1905

The Negotiable Instruments Law With Annotations

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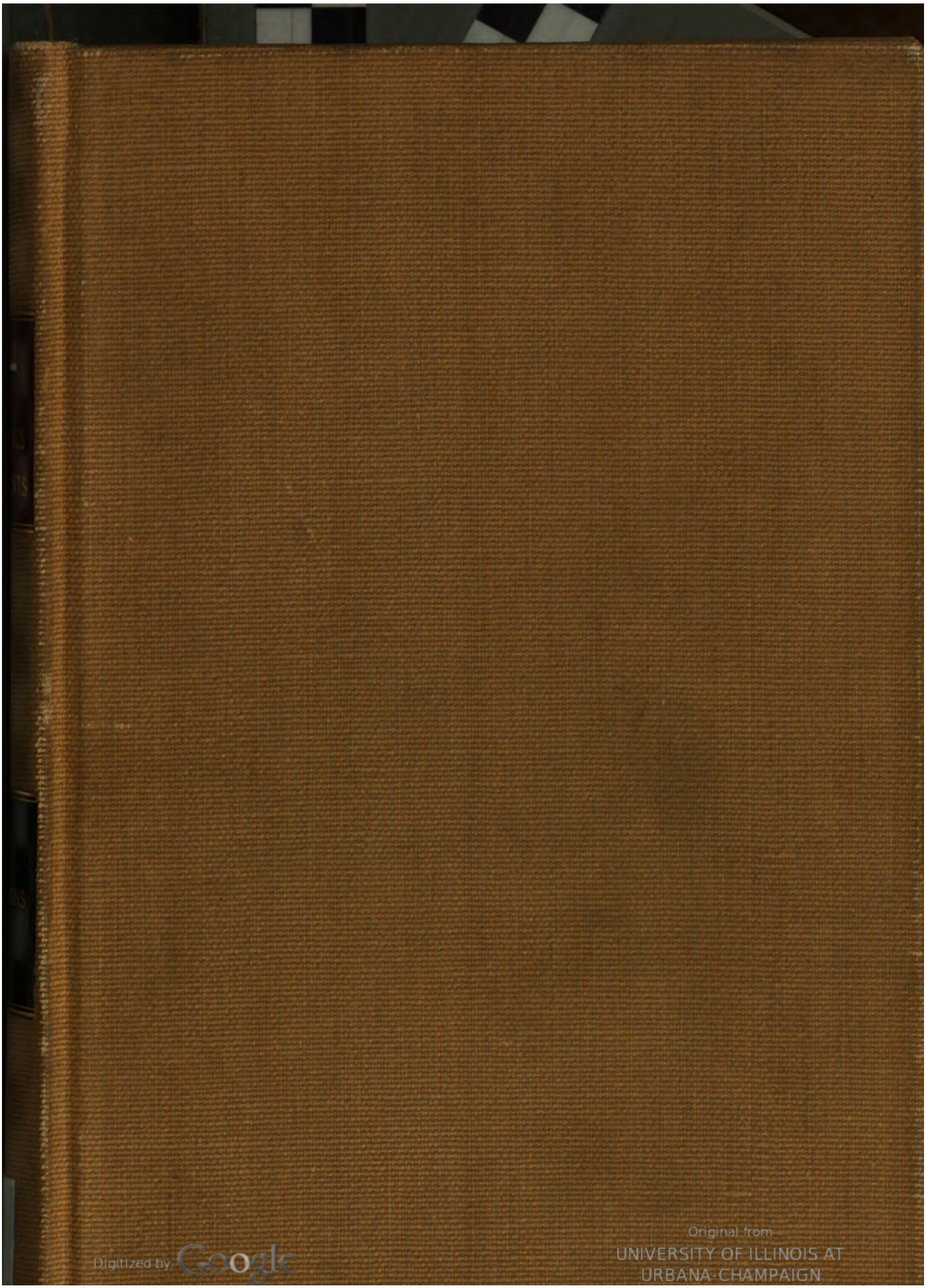

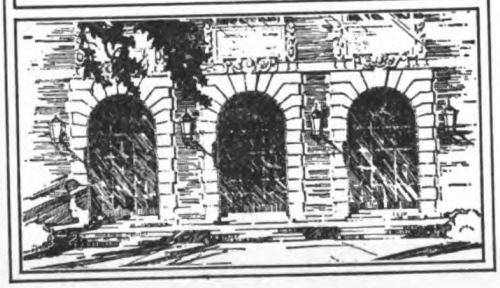

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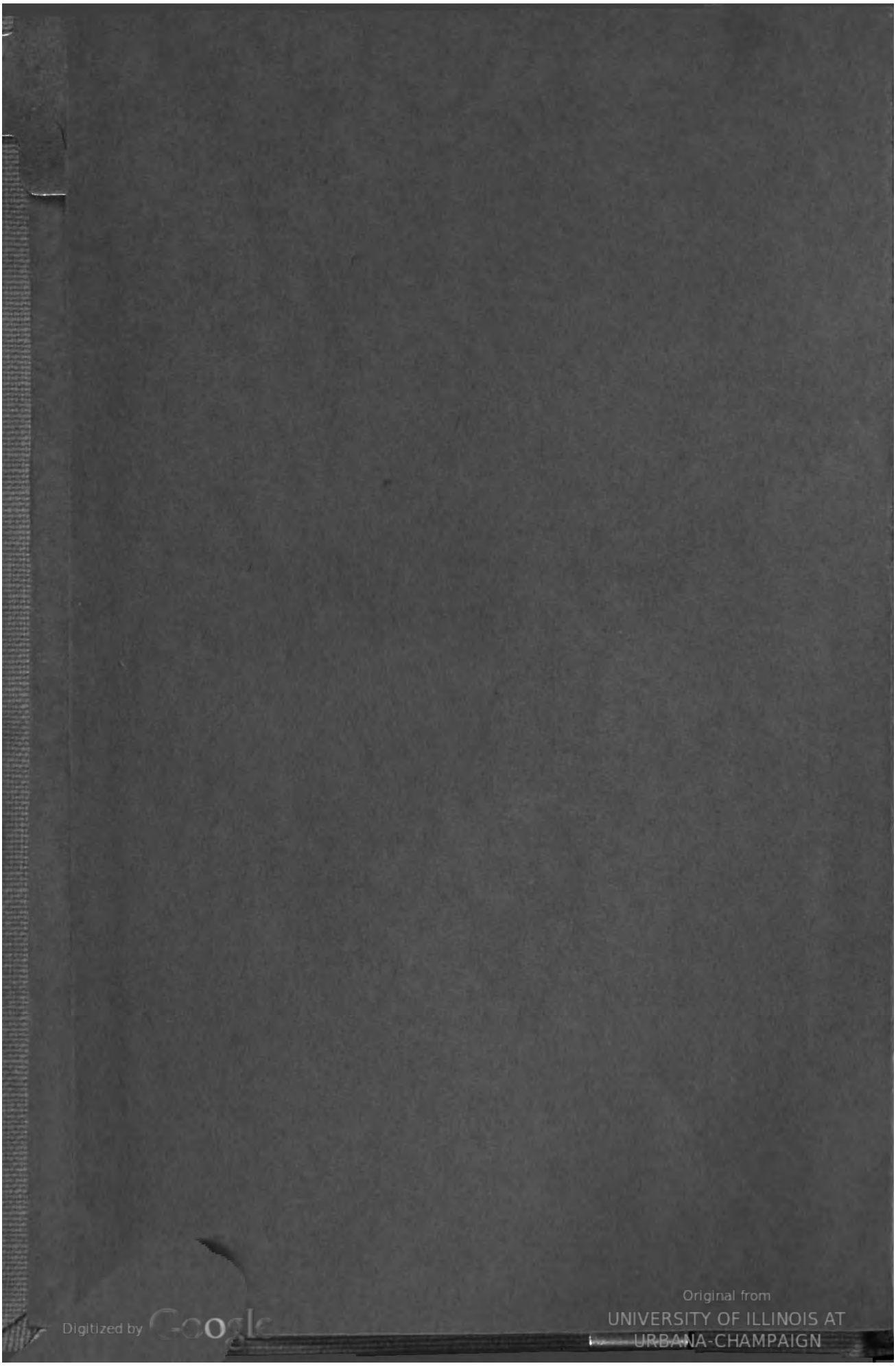

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THE

NEGOTIABLE INSTRUMENTS LAW

WITH

ANNOTATIONS

BY

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IN THE UNIVERSITY OF MICHIGAN

CHICAGO
CALLAGHAN AND COMPANY
1905

M. H. VESTAL
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CHICAGO

Law

PREFACE.

The Negotiable Instruments Law was enacted by the Legislature of Michigan at its 1905 session and on this 16th day of September, 1905, becomes a law of the State.

Soon after the approval of the Act—June 16, 1905,—I undertook the work of annotating the statute and of explaining its origin, scope and purpose in such particulars as seemed to invite explanation.

It has been my purpose to point out what changes the Statute has made in existing law, to what extent and how it and the Bills of Exchange Act upon which it is modeled have been construed by the courts, and wherein it has settled the law and removed conflict in the authorities. To these ends, I have cited under the several propositions of the statute the Michigan cases pertaining to the particular proposition and such English, Federal and other state cases as seemed to me good illustrations or clear explanations of the proposition involved and every case which has arisen under this statute and under the Bills of Exchange Act tending in any way to explain, illustrate or construe the statutory provision or to elucidate the general proposition covered thereby.

I submit the result of my work—undertaken in the hope that it might help the profession and the bankers and business men in dealing with this statute—to all who

may find occasion to make use of it, with regret, however, that the time available for its completion was necessarily so limited and with the assurance that I could not have done it at all within the stipulated time but for the energetic, efficient and intelligent aid of Mr. Oscar E. Waer of the Law Department of the University of Michigan, whose assistance in this behalf I most gratefully acknowledge.

I crave the courteous indulgence of all who may have occasion to consult these pages in attributing something of whatever of fault may be found in the plan and execution of this work to the enforced hurry of its preparation.

ROB'T E. BUNKER.

Ann Arbor, Michigan,
September 16, 1905.

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I. Form and interpretation.
II. Consideration.
III. Negotiation.
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THE NEGOTIABLE INSTRUMENTS LAW.

INTRODUCTION.

The negotiable instruments law.—The Negotiable Instruments Law is the name applied to a statute now enacted, in terms and in language almost identical, in twenty-nine States and the District of Columbia,[1] the primary purpose of which is to make the law relating to negotiable instruments uniform throughout the United States. Uniformity could not be secured without codification; therefore the negotiable instruments law is a codification of existing law.

1—States having adopted the negotiable instruments law:

Arizona; Revised Statutes 1901, title xlix, 3304, 3491. In effect September 1, 1901.

Colorado; Laws of 1897, chap. 64, approved April 20, 1897.

Connecticut; Laws of 1897, chap. 74, approved April 5, 1897.

District of Columbia; U. S. Stats., 1899, chap. 47, approved January 12, 1899.

Florida; Laws of 1897, chap. 4524, approved June 1, 1897.

Idaho; Laws of 1903, Sen. Bill 86.

Iowa; Laws of 1902, chap. 130, approved April 12, 1901.

Kansas: enacted 1905.

Kentucky; Laws of 1904, chap. 102, approved March 24, 1904.

Louisiana; enacted 1905.

Maryland; Laws of 1898, chap. 119, approved March 29, 1898.

Massachusetts; Laws of 1898, chap. 533, in effect January 1, 1899. Laws of 1899, chap. 130, in effect March 6, 1899.

Michigan; approved June 16, 1905.

Missouri; enacted 1905.

Montana; Laws of 1903, chap. 121, approved March 7, 1903.

Nebraska; Laws of 1905, chap. 83, in effect August 1, 1905.

The Statute of Michigan, printed in the following pages, is, in all respects, save in designation of divisions of the subject, in omission of heads to sections, and of an immaterial clause in section 72, an exact copy of the New York statute, the first negotiable instruments law enacted.

The negotiable instruments law emanated directly from the American Bar Association, but its enactment was indirectly induced by the English Bills of Exchange Act, of 1882, upon which it is modeled in substance and in form.

The desirability, if not the absolute necessity, of uniform laws relating to commercial paper had long been apparent to lawyers and laymen. The situation induced by conflicting decisions and statutes embarrassed business and interrupted that free circulation of commercial paper which is its distinguishing characteristic.

New Jersey: Laws of 1902, chap. 184, approved April 4, 1902.

New York; Laws of 1897, chap. 612, in effect May 19, 1897; 1898, chap. 336, in effect April 26, 1898.

North Carolina; Laws of 1899, chap. 733, in effect March 28, 1899.

North Dakota; Laws of 1899, approved March 7, 1899.

Ohio; Laws of 1902, Sen. Bill 10, in effect January 1, 1903.

Oregon; Laws of 1899, Sen. Bill 27, approved Feb. 16, 1899.

Pennsylvania; Laws of 1901, chap. 162, approved May 16, 1901.

Rhode Island; Laws of 1899, chap. 674, in effect July 1, 1899.

Tennessee; Laws of 1899, chap. 94, in effect May 15, 1899.

Utah; Laws of 1899, chap. 83, in effect July 1, 1899.

Virginia; Laws of 1897-8, chap. 866, approved March 29, 1898.

Washington; Laws of 1899, chap. 149, in effect March 22, 1899.

Wisconsin; Laws of 1899, chap. 356, in effect May 15, 1899.

Wyoming; Laws of 1905, chap. 43.

The bill was introduced but failed to pass in the following states: Arkansas, Indiana, New Hampshire, South Carolina, South Dakota and Vermont. The bill has been introduced and is pending in Georgia.

What was a promissory note in one State was a simple contract in another. What was a contract of an indorser in New York was a contract of a maker in Michigan, or of a guarantor or indorser or maker in Vermont, as oral proof of the circumstances attending the making of the contract might determine. What was an indorsement in one jurisdiction was only an assignment in another. The maturity of the obligation, in the absence of special stipulation in the instrument, fell upon one day in one State, and upon a different day in another State, if one State had abolished the grace of the law merchant and the other had not. Time of presentment and demand, protest and notice of dishonor was rendered confusing, if not uncertain. Paper payable on demand or at sight created the same obligation in one State and a different obligation in another, according to whether grace had been abolished or preserved.

At the suggestion of the American Bar Association, and through its coöperation, commissioners for the promotion of uniformity of legislation in the United States were from time to time appointed by the several States. In 1895 twenty-seven States had appointed such commissioners, and in August of that year the commissioners met in conference at Detroit, Michigan, nineteen States being represented in the conference. At that conference a resolution was adopted requesting the committee on commercial law to procure, as soon as practicable, a draft of a bill relating to commercial paper, based on the English statute on that subject and on such other sources of information as the committee might deem proper to consult. The matter was re-

ferred to a sub-committee consisting of Lyman D. Brewster, of Connecticut, Henry C. Willcox, of New York, and Frank Bergen, of New Jersey. The sub-committee employed Mr. John J. Crawford of New York, who had made a special study of the law relating to commercial paper, to make a draft of the proposed law. The draft was prepared by Mr. Crawford and submitted to the conference of commissioners which met at Saratoga in August, 1896. The commissioners in attendance, being twenty-seven in all and representing fourteen different States, went over the draft, section by section, making amendments therein, most of which were changes in the existing law which Mr. Crawford had not felt at liberty to incorporate into the original draft. The bill as thus amended was subsequently enacted as the statute of New York, and has since been enacted and is now the law in two-thirds of the States of the Union. The bill has been introduced in other states but has failed of passage for reasons which do not appear.[2] This statute presents within narrow compass the law of negotiable bills of exchange, promissory notes and checks. It is the result of two purposes; the first and controlling purpose was to make the law uniform, and whatever changes were necessary to be made to accomplish that purpose were accordingly made. The second purpose was to preserve the law as nearly as possible as it then existed. The work was committed to competent and experienced persons, well versed in the law relating to

2—See note 1. Preface to Crawford's Annotated Negotiable Instruments Law, New York, 1st ed.
Report of commissioners on uniformity of laws to the Senate of New Jersey, session of 1896.

the subject. They were aided by the able work of those to whom had been entrusted the preparation of the Bills of Exchange Act. These facts are a guaranty that we have in the negotiable instruments law the legislative expression of the law theretofore determined by the courts, through a long series of years and in a multitude of decisions, barring, of course, those conflicting decisions and diverse statutes which had led to embarrassment and confusion in the administration of the law of commercial paper. It may be said probably without serious question that in the enactment of this statute no essential feature of the law of negotiable instruments as theretofore determined has been eliminated. What business needs is fixed and uniform rules to govern commercial paper. Such rules are now to be found in the negotiable instruments law.

The bills of exchange act.—In 1882 the British Parliament passed an act entitled "An Act to codify the law relating to Bills of Exchange, Cheques, and Promissory Notes;" better known by its authorized short title as the "Bills of Exchange Act, 1882."[3] This act is with certain exceptions declaratory of the common law of England, or rather of the Law Merchant, as expounded by the authority of English law. The bill was drawn by Judge Chalmers, author of the excellent Digest of the law of bills, notes and checks,[4] an acknowledged expert on the subject, and submitted to recognized authorities on English commercial law and practice and finally settled by strong committees in

3—See Bills of Exchange Act, page 235.

4—Chalmers' Digest of the Law of Bills of Exchange, Promissory Notes, and Cheques.

Parliament. And so the act may be regarded for the main part and so far as the propositions contained in it are directly applicable as an authoritative declaration, under the sanction of the Legislature, of the English law.[5] The act was not intended to be merely a code of existing law. It was designed to alter and did alter the law in some respects.[6] The act has been adopted

5—See English Ruling Cases, vol. 4, p. 132.

6—Bank of England v. Vagliano (1891), App. Cas. 144. See Introduction to 3rd ed. Chalmers' Bills of Exchange, from which the following extract is taken in explanation of the purpose, mode of preparation, and enactment of the statute.

