p. 410 (5th edit.). — We have already seen, that, by the law of France, Bills of Exchange, payable at sight, are payable immediately on demand, without the allowance of any days of grace. Ante, § 228, note, 342, note, 343; Pothier de Change, n. 12, 139, 172; Pardessus, Droit Comm. Tom. 2, art. 420; Jousse, Comm. sur l'Ordin. 1673, tit 5, art. 4, p. 79 (edit. 1802).

[2] Ante, § 231, 324, 325; Chitty on Bills, ch 9, p. 402, 403, 410, 412, 413 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 233 to 242 (5th edit. 1830).

[3] As to when a Bill payable on demand, *with interest*, should be demanded, see Wethey *v.* Andrews, 3 Hill, R. 582.

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day.[2] Here we perceive, that the analogy is closely followed, which is applicable to other Bills and other

[2] Chitty on Bills, ch. 9, p. 402, 410, 412, 413, 418, 419, 421, 422 (8th edit. 1833); Scott v. Lefford, 9 East, R. 347; Robson v. Bennett, 2 Taunt. R. 383; Bayley on Bills, ch 7, § 1, p 236 to 244 (5th edit. 1830); 1 Bell, Comm. B 3, ch. 2, § 4, p. 410, 411 (5th edit.); Alexander v. Burchfield, 3 Scott, New R. 555. — Mr. Chitty, in p. 413, above cited, says; "Upon this question it has been observed, that there is no other settled general rule, than that the presentment must be made within a reasonable time, which must be accommodated to other business and affairs of life; and that a party is not bound, in any case, to present a Bill or note, payable on demand, on the same day it is issued or received by him; for a man ought not to be required to neglect every other business, for the purpose of making so prompt a presentment; and it would be very inconvenient to have an inquiry, in each particular case, whether or not the Holder could conveniently have presented the instrument on the same day. And, as observed by Lord Mansfield, it would be unreasonable to suppose, that a tradesman should be compelled to run about the town with a dozen drafts, from Charing Cross to Lombard Street, on the same day; and he directed the jury to consider, that twenty-four hours were the usual time allowed for the presentment for payment. The notion, however, that twenty-four hours was the limit, is not the present rule; and it suffices, in all cases, for a party to present a Bill or note, payable on demand, at any time during the hours of business on the day after he received it. But, although this rule universally prevails between the party delivering and the party receiving from him a Bill or note so payable, yet it must not be understood, that the ultimate presentment for payment cannot be delayed, for any indefinite time, by successive transfers between numerous parties, and by each party, on the day after he has received the Bill or note, transferring it to another; for, if there should, by that means, be an unreasonable number of days occupied, the party or parties first transferring the instrument, and other of the earlier parties, would probably be considered discharged from liability, in case the bankers or person, who issued the note so payable, should in the mean time fail; and no prudent party should permit any delay in presentment, especially if there be the least reason to doubt the solvency of the party to pay. It is perfectly clear, that, if a party, who has received such a Bill or note, does not on the next day present it, or forward it for presentment, in due time on the next day, nor transfer it, but locks it up, or keeps it, he thereby forfeits all claim upon the person, from whom he received it." See also Kyd on Bills, ch. 4, p. 47 (3d edit. 1795). Mr. Bayley has collected and stated the various cases in a summary manner in p. 236 to 243. His summary is; "Upon a Bill or note of this kind, given by way of payment, the course of business seemed formerly to allow the party to keep it, if payable in the place, where it was given, until the

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cases; it being in no case indispensable, that the Payee, or other Holder, should lay aside all other business, to make a demand of payment on the day, on which he receives such a Bill, any more than it is for the Holder to give notice of the dishonor of a Bill, on the day of its dishonor, to the other parties liable on the Bill.[1] If it be not so presented, then the Payee makes it his own by his delay, and thus giving undue credit to the Drawee; and, if the latter has, in the mean time, failed, it is his own loss, and he can have

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morning of the next day of business after its receipt; and till the next post, if payable elsewhere; but no longer. Thus, where a note of this kind, payable in London, was given there in the morning, a presentment the next morning was held sufficiently early; a presentment at two the next afternoon too late. In a later modern case, where a similar note was given in London at one, and not presented till the next morning, three juries held the delay unreasonable, but it was against the opinion of the Court. But, in a more recent case, where such a note, payable in London, was given in the country, it was held, that the person receiving it was not bound to send it to London till the following day, and that the person receiving it in London was not bound to present it till the next day. A Bill or note of this kind, given by way of payment to a banker, must be presented by him as soon as if it had been paid into his hands by a customer. And it has been held, that a Bill or note of this kind, if payable at the place, where the banker lives, must be presented the next time the banker's clerk goes his rounds. But, if a London banker receive a check by the general post, he is not bound to present it for payment until the following day. And, where a person in London received a check upon a London banker between one and two o'clock, and lodged it soon after four with his banker, and the latter presented it between five and six, and got it marked as a good check, and the next day at noon presented it for payment at the clearing-house; the Court held, that there had been no unreasonable delay, either by the Holder, in not presenting it for payment on the first day, which he might have done, or by his banker, in presenting it at the clearing-house only, on the following day at noon; it being proved to be the usage among such bankers, not to pay checks presented by one banker to another after four o'clock, but only to mark them, if good, and to pay them the next day at the clearing-house."

[1] Ibid.; Ante, § 231 to 233; Kyd on Bills, ch. 7, p. 127 to 129 (3d edit); Metcalf v. Hall, 3 Doug. R. 113; Appleton v. Sweetapple, 3 Doug. R. 137, and Roscoe's note, Id. p. 141.

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no recourse over against the Drawer,[1] In respect to the time of the demand in all these cases, there is no difference, whether the payment be demanded by the party himself, or by his agent or banker; for the agent or banker has no right to an extension of the time, beyond that, which his principal had.[2]

§ 472. The more difficult and embarrassing question is, to say, Within what time presentment should be made, where the Bill is indorsed, and put in circulation by the Payee. If he keeps it in his own hands several days before he puts it in circulation, the Drawer will be thereby discharged from all liability, if the Drawee in the mean time fails.[3] But, suppose, that the Payee indorses the Bill in blank, and puts it in circulation on the same day, on which he receives it, or on the next day, and the Indorsee and other subsequent Holders each hold it but for a day, and circulate it from hand to hand to other Holders, without any one retaining it exceeding one day; the question may then arise, Whether the Drawer would be held liable upon the Bill, so long as it has been thus kept in free circulation? Or, whether the payment must be deemed within the period limited to the Payee? It is difficult, in the present state of the law, to answer this question in any manner, which is entirely satisfactory. A distinction has been taken between cases, where such Bills are drawn by bankers and others, as a mode of making profit and a source of livelihood, by ex-

[1] Chitty on Bills, ch. 9, p. 412, 413, 415 to 417, 419, 423 (8th edit. 1833); Alexander v. Burchfield, 3 Scott, New R. 555.

[2] Alexander v. Burchfield, 3 Scott, New R. 555.

[3] Chitty on Bills, ch. 9, p. 413, 414, 421, 422 (8th edit. 1833); Bayley on Bills, ch. 7, § 1, p. 232 to 234 (5th edit. 1830); Camidge v. Allenby, 6 Barn. & Cressw. 373; Beeching v. Gower, 1 Holt, N. P. R. 313, note.

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changing them for ready money, and cases, where such Bills are drawn by private persons, having no such reference to profits or means of livelihood, but merely for their own accommodation or that of the Payee. In the former case it has been said, that the banker or other person is understood to sanction both the circulation and non-presentment by his course of business, and by the advantages of credit which he thus obtains from such circulation and non-presentment of the Bill; and, therefore, it is difficult to say, what length of time, consistent with the free circulation of the Bill, would be deemed unreasonable, in not presenting the Bill to the Drawee for payment.[1] But, in the latter