"For the most part the propositions of the act were taken word for word, from the propositions of the Digest. The Bills of Exchange Act, 1882, was the first enactment codifying any branch of the common law which found its way into the statute book. * * *"

The success of the Bills of Exchange bill depended on the wise lines laid down by Lord Herschell. He insisted that the bill should be introduced in a form which did nothing more than codify the existing law, and that all amendments should be left to Parliament. A bill which merely improves the form without altering the substance of the law creates no opposition, and gives very little room for controversy. Of course codification pure and simple is an impossibility. The draftsman comes across doubtful points of law which he must decide one way or the other. Again, voluminous though our case law is, there are occasional gaps which a codifying bill must bridge over if it aims at anything like completeness. Still in drafting the Bill of Exchange bill my aim was to reproduce as exactly as possible the existing law, whether it seemed good, bad or indifferent in its effects. The idea of codifying the law of negotiable instruments was first suggested to me by Sir Fitz-James Stephen's Digest of the Law of Evidence, and Sir F. Pollock's Digest of the Law of Partnership. Bills, notes and cheques seemed to form a well isolated subject, and I therefore set to work to prepare a digest of the law relating to them. I found that the law was contained in some twenty-five hundred cases, and seventeen statutory enactments. I read through the whole of the decisions, beginning with the first reported case, 1603. But the cases on the subject were comparatively few and unimportant until the time of Lord Mansfield. The general principles of

by two-thirds of the total number of the various colonies and dependencies of the British Empire and by all the most important of them, but not without changes

the law were then settled, and subsequent decisions, though very numerous, have been for the most part illustrations of, or deductions from, the general propositions then laid down. On some points there was a curious dearth of authority. As regards such points I had recourse to American decisions and to inquiry as to the usages among bankers and merchants. As the result, a good many propositions in the Digest, even on points of frequent occurrence, had to be stated with a ("probably") or a ("perhaps"). Some two years after the publication of my digest I read a paper on the question of codifying the law of negotiable instruments before the Institute of Bankers. Mr. John Hollams, the well known commercial lawyer, who was present, pointed out the advantages of a code to the mercantile community, and mainly, I think, on his advice, I received instructions from the Institute of Bankers and the Associated Chambers of Commerce to prepare a bill on the subject. The draft of the bill was first submitted to a sub-committee of the Council of the Institute of Bankers, who carefully tested such portions of it as dealt with matters of usage uncovered by authority. The bill was then introduced by Sir John Lubbock, the president of the Institute. After it had been read a second time in the Commons it was referred to a strong select committee of merchants, bankers and lawyers, with Sir Farrer Herschell as chairman. As the Scotch law of negotiable instruments differed in certain particulars from English law, the bill was originally drafted to apply to England and Ireland only. The first work of the select committee was to take the evidence of Sheriff Dove-Wilson, of Aberdeen, a well known authority on Scotch commercial law. He pointed out the particulars in which the bill, if applied to Scotland, would alter the law there. With three exceptions the points of difference were insignificant. The committee thereupon resolved to apply the bill to Scotland, and Sheriff Dove-Wilson undertook the drafting of the necessary amendments. Eventually the Scotch rules were in three cases preserved as to Scotland, while on the other points the Scotch rule was either adopted for England or the English rule applied to Scotland. A few amendments in the law were made when the Committee was unanimous in their favor, but very wisely no amendments were pressed on which there was a difference of opinion. Sir Farrer Herschell reported the bill to the House and it was read a third time and sent up to the Lords

which, though trifling in themselves, are destructive of complete uniformity.[7]

Continental codes.—The law of bills, notes and checks has been codified in most of the continental countries. The French code (code de commerce 1807, 1818) was enacted nearly a century ago, and no substantial alteration has been made in it by subsequent legislation. The German General Exchange Law was adopted in 1849, and slightly modified in 1869. It is an international and not merely a national code. All the German states including Austria have adopted it and the terms of its adoption are that each State is at liberty to supplement it by additional laws of its own, but such laws are not in any way to override it. Other continental codes have been modeled upon either the French Code de Commerce or the German General Exchange Law, the later tendency being to follow the German code in preference to the French.[8]

In the first half of the eighteenth century the law or practice of England and France was uniform on the subject of bills of exchange. The French law was then embodied in the code "Ordonnance de 1673," which was amplified but substantially adopted by the "Code de Commerce," of 1818. Its development was thus arrested and it remains in substance what it was two

without alteration. In the House of Lords it was again referred to a select committee, with Lord Bramwell for chairman. (The committee included the Lord Chancellor (Selborne), Lord Bramwell, Lord Fitzgerald, Lord Balfour of Burleigh, and Lord Wolverton.) A few amendments were there inserted, mainly at Lord Bramwell's suggestion. These were agreed to by the Commons, and the bill passed without opposition.

7—Jurid. Rev., vol. 8, 329. Article by J. Dove Wilson.

8—Introduction to Chalmers' Bills of Exchange, 3rd ed., *supra*.

hundred years ago. English law has been developed piecemeal by judicial decisions founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt due in one place was transferred in another. The French law keeps this theory steadily in view. The English law has developed bills into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper. French law endeavors to stamp it out. In England it is not necessary to express on the bill that value has been given. The law raises a presumption to that effect. In France the nature and value must be expressed and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may be drawn and payable in the same place; in France the place where the bill is drawn must be so far distant from the place where it is payable that there may be a possible rate of exchange between the two. In England a bill may now be drawn payable to bearer, though formerly it was otherwise;[9] in France it must be payable to order. In England a bill originally payable to order becomes payable to bearer when indorsed in blank; in France an indorsement in blank merely operates as a procuration. In England, if a bill be refused acceptance, a right of

9—Hodges v. Steward, 12 Mod. 36 (1692.)

action at once accrues to the holder; in France no cause of action arises unless the bill is again dishonored at maturity. The holder in the meantime is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is made between current and overdue bills; in France no such distinction is made. In England no protest is required in the case of inland bills; in France every dishonored bill must be protested.[10]

Law merchant.—The Law Merchant or Lex Mercatoria is a term employed to designate the usages of merchants and traders in the different departments of trade ratified by the decisions of the courts of law, which, upon such usages being proved, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding on the well known principle of law that with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common law, and may thus be said to be a part of it.[11] When a general usage has been judicially ascertained and established it becomes a part of the law merchant which courts of justice are bound to know and recognize.[12] The law merchant

10—See introduction 3rd ed. Chalmers' Bills of Exchange.

11—Goodwin v. Robarts, L. R. 10 Ex. 337.

12—Brandoa v. Barnett, 12 Cl. & Fin. 805.

is the source of the codifying statutes,—the Bills of Exchange Act and the Negotiable Instruments Law. Before their enactment it appeared scattered through thousands of decisions and hundreds of statutory enactments.[13]

It is not a fixed and stereotyped body of law, but is capable of expansion and enlargement to meet the wants and requirements of trade in the varying circumstances of commerce.[14] As a matter of legal history, it cannot be definitely stated when or where those usages arose which form the basis of the law governing negotiable instruments. Some writers assign them to one place and one time and others to others. But notwithstanding the number and the diligence of the laborers in this interesting field of inquiry, it cannot now be stated with certainty by whom bills and notes were invented or when they were first used.[15] The matter is of no practical importance at this time. Every one is now fully assured that those usages, whatever their origin or whenever they were employed in the affairs of trade, have long since been engrafted upon or become a part of the common law. The general body of the law merchant embraced many branches other than that pertaining to bills and notes, for example partnership, joint stock companies, agency, insurance, bankruptcy, bottomry and respondentia, stoppage in transitu, lien, contracts with carriers, and the contract

13—See note 4, *supra*. Vol. 7 American Digest, Century ed., which is almost exclusively devoted to a digest of decisions on the law of Bills and Notes.

14—Goodwin v. Robarts, *supra*. One of the criticisms urged against the Negotiable Instruments Law is that codification arrests expansion and enlargement.

15—Daniel, Neg. Inst., 5th ed., sec. 3.

of affreightment,[16] but such branches of the law merchant became so far incorporated into the common law as wholly to lose their identity as separate and distinct from it. The branch of the law merchant relating to bills and notes has likewise become a part of the common law, despite the fact that it is quite usual to refer to it as if it were a separate and distinct body of law.[17] The law merchant has been spoken of as a branch of the law of nations,—as a form of private international law,[18] by which no more was meant than that it was free from certain technical rules of the common law. The law merchant was not a native of England, it was adopted in England when its use was there demanded by trade, it became a part of the law of England because it was the law of other nations and because the merchants of other nations traded with the merchants of England. Nor was it less the law of England because the usages on which it was based were in their origin foreign to English usages, but, all speculation aside, it was incorporated into and became a part of the common law.[19]

16—Introduction to Smith's Mercantile Law, 10th ed., Macdonnell.

17—"This branch of the law merchant (the branch which deals with the law of bills, notes and checks) has retained throughout its life, to the present day, its essential characteristics, clearly marking it off from the common law, while other branches have differed so little from the common law or have become so far assimilated to it, that the fact is all but forgotten that they are not of the common law stock. The result is that the term law merchant at the present time usually suggests the law of bills, notes and cheques." Bigelow, Bills, Notes and Cheques, 2d ed., 1.

18—Blackstone's Com., Cooley's 4th ed., 273.

19—Blackstone's Com., Cooley's 4th ed., 75; Christian's note, same page. "The laws relating to bills of exchange, insurance and all mercantile contracts are as much the

The law merchant as here used embraces, and the Negotiable Instruments Law deals with negotiable bills, of exchange, promissory notes and checks, and the contracts of the several parties thereto. "Bills of Exchange," says Cockburn, C. J.,[20] "are known to be of comparatively modern origin, having first been brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and, still later and but slowly, into England." The bill of exchange was the earliest form of negotiable instrument. Originally it was used exclusively for the purpose of foreign trade. It was not in use in England earlier than 1600, certainly not as an instrument of trade and commerce. A statute of 3 Rich. II, c. 3 (1379) makes indefinite reference to the bill of exchange as a means of conveying money out of the realm and forbids such practice. The first case to be found in the English books on the subject of bills of exchange is Martin v. Boure[21] decided in 1603. "Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills

general laws of the land, as the laws relating to marriage or murder."

Dunlop v. Silver, 1 Cranch, appendix, 367. This is an instructive case because of its exhaustive review of the authorities. From those authorities the conclusion is reached that the law merchant is part of the common law and particularly that a promissory note was negotiable, according to the custom, prior to the enactment of the statute of Anne (see *infra.*) The value of the case lies in its comprehensive historical account of the introduction of the law merchant into England, and its development in the courts of the common law. See Mandeville v. Riddle, 1 Cranch 290, wherein a conclusion is reached contrary to the conclusion in Dunlop v. Silver.

20—Goodwin v. Robarts, *supra.*

21—2 Croke's Rep. 6.

are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century the practice of making bills payable to order and transferring them by indorsement took its rise."[22] But because cases involving the subject of commercial paper do not appear in the English reports prior to the opening of the seventeenth century, it is not to be concluded that there were no cases involving commercial transactions.

The law merchant, at one time distinct from the common law, underwent three stages of development in England. The first stage embraced the period from its earliest introduction in England down to the time when Coke became Chief Justice in 1606. The second stage embraced the period from 1606 to 1756 when Lord Mansfield became Chief Justice, the third stage embraced the period from 1756 to the present.[23] During the first stage of development, the law merchant was administered in special informal courts called pie powder, pied poudre, pepoudrous, or dusty foot courts, so named either because litigants came to the trial of their causes with feet dusty from participating in the fairs in connection with which and as an incident of which these courts were held, or because the courts were so prompt in their judgments that justice was administered "while the dust fell from the feet."[24]

22—Goodwin v. Robarts, *supra*.

23—Preface to Smith's Mercantile Law, Macdonell, p. 82. Elements of Mercantile Law, chap. 1. Thomas Edward Scrutton.

24—The greater part of the foreign trade of England, and indeed of the whole of Europe at that time, was conducted in the great fairs, held at fixed places

Promptness of decision and a strict adherence to and enforcement of the customs of merchants were the characteristic features of the dusty foot courts. As long as submission was yielded to their judgments they were adequate to the times and to the discharge of the duties imposed upon them by custom. But there came a time when submission to their judgments was not yielded and they were without power to compel obedience to their mandates. A power stronger than persuasion or pressure was needed to compel of the refractory loser of a cause compliance with the judgment of the court. And because that power was lacking the dusty foot courts died out. Controversies involving the customs of merchants were transferred to the common law courts.[25] The second stage of development

and fixed times in each year, to which merchants of all countries came; fairs very similar to those which meet every year at the present time in Novgorod in Russia and at other places in the East. In England also, there were then the great fairs of Winchester and Stourbridge and the fairs of Besançon and Lyons in France, and in each of those fairs a court sat to administer speedy justice by the law merchant to the merchants who congregated in the fairs and in case of doubt and difficulty to have that law declared on the basis of mercantile customs by the merchants who were present. The Elements of Mercantile Law, *supra*, q. v. for pleadings and forms of actions in these courts.

25—"But the custom applied for admission at the hands of common lawyers, to common law judges at the common law courts; and the applicant could not hope for success except by putting on the common law garb. Fictions were accordingly resorted to in the pleadings by which it was made to *seem* that the custom was after all nothing but a sister of the common law. Suit was brought in *assumpsit* upon a foreign bill of exchange, alleging in effect, by a fiction of factorage or agency, that the defendant, acceptor of the bill, had, at the hands of his foreign factor, received money from the plaintiff, in consideration whereof he now, in accepting the bill drawn by his factor for the purpose, promised to repay the same. Here were both consideration and priv-

of the law merchant dates from the time when the common law courts began to deal with controversies involving the customs of merchants. They determined these controversies according to the common law procedure and thus the customs of merchants became engrafted upon or incorporated into the common law. The law merchant was administered at first by the courts of common law as a custom and not as law[26] and the custom applied only to cases wherein one of the parties was a merchant. In every action on a bill of exchange it was necessary to count upon the promise according to the use and custom of merchants and so the old pleas ran "secundum usum et consuetudinem mercatorum." The stages by which the bill of exchange was developed is well explained by Treby C. J., in Bromwich v. Loyd,[27] decided in 1698, wherein he says: "Bills of Exchange at first extended only to merchant strangers trafficking with English merchants, and afterwards to inland bills between merchants trafficking the one with the other in England; and afterwards to all traders, and then to all persons whether traders or not; and there was then no need to allege any custom of merchants." In 1613 a plea that an acceptor of a bill of exchange was not a merchant was held a good answer.[28] In 1692 a plea that the acceptor of a bill of exchange was a gentleman and not a merchant was held not a

ity of contract of the common law. The courts winked at the allegations, accepted the fictions as not to be traversed and called for proof only of what was left." Bigelow Bills, Notes and Cheques, 2d ed., 3. See also Dunlop v. Silver, *supra*.

26—The Elements of Mercantile Law, Scrutton, *supra*.

27—2 Lutwyche's Reports 1585.

28—Oaste v. Taylor, 1 Cro. Jac. 306.

good defence,[29] the court holding that if gentlemen took it upon themselves to accept bills they ought to pay them.

In the second stage of development the negotiability of instruments was declared and established in this order: first, the foreign bill; second, the inland bill; third, the promissory note. The law in respect to these instruments became well settled within the second stage of development of the law merchant. Foreign bills and inland bills were put upon the same footing except in the matter of protest. "All the difference between foreign and inland bills," said Lord Holt, "is that foreign bills must be protested before a public notary before the drawer can be charged; but inland bills need no protest,[30] and in this distinction there survived the only trace of the former history of bills of exchange.

Promissory notes were declared to be negotiable instruments in 1680. The first case which recognized their negotiability was Shelden v. Hentley[31] wherein the court said that "it was the custom of merchants that made these good." This case was followed for more than twenty years[32] but was overruled by Clarke v. Martin[33] in 1702, in which it was held that a promissory note payable to J. S. or order is not a negotiable instrument within the custom of merchants. "Holt C. J. was *totis viribus* against the action and said that this note could not be a bill of exchange. That the main-

29—Sarsfield v. Witherly, Carth. 82.

30—Buller v. Crips, 6 Mod. 29.

31—2 Showers 160.

32—Duke of Norfolk v. Howard, 2 Showers 235; Horton v. Coggs, 2 Lev. 299; Hill et al. v. Lewis, 1 Salk 132; Williams v. Williams, Carth. 269; Bromwich v. Loyd, 2 Lut. 1582.

33—2 L'd Raym. 758.

taining of these actions upon such notes, were innovations upon the rules of the common law, and that it amounted to setting up a new sort of specialty, unknown to the common law and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness."[34]

The same question was before the court two years later in Buller v. Crips, supra, note 33. Again Lord Holt declared against the negotiability of promissory notes and denied that they were in the nature of bills of exchange and affirmed that they were "an invention of the goldsmiths of Lombard street." He learned from the merchants of London that it was very frequent with them to make such notes and that they looked upon them as bills of exchange and had used them for a matter of thirty years, and had transferred them and indorsed them as bills of exchange. The court did not decide the case but in the language of the reporter "took the vacation to consider of it." But the law had been thrown into confusion and conflict. Parliament intervened and passed the statute of Anne,[35] de-

34—Clarke v. Martin was followed in Potter v. Pearson, 2 Ld. Raym. 759; Burton v. Souter, Id. 774; Williams v. Cutting, Id. 825; Buller v. Crips, 6 Mod. 29.

35—Statute of Anne, 3 & 4, chap. IX, 1704. An act for giving like remedy upon promissory notes as is now used upon bills of exchange.

Whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over, within the custom of merchants, to any other person; and that such

claring promissory notes assignable or indorsable over in the same manner as inland bills of exchange according to the custom of merchants. Whether promissory

person to whom the sum of money mentioned in such note is payable, cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same; therefore to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner; be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by authority of the same that all notes in writing, that after the first day of May in the year of Our Lord, One Thousand seven hundred and five shall be made and signed by any person or persons, body politick or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politick and corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politick and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politick and corporate, to whom the same is made payable; and also every such note payable to any person or persons, body politick and corporate, his, her, or their order, shall be assignable, or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politick and corporate to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they might do, upon any inland bill of exchange, made or drawn according to the custom of merchants against the person or persons, body politick and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politick and corporate, to whom such note that is payable to any person or persons, body politick and corporate, his, her, or their order, is indorsed or assigned, or the money therein men-

notes were negotiable by the custom of merchants after the manner of bills of exchange or were made so by the statute of Anne became a question of little importance.

But it has long been the custom to refer to the Statute of Anne as authority for the negotiability of promissory notes.

The third stage of development of the law merchant began when Lord Mansfield became Chief Justice of the King's Bench in 1756. Before his time there had been no established system in England of Mercantile law, no successful effort to find some certain general principle which should serve as a guide for future cases as well as for a determination of the particular case under consideration. Lord Mansfield found the general principle and created a system and his administration of the law for thirty years earned for him the title, Founder of the Commercial Law of England.[36]

People were wont to deposit their money, their coin and their valuables with the goldsmiths and bankers who gave their promissory notes therefor payable on demand. Such notes came to be called bank notes. To these the custom of merchants speedily attached and the negotiability of bank notes was declared in the leading case of Miller v. Race.[37] In 1764 checks—then

tioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politick and corporate, who, or whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange. * * *

36—Lickbarrow v. Mason, 2 T. R. 73.

37—1 Burr, 452, 1 Smith's Leading Cases, 9th ed., 490.

called cash notes—were declared to be negotiable instruments.[38] At the close of Lord Mansfield's career as Judge, the principles of the law of negotiable instruments were firmly established and settled. Since that time those principles have not been materially changed or enlarged but their application has been extended to fresh usages, provided they are the usages of English merchants,[39] and to instruments other than bills, notes and checks, namely exchequer bills, coupon bonds, bills of lading, certain foreign bonds, on proof that bonds of that description were sold in the English market and passed from hand to hand daily like exchequer bills, foreign scrip though not payable in money but exchangeable for other securities.[40] The law merchant, offspring of that body of customs and usages which prevailed wherever trade became active among men, has expanded and enlarged "so as to meet the wants and requirements of trade in the varying circumstances of commerce."

38—Grant v. Vaughan, 3 Burr. 1516; Goodwin v. Robarts, *supra.*

39—Picker v. The London and County Bank, 18 Q. B. D. 515.

40—Goodwin v. Robarts, *supra;* Gorgier v. Mieville, 3 B. & C. 45; Daniels Neg. Inst., 5th ed., sec. 1488.

NEGOTIABLE INSTRUMENTS LAW.

(Act 265, P. A. 1905.)

AN ACT relating to negotiable instruments.

The People of the State of Michigan enact:

Section 1. **Short title.**—This act shall be known as the "Negotiable instruments law."[1]

1—See Introduction.

The statute deals solely with negotiable instruments. An instrument which is not negotiable by the terms of the statute is excluded from its operation. In determining whether a given instrument is within the statute it is first necessary to ascertain whether the instrument is negotiable according to the terms of the statute. If such instrument be not negotiable according to the terms of the statute it is governed by the rules of the common law. This manifest distinction must be carefully observed.

The statute makes this radical change: Heretofore one would have consulted the cases to determine the law of negotiable instruments, now he must consult the statute. Cases decided before the act are law only in so far as they are in harmony with its provisions or are correct and logical deductions from its propositions. The proper course now to be pursued by one who seeks to find out what the law of negotiable instruments is, is to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law. If a provision of the statute be found of doubtful import, a resort to the cases to determine the previous state of the law will be proper for the purpose of aiding in the construction of the statutory provisions, but the first step to be taken is to interpret the language of the statute. Bank of England v. Vagliano, L. R. [1891], App. Cas. 144 (a case under Bills of Exchange Act).

GENERAL PROVISIONS.

Sec. 2. **Definitions and meaning of terms.—Person primarily liable on instrument.—Reasonable time, what constitutes.—Time, how computed; when last day falls**

on holiday.—Application of the act.—Law merchant, when governs.—In this act, unless the context otherwise requires: "Acceptance" means an acceptance completed by delivery or notification. "Action" includes counterclaim and set-off. "Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not. "Bearer" means the person in possession of a bill or note which is payable to bearer.[1] "Bill" means bill of exchange and "note" means negotiable promissory note. "Delivery" means transfer of possession, actual or constructive, from one person to another. "Holder" means the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof.[2] "Indorsement" means an indorsement completed by delivery.[3] "Instrument" means negotiable instrument. "Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.[4] "Person" includes a body of persons, whether incorporated or not. "Value" means valuable consideration. "Written" includes printed, and "writing" includes print. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same.[5] All other parties are "secondarily" liable. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case.[6] Where the day, or the last day, for doing any act herein required or permitted to be done, falls on Sunday, or on a holiday, the act may be done on the next succeeding secular or business day.[7] The provisions of this act do

not apply to negotiable instruments made and delivered prior to the passage hereof.[8] In any case not provided for in this act the rules of the law merchant shall govern.[9]

1—Referred to in: Mass. Nat. Bank v. Snow (Mass.) 72 N. E. 959.

2—Referred to in: New Haven Mfg. Co. v. N. H. Pulp and Board Co. 76 Conn. 126.

3—Referred to in: Louisville Coal Mining Co. v. International Trust Co. (Col.) 71 Pac. 898.

4—Referred to in: Clutton v. Attenborough [1897] A. C. 90. (A case under the corresponding provisions of the Bills of Exchange Act.)

5—This provision is to be construed in connection with sections 20, 129 and 191. No person is liable on the instrument whose signature does not appear thereon (Sec. 20); the drawee is not liable on the bill unless and until he accepts the same (sec. 129); the bank is not liable to the holder unless and until it accepts or certifies the check (sec. 191). These are not, by the terms of the instrument absolutely required to pay the same, unless they shall have signed, accepted, or certified.

Referred to in: Nat. Citizens Bank v. Toplitz, 81 N. Y. Supp. 422, 81 App. Div. 593.

6—Referred to in: Merritt v. Jackson, 181 Mass. 69.

7—According to the law merchant when the last day of grace fell upon a non-secular day the paper matured on the next preceding secular day. Capital etc. Bank v. American etc. Bank, 51 Neb. 707; Bartlett v. Leathers, 84 Me. 241.

This provision changes the rule of the law merchant, but affirms the previous statutory rule in Michigan. C. L. '97, sec. 4880, as amended, Laws 1903, p. 420.

8—The words "prior to the passage hereof" are legally equivalent to the words "prior to the taking effect hereof". The words "passage of the act" and similar expressions in statutes have legal reference to the time of their taking effect. Rogers v. Vass, 6 Iowa 405. Followed in: Schneider v. Hussey, 2 Idaho 12, 1 Pac. 343. The term "passage of the act" as used in a statute which provides that the State Board of Medical Commissioners within ninety days after the passage of the act shall receive, through its president, applications for certificates and examinations, taken in connection with Const. Art. 5 sec. 19, which provides that no act shall take effect until ninety days after its passage, unless in case of an emergency, is to be construed, in the absence of an emergency clause, as meaning, after the act goes into effect. Words and Phrases, Vol. 6, p. 5218, citing Harding v. People, 10 Col. 387, 15 Pac. 729. To same effect is: State v. Bemis, 45 Neb. 724, 64 N. W. 348.

An act must be understood as beginning to speak at the moment when it takes effect and not before. Cargill v. Power, 1 Mich. 369; Rice v. Ruddiman, 10 Mich. 125; Carleton v. People, Id., 250; Price v. Hopkin, 13 Mich. 318; Fosdick v. Van Husan, 21 Mich.. 567; Mich. Mut. Ben. Ass'n. v. Rolfe, 76 Mich. 146.

Mr. Crawford in his note to this provision of the statute seems to construe "passage" as having reference to the enactment of the statute and its approval. The New York statute was approved May 19, 1897. By its terms it was to take effect October 1, 1897. He says: "But while the law did not go into effect until then, its application is not limited to instruments made after that date. An instrument made and delivered after *the passage of the act* was equally within its operations after October 1st. For example, if a note payable four months after date was dated and delivered on July 15, 1897, it must, at maturity, have been presented for payment *in the manner prescribed by the statute;* and if dishonored, the statutory rules as to giving notice of dishonor must have been complied with. But in the case of a note dated and delivered April 15, 1897, and payable six months after date, none of the provisions of the statute apply." The note in the first example was made and delivered after the enactment and approval of the statute but before it went into effect; it matured November 15, 1897, after the statute was in effect. Presentment must be made and notice given, says Mr. Crawford, in accordance with the statute. The note in the second example was made and delivered before the enactment and approval of the statute, it matured October 15, 1897, after the statute was in effect. None of the provisions apply, says Mr. Crawford. The distinction is not apparent, except upon the mistaken notion that "passage of the act" has, as employed in this connection, a different meaning from "taking effect of the act."

One who, before the statute goes into effect becomes an irregular indorser (see sec. 66), of paper maturing after the statute is in effect will be liable as maker, and neither presentment and demand nor notice will be necessary to fix his liability. Grace will attach to a bill or note made and delivered before the statute goes into effect, but maturing after the statute is in effect, unless the instrument be drawn without grace. After the statute is in effect, it will govern every step then necessary to be taken in respect to a negotiable instrument.

9—The language of this provision seems to admit of no other construction than that cases not provided for in the act are to be governed by the rules of the Law Merchant and that in the determining of such cases no resort is to be had to any former statute even though it stands unrepealed by the provisions of sec. 192, as not being inconsistent with this act.

TITLE I.

NEGOTIABLE INSTRUMENTS IN GENERAL.

Article 1. Form and Interpretation.

Sec.
3. Form of negotiable instrument.
4. Certainty as to sum; what constitutes.
5. When promise is unconditional.
6. Determinable future time; what constitutes.
7. Additional provisions not affecting negotiability.
8. Omissions; seal; particular money.
9. When payable on demand.
10. When payable to order.
11. When payable to bearer.
12. Terms; when sufficient.
13. Date; presumption as to.
14. Ante-dated and post-dated.
15. Date; when may be inserted.
16. Blanks; when may be filled.
17. Incomplete instrument not delivered.
18. Delivery; when effectual; when presumed.
19. Construction where instrument is ambiguous.
20. Liability of person signing in trade or assumed name.
21. Signature by agent; authority, how shown.
22. Liability of person signing as agent, etc.
23. Signature by procuration; operation of.
24. Indorsement by infant or corporation; effect of.
25. Forged signature; effect of.

Sec. 3. **Form of negotiable instrument.**—An instrument, to be negotiable, must conform to the following requirements:[1]

First, It must be in writing[2] and signed[3] by the maker or drawer;

Second, It must contain an unconditional promise or order[4] to pay a certain[5] sum in money;[6]

Third, It must be payable on demand[7] or at a fixed or determinable future time;[8]

Fourth, It must be payable to order or to bearer;[9] and

Fifth, Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.[10]

1—These are the essential requirements of the Law Merchant. Daniel Neg. Inst. 5th ed., sec. 27, 28, 1566.

2—The writing may be in pencil. Geary v. Physic, 5 B. & C. 234 (1826); Brown v. Butchers Bank, 6 Hill (N. Y.) 443.

3—An instrument in the form of a bill of exchange without date and without drawer's name but with acceptance by the drawee is neither a bill of exchange nor a promissory note. It is only an inchoate instrument. The bill or note must be signed. M'Call v. Taylor, 34 L. J. R. C. P. 365; Reg. v. Harper, L. R. 7 Q. B. Div. 78 and cases cited.

Signing by rubber stamp is valid. Cadillac State Bank v. Cadillac Stave & Heading Co., 129 Mich. 15.

A person may become bound by any mark or designation he thinks proper to adopt, provided it be used as a substitute for his name and he intend to bind himself. If the name is not signed the holder is required to show that what was written was intended to answer the purpose of a signature. Brown v. Butchers Bank, *supra*. In this case the indorsement was made with lead pencil and in figures thus: "1, 2, 8;" no name being written. In such a case evidence that the party could write is immaterial. See Rogers v. Coit, 6 Hill 322; Brown v. McHugh, 35 Mich. 50.

A person though able to write his name may nevertheless sign by his mark. The legal effect is the same as if the party had written his name. Bliss *v.* Johnson, 162 Mass. 323.

4—The statute is but the expression of the uniform rule of the law merchant that, to constitute a negotiable instrument, the promise or order must be absolute and without any contingency that would embarrass the circulation of the instrument. White v. Cushing, 88 Me. 339. In this case suit was brought by the indorsee of an order in the following form:

$120. Piscataquis Savings Bank.

Pay James Lawler, or order, one hundred and twenty dollars and charge to my account on book No.———. J. N. Cushing.

Witness.

The bank book of the depositor must accompany this order.

Held: That without the words italicized the order is payable absolutely and there is no apparent uncertainty affecting its negotiability; with them, the order is payable only upon contingency, or condition, and that is upon production of the drawer's bank book.

* * * The drawer has it in his power to defeat its payment by withholding the bank book. It was the necessity of certainty and precision in mercantile affairs and

the inconveniences which would result if commercial paper was incumbered with conditions and contingencies, that led to the establishment of an inflexible rule, that to be negotiable, paper must be payable absolutely and without any conditions or contingencies to embarrass its circulation. To same effect, Iron City Bank v. McCord, 139 Penn. St. 52. The order or promise must be to pay out of the general account of the drawer or maker.

An order or promise to pay out of a particular fund is not unconditional. This is the well settled rule of the law merchant. Worden v. Dodge, 4 Denio 159.

An instrument in form of a promissory note but made expressly subject to the conditions of a mortgage not payable absolutely but only on certain contingencies is not negotiable. Goodenow v. Curtis, 33 Mich. 505; Humphrey v. Beckwith, 48 Mich. 151; Brooke v. Struthers, 110 Mich. 569; Dilley v. VanWie, 6 Wis. 206. See also Lamb v. Story, 45 Mich. 488; Chandler v. Carey, 64 Mich. 237; Wright v. Traver, 73 Mich. 493. See sec. 5.

A bill reading: Pay Julius C. Cable or order three hundred dollars, or what may be due on my deposit book number E.

(Signed) John Edwards

is not negotiable, because payable out of a particular fund and the amount to be paid being made to depend upon the adequacy of a specified fund. Nat. Savings Bank v. Cable, 73 Conn. 568; 48 Atl. 428 (a case under the statute).

An instrument in the following form is negotiable:

"Mr. William Tebo will please pay to R. J. Torpey or order two hundred and fifty dollars and charge to my account. Due Oct. 1.

"John Ryan."

Torpey v. Tebo, 184 Mass. 307 (a case under the statute).

5—It is the rule of the law merchant that the sum ordered or promised to be paid must be certain, else the instrument will not be negotiable. Daniel's Neg. Inst., 5th ed., sec. 53.

The maxim "*id certum est quod certum reddi potest*" applies; so if the amount can be ascertained from the instrument itself, the rule as to certainty is satisfied. Smith v. Clopton, 4 Tex. 109; Parsons v. Jackson, 99 U. S. 440.

In the former case the promise was to pay $1.50 per acre for each and every acre of land lying within certain described boundaries. Subsequently there was added to the instrument the following, which was signed by the maker: "Since the within was written, the land has been surveyed and found to be sixty five acres, which will make the within, call for $97.50." The note was made April 15, 1848; the addition November 10, 1848. It was held that the note was a negotiable instrument from the date of the addition, to-wit: Nov. 10, 1848. In the latter case the action was on bonds reciting that the

Vicksburg, Shreveport and Texas Railway Company is indebted to John Ray or bearer, for value received, in the sum of 225 *l* sterling, or $1,000, lawful money of the United States of America, to-wit: 225 *l* sterling, if the principal and interest are payable in London, and $1,000 lawful money of the United States of America, if the principal and interest are payable in New York or New Orleans, etc. Each bond further on its face declares that 'the president of said company is authorized to fix, by his indorsement, the place of payment, of the principal and interest in conformity with the terms of this obligation. On the back of the bonds is endorsed a printed blank in the following words, to-wit: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in ————." The uncertainty of the amount payable, in the absence of the required indorsement is of itself a defect which deprives these instruments of the character of negotiability. As they stand they amount to a promise to pay so many pounds, or so many dollars, without saying which. And so it was held that without such indorsement the bonds were not negotiable by reason of the uncertainty of the sum. It is quite obvious that had the indorsement of place of payment been completed, in the manner contemplated, the sum to be paid would thereby have been made certain. See Knight v. Jones, 21 Mich. 161; Parker v. Plymell, 23 Kan. 402; Smith v. Crane, 33 Minn. 144.

A promise to pay a named sum "with such additional premium as may arise or become due on policy No. 50" renders the note non-negotiable. Dodge v. Emerson, 34 Me. 96; Marrett v. Equitable Ins. Co. 54 Me. 537; Palmer v. Ward, 6 Gray (Mass.) 340.

A promise to pay a named sum "or what might be due after deducting all advances and expenses," renders the note non-negotiable. Cushman v. Haynes, 20 Pick. 132. See sec. 4.

6—The rule of the law merchant is thus stated by Mr. Daniel: "It is essential to the negotiability of a bill or note that it purport to be only for the payment of money." Daniel's Neg. Ins., 5th ed., sec. 59.

Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin. By universal consent under the sanction of all courts everywhere, or almost everywhere, bank notes lawfully issued, actually current at par in lieu of coin, are money. The common term, paper money, is in a legal sense quite as accurate as the term coined money. Klauber v. Biggerstaff, 47 Wis., 557.

An instrument wherein the maker promises to pay to A or order $1,000 in cotton is not a promissory note according to the

law merchant. Auerbach v. Pritchett, 58 Ala. 451. Nor is one wherein the promise is to pay a named sum in carpenter's work. Quincy v. Merritt, 11 Hump. 439 (30 Tenn.). Nor is an instrument a bill of exchange which orders the payment of 1,000 *l* in good East India bonds. Buller N. P. 272.

A promise to pay by or in New York or Chicago exchange is not a promise to pay in money. An instrument containing such a promise is not a promissory note within the law merchant. First Nat. Bank v. Slette, 67 Minn. 425. The promise is not to pay a given number of dollars "with," that is, plus the current rate of exchange, but is to pay the sum named in the note by New York or Chicago exchange. The holder of such an instrument cannot demand in payment thereof the sum named, in money plus the cost of exchange; for the maker is not bound to discharge his obligation except by means of inland bills on New York or Chicago, nor can the maker tender in payment the sum named in money; for his promise is to make payment by inland bills, which he must purchase in the market. To same effect: Chandler v. Calvert, 87 Mo. App. 368. But see Bradley v. Lill, 4 Biss. 473, Fed. Cas. No. 1783; wherein it is held that "in exchange" is equivalent to "with exchange."

An instrument in the form of an ordinary certificate of deposit, but reciting that T. W. "has deposited in this bank $2180 in cks., payable," etc., is not negotiable, because it does not appear that the bank promises to pay any money. First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40.

An order to pay quarterly rents as they may become due is not a bill of exchange, because (a) it is payable out of a particular fund, (b) it is not on its face payable in money. Rents may be due in wheat, fowls or services as well as in money. Morton v. Naylor, 1 Hill (N. Y.) 583.

In some states, as for example, Iowa and Georgia, certain instruments are declared by statute to be negotiable, though they provide that payment is to be made in goods or merchandise. In New York, warehouse receipts issued by certain corporations are declared to be negotiable. See Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612; Corn Exchange Bank v. Same, 149 N. Y. 174; Crawford's Annotated Negotiable Instrument Law, 2d ed., 9.

Certain scrip issued by the authority of the Russian government and certain other scrip issued by the authority of the Hungarian government, the essential part of which was as follows: "Received the sum of twenty pounds, being the first installment of 20 per cent upon one hundred pounds stock, and on payment of the remaining instalment at the period specified the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds, after receipt thereof from the imperial government," was held to be a

negotiable security for money so that the transfer of it by a person not being the true owner, to a *bona fide* holder for value, conferred a good title on the latter, despite the fact that the scrip did not correspond to any of the forms of securities for money which had been theretofore held to be negotiable by the law merchant and did not contain a direct promise to pay money but only a promise to give security for money. Goodwin v. Robarts, L. R. 10 Ex. 337.

Equivalents of money.—The word "money" has been used for some purposes in a very wide sense, and for others in a restricted sense. When questions have come up in considering negotiable paper it has never been extended beyond coin and paper at par value. Black v. Ward, 27 Mich. 191. A note made and indorsed in Michigan and payable in Canada in "Canadian currency" is payable in money and is negotiable. Id.; Oliver v. Shoemaker, 35 Mich. 464.

The following have been judicially determined to be equivalent to money:

"*The bank notes current in the city of New York.*" Judah v. Harris, 19 Johns. 144.

"*Current bank notes.*" Pardee v. Fish, 60 N. Y. 265; Fleming v. Nall, 1 Tex. 246.

"*Current bank notes of Cincinnati.*" Morris v. Edwards, 1 Ohio 189; Swetland v. Creigh, 15 Ohio 118.

"*Current funds.*" Phoenix Ins. Co. v. Allen, 11 Mich. 501; Phoenix Ins. Co. v. Gray, 13 Mich. 191; Bull v. Bank, 123 U S. 105; Lacy v. Holbrook, 4 Ala. 88; Telford v. Patton, 144 Ill. 611; White v. Richmond, 16 Ohio 6; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39; *contra*, National State Bank v. Ringel, 51 Ind. 393; Johnson v. Henderson, 76 N. C. 227; Wright v. Hart's Administrator, 44 Pa. St. 454; Texas Land & Cattle Co. Bank v. Carroll, 63 Tex. 48; Platt v. Bank 17 Wis. 230; *explained and criticized* in Klauber v. Biggerstaff, 47 Wis. 551.