[1] Bayley on Bills, ch. 7, § 1, p. 236 (5th edit. 1830); Chitty on Bills, ch. 9, p. 414 to 416, 421 (8th edit. 1833); Shute v. Robins, 1 Mood. & Malk. 133. — The language of Mr. Bayley is; "Upon a Bill or note payable on demand, or at sight, and given for cash by a person, who makes the profit by the money on such Bills or notes a source of his livelihood, it is difficult to say, what length of time such person shall be entitled to consider unreasonable; but, upon such Bills or notes, given by way of payment, or paid into a banker's, any time, beyond what the common course of business warrants, is unreasonable." — Mr. Chitty (p. 414) says; "It seems, that, with respect to the length of time Bills and notes, payable on demand, may be kept in circulation, a distinction may be taken between the notes of a private individual and country bankers' notes, and also with reference to the persons by and between whom they have been circulated; and it has been considered, that, upon a Bill or note, payable on demand, and given for cash, by a person, who makes the profit by the money on such Bills or notes a source of his livelihood (as is the case of country bankers issuing their notes), it is difficult to say, what length of time such person shall be entitled to consider unreasonable; but that, upon such Bills or notes given by way of payment, or paid into a banker's, any time, beyond what the common course of business warrants, is unreasonable. This position is explained by a recent case, where the defendants themselves, country bankers, transferred another country banker's Bill, some days after they had kept it, to the plaintiff's traveller, who did not remit it to the correspondents for some days; and, on its being presented, it was dishonored; and it was held, that the defendants were not discharged from liability, because, as Lord Tenterden observed, the character of the Bill, and the course of dealing, must be attended to. It was a Bill by a country banker upon hi

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case, the presentment ought to be within a very short period, and perhaps ought to be limited to such a pe-

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London banker, and it did not seem unreasonable, to treat such Bills as not requiring immediate presentment, but as being retainable by the Holders for use within a moderate time, as part of the circulating medium of the country; and the defendants themselves, by the time they kept it, showed they so considered this Bill; but he left it to the jury to say, whether they thought the delay unreasonable or not, and they found for the plaintiff." In Camidge *v.* Allenby (6 Barn. & Cressw. 373), notes of a banker, payable to Bearer, were taken in payment of goods, and the banker failed; and the question was, Who was to bear the loss, the buyer or the purchaser. Mr. Justice Bayley, in delivering the opinion of the Court said; "The rule, as to all negotiable instruments, is, that, if they are taken in payment of a preëxisting debt, they operate as a discharge of that debt, unless the party, who holds the instrument, does all that the law requires to be done, in order to obtain payment of them. Then the question is, What it was the duty of the plaintiff to do, in order to obtain payment of these notes. They were intended for circulation. But I think, that he was not bound immediately to circulate them, or to send them into the bank for payment; but he was bound, within a reasonable time after he had received them, either to circulate them, or to present them for payment. Now, here it is conceded, that, if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on the Monday. It is clear, that the plaintiff, on that day, might have had knowledge, that the bankers had stopped payment; and, having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence of the negotiable nature of the instrument, it became his duty to give notice to the party, who paid him the notes, that the bankers had become insolvent, and that he, the plaintiff, would resort to the defendant for payment of the notes; and it would then have been for the defendant to consider, whether he could transfer the loss to any other person; for, unless he had been guilty of negligence, he might perhaps have resorted to the person, who paid him the notes. That party would, however, be discharged, if he received no notice of non-payment, or of the insolvency of the bankers, till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff, to give to the defendant notice of the insolvency of the bankers, may have been prejudicial to the defendant. The law requires, that the party, on whom the loss is to be thrown, should have notice of non-payment, in order to enable him to exercise his judgment, whether he will take legal measures against other parties to the Bill or note. Now here, if the notes had been returned on the Tuesday to the defendant, he might have taken steps against the bankers; and he had a right to exercise his judgment, whether he would do so or not, although they had stopped; or he might have had a remedy

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riod, as would be reasonable, supposing the Bill had not been put into circulation.[1]

§ 473. The distinction here alluded to may seem nice, but it turns upon the supposed intention and understanding of the parties, derived either from their own particular acts, or from the common course of business. And, certainly, upon the question, of what is reasonable diligence, or not, in the presentment of a

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against the person, who had paid him the notes. It may be hard, in some cases, that the entire loss should fall upon any one individual, but it is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the Holder of such an instrument is to present promptly, or to communicate without delay, notice of non-payment, or of the insolvency of the Acceptor of a Bill, or the Maker of a note; for a party is not only entitled to knowledge of insolvency, but to notice, that, in consequence of such insolvency, he will be called upon to pay the amount of the Bill or note. The case of Beeching v. Gower is an answer to the whole of the argument for the plaintiff, founded upon the fact, that the notes were paid away after the bank had stopped."