Currency.—Currency means money, coined money, and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money,—equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender. The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money. Klauber v. Biggerstaff, 47 Wis. 561.

Currency the equivalent of money: Phelps v. Town, 14 Mich. 374; Swift v. Whitney, 20 Ill. 144; Butler v. Pine, 8 Minn. 284; Mitchell v. Hewett, 13 Miss. 361; Frank v. Wessels, 64 N. Y. 155; Dugan v. Campbell, 1 Ohio 115; Howe v. Hartness, 11 Ohio St. 449; Wright v. Morgan, (Texas)

37 S. W. 627. *Contra*: Bank of Mobile v. Brown, 42 Ala. 108; Dillard v. Evans, 4 Ark. 175; Rindskoff v. Barrett, 11 Iowa 172; Huse v. Hamblin, 29 Iowa 501; Chambers v. George, 5 Litt. (Ky.) 335. But otherwise as to "Kentucky currency." Hicklin v. Tucker, 2 Yerg. 448.

Gold dollars. Chrysler v. Renois, 43 N. Y. 209.

Mexican silver dollars. Hogue v. Williamson, 85 Tex. 553. See note 5, sec. 8.

7—See sec. 9.

8—Brooks v. Hargreaves, 21 Mich. 254.

A clause attached to a promissory note and providing that the payee or his assigns may indefinitely extend the time of payment destroys its negotiability. Smith v. VanBlarcom, 45 Mich. 371.

The provision in a promissory note "that the payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties and indorsers and each of them, parties hereto, at any time when the same may be due and payable," destroys the negotiability of the note. Second Nat. Bank v. Wheeler, 75 Mich. 546. To same effect Glidden v. Henry, 104 Ind. 278, 54 Am. Rep. 316.

But an option indorsed upon the back of a negotiable note for its extension for a definite time by giving a new note at the option of the makers and indorsers similar to the original does not destroy its negotiability. Anniston Loan and Trust Co. v. Stickney, 108 Ala. 146; 31 L. R. A. 234.

9—A note made payable to the order of M's estate is negotiable. Peltier v. Babillon, 45 Mich. 384.

An instrument in the form of a certificate of deposit acknowledging receipt of five hundred dollars from Z., and reciting "and on five days' notice will pay in current funds the like amount with interest to the said Z *or her assigns*," is not a negotiable instrument in that it is not payable to order or bearer. Zander v. N. Y. Security & Trust Co., 81 N. Y. Supp. 1151 (a case under the statute); Westberg v. Chicago L. & C. Co., 117 Wis. 589 (a case under the statute).

The North Carolina and Wyoming acts read: "Must be payable to the order of a specified person or bearer." The words, "specified person" are really unnecessary inasmuch as section 10 provides that an instrument is payable to order where it is drawn payable to the order of a specified person.

10—It is essential to the validity of a bill of exchange that there be a clear designation of the person upon whom it is drawn. There cannot be a bill without a drawee. Peto v. Reynolds, 9 Exch. 410; Watrous v. Halbrook, 39 Tex. 572.

It is not necessary that the drawee be named. He may be identified by some other designation than his name. For example, a bill addressed to steamer C. W.

Dawrence and owners was held a sufficient designation of the drawee. Alabama Coal Mining Co. v. Brainard, 35 Ala. 476. The same concerning a bill which contained no address, but specified that it was to be "payable at number one West street, etc." Gray v. Milner, 8 Taunt. 739, 4 E. C. L. 361.

The fact that the bill does not designate a drawee will not vitiate it after it has been accepted. Acceptance is an admission that the party accepting it was the party intended. Wheeler v. Webster, 1 E. D. Smith (N. Y.) 1. This case is in conflict with Peto v. Reynolds, *supra*.

In Funk v. Babbitt, 156 Ill. 408 it was held that instruments in the form following "Thirty days after date pay to the order of E. D. Babbitt $350 for value received." (Signed) Funk and Lackey, but not addressed to any person as drawee, were to be regarded, in legal effect, as addressed to the drawers themselves as drawees, and that the signatures of such drawers to such instrument bound them as drawers and acceptors; that the firm sustained to the bills the triple relation of drawers, drawees, and acceptors; that the drawers and drawees being the same, the bills were in legal effect promissory notes and might be treated as such, or as bills, at the holder's option. In Forward v. Thompson, 12 U. C. Q. B. 103, a similar instrument was held not to be a promissory note inasmuch as it lacked the very essence of a promissory note,—a promise in terms by the maker which makes him primarily liable to pay the money.

The Wisconsin act adds the following: "But no order drawn upon or accepted by the treasurer of any county, town, city, village, or school district, whether drawn by any officer thereof, or any other person, and no obligation or instrument made by any such corporation or any officer thereof, unless expressly authorized by law to be made negotiable shall be, or shall be deemed to be negotiable according to the custom of merchants in whatever form they may be drawn or made. Warehouse receipts, bills of lading, and railroad receipts, upon the face of which the words 'not negotiable' shall be plainly written, printed, or stamped, shall be negotiable, as provided in section 1676 of the Wisconsin statutes, 1878, and in section 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

In Michigan village orders are not negotiable. Miner v. Vedder, 66 Mich. 101.

Sec. 4. **Certainty as to sum; what constitutes.**—The sum payable is a sum certain within the meaning of this act, although it is to be paid:

First, With interest;[1] or

Second, By stated installments;[2] or

Third, By stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due;[3] or

Fourth, With exchange, whether at a fixed rate or at the current rate;[4] or

Fifth, With costs of collection or an attorney's fee, in case payment shall not be made at maturity.[5]

1—A note providing for interest at 7 per cent and containing this additional stipulation: "if not paid when due I agree to pay 10 per cent interest from date until paid" is negotiable. Crump v. Berdan, 97 Mich. 293; See Flanders v. Chamberlain, 24 Mich. 305; Hope v. Barker, 112 Mo. 338; Dinsmore v. Duncan, 57 N. Y. 573; Parker v. Plymell, 23 Kan. 402; Smith v. Crane, 33 Minn. 144.

An instrument containing a promise to pay a certain sum together with any interest that may accrue thereon (the rate of interest not being specified) is not negotiable in that it lacks certainty as to sum. Lamberton v. Aiken, 2 F 189, [1899] Ct. of Sessions (a case under the corresponding provision of the bills of exchange act).

An instrument does not fall short of being a bill or note merely because it contains a stipulation for the payment of interest, but the interest must be ascertained from the face of the document or it must be capable of being ascertained by numerical calculation from materials contained in the document. This would be the case where the document in question specifies the rate of interest, and date of payment, for then one could by simple calculation ascertain the amount of interest due.

2—A note for $1500 to be paid 20 per cent a month from July 1, 1871 is negotiable. Wright v. Irwin, 33 Mich. 32.

A note providing for payment of the principal sum, with the reserved right on the part of the maker expressed in the body of the note to pay the same before maturity in installments of not less than 5 per cent of the principal, is negotiable. Riker v. Sprague Mfg. Co., 14 R. I. 402.

An instrument wherein the defendant promises in writing to pay the plaintiff 170*l* with interest at 5 per cent as follows: the first payment, to-wit: 40*l* or more to be made on the 1st of February, 1873, and 5*l* on the first day of each month following until the note shall be fully satisfied, is a valid promissory note. Cooke v. Horn, 29 L. T. (n. s.)

369. The objection to the note was that if the first payment were more than 40*l*, which the note provided it might be, the subsequent instalments and the final time for payment would be indefinite. Blackburn, J., said: "The amount of the note, however, is certain and any variation in the time will depend only upon the defendant. * * * I do not see why a stipulation which enables a maker of a note to reduce his liability for interest should prevent the instrument containing it from being a promissory note."

3—Markey v. Corey, 108 Mich. 184; Brooke v. Struthers, 110 Mich. 562; Wilson v. Campbell, id. 580; Brooks v. Hargreaves, 21 Mich. 254; Rice v. Rankans, 101 Mich. 378; Cox v. Cayan, 117 Mich. 599; Clark v. Skeen, 61 Kan. 526, 49 L. R. A. 190; Carlon v. Kenealy, 12 M. & W. 139; Thorpe v. Mindeman (Wis.) 101 N. W. 417 (a case under the statute). See also First Nat. Bank v. Carson, 60 Mich. 432; Choate v. Stevens, 116 Mich. 28.

An instrument in the form of a joint and several promissory note and providing for payment in instalments and that upon default in the payment of any one of the instalments the whole amount remaining unpaid should become due and payable is a negotiable promissory note within the meaning of the bills of exchange act. Kirkwood v. Carroll, 51 W. R. 374; 88 L. T. R. (1903) 52, approving Yates v. Evans, 61 L. J. Q. B. 446, (1892), overruling Kirkwood v. Smith, 65 L. J. Q. B. 408 (1896).

4—Smith v. Kendall, 9 Mich. 241; Johnson v. Frisbie, 15 Mich. 286; Bullock v. Taylor, 39 Mich. 137; Second Nat. Bank v. Basuier, 65 Fed. 58; Whitle v. Fond du Lac Nat. Bank (Tex.) 26 S. W. 1106; Hastings v. Thompson, 54 Minn. 184, 55 N. W. 968; *Contra:* Culbertson v. Nelson, 93 Iowa 187. See note 6, sec. 3.

5—This provision changes the rule in Michigan as established by the following cases: Bullock v. Taylor, 39 Mich. 137; Myer v. Hart, 40 Mich. 517; Cayuga Co. Bank v. Purdy, 56 Mich. 6; Altman v. Rittershofer, 68 Mich. 287; Altman v. Fowler, 70 Mich. 57; Wright v. Traver, 73 Mich. 493; Second Nat. Bank v. Wheeler, 75 Mich. 546; Rice v. Rankans, 101 Mich. 378; Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191; Strawberry Point Bank v. Lee, 117 Mich. 122; People v. Bennett, 122 Mich. 281; but affirms the rule sustained by the weight of authority. The reason of the rule in Michigan is based upon the proposition that the requisite of certainty *must continue until the discharge of the instrument.* In Altman v. Fowler, *supra*, the court said: "The certainty requisite to the negotiability of the instrument must continue until the obligation is discharged, and any provision which before that time removes such certainty prevents the instrument from being negotiable at all."

The rule in Michigan is the

rule of the following courts: Johnston v. Speer, 92 Pa. St. 227; First Nat. Bank v. Bynum, 84 N. C. 24; First Nat. Bank v. Gay, 71 Mo. 627; Jones v. Radatz, 27 Minn. 240; Morgan v. Edwards, 53 Wis. 599; Maryland Fertilizing Co. v. Newman, 60 Md. 584; Carroll County Savings Bank v. Strother, 28 S. C. 504; Findlay v. Pott, 131 Cal. 385. The rule adopted by the act is sustained by: Oppenheimer v. Bank, 97 Tenn. 19; 36 S. W. 705; Chicago R'y Equipment Co. v. Merchants Bank, 136 U. S. 268; Farmers' Nat. Bank v. Sutton Mfg Co. 6 U. S. App. 312; 52 Fed. 191; Dorsey v. Wolff, 142 Ill. 589; Tyler v. Walker, 101 Tenn. 306, 47 S. W. 424; Benn v. Kutzschan, 24 Ore. 28, 32 Pac. 763; Shenandoah Nat. Bank v. Marsh, 89 Iowa 273, 56 N. W. 458; First Nat. Bank v. Slaughter, 98 Ala. 602, 14 So. 545; Chandler v. Kennedy, 8 S. Dak. 56, 65 N. W. 439; Stark v. Olsen, 44 Neb. 646, 63 N. W. 437; Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 So. 394; Trader v. Chidester, 41 Ark. 242. The reason of the rule of these cases is based upon the proposition that the requisite of certainty need not continue beyond the maturity of the instrument. It is expressed in Oppenheimer v. Bank, *supra*, wherein it is said "Upon a careful review of the authorities we can perceive no reason why a note otherwise endowed with all the attributes of negotiability is rendered non-negotiable by a stipulation which is entirely inoperative until after the maturity of the note and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument and it only becomes uncertain after it ceases to be negotiable by the fault of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whom the action was rendered necessary and the expense entailed." In Morrison v. Ornbaun, 30 Mont. 111, 75 Pac. 953 (a case under the statute) the note contained this provision: "With interest from date at the rate of 12 per cent per annum until paid, and reasonable attorneys fees." The note was not paid at maturity. It was placed in the hands of an attorney for collection but suit had not been brought upon it. It was held that the holder could collect such reasonable attorney's fees.

The conflict of authority on the matter covered by this provision of the act has resulted in four distinct holdings. First, the stipulation is valid and enforceable and does not affect the negotiability of the instrument. Dorsey v. Wolff, *supra*. Second, the stipulation is valid and enforceable but it destroys the negotiability of the instrument. Jones v. Radatz, 27 Minn. 240; Johnston Harvester Co. v. Clark, 30 Minn. 308; First Nat. Bank v. Larson, 60 Wis. 206. Third, the stipulation is void and as it may therefore be disregarded it does not affect

the negotiability of the instrument. Gilmore v. Hirst, 56 Kan. 626; Chandler v. Kennedy, *supra*. Fourth, the stipulation is void but nevertheless it destroys the negotiability of the instrument. Bullock v. Taylor, *supra;* Altman v. Rittershofer, *supra;* Tinsley v. Hoskins, 111 N. C. 340; First Nat. Bank v. Bynun, 84 N. C. 24; Huffcut's Neg. Inst. 218.

Sec. 5. **When promise is unconditional.**—An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

First, An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount;[1] or

Second, A statement of the transaction which gives rise to the instrument.[2]

But an order or promise to pay out of a particular fund is not unconditional.[3]

1—An indication of a particular fund out of which the drawer is to reimburse himself or a direction to charge the amount to a particular account has never been regarded as a qualification of the general order to pay. The requisite of a valid bill of exchange is an unconditional order to pay on the general account of the drawer. That order may be coupled with a direction to charge the amount to a particular fund without invalidating the bill. For example; an order in the following terms: Pay to the order of A one thousand dollars out of the dividends on my bank stock is a non-negotiable bill, but an order in the following terms: Pay to the order of A one thousand dollars and reimburse yourself out of dividends on my bank stock or charge to dividends on my bank stock, is a negotiable bill.

The real test to be applied is, is the order to pay unconditional and absolute? If it is, then any subsequent statement indicating a mode of reimbursement does not make it conditional and does not destroy negotiability. If the drawee is confined to a particular fund, the bill is not negotiable. If he is directed to pay absolutely and to look to a particular fund for his reimbursement, the bill is negotiable; Munger v. Shannon, 61 N. Y. 251; Schmittler v. Simon, 101 N. Y. 554. This case involved the negotiability of a draft drawn upon and accepted by an executor. The draft contained the words "and charge the amount against me and of my mother's estate." It

was held that the reference to the estate was not an order to pay out of it but that the estate was referred to simply as a means of reimbursement.

In Macleed v. Snee, 2 Stra. 762, the plaintiff declared upon a bill wherein A requested the defendant to pay plaintiff or order a principal sum "as my quarterly half pay to be due from 24th June to 27th of September next, by advance." The court held that the mention of half pay was only by way of direction how the drawee should reimburse himself. The instrument was held to be a bill of exchange.

Redman v. Adams, 51 Me. 429, is a leading case. The bill involved in this case was as follows: "For value received please pay to order of G. F. and C. A. Tilden $40 and charge the same against whatever may be due me for my share of fish caught on board schooner 'Morning Star,' for the fishing season of 1860." It was held that this was an order to pay absolutely and without contingency and that the last clause merely indicated the means of reimbursement, and the payment of the order was not made to depend upon his having any share of the fish, nor was the call limited to the proceeds thereof. To the same effect, Whitney v. Eliot Nat. Bank, 137 Mass. 351; Nichols v. Ruggles, 76 Me. 27; Corbett v. Clark, 45 Wis. 403; Ellett v. Britton, 6 Tex. 229; Griffin v. Weatherby, L. R. 3 Q. B. 753. See Shepard v. Abbott, 179 Mass. 300, in which the order read: "and charge the same to the $1800 payment." It was held that the negotiability of the draft was not affected by this provision (this case was decided after the statute went into effect in Massachusetts, but no reference is made to it).

In Crofton v. Crofton, 33 Ch. D. 612, the bill involved was as follows: "At sight pay to my order the sum of 7,000*l* sterling, which sum is on account on the dividends and interests due on the capital and dividends registered in the books of the governor and of the *Bank of England* and Company, in the name of Colclough and Boyse, which you will please charge to my account and credit according to a registered letter I have addressed to you." The instrument was held to be a good bill of exchange under the corresponding provision of the bills of exchange act, section 3, (3).

2—Beardelee v. Horton, 3 Mich. 560; Littlefield v. Hodge, 6 Mich. 326; Preston v. Whitney, 23 Mich. 260; Wright v. Irwin, 33 Mich. 32; Howry v. Eppinger, 34 Mich. 29; Hudson v. Emmons, 107 Mich. 549; Markey v. Corey, 108 Mich. 184; Choate v. Stevens, 116 Mich. 28; Siegel v. Chicago Trust and Savings Bank, 131 Ill. 569; Wells v. Brigham, 6 Cush. (Mass.) 6; Hereth v. Meyer, 33 Ind. 511; Roberts v. Jacks, 31 Ark. 597. The transactions for which the notes in the foregoing cases were generally given involved the purchase of goods, chattels, or the

performance of some contract. As an illustration; in Preston v. Whitney there was added at the foot of the note this provision: "this note is to be valid as part pay of a pianoforte of me at a retail price." In Siegel v. Chicago Trust and Savings Bank the promise was to pay three hundred dollars "for the privilege of one framed advertising sign etc." But see Post v. Kinzua Hemlock R'y Co., 171 Pa. St. 615.

3—The reason for this is that in such a case the payment depends upon the sufficiency of the particular fund indicated which may prove inadequate. Munger v. Shannon, 61 N. Y. 251; Averett's Admr. v. Booker, 15 Gratt. 163; Kelly v. Bronson, 26 Minn. 359; Hoagland v. Erck, 11 Neb. 580; West v. Foreman, 21 Ala. 400. But see Corbett v. Clark, 45 Wis. 403; Price v. Jones, 105 Ind. 543.

In Nat. Savings Bank v. Cable, 73 Conn. 568, 48 Atl. 428 (a case under the statute) it was held that an order to pay A or order $300 "or what may be due on my deposit book" was not negotiable.

This order would appear to be in contravention of section 3 subdivision 2 and non-negotiable in that it is not an order for the payment of a sum certain.

Sec. 6. **Determinable future time; what constitutes.**—An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

First, At a fixed period after date or sight;[1] or

Second, On or before a fixed or determinable future time specified therein;[2] or

Third, On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.[3]

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.[4]

1—Where the parties insert a specific date of payment the instrument is payable then at all events,—and this although in the same instrument an uncertain and different time of payment may be mentioned, as, that it shall be payable upon a particular day or upon the completion of a house or the performance of other contracts and the like. Siegel v. Chicago Trust and Savings Bank,

131 Ill. 569. The Wisconsin act makes special provision for a contingency of this sort. See note 4.

2—In such a case the legal rights of the holder are clear and certain. The instrument is due at a time fixed and it is not due before. True, the maker may pay sooner if he choose, but this option if exercised would be a payment in advance of the legal liability to pay and nothing more. Mattison v. Marks, 31 Mich. 421; Helmer v. Krolick, 36 Mich. 371; Smith v. Ellis, 29 Me. 422; Buchanan v. Wren (Tex.), 30 S. W. 1077; Charlton v. Reed, 61 Iowa 166; Jordan v. Tate, 19 Ohio St. 586; Ernst v. Steckman, 74 Pa. St. 13; Albertson v. Laughlin, 173 Pa. St. 525. In this case the note was made payable twelve months after date or before, if the money was made out of the sale of a machine.

3—The requirement is absolute that the event is sure to happen at some future time. So, if the event might not happen, no matter how probable its happening may be, it is not, according to the weight of authority, and it would seem of reason, a negotiable instrument. Thus, if it is payable when X shall come of age it is not a good bill or note, because X may die before he comes of age. Rice v. Rice, 43 App. Div. N. Y. 458, 60 N. Y. Supp. 97. If payable at or within a certain time after one's death it is good, because death is something sure to occur. Cooke v. Colehan, 2 Str. 1217; Bristol v. Warner, 19 Conn. 7; Shaw v. Camp, 160 Ill. 425, 43 N. E. 608; Hegeman v. Moon, 60 Hun 412, 30 N. E. 487. For further illustrations see Chandler v. Cary, 64 Mich. 238; Brooks v. Hargreaves, 21 Mich. 255; Smith v. Van-Blarkcom, 45 Mich. 371; First Nat. Bank v. Carson, 60 Mich. 432; Pearson v. Garrett, 4 Mod. 242; Husband v. Epling, 81 Ill. 172. A note payable at a certain time after peace between the Confederate states and the United States is not contingent, since peace must come at some time, Mortee v. Edwards, 20 La. Ann. 236.

There are some cases to the effect that moral certainty, as distinguished from absolute certainty is sufficient to satisfy the rule. Thus, it has been held that an instrument payable at a certain time after a government ship is paid off, would be negotiable, because the government is sure to pay. Andrews v. Franklin, 1 Str. 24; Evans v. Underwood, 1 Wils. 262. But this holding has been criticized and distrusted. Daniel's Neg. Inst., 5th ed., sec. 46. Mr. Bigelow says that the doctrine should be taken with hesitation because it cannot be founded on any custom. Bigelow's Bills, Notes and Cheques, 2nd. ed., 36.

Certain expressions falling short of absolute certainty have been interpreted to mean a reasonable time. And instruments loaded with such expressions have been held negotiable. For example: a note payable as soon as collected from my accounts at P was held negotiable and payable in a reasonable time. Ubsdell v. Cun-

ningham, 22 Mo. 124. So of a note payable "as soon as I receive the sum mentioned from the government, or as soon as otherwise convenient." Jones v. Isler, 3 Kan. 128.

4—Where an instrument is made payable when a certain person shall become of age, his actually coming of age does not make the instrument negotiable. Goss v. Nelson, 1 Burr 226; Kelley v. Hemmingway, 13 Ill. 604; First Nat. Bank v. Alton, 60 Conn. 402; Duffield v. Johnston, 96 N. Y. 369; Carlos v. Fancourt, 5 T. R. 482.

The Wisconsin act contains an additional subdivision, number 4. "At a fixed period after date or sight, although payable before then, on a contingency."

Sec. 7. **Additional provisions not affecting negotiability.**—An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable.[1] But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

First, Authorizes the sale of collateral securities in case the instrument be not paid at maturity,[2] or

Second, Authorizes a confession of judgment if the instrument be not paid at maturity;[3] or

Third, Waives the benefit of any law intended for the advantage or protection of the obligor;[4] or

Fourth, Gives the holder an election to require something to be done in lieu of payment of money.[5]

But nothing in this section shall validate any provision or stipulation otherwise illegal.[6]

1—In determining whether paper is negotiable it alone can be looked to. First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40. The instrument must not contain an order or promise to do any act in addition to the payment of money; otherwise it will be rendered non-negotiable. Humphrey v. Beckwith, 48 Mich. 151; Davies v. Wilkinson, 10 A. & E. 98; Leonard v. Mason, 1 Wend. 522; Cook v. Satterlee, 6 Cow. 108; Killam v. Schoeps, 26 Kan. 310; Bunker v. Athearn, 35 Me. 364.

Agreement to pay taxes: An instrument is non-negotiable

which contains a promise to pay a specified amount and all taxes assessed against the land described in a mortgage given to secure such instrument or against the mortgagee's interest in said land. Walker v. Thompson, 108 Mich. 686. And this, even though at the time of the execution of the note there is no statute authorizing an assessment upon the interest of the mortgagee. Carmody v. Crane, 110 Mich. 508. And so, too, where the interest of a mortgagee in lands was taxable as such under the law in force at the time of the execution of the mortgage; since the amount payable to or on behalf of the mortgagee is thereby rendered uncertain. Brooke v. Struthers, 110 Mich. 562. But a mortgage note is not rendered non-negotiable by a provision in the mortgage requiring the mortgagor to pay all taxes and assessments upon the mortgaged premises, where the same obligation rested upon him by law at the time the instruments were executed, independent of any such stipulation. Wilson v. Campbell, 110 Mich. 580. Accord: Cox v. Cayan, 117 Mich. 599. On the general import of this provision see Thorpe v. Mindeman (Wis.), 101 N. W. 417 (a case under the statute).

2—An instrument does not lose its negotiable character because of a recital that the maker has deposited collateral security for its payment which he agrees may be sold in a specified manner. Cox v. Cayan, *supra*; Goss v. Emerson, 23 N. H. 38; Valley Nat. Bank v. Crowell, 148 Pa. St. 284, 23 Atl. 1068.

A provision authorizing the sale of collateral in case of non-payment does not render the note non-negotiable. Wise v. Charlton, 4 A. & E. 786; Towne v. Rice, 122 Mass. 67; Perry v. Bigelow, 128 Mass. 129; Arnold v. Rock River &c. Co., 5 Duer. 207; Heard v. Bank, 8 Neb. 16; Kirkwood v. Carroll, 72 L. J. K. B. 208 (a case under the corresponding provision of the bills of exchange act). But a note on the margin of which are written the words "given as collateral security with agreement" is not negotiable; Castello v. Crowell, 127 Mass. 293.

3—This provision, says Mr. Crawford, who drew the New York act, was inserted in the act to meet the requirements in some of the states where judgment notes are in use. It changes the law of Michigan as declared in Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191. It may be questioned, however, whether the Court declared the note in that case non-negotiable by reason of the following provision: "And to secure the payment of said note I hereby authorize irrevocably any attorney of any court of record to appear for me in such court in term time or vacation, at any time hereafter and confess a judgment without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon," or by reason of the further provision "together with costs and usual attorney's fees." It ap-

pears that Judge Champlin based his holding "that the instrument is not a promissory note" upon cases which had held instruments non-negotiable by reason of a stipulation therein for the payment of costs of collection and attorney's fees.

In Pennsylvania it was held that a warrant of attorney rendered a note non-negotiable. Overton v. Tyler, 3 Pa. St. 346; Sweeney v. Thickstun, 77 Pa. St. 131.

Mr. Daniel states that the later cases maintain that such a provision does not render the note non-negotiable. Daniel's Neg. Inst. 5th ed. Sec. 61; Osborn v. Hawley, 19 Ohio 130; Clements v. Hull, 35 Ohio St. 141; Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603; Mumford v. Tolman, 157 Ill. 258, 41 N. E. 617.

In Wisconsin Yearly Meeting &c. v. Babbler, 115 Wis. 289 (a case under the statute) it was held that a power of attorney contained in a note "to confess judgment any time after the date of the note *whether due or not*" destroyed its negotiability, as the statute authorized a confession only *at* maturity.

4—This provision of the act is designed to meet the practice, common in some of the states, of inserting in promissory notes a waiver of the benefits of homestead and exemption laws. It has generally been held that the provision in a negotiable instrument waiving such benefits does not impair the negotiable character of the instrument. Hughitt v. Johnson, 28 Fed. 865; Lyon v. Martin, 31 Kan. 411. In Zimmerman v. Anderson, 67 Pa. St. 421, the Court said that a provision of this kind instead of clogging the negotiability of the instrument adds to it and gives additional value to the note. Accord: First Nat. Bank v. Slaughter, 98 Ala. 602; Zimmerman v. Rote, 75 Pa. St. 188; Walker v. Woollen, 54 Ind. 164.

5—The negotiable quality of an instrument is not affected by a provision which leaves a choice with the holder to receive something other than money, but leaves no election to the debtor to pay in anything less than money. For example, the holder's right to elect to take stock of a corporation in lieu of a payment in money. Hodges v. Shuler, 22 N. Y. 114; Hosstatter v. Wilson, 36 Barb. 307; Dinsmore v. Duncan, 57 N. Y. 573; Mosley v. Walker, 84 Ga. 274; Owen v. Barnum, 7 Ill. 461.

6—The full significance of this provision can be understood only by taking into consideration the fact that this statute was drawn with a view to ultimate adoption throughout the United States. See Introduction. The object of this provision is to rebut the inference of an intent to make valid any agreement or stipulation made invalid by the settled policy of the state or by any statute, such for example as the "Bohemian oats" statute, so called, Mich. C. L. '97, secs. 11370-11372.

Sec. 8. **Omissions; seal; particular money.**—The validity and negotiable character of an instrument are not affected by the fact that:

First, It is not dated;[1] or

Second, Does not specify the value given, or that any value has been given therefor;[2] or

Third, Does not specify the place where it is drawn or the place where it is payable;[3] or

Fourth, Bears a seal,[4] or

Fifth, Designates a particular kind of current money in which payment is to be made.[5]

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.[6]

1—It has never been deemed necessary to the validity of a negotiable instrument that it should be dated. Husbrook v. Wilder, 1 Pin. (Wis.) 643; Mich. Ins. Co. v. Leavenworth, 30 Vt. 11. When an instrument is dated the date expressed is only presumptive evidence of the actual time of execution. When an instrument is not dated the time of its maturity should be computed from its delivery. Cowing v. Altman, 71 N. Y. 435.

As between immediate parties parol evidence is admissible to show the true date of a misdated note. Biggs v. Piper, 86 Tenn. 589. But not as between remote parties, if an innocent purchaser or indorser would be prejudiced by the correction. Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Huston v. Young, 33 Me. 85. See sec. 19, subdivision 3.

2—The words "*value received*," although almost invariably expressed in bills and notes, are not necessary. Daniel's Neg. Inst., 5th ed., sec. 108; Mehlberg v. Tisher, 24 Wis. 607. In Edgerton v. Edgerton, 8 Conn. 6; and Bristol v. Warner, 19 Conn. 7, it was held that a promissory note not purporting on its face to be for value received did not import consideration.

In Missouri, under a statute, the words "value received" were necessary in notes: Taylor v. Newman, 77 Mo. 263. Likewise in certificates of deposit; Savings Bank v. Nat. Bank of Commerce, 38 Fed. 800.

The omission of the words "for value received" does not impair the note, affect its legal import, or weaken the presumption that it was given for value. McLeod v. Hunter, 29 N. Y. Misc. 558, 61

N. Y. Supp 73 (a case under the statute.)

3—This affirms the general rule. Mehlberg v. Tisher, *supra.*

4—This changes the rule of the law merchant. The presence of a seal on an instrument destroyed its negotiable character, and rendered it a covenant, governed by the rules relating to instruments under seal. Rawson v. Davidson, 49 Mich. 607; Hopkins v. Railway Co., 3 Watts & Sarg. 410; Parkinson v. McKim, 1 Pin (Wis.) 214; Muse v. Dantzler, 85 Ala. 359; Laidley's Admr. v. Bright's Admr., 17 W. Va. 779; Clark v. Farmers Mfg. Co., 15 Wend. 256; Brown v. Jordhal, 32 Minn. 135. Whether the seal of a corporation destroyed the negotiability of its note has been differently decided by different courts. The paper of a corporation is not deprived of its negotiability by being executed under seal. Chase Nat. Bank v. Faurot, 149 N. Y. 532; Marine Mfg. Co. v. Bradley, 105 U. S. 175; Mercer County v. Hacket, 1 Wallace 83; Bank v. R. R. Co., 5 S. C. 156; Weeks v. Esler, 143 N. Y. 374. The paper of a corporation is deprived of its negotiability by being executed under seal. Conine v. Junction & B. R. R. Co., 3 Houst. (Del.) 289.

Before this statute was enacted it was provided in many states that a promissory note under seal was negotiable.

5—Phoenix Ins. Co. v. Allen, 11 Mich. 501; Smith v. Kendall, 9 Mich. 241; Phelps v. Town, 14 Mich. 374; Johnson v. Frisbie, 15 Mich. 286; Black v. Ward, 27 Mich. 191; see note 6, sec. 3.

6—See note 6, sec. 7.

Sec. 9. **When payable on demand.**—An instrument is payable on demand:

First, When it is expressed to be payable on demand, or at sight, or on presentation;[1] or

Second, In which no time for payment is expressed.[2]

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.[3]

1—This changes the rule in Michigan. By the law merchant all instruments payable at sight were entitled to grace; instruments payable on demand were not entitled to grace. Daniel's Neg. Inst., secs. 617-619, and cases. This rule prevails in Michigan by the additional force of the statute; C. L. '97, secs. 4871-72. The rule of the law merchant is illustrated by Walsh v. Dart, 12 Wis. 709; Lucas v. Ladew, 28 Mo. 342; Hart v. Smith, 15 Ala. 807; Cribbs v. Adams, 13 Gray, 597; Thornburg v. Emmons, 23 W. Va. 325;

The distinction is abolished by the statute. By this provision "at sight," "on demand," and "at presentation," are synonymous terms. "On demand," "when demanded," "on call," "at any time called for," are equivalent expressions. Bowman v. McChesney, 22 Grat. 609.

Paper payable on demand is due forthwith and suit may be brought without demand. Palmer v. Palmer, 36 Mich. 487; In re Estate of King, 94 Mich. 411; Beardsley v. Webber, 104 Mich. 88; Peninsular Savings Bank v. Hosie, 112 Mich. 351; Citizens Savings Bank v. Vaughan, 115 Mich. 156.

The statute of limitations runs against demand paper from the time of its date, if that is coincident with delivery. Palmer v. Palmer, *supra*; In re Estate of King, *supra*; Curran v. Witter, 68 Wis. 16.

Interest on a demand note providing for interest after maturity begins to run from the time demand is made. In re Estate of King, *supra*.

2—Instruments which express no time of payment are payable on demand. This is the rule of the law merchant. Aldous v. Cornwell, L. R. 3 Q. B. 573; Collins v. Trotter, 81 Mo. 278; Hall v. Toby, 110 Pa. St. 318; Messmore v. Morrison, 172 Pa. St. 300, 34 Atl. 45; Porter v. Porter, 51 Me. 376; Bowman v. McChesney, *supra*; Keyes v. Fenstermaker, 24 Cal. 329; Herrick v. Bennett, 8 Johns. (N. Y.) 374; Raymond v. Sellick, 10 Conn. 485; Jones v. Brown, 11 Ohio St. 601; Bank v. Price, 52 Iowa 570; Libby v. Mikelburg, 28 Minn. 38; Mitchell v. Easton, 37 Minn. 335, *sub nom.* Mitchell v. Wilkins, 33 N. W. 910; Sheldon v. Heaton, 88 Hun 535; McLeod v. Hunter, 29 N. Y. Misc. 558 (a case under the statute).

3—Where there is an indorsement after maturity, a note or bill as to the indorser becomes payable within a reasonable time upon demand. Leavitt v. Putnam, 3 N. Y. 494. Where a note was protested and afterwards sold by the indorsers without erasing their indorsement they were held liable for the payment of the same without further notice. St. John v. Roberts, 31 N. Y. 441. See Bills of Exchange act, sec. 10 (2). Chalmers, commenting on this provision, says: "Before this enactment the English law on the subject dealt with was very obscure; but it had been held in the United States that where a bill was indorsed after maturity the indorser was entitled to have it presented for payment and to receive notice of dishonor in the event of non-payment within a reasonable time, citing Patterson v. Todd, 18 Pa. St. 433; Eisenlord v. Dillenback, 15 Hun (N. Y.) 23; aliter, if the indorser take up a dishonored bill and reissue it on his original indorsement, if his liability was then already fixed, citing St. John v. Robert, 31 N. Y. 441.

This provision of the statute expresses the American rule. The indorsement of a bill or note which

is overdue is the equivalent of drawing a new instrument payable at sight. Bishop v. Dexter, 2 Conn. 219; Mudd v. Harper, 1 Md. 110. In such cases, presentment for payment must be made and notice of dishonor given as in other instances of instruments payable on demand. Berry v. Robinson, 9 Johns. 121; Rosson v. Carroll, 90 Tenn. 90. Where a note negotiated before due is further negotiated, after it has been dishonored, the holder takes the legal title and can maintain a suit upon it in his own name in the same manner as if he had received it before due. French v. Jarvis, 29 Conn. 353; Crawford's An. Neg. Inst. Law, 18.

Sec. 10. **When payable to order.**—The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order.[1] It may be drawn payable to the order of:

First, A payee who is not maker, drawer, or drawee; or

Second, The drawer or maker;[2] or

Third, The drawee;[3] or

Fourth, Two or more payees jointly;[4] or

Fifth, One or some of several payees;[5] or

Sixth, The holder of an office for the time being.[6]

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.[7]

1—This is a change from the similar provision in the Bills of Exchange Act, which provides that "a bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it should not be transferred." See Bills of Exchange Act, sec. 8 (4). The American statute affirms the rule of the common law on this point, that an instrument payable to a specified person is not negotiable. Smith v. Kendall, 6 T. R. 123, 1 Esp. 231; Bank v. Apperson, 4 Fed. 25; Maule v. Crawford, 14 Hun 193; Carnwright v. Gray, 127 N. Y. 92.

2—An instrument payable to the drawer or maker is without legal inception until it is indorsed by the payee. Moses v. Bank, 149 U. S. 298; Pickering v. Cording, 92 Ind. 306, 47 Am. Rep. 145; see sec. 186. In Cham-

berlain v. Young, 1893, 2 Q. B. 206 (a case under the Bills of Exchange Act) the material part of the bill was as follows: "Five months after date pay to ——— order the sum of etc." It was held that this must mean: pay to my order, and hence it was a valid bill.

3—The validity of a bill is not destroyed by the fact that the drawee and payee are identical. Wildes v. Savage, 1 Story 22, Fed. Cas. No. 7653; Witte v. Williams, 8 S. C. 290, 28 Am. Rep. 294; Commonwealth v. Buttrick, 100 Mass. 12. See Bills of Exchange Act, sec. 5 (1).