[1] Chitty on Bills, ch. 9, p. 414, 421 (8th edit. 1833). See also Bayley on Bills, ch. 7, § 1, p. 236 to 243 (5th edit. 1830). — Mr. Chitty, in page 421, above cited, speaking of checks, which seem, in many respects, governed by the same rule as Bills payable on demand, says; "It will be observed, that this rule, allowing the party, receiving a Bill, note, or check, payable on demand, until the next day to present it for payment, will not enable a succession of persons to keep such instrument long in circulation, so as to retain the liability of all the parties, in case the same should ultimately be dishonored by the Maker of the note, or Drawee of the check. And, though each party may be allowed a day, as between him and the party, from whom he received a check, it would be otherwise as to the Drawer, if the banker should, during a succession of several days, fail, and would have paid, if the check had been presented on the day after it was drawn; a check being an instrument not, in general, intended by the Drawer to be long in circulation, and in that respect differing from a country banker's note, which is known to all parties to have been intended to be in circulation, and not so promply presented for payment as a check." See also Chitty on Bills, ch. 9, p. 410, 413, 414 (8th edit. 1833); Ante, § 471, and § 472, and note. See also Lord Kenyon's remarks on the supposed difference between bankers' checks, and Bills of Exchange, and denying its correctness, in Boehm v. Sterling, 7 Term R. 423, 430.

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Bill, the situation of the parties, the course of their business, and the mode of negotiation, are not unfit to be considered, in determining, as between themselves, (whatever may be the case as to third persons,) what may properly be deemed, according to their understanding, a reasonable time for presentment; for, if they should expressly agree, that the Bill might be kept in circulation for an indefinite time, there would be no doubt, that the Drawer would be bound to pay the Bill, notwithstanding there had been no presentment for payment thereof to the Drawee until after a considerable lapse of time, and he had, in the intermediate time, failed in business, and become insolvent. And, if such an express agreement would be a waiver of what would otherwise be deemed laches on the part of the Payee or Holder, an agreement of a like nature might be implied from the surrounding circumstances, with equal cogency and propriety.

§ 474. But very different considerations would or might take place between third persons, even in regard to Bills of Exchange issued by bankers and others, as a mode of livelihood. Thus, if a banker's Bill, payable to A. or the bearer on demand, were put in circulation, and passed from hand to hand to successive Holders; as between the Holder, who should pass them, and the immediate Holder, under or from him, the duty of presentment to the Drawee on the next day, if payable in the same town or city, or, if payable in another town or city, the duty of transmission by the next day's mail, and due presentment, might be completely obligatory, and otherwise discharge the Holder, who so passed the Bill, if the Drawee should become bankrupt or insolvent, although the remedy of the present Holder might be complete

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and perfect against the banker, who had issued the Bill. Due and reasonable diligence in the presentment of the Bill might, as to the banker, be governed by very different considerations from those, which are applicable to subsequent Holders, who should circulate the same bill. Hence, the rule seems well established, that, as between such subsequent Holders, so circulating a banker's Bill, payable on demand, the presentment should be made on the next succeeding day, if payment is to be made in the same town or city, where the Bill is received; and if received in another place, then it should be put into circulation, and sent forward by the next day's mail to the place of payment, or otherwise, the party, paying the same, will be discharged from all liability.[1]

§ 475. And this leads us to remark, that, where an Inland Bill, payable on demand, is received in the country, or at a distance from the place of payment, as, if received in Manchester, payable in London, the party, who receives the same, need not forward the same to London, for presentment for payment, by the mail of the same day, although there is time to do so; but he may retain the Bill until the next day, and transmit it by that day's mail, and it will be sufficient, and within reasonable time.[2] And the party receiving

[1] Ante, § 472; Bayley on Bills, ch. 7, § 1, p. 236 to 243 (5th edit. 1830); Chitty on Bills, ch. 9, p. 416 to 421 (8th edit. 1833).