4—A note payable to two or more persons imports presumptively a joint and coequal interest, but this does not preclude proof that the consideration moved from them in separate and unequal amounts and values. Tisdale v. Maxwell, 58 Ala. 40; Gordon v. Anderson, 83 Iowa 224. The note in this case reading "pay to Charles R. Whitsell et al or order" was held non-negotiable.

5—Mr. Crawford illustrates the meaning of this subdivision by the following example: "A draft payable to A, B & C or either of them or any two of them." Crawford's Ann. Neg. Inst. Law, 19. If this illustration correctly interprets the meaning of this subdivision—and Mr. Crawford's construction is entitled to great consideration,—the existing law has been changed because the statute recognizes an instrument payable to two payees in the alternative as negotiable whereas, under the law merchant an instrument payable to two persons in the alternative is not negotiable. Musselman v. Oakes, 19 Ill. 81; Carpenter v. Farnsworth, 106 Mass. 561; Walrad v. Petrie, 4 Wend. 575; Blanckenhogen v. Blundell, 2 B. & Ald. 417. But see Watson v. Evans, 1 Hurl. & Colt. 663; Spaulding v. Evans, 2 McLean, 139, Fed. Cas. No. 13216; Record v. Chisum, 25 Tex. 348.

The question has not been passed upon by the courts.

6—Thus, a note payable to White, Davis and McLane, trustees Apalachicola Land Co., or their successors in office, or order, is negotiable. Davis v. Garr, 6 N. Y. 124. See also Storm v. Sterling, 3 El. & Bl. 832; Holmes v. Jacques, 1 Q. B. 376. The Bills of Exchange Act, sec. 7 (2) changed the prior English law as laid down in Cowie v. Sterling, 6 El. & Bl. 333.

7—It is not essential that the payee be named; it is sufficient if he be indicated with reasonable certainty. The maxim *id certum est quod certum reddi potest* applies. Thus, a note payable to "the administrators of Abner Chase deceased" was held sufficiently certain as to the payee. Adams v. King, 16 Ill. 169. See United States v. White, 2 Hill 59; Moody v. Threlkeld, 13 Ga. 55; Blackman v. Lehman, 63 Ala. 547; Knight v. Jones, 21 Mich. 161.

A check drawn without the name of a payee and with a line drawn through the space reserved

for the name of the payee is invalid for the reason that it is without a payee. Where the drawer of a check not only fails to insert the name of a payee or leave a blank where the name of the payee may be inserted, but draws a line through the blank space, making it impossible for anyone else to do so, he indicates very clearly not only that he declined to name a payee but intended to make it impossible for anyone else to do so. Gordon v. Lansing State Bank, 133 Mich. 143.

Sec. 11. **When payable to bearer.**—The instrument is payable to bearer:

First, When it is expressed to be so payable;[1] or

Second, When it is payable to a person named therein or bearer;[2] or

Third, When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable;[3] or

Fourth, When the name of the payee does not purport to be the name of any person;[4] or

Fifth, When the only or last indorsement is an indorsement in blank.[5]

1—Illustration: Pay to the bearer hereof, as in bonds and coupons.

2—A note payable to the order of A or bearer is the same as payable to bearer. Bitzer v. Wagar, 83 Mich. 223. It is not necessary to use the word bearer. A note payable to A or holder is payable to bearer. Putnam v. Crymes, 1 McMullen (S. C.) 9, 36 Am. Dec. 250; Eddy v. Bond, 19 Me. 461; see sec. 32.

3—Compare Bills of Exchange act, sec. 7 (3). The difference between the two statutes is important. The element of knowledge is the distinguishing feature. Under the English statute the paper is payable to bearer if the payee be a fictitious or non-existing person. Under the American statute paper payable to a fictitious or non-existing person is not payable to bearer unless the maker or drawer knew that the payee was a fictitious or non-existing person. Under the English statute the fact governs; under the American statute the fact coupled with knowledge governs. Thus there has been carried into the two statutes the differences heretofore existing in the authorities, as will appear from the following: The authorities agree that if the maker or drawer of an instrument

knew at the time of making or drawing it that the payee was a fictitious or non-existing person, the instrument is payable to bearer. The authorities disagree upon the effect of absence of knowledge. Some courts hold that paper payable to a fictitious or non-existing person is not payable to bearer unless the paper was put in circulation by the maker with knowledge that the name of the payee does not represent a real person. A statute in New York prior to the enactment of the Negotiable Instrument Law provided that paper made payable to the order of a fictitious person and negotiated by the maker should have the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer. Shipman v. Bank, 126 N. Y. 318, was a case in which a clerk of the plaintiff made out checks to fictitious persons and indorsed the names of the payees and procured the checks to be cashed at the drawee bank. It was held that such paper could not be treated as payable to bearer. The court said: "We are of the opinion upon examination of the authorities that this rule applies only to paper put in circulation by the maker with the knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person." To the same effect: Armstrong v. Bank, 46 Ohio St. 512; Chism v. Bank, 96 Tenn. 641; First Nat. Bank v. Farmer's Bank, 56 Neb. 149; Tatlock v. Harris, 3 T. R. 174. The contrary view is upheld by Mr. Daniel, Daniel's Neg. Inst., 5th ed., sec. 139, wherein the author says, that it will be no defense for the maker to set up the fact that he did not know the payee to be fictitious. The weight of authority would appear to be against the learned author, but he is supported by: Kohn v. Watkins, 26 Kan. 691; Lane v. Kreekle, 22 Iowa 404; Meridian Bank v. First Nat. Bank, 7 Ind. App. 322, 33 N. E. 247, on rehearing 34 N. E. 608. The state of the law in England prior to the enactment of the Bills of Exchange act is summed up by Bowen, L. J., in Vagliano v. Bank of England, 23 Q. B. Div. 243, as follows: "Down to the date of the passing of the recent statute (Bills of Exchange Act) the exception that bills drawn to the order of a fictitious or non-existing payee might be treated as payable to bearer was based uniformly upon the law of estoppel and applied only against the parties who at the time they became liable were cognizant of the fictitious character or of the non-existence of the supposed payee." And it was held in that case that the Bills of Exchange Act affirmed the then existing law on this point. On appeal the judgment was overruled, Bank of England

v. Vagliano H. L. [1891] A. C. 107, wherein it was held that the section in question changed the existing law. Lord Herschell, referring to the words of the subsection said: "I confess they appear to me to be free from ambiguity. 'Where the payee is a fictitious or non-existing person,' means surely according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee. I can find no warrant in the statute itself for inserting any limitation or condition. * * * I find it impossible, without doing violence to the language of the statute, to give any other answer than this,—in all cases in which the payee is a fictitious or non-existent person. The majority of the Court of Appeal read the section thus: Where the payee is a fictitious or non-existent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge. I am unable to see why it must mean this." This case is followed by Clutton v. Attenborough [1897] A. C. 90. In this case the plaintiff drew certain checks in favor of a person named Brett, believing him to be a real person. There was in fact no such person, but the name was provided by a clerk who intended to commit a fraud and appropriate the money of his employers. The clerk negotiated the checks by endorsing the name of Brett upon the same. It was held that these checks were within the language of the act; that they were payable to a fictitious and non-existing person and therefore payable to bearer.

See C. L. Mich. 4870; Shaw v. Brown, 128 Mich. 573.

4—Illustrations: Checks drawn payable to the order of "bills payable," or "cash," or "sundries," etc. Such instruments are payable to bearer for the reason that the use of the words "or order" indicates an intention that the paper shall be negotiated. McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410; Willets v. Phoenix Bank, 2 Duer 121.

5—Howry v. Eppinger, 34 Mich. 29; Curtis v. Sprague, 51 Cal. 239; Unaka Nat. Bank v. Butler (Tenn. 1904), 83 S. W. 65 (a case under the statute); Mass. Nat. Bank v. Snow (Mass. 1905), 72 N. E. 959 (a case under the statute). Where a note indorsed in blank by a payee is afterwards transferred by special indorsement it is still transferable by delivery and the party to whom it is so transferred may make title by filling up the blank indorsement to himself and striking out subsequent ones. Watervliet Bank v. White, 1 Den. (N. Y.) 608.

Sec. 12. **Terms when sufficient.**—The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.[1]

1—Illustration: An express promise is requisite to a promissory note, but the use of the word "promise" is not necessary. "Agree," "undertake," "engage," or "stipulate," would probably be held equivalent, or any word which would amount to a declaration of the maker's will to pay. The imperative form need not be used in a bill of exchange. Language indicating an expression of the drawer's will that the money should be paid is sufficient. The instrument may be written in pencil as well as in ink. Geary v. Physic, 5 B. & C. 234; Brown v. Butchers Bank, 6 Hill 443. It may be written in a foreign language. Debebian v. Galà, 64 Md. 262. An order written under a note, "please pay the above note and hold it against me in our settlement," signed by the drawer and accepted by the drawee, was held a good bill. Leonard v. Mason, 1 Wend. 522. An instrument in the following form: "Nathaniel O. Winslow cr. by labor 16-3/4 days at $4 per day, $67, good to bearer, signed, William Vanick," was held a negotiable promissory note payable on demand. Hussey v. Winslow, 59 Me. 170.

In certificates of deposit there is sometimes an express promise to pay, but the promise is most frequently implied from the word "payable," used in connection with the acknowledgment of the deposit, or receipt of a named sum of money, by or for the benefit of the person to whom or to whose order the payment is to be made. First Nat. Bank v. Greenville Nat. Bank, 84 Tex. 40.

Sec. 13. **Date, presumption as to.**—Where the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement, as the case may be.[1]

1—Anderson v. Weston, 8 Scott 583.

The presumption is that the note was executed and delivered on the day of its date, but such presumption is removable. Maybury v. Berkery, 102 Mich. 126; Hill v. Dunham, 7 Gray 543. If the date be a *dies non*, the law adopts the nearest day. Thus, a note dated September 31, will be considered to have been made September 30. Wagner v. Kenner, 2 Rob. (La.) 120. See note 1, sec. 8.

Sec. 14. **Ante-dated and post-dated.**—The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.[1]

1—The indorsee of a bill post dated and indorsed by the payee who died before the day of its date derives title through the indorsement and can recover from the drawer. Pasmore v. North, 13 East. 517. This case was followed by Brewster v. McCardel, 8 Wend. 478.

Where a false date is put in to evade some law, the instrument is void as to all parties having notice. Bayley v. Taber, 5 Mass. 286; Serle v. Norton, 9 M. & W. 309. So, too, if its purpose is to effect a fraudulent design. Lansing v. Gaine, 2 Johns. (N. Y.) 300; Vail v. VanDoren, 45 Neb. 450, 63 N. W. 787.

The fact that a note is negotiated prior to the day of its date is not a suspicious circumstance against which parties must guard. Brewster v. McCardel, *supra*. On the general proposition of the section see Gatty v. Fry, 2 Ex. D. 265, 36 L. T. (n. s.) 182, and cases cited. A post dated draft purporting to be payable at sight is for all the legal purposes of presentment, demand, protest, and payment, a draft payable a certain time after date, for example, actual date 10th, post date 20th, maturity thirteen days after actual date. New York Iron Mine v. Citizens Bank, 44 Mich. 344.

Sec. 15. **Date; when may be inserted.**—Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly.[1] The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.[2]

1—When a note is made for another's accommodation without date and delivered to him, he is authorized to fill in the date as

he sees fit. Androscoggin v. Kimball, 10 Cush. 373; see next section.

2—First State Savings Bank v. Webster, 121 Mich. 149.

Where a note was made on June 10th, payable thirty days after date, dated June —, 1859, and a subsequent indorser to whom it was negotiated June 15th, filled in the blank in the date so as to read June 1st, 1859, it was held he could recover against a prior accommodation indorser on the ground that he had implied authority from both maker and prior indorsers to fill the blank with any day in the month. Page v. Morrel, 3 Abb. Dec. (N. Y.) 433; Inglish v. Breneman, 5 Ark. 377, holding to the contrary is not supported by authority.

Sec. 16. **Blanks; when may be filled.**—Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein.[1] And a signature on a blank paper delivered by the person making the signature, in order that the paper may be converted into a negotiable instrument, operates as a prima facie authority to fill it up as such for any amount.[2] In order, however, that any such instrument, when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time; but if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given, and within a reasonable time.[3]

1—One who executes a promissory note by filling in all the blanks on the printed form except the one designed for the rate of interest, which blank is thereafter filled without his knowledge, is liable to a *bona fide* holder without notice of the alteration. Weidman v. Symes, 120 Mich. 657.

The maker of a note who carelessly leaves room for an alteration to be made without defacing the note, or exciting the suspicion

of a careful man will be liable upon it to a *bona fide* holder without notice, when the opportunity he has offered has been embraced. First Savings Bank v. Webster, 121 Mich. 149. To the same effect are the following cases: Holmes v. Trumper, 22 Mich. 427; Bank of Pittsburgh v. Neal, 22 How. (U. S.) 96; Mitchell v. Culver, 7 Cow. 336; Kitchen v. Place, 41 Barb. 465; Page v. Morrel, 3 Abb. Dec. (N. Y.) 433; Van Etta v. Evenson, 28 Wis. 33; Johnston Harvester Co. v. McLean, 57 Wis. 258; Yocum v. Smith, 63 Ill. 321; Garrard v. Lewis, 10 Q. B. D. 30; Cruchley v. Clarance, 2 M. & S. 90; Harvey v. Cane, 34 L. T. (n. s.) 64; Boyd v. McCann, 10 Md. 118.

2—This is the settled rule of the law merchant. A person indorsing such paper to another is liable on it when it is filled up according to the *prima facie* authority which it gives, though contrary to actual instructions. In Russel v. Langstaffe, 2 Doug. 514, a person indorsed his name upon the back of certain checks, blank as to sum, date and time of payment. The checks were filled in by the person to whom the indorser gave them, with sums, dates, and time of payment, different from those authorized. The court held the indorser liable, saying: "The indorsement upon a blank note is a letter of credit for an indefinite sum."

In Bank of Pittsburgh v. Neal, 22 How. (U. S.) 107, the court said: "Where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it is intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument, and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody, or in other words it is the act of the principal, and he is bound by it."

See also Market Nat. Bank v. Sargent, 85 Me. 349; Ives v. Farmers' Bank, 2 Allen (Mass.) 236; Violett v. Patton, 5 Cranch 142; Angle v. Ins. Co., 92 U. S. 330; DePauw v. Bank, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151; Bradford Nat. Bank v. Taylor, 75 Hun, 297, 27 N. Y. Supp. 96; Frank v. Lilienfeld, 33 Gratt. 384; London & Southwestern Bank v. Wentworth, 5 Ex. D. 96.

3—Boston Steel and Iron Co. v. Steuer, 183 Mass. 140 (a case under the statute). In this case a check was brought to the plaintiff by the defendant's husband, signed in blank by the wife and all filled up except the amount. With the husband's consent the plaintiff filled in the amount for $400. It was held that this was an incomplete instrument under sections 16 and 17 and that evidence to show the real authority of the husband was admissible.

In Guerrant v. Guerrant, 7 Va.

Law. Reg. 659 (1902) (a case under the statute) it was held that one taking a negotiable instrument before the blank in it was filled, is put upon notice and must ascertain the real authority of the person intrusted with the incomplete instrument, and that the statute reverses the previous rule as established in Frank v. Lilienfeld, 33 Gratt. 384.

Under the corresponding provision of the Bills of Exchange act, sec. 20 (2), it has been held that the word "negotiated" does not include "issue." Herdman v. Wheeler, 86 L. T. (N. S.) 48. The facts in this case were that W gave A a note, signed in blank and stamped with a 9d stamp, sufficient for a note of 75 *l*, coupled with authority to fill it up for 15 *l*, and make it payable to himself and get a loan on it for W. A applied to H for a loan of 25 *l*, saying it was for W, who was willing to pay 5 *l* for the accommodation. A filled the amount blank with 30 *l*, delivered it to H, who had no knowledge that W had not himself made the note complete for the sum of 30 *l*. A did not turn the money over to W. It was held that A's delivery of the note to H did not "negotiate" it within the meaning of the act, and H could therefore not recover. The court said that if the section had been intended to include such a case, appropriate words should have been used. The language should have been "issued or negotiated," instead of simply "negotiated"; that negotiation simply meant transfer by one holder to another, and that the payee was not a holder in due course. See further as to payee being a holder in due course, note 3, sec. 54.

Sec. 17. **Incomplete instrument not delivered.**—Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.[1]

1—The well established rule of the law merchant is here affirmed; and so a party will incur no liability on an instrument which bears his signature put thereon when the instrument was incomplete, if such incomplete instrument was completed and negotiated without authority. Ledwich v. McKim, 53 N. Y. 307; Davis Sewing Machine Co. v. Best, 105 N. Y. 67; Baxendale v. Bennett, L. R. 3 Q. B. D. 525 (1878), 47 L. J. Q. B. 624. The case last above cited is the leading English case on the proposition. The facts were: One Holmes had asked the defendant

for his acceptance of an accommodation bill and the defendant had written his name across the paper, which had an impressed bill stamp on it, and had given it to Holmes to fill in his name and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then put it into a drawer, which was not locked, of his writing table, at his chambers, to which his clerk, laundress, and other persons going there, had access. He had never authorized any person to fill up the paper with the drawer's name. Held, there could be no recovery on the acceptance, inasmuch as there was no delivery; that the disposition which the defendant made of the bill after it was returned to him did not amount to negligence on which delivery could be predicated. Boston Steel and Iron Co. v. Steuer, *supra*, note 3.

Sec. 18. **Delivery; when effectual; when presumed.** —Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto.[1] As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting,[2] or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument.[3] But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all the parties prior to him, so as to make them liable to him, is conclusively presumed.[4] And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.[5]

1—Instruments of the law merchant, like other written contracts, are without legal inception or valid existence until they have

been delivered according to the purpose and intent of the parties. Burson v. Huntington, 21 Mich. 416; Baxendale v. Bennett, 3 Q. B. D. 525 (1878); Cox v. Troy, 5 B. & Ald. 474; Mass. Nat. Bank v. Snow (Mass. 1905), 72 N. E. 959 (a case under the statute).

Delivery may be made (a) by intention, (b) by agency, (c) by negligence, (d) by conclusive presumption. Actual transfer of the instrument from the maker to the payee is not indispensable, but it must appear that the maker in some way evidenced an intention to make the instrument an enforceable obligation against himself, according to its terms, by surrendering control over it and intentionally placing it in the power of the payee or some third person, for his use. Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099. Intent to deliver is not sufficient; act and intent must concur. Drum v. Benton, 13 App. Cas. (D. C.) 245.

2—The word "accepting" is omitted from the North Carolina act.

3—As to conditional delivery see Hyde v. Tenwinkel, 26 Mich. 93; McCormick Harvesting Co. v. McKee, 51 Mich. 426; Brown v. St. Charles, 66 Mich. 71; Central Savings Bank v. O'Connor, 132 Mich. 578; Burke v. Dulaney, 153 U. S. 228; Bell v. Lord Ingestre, 12 Q. B. 317, 19 L. J. Q. B. 71; Burns and Smith Lumber Co. v. Doyle, 71 Conn. 742, 43 Alt. 483; Merchants' Bank v. Luckow, 37 Minn. 542; Juilliard v. Chaffee, 92 N. Y. 529; Stewart v. Anderson, 59 Ind. 375; Jones v. Shaw, 67 Mo. 667; Garner v. Fite, 93 Ala. 405; Carter v. Moulton, 51 Kan. 9. The last four cases are to the effect that there can be no delivery in escrow to the payee himself.