[2] Bayley on Bills, ch. 7, § 1, p. 240, 241 (5th edit. 1830); Chitty on Bills, ch. 9, p. 416, 417, 421 (8th edit. 1833); Williams v. Smith, 2 Barn. & Ald. 496; Beeching v. Gower, 1 Holt, N. P. Rep. 315, 316, and note. — In Williams v. Smith (2 Barn. & Ald. 496), Lord Chief Justice Abbott, in delivering the opinion of the Court, said; "It is of the greatest importance to commerce, that some plain and precise rule should be laid down, to guide persons in all cases, as to the time, within which notices of the dishonor of Bills must be given. That time, I have always understood to be, the departure of the post on the day following that, in which

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it in London need not present it for payment until the day after he receives it.[1]

§ 476. Another question, naturally arising out of Inland Bills, payable on demand, is, Whether the bankruptcy, insolvency, or other stoppage of payment by the Drawee, before or at the time, when the Bill ought to be presented for payment, will constitute a just excuse to the Holder, for the want of a due non-presentment thereof. And here the rule seems firmly established, in analogy to the cases of Foreign Bills, that, whether such a Bill be payable by a private person, or by a banker, it must be presented for payment at the proper time and place, exactly as if there had been no such bankruptcy, or insolvency, or stoppage

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the party receives the intelligence of the dishonor. And, in that sense, the passage cited from the very learned treatise on Bills of Exchange must be understood, as well as the judgment of Lord Mansfield, in Tindal *v.* Brown (1 Term R. 167). If, instead of that rule, we were to say, that the party must give notice by the next practicable post, we should raise, in many cases, difficult questions of fact, and should, according to the peculiar local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule, which I have stated. In its application to the present case, the result is, that the plaintiff has been guilty of no laches, and that he is entitled to our judgment. It appears, that, if these notes had been transmitted direct to Newbury by the post, they would not have been paid; for they discontinued payment there on Monday morning; and, though the circumstance, of one set of halves being sent by the coach, caused their arrival in London two hours later, still, that being a reasonable precaution, the plaintiff had a right to send them by that conveyance. There is a difference between this case and that of a Bill of Exchange, payable to order, for such Bill may be specially indorsed, and no risk incurred by sending it then by the post. But here it would not have been so safe to have transmitted notes, payable to the Bearer on demand, by that conveyance. Then, in addition to this, it appears, that the defendant has not been, in the least degree, prejudiced by this mode of conveyance having been adopted. On the whole, therefore, the plaintiff is entitled to our judgment."

[1] Ibid.

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of payment of the Drawee.[1] And it will make no difference as to the duty of the Holder in this respect, whether the Bill has been circulated and received by the Holder after such bankruptcy, insolvency, or stoppage of payment, unless the party passing it knew the fact; for he is entitled, notwithstanding, to have a strict compliance, on the part of the Holder, with the general obligations imposed upon him by law.[2] How-

[1] Chitty on Bills, ch. 9, p. 417, 418 (8th edit. 1833). Ante, § 326, 346, 347, 362, 375.

[2] Ibid.; Bowes v. Howe, 5 Taunt. R. 30; S. C. 16 East, R. 112; 1 Maule & Selw. 555; Camidge v. Allenby, 2 Barn. & Cressw. 373; Bayley on Bills, ch. 7, § 1, p. 221, 232, 233 (5th edit. 1830). — Mr. Chitty (p. 417, 418) says; "In general, in the case of country bankers' notes, payable on demand, although the bank has stopped payment and been shut up, and has declared, that they will not pay any notes, yet a due and regular presentment of such notes, with respect to time, must be formally made at the banker's, or to one or more of the Makers, unless dispensed with by the parties to be resorted to by the Holder, and due and immediate notice of the dishonor must be given to all the parties, who are known to have transferred the same, or they will be discharged from all liability, as well to pay the note as the debt, in respect of which it was transferred. Hence, it is expedient for any Holder of a note, payable on demand, to present it for payment as soon as possible, and immediately on being apprized of the insolvency of the banker, or other party, who ought primarily to pay the same, formally to tender the same and demand payment at the banking-house, and also of the partners of the firm, if practicable; and, as soon as possible afterwards, to give notice of the non-payment to all the parties, on whom he can possibly have any claim. Nor is there any distinction in this respect, whether the note payable on demand has been circulated by a party, after the Maker has stopped payment, or was insolvent, unless the former knew that fact at the time. If he did not, then he may insist on a due presentment of the note, or, at least, on having due notice of the dishonor, within the time usually applicable to such notes. Therefore, where it appeared, that a note of a country bank was given in payment, while the bank continued open, but, before the time allowed by the Law Merchant for presentment had expired, the bank failed; yet it was held, that the Holder was bound to present the note for payment in due time, and that he, by neglecting to do so, made it his own. So, where, on the 10th of December, at three o'clock in the afternoon, the defendant, at York, forty miles from Huddersfield, delivered to the plaintiff four £5 notes, payable to bearer on demand, of the bank of Dobson & Co., Hud-

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ever, the want of a demand of payment may, in such cases of bankruptcy, insolvency, or stoppage of payment, be excused; as, if it takes place before presentment can be made for payment, and the Holder, before the time for the presentment expires, offers to return it to the party, from whom he has received it, and the latter refuses to take it back, saying, that the banker, or other Drawee, is going on in business; for such conduct will dispense with the necessity of any such presentment, if, in fact, the Drawee never has resumed payment.[1]

§ 477. We have already seen, that, in France, Bills, payable at sight, are held to be payable on demand, and at the very time when they are presented.[2] And the question has then arisen, Within what period they ought to be presented for payment? Pothier holds, that no particular time is or can be assigned, and that it must be left for the court to decide, whether the presentment is within due season or not; and he adds, that the Holder ought not, by delaying the presentment a little too long, oblige the Drawer to run the risk of the insolvency of the Drawee.[3] Savary holds, that the time, within which presentment for payment

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dersfield, in payment for goods sold, and, at eleven o'clock on that day, those bankers had stopped payment, but neither the plaintiff nor the defendant knew of it; and the plaintiff did not circulate or transfer the notes, nor present them for payment, and, on the 17th of December, required the defendant to take them back, and, he refusing, the plaintiff sued him for the price of the goods, the Court held, that the defendant was discharged from liability, and the plaintiff should either have negotiated the notes, or forwarded them for payment, on the day after he received them, and to have given due notice of non-payment.

[1] Chitty on Bills, ch. 9, p. 388, 418, 419 (8th edit. 1833); Henderson v. Appleton, cited ibid., p. 388.

[2] Ante, § 228, note, § 342, note, § 343.

[3] Pothier de Change, n. 143.

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of such a Bill ought to be made, should be regulated by a reference to the distance of the place, where the Bill is drawn, from the place, where it is payable; and, that fifteen days, for the distance of the first fifteen leagues, and one day for every league beyond them, should be allowed, by analogy to the rule prescribed by the thirteenth section of the fifth article of the Ordinance of 1673, with regard to the delay of proceeding against the Drawers, or Indorsers, in the case of other Bills.[1] Pothier adds, that he has been informed, that it is a common opinion among merchants, that the presentment and the protest of such Bills will be valid and sufficient, if made within the period of five years, which is the common prescription, or statute of limitations, by the law of France.[2]

§ 478. The want of effects of the Drawer in the hands of the Drawee, as well as the other matters, which will excuse a non-presentment of other Bills for payment at the maturity thereof, and the want of notice of the dishonor, apply with equal force to Inland Bills payable on demand, as to other Bills, payable after sight, or after date,[3] as to the respective parties liable thereon; and, therefore, these matters need not be farther commented on in this place.[4] The French Law has avowed a broader principle upon this whole subject than ours, and has (as we have seen) put the doctrine of want of due presentment of the Bill for payment, and the want of due notice of the dishonor thereof, upon the simple consideration, wheth-

[1] Savary, Le Parfait Négociant, Tom. 2, Parere 17, p. 152.

[2] Pothier de Change, n. 143. See also Code of Commerce, art. 165 to 167.

[3] Kemble v. Mills, 1 Mann. & Grang. R. 757.

[4] See Ante, § 279 to 281, 306, 307 to 320, 326, 392.

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er the party to the Bill, against whom redress is sought, has suffered any damage or not, by such omission. If he has, he is, *pro tanto*, discharged; if he has not, then he is liable.[1] The like rule seems adopted in other commercial nations of Continental Europe.[2]

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[1] Pothier de Change, n. 156, 157; Kemble v. Mills, 1 Mann. & Grang. R. 762, note (*b*); Ante, § 306, 372, 393.