New London Credit Syndicate v. Neale [1898], 2 Q. B. 487, (a case under the corresponding provision of the Bills of Exchange act). The action in this case was upon a bill by which the defendant undertook to pay 110 *l* at the end of three months. The bill was signed and handed over as a bill of exchange, but there was an oral agreement that at maturity it should be renewed if the defendant required it. "In other words, although the written document states that the bill is to be met upon a day certain, the parol evidence is that it is not to be then met. Nothing is more clearly settled than that evidence of such an agreement is not admissible * * * . I do not think that it was intended by the act to alter the general law of evidence which renders parol evidence inadmissible for the purpose of contradicting the terms of a written document."

4—This changes the rule in Michigan as established in Burson v. Huntington, *supra*, but affirms what is probably the numerical weight of authority. In accord with Burson v. Huntington: Palmer v. Poor, 121 Ind. 135; Branch v. Sinking Fund, 80 Va. 427, 56 Am. Rep. 596; Dodd

v. Dunne, 71 Wis. 578; Hillsdale College v. Thomas, 40 Wis. 661. To the contrary: Kinyon v. Wohlford, 17 Minn. 239; Faulkner v. White, 33 Neb. 199, 49 N. W. 1122; Martina v. Muhlke, 186 Ill. 327, 57 N. E. 954; Gould v. Segee, 5 Duer (N. Y.) 260; Worcester Bank v. Dorchester Bank, 10 Cush. 488.

It is presumed conclusively that one of two joint makers of a note had authority from the other to deliver it, if he does so. Beman v. Wessels, 53 Mich. 549. "Delivery * * * is conclusively presumed in case a note has been stolen and transferred by the thief to a *bona fide* holder." Mass. Nat. Bank v. Snow (Mass. '05), 72 N. E. 959; Greeser v. Sugarman, 37 Misc. Rep. (N. Y.) 799, 76 N. Y. Supp. 922; Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857 (cases under the statute).

5—Possession of the instrument and its production at the trial is *prima facie* evidence of the plaintiff's title, and right to sue upon it. Hogan v. Dreifus, 121 Mich. 453. See also Hovey v. Sebring, 24 Mich. 232; Hall v. Wortman, 123 Mich. 304; Worth v. Case, 42 N. Y. 362; Newcombe v. Fox, 1 App. N. Y. Div. 389, 37 N. Y. Supp 294; Moak v. Stevens, 45 Misc. Rep. 147, 91 N. Y. Supp. 903 (a case under the statute).

Sec. 19. **Construction where instrument is ambiguous.**—Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

First, Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the sum payable;[1] but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount;[2]

Second, Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof;[3]

Third, Where the instrument is not dated, it will be considered to be dated as of the time it was issued;[4]

Fourth, Where there is conflict between the written

and printed provisions of the instrument, the written provisions prevail;[5]

Fifth, Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either, at his election;[6]

Sixth, Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;[7]

Seventh, Where an instrument containing the words "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon.[8]

1—Thus, where the bill expressed the sum payable in figures, as 245 *l*, and in words two hundred pounds, although a stamp was affixed applicable to the higher amount, it was held that evidence to show that the words "and forty-five" had been omitted by mistake was not admissible. The rule is absolute that in case of a discrepancy between the sum expressed in words and the sum expressed in figures, the sum expressed in words governs. Saunderson v. Piper, 5 Bing. N. C. 425; Mears v. Graham, 8 Blackf. (Ind.) 144.

2—Witty v. Mich. Mutual Life Ins. Co., 123 Ind. 411. In this case there was no sum expressed in words. The marginal figures expressed the sum $147.70. In Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652, the sum expressed in words was three hundred seventy-five 94/100 dollars, in figures $175.94. The clerk of the bank discounting the bill had altered the figures to conform to the written words, and the defendant therefore objected to its admission in evidence as avoided by the alteration. The court said: "We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it." This holding naturally suggests the inquiry, how that which is not a part of the bill can be appealed to to determine what the bill is. It would seem that inasmuch as the marginal figures are so generally and extensively employed, it cannot be said that they form no part of the instrument. The very language of the statute, which is an affirmation of the general rule, indicates that the

marginal figures may be appealed to in case of ambiguity and uncertainty. Burnham v. Allen, 1 Gray 496; Williamson v. Smith, 1 Cold (Tenn.) 1.

3—See "Issue," sec. 2.

See Bills of Exchange Act, sec. 9.

An instrument made payable with interest, but without specifying the rate of interest or the time from which it was to be computed, carries interest at the legal rate and from the date of complete execution. Campbell Printing Co. v. Jones, 79 Ala. 475; Belford v. Beatty, 145 Ill. 414. An instrument payable on demand and providing for the payment of interest carries interest from its date without a demand. Proctor v. Whitcomb, 137 Mass. 303; Pate v. Gray, Fed. Cas. No. 10794 *a;* Paine v. Caswell, 68 Me. 80; Colby v. Bunker, id. 424. For the purpose of suit paper payable on demand reaches maturity from the day of its issue. In re Estate of King, *supra;* Palmer v. Palmer, 36 Mich. 487, and the statute of limitation runs against it from that time. For the purpose of transfer, paper payable on demand is considered overdue after the lapse of a reasonable time after its issue; but before the lapse of a reasonable time knowledge of actual dishonor will not be presumed. What is a reasonable time depends upon circumstances. Randolph's Com. Pap., 2d ed., secs. 1041-3. An instrument payable on demand with interest after maturity carries interest from the date of actual demand or the institution of suit, which is treated as a sufficient demand. In re Estate of King, *supra.*

4—Maybury v. Berkery, 102 Mich. 126; Richardson v. Ellett, 10 Tex. 190; Knisely v. Sampson, 100 Ill. 573.

5—American Express Co. v. Pinckney, 29 Ill. 392.

6—Heise v. Bumpass, 40 Ark. 547; Funk v. Babbitt, 156 Ill. 408; Brazelton v. McMurray, 44 Ala. 323; Planters' Bank v. Evans, 36 Tex. 592; Lloyd v. Oliver, 18 Q. B. 471; Edis v. Burry, 6 B. & C. 433. In the case last cited the instrument was in the following form: "Three months after date I promise to pay Mr. John Bury, or order, 44 *l*, 11 *s*, 5 *d*, value received, John Bury." It was addressed to "J. B. Grutherot, 35 Montague Place," whose name appeared in the lower left hand corner, and whose acceptance was written across the face. Bury's name was written across the back as an indorsement. Held that the instrument might be treated either as a bill or note, at the option of the holder.

7—Herring v. Woodhull, 29 Ill. 92; Walton v. Williams, 44 Ala. 347. The statute in this provision and in section 66 has settled the vexed question of what liability is incurred by an irregular indorser. The comment of Mr. Crawford on this section is: "Throughout the act it has been the policy to make all irregular parties indorsers."

8—See Bills of Exchange Act, sec. 85 (2).

Dederick v. Barber, 44 Mich.

19; Dow Law Bank v. Godfrey, 126 Mich. 521; Scraper Co. v. Locklin, 100 Mich. 339; Dart v. Sherwood, 7 Wis. 523; Dill v. White, 52 Wis. 169; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716; Arbuckle v. Templeton, 65 Vt. 205, 25 Atl. 1095.

Where a person signs a note in place of the maker and adds thereto the word "surety," he does not thereby change the nature of his liability to the payee or holder. Inkster v. First Nat. Bank, 30 Mich. 143; Dart v. Sherwood, *supra*. The liability of one who signs a note as surety is not coextensive with that of the maker. If the fact of suretyship is disclosed by the note itself (as in above cases) the holder must respect the suretyship relation. He cannot make agreements to extend the time of payment to the surety's detriment. The same rule prevails if the holder of the paper has knowledge of the suretyship relation, independent of facts disclosed by the paper. Barron v. Cady, 40 Mich. 259. If the fact of suretyship was a private matter between principal and surety, undisclosed, in any manner, to the holder, it has no bearing upon the rights of the holder. As to him there might as well have been no special understanding and no suretyship relation in fact. As between the parties signing a note as makers, it is competent to show that part of them were mere sureties. Stevens v. Oaks, 58 Mich. 343; Eastman v. Cleaver, 72 Mich. 167. Where the payee in a note sold it before maturity, for a valuable consideration, and at the request of the purchaser signed his name below that of the payer, it was held that his liability would be measured according to that of a maker, although he claimed to have signed as indorser, and supposed his legal liability would be measured according to the standard of the indorser; that such mistake was one of *law* and no defense to the action. Cook v. Brown, 62 Mich. 473.

The Wisconsin act adds the following subdivision: "8. Where several writings are executed at or about the same time, as parts of the same transaction, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

Sec. 20. **Liability of person signing in trade or assumed name.**—No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided.[1] But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.[2]

1—See Bills of Exchange Act, sec. 23 (1).

Thus, an agent cannot by signing his own name to a negotiable instrument, and adding the word "agent," thereby bind his principal. To bind his principal, he must either sign his principal's name, or it must appear on the face of the paper in some way that it was drawn for the principal. Anderton v. Shoup, 17 Ohio St. 126; Sparks v. Transfer Co., 104 Mo. 531; Bradlee v. Boston Glass Mfg. Co., 16 Pick. 347; Manufacturers Bank v. Love, 13 App. Div. (N. Y.) 561, 43 N. Y. Supp. 812.

An oral guaranty of payment is not within this provision of the statute. Swanson v. Stoltz, 36 Wash. 318, 78 Pac. 999 (a case under the statute).

2—*Trade name:* Notes were made payable to the order of National Publishing Co. and indorsed in that name to the plaintiff. The claim was made that the notes were made payable to a company that had no existence, and that therefore the paper was fictitious, and that as the indorsement was fictitious and spurious no title passed to the notes. Held, that the defendant was estopped from alleging that the notes were made payable to a fictitious payee. Jones v. Home Furnishing Co., 9 App. Div. N. Y. 103; 41 N. Y. Supp. 71. The court said: "The notes were as much payable to Jones when they were made payable to the name under which he carried on his business as though he had been named therein. It is not in legal contemplation a fiction, but it was the plaintiff, under this business name, and represented him."

Assumed name: One may be bound by any mark or designation he thinks it proper to adopt, provided it be used as a substitute for his name and he intend to bind himself. Brown v. Butchers' Bank, 6 Hill (N. Y.) 443; Fiore v. Ladd, 22 Ore. 202, 29 Pac. 435; Anderson v. Bank, 66 Hun, 613, 21 N. Y. Supp. 925. But see Bartlett v. Tucker, 104 Mass. 336; Brown v. Parker, 7 Allen 337.

The fact whether the party could write is immaterial. Baker v. Dening, 8 Ad. & El. 94, 35 E. C. L. 498.

Sec. 21. **Signature by agent; authority; how shown.**—The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.[1]

1—Authorization may be by parol. Odd Fellows v. Bank, 42 Mich. 461; Coy v. Stiner, 53 Mich. 42. The signing by one person of another's name in his presence and by his direction is sufficient.

Sager v. Tupper, 42 Mich. 605. It is not necessary that a person unable to write his own name should, in the execution of a note, touch the pen while another is signing for him. It is only necessary that such person be authorized to sign. Kennedy v. Graham, Admr., 9 Ind. App. 624, 35 N. E. 925, 37 N. E. 25. Where a party or a partnership is sought to be charged on a signature made by an agent or by a partner, if authority so to sign is disputed, the burden is upon the plaintiff to show due authorization. New York Iron Mine v. Citizens Bank, 44 Mich. 344; Gooding v. Underwood, 89 Mich. 187.

Sec. 22. **Liability of person signing as agent, etc.**—Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized;[1] but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.[2]

1—See Bills of Exchange Act, sec. 26. The original draft submitted to the Conference of Commissioners on Uniformity of Laws by Mr. Crawford, adopted in terms and substantially in language the provision of the Bills of Exchange Act, above referred to, thus adopting the English rule, and the rule prevailing in New York prior to that time. The section as it now stands was substituted for that submitted in the original draft. Crawford's Annotated Neg. Inst. Law, 28. The result is a change in the rule as recognized by the weight of authority in the United States. Heretofore the person signing, for or on behalf of another, would not, though he were unauthorized, be liable on the instrument, but would be liable only on his implied warranty that he had such authority. Bartlett v. Tucker, 104 Mass. 336; White v. Madison, 26 N. Y. 117; Taylor v. Nostrand, 134 N. Y. 108; Miller v. Reynolds, 92 Hun, 400; Taylor v. Shelton, 30 Conn. 122; Kroeger v. Pitcairn, 101 Pa. St. 311; Sheffield v. Ladue, 16 Minn. 388; Simpson v. Garland, 76 Me. 203; Hall v. Crandall, 29 Cal. 572. To the contrary: Byars v. Doores' Admr., 20 Mo. 284; Dale v. Donaldson, 48 Ark. 188; Weare v. Gove, 44 N. H. 196. The statute makes the agent liable on the instrument, if he were unauthorized to sign on behalf of his principal. In Tuttle v. Bank (Mass. 1905), 73 N. E. 560 (a case under

the statute), it was held that where a trustee executed a note without authority he was personally liable on it without regard to the form in which the note was executed, even though the note was given as evidence of a loan for the benefit of the estate.

2—Thus, one is not relieved from personal liability by adding to his name the descriptive term trustee, administrator, guardian, agent, president, secretary, treasurer, etc. One signing as "vestryman Grace church" is not relieved from personal liability. Tilden v. Barnard 43 Mich. 376. The mere impression of the seal of a corporation upon paper, signed by individuals with added words describing them as chairman, president, or secretary, does not show the representative character of the signers nor relieve them from personal liability. Dutton v. Marsh, L. R. 6 Q. B. 361; 4 Eng. Rul. Cas. 278; Daniel v. Buttner, (Wash. 1905) 80 Pac. 811 (a case under the statute).

The general rule of the law merchant is expressed in Nash v. Towne, 5 Wallace 689, as follows: "Parol evidence can never be admitted to exonerate an agent, who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency and mentioned the name of his principal at the time the contract was executed." To the same effect: Anderson v. Pearce, 36 Ark. 293; Richmond, etc. v. Moragne, 119 Ala. 80, 24 So. 824; Stinson v. Lee, 68 Miss. 113, 8 So. 272; McClellan v. Robe, 93 Ind. 298; Roger Williams Bank v. Groton Mfg. Co., 16 R. I. 504, 17 Atl. 170; Ins. Co. v. Burkett, 72 Mo. App. 1; Pugh v. Moore, 44 La. Ann. 209, 10 So. 710; Penn Mutual Life Ins. Co. v. Conoughy, 54 Neb. 124, 74 N. W. 422. But in Michigan, a contrary rule is recognized in Keidan v. Winegar, 95 Mich. 430, wherein it was held that in a suit by a payee against the maker of a promissory note who added the word "agent" to his signature, the defendant may show by parol testimony that the paper is really that of his principal, who, to the knowledge of the payee, was the real party to the transaction. The rule thus expressed is affirmed by the statute.

In Megowan v. Peterson, 173 N. Y. 1 (a case under the statute), the words "without disclosing his principal," were construed. It was held that the representative character need not be disclosed upon the face of the paper so far as immediate parties were concerned, but the case might be different so far as innocent purchasers for value were concerned. The court adds: "We do not understand that the statute to which we have alluded was designed to change the common law rule in this regard, which is to the effect that as between original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown."

In Daniel v. Buttner, *supra*, ac-

tion was upon paper in the following form: "German-American Investment Co., Inc., No. 409, $600.00. Seattle, Washington, February 8th, 1902. Received from Herman Daniel $600.00 (six hundred dollars), which we promise to pay six (6) months after date, with interest at the rate of eight (8) per cent per annum. William H. Buttner, President; H. M. Glidden, secy." The note bore the corporate seal, but there was no reference by which it was made a part of the instrument. It was executed upon a lithographed form, bearing the name of the corporation, as indicated. Held, that the instrument did not purport to be executed by the corporation, and that it came within this section of the statute; that the defendants were personally liable thereon. In the two last preceding cases the facts out of which the transaction grew were known to the respective parties. The case last cited seems to construe the words "without disclosing his principal" as meaning that such disclosure must be made upon the face of the instrument. For further illustrations of instruments executed by agents, see: Finan v. Babcock, 58 Mich. 305; Cadillac State Bank v. Cadillac Stave and Heading Co., 129 Mich. 15; McGraw v. Union Co., (Mich.) 99 N. W. 758; Nunnemacher v. Poss, 116 Wis. 444; Wis. Trust Co. v. Chapman, 121 Wis. 479; Chipman v. Foster, 119 Mass. 189.

Sec. 23. **Signature by procuration; operation of.**—A signature by "procuration" operates as notice that the agent has but limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.[1]

1—Procuration signifies a consensual contract in writing by which one party confides the carrying on or execution of one or more matters of business to another, who takes it in his charge. William v. Conger, 125 U. S. 422. As a term applied to negotiable instruments it is technical. In form it is usually expressed per proc., or p.p. The use of the term is uncommon in the United States, but common in England. Attwood v. Munnings, 7 B. & C. 278, 4 Eng. Rul. Cas. 364. The phrase is an express intimation of a special and limited authority and the person who takes a bill or note so drawn, accepted or indorsed, is bound to inquire into the extent of the authority. Daniel's Neg. Inst., 5th ed., sec. 299. But where an agent has such authority his abuse of it does not affect a *bona fide* holder for value. Bryant v. La Banque du Peuple (1893) A. C. 170. But see Reid v. Rigby (1894) 2 Q. B.

40, a case under the Bills of Exchange act, sec. 25, where the signature to a check was Rigby and Company, per procuration of J. Alport, manager, it was held that such signature conveyed to the bank the intimation that Alport had only limited authority to sign, and the bank could not recover inasmuch as Alport had exceeded his authority. Alport had authority to draw on his principal's bank account for the purpose of the business but had no authority to overdraw their account, or borrow money on their behalf, both of which he did in this case.

Sec. 24. **Indorsement by infant or corporation; effect of.**—The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation[1] or the infant[2] may incur no liability thereon.

1—Thus an indorsement of an instrument by a corporation will transfer title to the instrument, although for want of capacity to bind itself, the corporation would incur no liability as indorser.

2—This changes the law. Heretofore an infant's indorsement could be avoided by him. Roach v. Woodall, 91 Tenn. 206. See In re Soltykoff [1891], 1 Q. B. 413 (a case under the Bills of Exchange act, sec. 22 (2),) in which it was held that an infant cannot bind himself by the acceptance of a bill of exchange even though the bill is given for the price of necessaries supplied to him during infancy.