[2] Ibid.; Casaregis, Discurs. Comm. Disc. 54. — The learned Reporters have annexed to the case of Kemble v. Mills (1 Mann. & Grang. R. 762, note *b*) an extract from Pothier, and also some comments, as to the opinion of other writers. The whole note is as follows; "Pothier says (Traité du Contrat de Change, No. 156, 157); 'The penalty, incurred by the Holder of a Bill of Exchange, when he or his agent has neglected to cause it to be protested within the time prescribed by the law, or, after having done so, has neglected to bring his action against the Drawer and Indorsers within the time fixed by the Ordonnance, is, that he must take upon himself the consequences of the insolvency of the Drawee, and is, therefore, debarred from any action against the Drawer and Indorsers, for the recovery of the sum, which he has given for the Bill (Ordonnance de 1673, tit. 5, art. 15). This penalty is a consequence of the obligation, which the Payee contracts with the Drawer, to present the Bill, when due, to the Drawee for payment, and to advise the Drawer of the refusal of payment, in order that the Drawer may take his measures to enforce payment. The Holder, who neglects this duty, is liable to the damage, which the Drawer suffers. This damage consists in the loss sustained by the Drawer, with reference to funds, which he had remitted to the Drawee, for the purpose of providing for the payment of the Bill; and which funds, perhaps, the former might have been enabled to withdraw, if he had been advised of the non-payment of the Bill. The reparation, to be offered to the Drawer for this damage, consists in making the Holder, instead of the Drawer, bear the loss resulting from the insolvency of the Drawee, by depriving him of all right of resorting to the Drawer for the value of the Bill; without prejudice, however, to any power he may have of obtaining payment from the Drawee, for which purpose he is allowed to exercise the rights of the Drawer. In order to enforce this penalty, and in order that the Drawer and Indorsers may be entitled to insist upon the inadmissibility of the claim of the Holder (*soient admis dans la fin de non-recevoir, contre la demande du propriétaire de la lettre*), founded upon the neglect of the Holder to cause the Bill to be protested (or to bring his action within the time fixed by the Ordonnance), they are bound to prove, within the time fixed by the Court, that the Drawee held funds to meet the Bill, at the ime, at which it ought to have been protested; in default of which proof, they are bound to reimburse the Holder the amount of the Bill. This is

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§ 479. And here these Commentaries upon Bills of Exchange are brought to their close. The only remark, which occurs to me, as proper to be brought under the review of the learned reader, is, that while England was among the last, if not the very last, of the commercial nations of Europe, to adopt into her own jurisprudence the doctrines respecting negotiable instruments, which the custom of merchants, and the flexible character of the Civil Law, had gradually introduced and studiously spread over the whole Continent, to the incalculable advantage of foreign trade and domestic intercourse, and public and private credit, as being repugnant to the sturdy precepts of her own Common Law, she has, since her adoption of it, infused into it a vigor, and given to it a practical convenience, and a philosophical character, that make it

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so decided by the Ordonnance de 1673 (tit. 5, art. 16), which says, The Drawers and Indorsers of Bills shall be bound to prove, that the Drawees were indebted to them, or had funds in their hands at the time, when the Bill ought to have been protested, otherwise they shall be held liable to reimburse the Holder. The reason is, that, as the Drawer, who has remitted no funds, and is not a creditor of the Drawee, can suffer no damage from the insolvency of the Drawee, or, consequently, from the want of protest, or from the want of notice of protest, so he cannot complain of this default; nor can he, on pretext of this default, by which he has sustained no injury, as against the Drawee, excuse himself from the obligation to reimburse to the Holder the amount of the unpaid Bill. This decision holds, whether the Drawee has accepted or not; because, though, by his acceptance, he renders himself a debtor to the Holders of the Bill, he enters into no engagement with the Drawer, who has remitted him no funds.' A much older writer, Casaregis (De Commercio, Disc. 54), says; 'Propterea pro regula tradimus, quod, ubi in facto appareat nihil omnino fuisse profutura prædicta protesta, vel ob decoctionem scribentis (the Drawer of the Bill of Exchange), vel solvere debentis literas (the Drawee of the Bill), tum omissio vel negligentia in illis *elevandis*, vel transmittendis, nullatenus nocebit; quando enim diligentiæ prodesse non possunt, impunè valent omitti per eum qui illas facere tenebatur.' With this, agrees Baldasseroni, in his Leggi e Costumi del Cambio, Part 2, art. 10, § 35. And see the Code de Commerce, No. 160, 170, 171."

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the repository of the most profound and enlightened principles, from which every age may derive instruction, and to which every enlightened jurist cannot fail to look with admiration and reverence, as long as the Science of Law shall be cultivated.

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