Sec. 25. **Forged signature; effect of.**—Where a signature is forged or made without the authority of the person whose signature it purports to be, if it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature,[1] unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.[2]

1—One can never be bound on an instrument to which his name has been forged or affixed without authority. Robarts v. Tuck-

er, 16 Q. B. 560; Lancaster v. Baltzell, 17 G. & J. (Md.) 468; Whiteford v. Munroe, 17 Md. 135; Pettyjohn v. Nat. Bank, 101 Va. 111, 43 S. E. 203 (a case under the statute); Buckley v. Bank, 35 N. J. Law 400. Tolman v. American Nat. Bank, 22 R. I. 462, 48 Atl. 480 (a case under the statute). In this case the facts were: C gave A a check, upon the fraudulent representations of A that he was B. A indorsed B's name on the check which was payable to the order of B, and transferred it to D, who collected it at the bank. It was held that C could recover from the bank under this provision of the statute, as the signature here was clearly one "made without the authority of the person whose signature it purports to be," and was therefore "wholly inoperative." The contrary view was maintained in Hoffman v. American Nat. Bank (Neb.) 96 N. W. 112. The statute was not in force in Nebraska when this decision was rendered (but is now, see Introduction), but the court referred to it and cited the case of Tolman v. Bank, *supra*. In the Nebraska case B No. 1, an impostor, bore the same name as another B No. 2, represented himself to be B No. 2, and induced A to believe that he was B No. 2. A believing him to be B No. 2 procured a draft to his own order, indorsed it to the order of Peter W. Brubaker, a name common to the two Bs, and delivered it to B No. 1. B No. 1 indorsed the draft, was identified at the defendant bank on which the draft was drawn, as Peter W. Brubaker, and received the amount of the draft. A brought suit against the drawee bank. It was held he could not recover. This case, however, has two points which distinguish it from Tolman v. Bank, *supra*. Here the parties bore the same name, and here also the bank required identification and obtained it, through a notary. See also Land Title & Trust Co. v. N. W. Nat. Bank (Pa. 1905) 60 Atl. 723, wherein it was held that the drawer of a check, draft, or bill of exchange, who delivers it to an impostor, supposing him to be the person whose name he has assumed, must as against the drawee, or *bona fide* holder, bear the loss where the impostor obtains payment of or negotiates the same. Beattie v. Nat. Bank, 174 Ill. 571, 51 N. E. 602. In this case a draft designed for Geo. *P*. Bent was, by mistake, made payable to Geo. *A*. Bent, to whom it was mailed and by whom it was received. Geo. *A*. Bent indorsed the draft and sold it to the plaintiff. It was held that the indorsement was a forgery and plaintiff acquired no title to the instrument.

Sec. 24 of the Bills of Exchange act is identical with this section except this prefix: "subject to the provisions of this act." This prefix requires sec. 60 to be read in connection with sec. 24. The English statute was passed upon in Lacave & Co. v.

Credit Lyonnais [1897], 1 Q. B. 148, but as sec. 24 of the English act is restricted in the manner above stated the case does not aid in the construction of the American statute.

Forgery embraces a case where one unwittingly signs an instrument in the form of a negotiable promissory note, relying upon false representations made to him at the time, that the instrument he is signing is a contract of an entirely different nature. Gibbs v. Linabury, 22 Mich. 479; Anderson v. Walter, 34 Mich. 113.

2—As to the ratification of a forgery there is a conflict of authority. Some courts hold that a person can adopt and affirm his signature made by another without authority, and thereby subject himself to liability on the instrument. Ashpitel v. Bryan, 3 B. & S. 492; Seaver v. Weston, 163 Mass. 202; Bowlin v. Creel, 63 Mo. App. 229; Casco Bank v. Keen, 53 Me. 103; Forsythe v. Bonta, 5 Bush 547; Greenfield Bank v. Crafts, 4 Allen 447. In the case last cited the court said: "It was clearly competent, if duly authorized (i. e., the signing), thus to sign the note. It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent as indicated by the form of the signature, but who in fact had no authority. It is, however, urged that public policy forbids sanctioning the ratification of a forged note as it may have a tendency to stifle prosecutions for criminal offenses. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offense." To the contrary: McHugh v. County of Schuylkill, 67 Pa. St. 391; Building and Loan Assn. v. Walton, 181 Pa. St. 201; Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 547; Smith v. Tramel, 68 Iowa 488; Henry v. Heeb, 114 Ind. 280; Brooke v. Hook, 24 L. T. (n. s.) 34. One whose name has been forged may be estopped from setting up the forgery as a defense.

Article II. Consideration.

Sec.		Sec.	
26.	Consideration; presumption of.	29.	When lien on instrument constitutes holder for value.
27.	Consideration, what constitutes.	30.	Want of consideration, effect of.
28.	Holder for value, what constitutes.	31.	Accommodation party, liability of.

Sec. 26. **Consideration; presumption of.**—Every negotiable instrument is deemed prima facie to have been issued for valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.[1]

1—Herein lies one controlling distinction between contracts of the law merchant and contracts of the common law. It is presumed that negotiable instruments were given for a valid consideration and the burden is upon the party alleging no consideration to prove his allegation. Rood v. Jones, 1 Doug. (Mich.) 188; Matteson v. Morris, 40 Mich. 52; Manistee Nat. Bank v. Seymour, 64 Mich. 59; Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191; Beath v. Chapoton, 124 Mich. 508; Young v. Shepard's Est. Id. 552; Farnsworth v. Fraser (Mich.), 100 N. W. 400; Taylor v. Taylor's Est. (Mich.) 101 N. W. 832; Union Trust Co. v. Morgans (Mich.) 103 N. W. 568. When the consideration of a promissory note is named therein it is part of the contract itself and the contract cannot be so varied by parol as to show another consideration. Johnson v. Sutherland, 39 Mich. 579. The plaintiff does not lose the benefit of the presumption by offering evidence to show consideration, Durland v. Durland, 153 N. Y. 67. Consideration is presumed although the words "value received" be omitted and no consideration be expressed. Taylor v. Taylor's Est. *supra*; Bristol v. Warner, 19 Conn. 7. See note 2, sec. 8.

Under the law merchant a bill of exchange non-negotiable by reason of lacking the words "to order," or "bearer" nevertheless imports a consideration. But a bill non-negotiable by reason of being payable out of a particular fund does not import a consideration under either the law merchant or the statute. Daniel's Neg. Inst. (5th ed.) sec. 161; Nat Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428; Louisville etc. R. R. Co. v. Caldwell, 98 Ind.

251; Cowan v. Hallack, 9 Col. 576. For cases under the statute see: Bringman v. Von Glahn, 71 N. Y. App. Div. 537, 75 N. Y. Supp. 845; Towles v. Tanner, 21 App. (D. C.) 530; Black v. Bank, 96 Md. 399; Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059; Moak v. Stevens, 91 N. Y. Supp. 903, 45 Misc. Rep. 147; Karsch v. Pottier etc. Co., 82 App. Div. 230, 81 N. Y. Supp. 782; Bank v. Dooley, 113 Wis. 590. Under the statute a non-negotiable note does not import consideration. Deyo v. Thompson, 53 N. Y. App. Div. 9, 65 N. Y. Supp. 459.

Sec. 27. **Consideration, what constitutes.**—Value is any consideration sufficient to support a simple contract.[1] An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time.[2]

1—A valuable consideration is necessary to support a negotiable instrument as well as any other contract. This is the settled rule. A note given by a father to his son as the son's share in the father's estate being but a promise to make a gift in the future is without consideration and unenforceable against the estate by the payee or by the indorsee with knowledge of the facts. Conrad v. Manning's Est., 125 Mich. 77; Phelps v. Phelps, 28 Barb. 121; Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608. But see Eaton v. Libbey, 165 Mass. 218, 42 N. E. 1127, where the privilege of naming a child was held a valid consideration for a promise.

Sufficient consideration: Rood v. Jones, 1 Doug. 188; Miller v. Finley, 26 Mich. 249; Wright v. Irwin, 35 Mich. 347; Taylor v. Dansby, 42 Mich. 82; Parsons v. Frost, 55 Mich. 230; Hanold v. Kays, 64 Mich. 439; McCabe v. Caner, 68 Mich. 182; Steers v. Holmes, 79 Mich. 430; Aultman etc. v. Gorham, 87 Mich. 233; Walton v. Mason, 109 Mich. 486; Hilbert v. Barry, 111 Mich. 698; Union Banking Co. v. Martin's Est., 113 Mich. 521; Stevens v. McLachlan, 120 Mich. 285; Walbridge v. Tuller, 125 Mich. 218.

Lack of Consideration: Kulenkamp v. Groff, 71 Mich. 675; Thornton v. Damm, 120 Mich. 510; Graham v. Alexander, 123 Mich. 168; Taylor v. Weeks, 121 Mich. 233; Brown v. Smedley, (Mich.) 98 N. W. 856; Nowack v. Lehmann, (Mich.) 102 N. W. 992.

Illegal consideration: Where a note is given upon an illegal consideration or one contrary to public policy, it is as if it were given for no consideration at all and is unenforceable. Comstock v. Draper, 1 Mich. 481; Paton v. Coit, 5 Mich. 505; People v. Twp., 11 Mich. 222; O'Hara v.

Carpenter, 23 Mich. 410; Buck v. First Nat. Bank, 27 Mich. 293; Hannah v. Fife, 27 Mich. 180; Hill v. Callaghan, 31 Mich. 424; Snyder v. Willey, 33 Mich. 483; Williams v. Guarde, 34 Mich. 82; Lyon v. Waldo, 36 Mich. 345; Wisner v. Bardwell, 38 Mich. 278; Mut. Assn. v. Hoyt, 46 Mich. 473; Shaw v. Clark, 49 Mich. 384; Tinker v. Hurst, 70 Mich. 159; Turnbull v. Twp., 74 Mich. 621; Fosdick v. Van Arsdale, 74 Mich. 302; Ward v. Doane, 77 Mich. 328; Goodrich v. McDonald, 77 Mich. 486; Chapman v. Remington, 80 Mich. 552; Wolf v. Troxell Est., 94 Mich. 573; French v. Talbot Pav. Co., 100 Mich. 443; Case v. Smith, 107 Mich. 416; Heffron v. Daly, 133 Mich. 613; Hubbard v. Freiberger, 133 Mich. 139.

2—This affirms the rule in Michigan and many other states. Bostwick v. Dodge, 1 Doug. 413; Outhwite v. Porter, 13 Mich. 533; Hanold v. Kays, 64 Mich. 439; Crump v. Berdan, 97 Mich. 293; Burroughs v. Ploof, 73 Mich. 607. In the case last cited it was held that the debt must have been extinguished to render the holder, a holder for value. See also Henriques v. Ypsilanti Sav. Bank, 84 Mich. 168; City Bank v. Dill, id. 549; Currie v. Misa, L. R. 10 Ex. 153.

Whether this section extends the rule that an antecedent or preëxisting debt constitutes value to include instruments given merely as collateral security for such a preëxisting debt seems to be still in doubt. In Michigan the giving or transfer of an instrument as collateral security for a preëxisting debt does not constitute a valuable consideration. The rule is thus expressed: One who takes a note as additional security for a preëxisting debt, without releasing any security already held or agreeing to extend the time of payment is not a *bona fide* holder for value. Boxheimer v. Gunn, 24 Mich. 372; Hanold v. Kays, 64 Mich. 439; Burroughs v. Ploof, 73 Mich. 607; Maynard v. Davis, 127 Mich. 571. The former New York rule as established in Coddington v. Bay, 20 Johns. 636, was that when a note is given as payment or as collateral security for the payment of a preëxisting debt it is not based on sufficient consideration. This rule has been followed by a minority of the other states. Thompson v. Maddux, 117 Ala. 468, 23 So. 157; Goodman v. Simonds, 19 Mo. 106; Penn. Bank v. Frankish, 91 Pa. St. 339; First Nat. Bank v. Strauss, 66 Miss. 479, 6 So. 233; Jenkins v. Schaub, 14 Wis. 1; Roach v. Woodall, 91 Tenn. 206; Bank v. Wright, 63 Ark. 604; Bone v. Tharp, 63 Iowa 223.

The United States courts and a majority of the state courts have taken a different view. Swift v. Tyson, 16 Pet. (U. S.) 1. In Railroad Co. v. National Bank, 102 U. S. 25 the court said, "Our conclusion, therefore, is that the transfer before maturity of negotiable paper, as security for an antecedent debt, *merely, without other* circumstances, *if the paper*

be so indorsed that the holder becomes a party to the instrument although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case the *bona fide* holder is unaffected by equities or defenses between prior parties of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world." Maitland v. Citizens' Nat. Bank, 40 Md. 540; Alexander v. Bank, 19 Tex. Civ. App. 620, 47 S. W. 840; Rockville Nat. Bank v. Citizen's Gas Light Co., 72 Conn. 581, 45 Atl. 361; Nat. Revere Bank v. Morse, 163 Mass. 383; Dunham v. Peterson, 5 N. Dak. 414, 67 N. W. 293, 57 Am. St. Rep. 556; Spencer v. Sloan, 108 Ind. 183; Bonaud v. Genesi, 42 Ga. 639; McPherson v. Boundreau, 48 La. Ann. 431; Barker v. Lichtenberger, 41 Neb. 751, 60 N. W. 79.

Thus the authorities were in irreconcilable conflict. It was the evident purpose of the statute to settle the question, but it would appear that the purpose has failed of accomplishment. This provision of the statute has been passed upon by the courts of Virginia, North Carolina and New York.

In Payne v. Zell, 98 Va. 294, it was held that a preëxisting debt constitutes value for the transfer of negotiable paper and a person to whom a negotiable instrument has been pledged as collateral is a holder to the extent of the amount due him. In Brooks v. Sullivan, 129 N. C. 190 it was held that when a negotiable instrument is transferred before maturity as collateral security for a preëxisting debt, the assignee is such a holder for value to the extent of the debt secured, that he takes the paper free from all equities of which he had no notice; changing the prior law of North Carolina.

In Mohlman Co. v. McKane, 60 N. Y. App. Div. 546, 69 N. Y. Supp. 1046, it was held that under the statute, receiving a note as security for a debt or forbearance to sue upon a present claim or debt, constitutes a consideration for the note or an indorsement of the note made for the purpose of procuring its acceptance. See also Petrie v. Miller, 57 App. Div. 17, 173 N. Y. 596.

Brewster v. Shrader, 26 Misc. Rep. 480, 57 N. Y. Supp. 606, was the first New York case in which this provision of the statute was specially construed. The court said: "Prior to the enactment of the said law it was the settled rule in this state that one who receives a promissory note as collateral security merely, for an antecedent debt, cannot enforce such note against a maker or indorser thereof when the same has been obtained by fraud, or has

been fraudulently diverted from the purpose for which it was made." (Citing Coddington v. Bay, 20 Johns, 637).

The court says of this provision, "The language of this section when given its usual and ordinary signification, ought to leave no room for doubt upon the subject. There is, however, such a universal disposition among lawyers to look for some hidden or subtle meaning in the most simple language, that it has become quite the fashion to require the courts to construe statutes, which, to the average lay mind, seem to require no construction." The court holds that this section changes the prior law as announced in Coddington v. Bay and subsequent cases and affirms the rule laid down in Railroad Co. v. Nat. Bank, *supra*; Swift v. Tyson, *supra*. This case was thought to settle the matter once and for all, but in 1903 the question was again raised in Sutherland v. Mead, 80 App. Div. 103, 80 N. Y. Supp. 504, 1149. In this case the court seems partially if not wholly to reaffirm the old rule of Coddington v. Bay. The court said that this provision standing alone had not changed the existing law as laid down in Coddington v. Bay, and added: "All of these sections (27, 28, 31, 54, 57, 58, 59, 61) can be harmonized in their entirety, without any subtle refinement of reasoning, by construing section 27 to mean that, to constitute an antecedent or preëxisting debt a valuable consideration in support of a promissory note that had been fraudulently diverted, as valid in the hands of a *bona fide* holder, the latter must have been cancelled, and, in legal effect, paid and discharged the antecedent or preëxisting debt. By still holding the debt, he in fact parts with no value. It was not intended thereby that, where a debt continued to remain in existence and enforceable as such, and the note is taken as collateral security for its payment, such debt, undischarged, constitutes a valuable consideration, or the holder of the note one in due course, as against the accommodation maker or indorser who has been defrauded by the negotiation of the instrument. We are not to impute to the Legislature an intent to change a rule of law which has existed in uniform course of enforcement for over three-quarters of a century, without a clear and unequivocal expression so to do. We may take judicial notice that the commission appointed to revise and codify the statutes was created, in the main, to codify existing laws and not make new rules; and certainly it was never intended that settled usages in respect of commercial paper, founded upon decisions covering a period of 80 years, and uniform in application, should be overthrown in the construction of ambiguous and obscure expressions used by such body. The harmony of these provisions of the statute is in no measure disturbed by a construction which causes them to read that an an-

tecedent and preëxisting debt must be paid and discharged, in order to constitute the holder of commercial paper, which has been fraudulently diverted, a *bona fide* holder and, as such, capable of enforcing the same as against the accommodation maker or indorser. Merely taking such paper as collateral security for the payment of a preëxisting or antecedent debt does not constitute such debt value, within the meaning of this statute." The court in speaking of the construction of the statute in Brewster v Shrader, *supra*, said, "We are not disposed to adopt this construction of the law." Roseman v. Mahony, 86 N. Y. App. Div. 377, 83 N. Y. Supp. 749, followed Sutherland v. Mead. The court held that to make an antecedent or preëxisting debt constitute value the holder of the note must give up the debt, either wholly or qualifiedly. He must part with something, if not with the debt, at least with the right to sue upon it for some determinate period. Bank of America v. Waydell, 92 N. Y. Supp. 666, was decided in March, 1905, and the rule laid down in Sutherland v. Mead and Roseman v. Mahoney was affirmed. See also Milius v. Kauffman, 93 N. Y. Supp. 669.

The Wisconsin Legislature removed the question from the field of controversy by adding to the section the following: "But the indorsement or delivery of negotiable paper as collateral security for a preëxisting debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value."

Sec. 28. **Holder for value, what constitutes.**—Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.[1]

1—Elliott v. Miller, 8 Mich. 131; Hunter v. Wilson, 4 Ex. 489, 19 L. J. Ex. 8; Hoffman v. Bank, 12 Wall. 181; DeWitt v. Perkins, 22 Wis. 451; Griffiths v. Kellogg, 39 Wis. 290; Simon v. Merritt, 33 Iowa 537.

The section is referred to in: Black v. Bank, 96 Md. 399; Petrie v. Miller, 173 N. Y. 596.

An indorsee of negotiable paper must have relinquished some right, incurred some responsibility, or parted with some value upon the credit of the paper at the time of the transfer, else he will not be a holder for value so as to shut out the equities of antecedent parties. Phœnix Ins. Co. v. Church, 56 How. Pr. 29, 81 N. Y. 218. If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to en-

force it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. Heuertomatte v. Morris, 101 N. Y. 63.

Sec. 29. **When lien on instrument constitutes holder for value.**—Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.[1]

1—Compare Bills of Exchange Act, sec. 27 (3).

A lien generally is a mere right to hold a thing till a debt is paid. It differs from a pledge in that the pledgee has a special property in the thing pledged. The person who has a lien on a negotiable instrument is the holder thereof, with the corresponding rights and duties. He has more than an ordinary lien on an ordinary chattel. The lien of a banker will protect a bank having possession of the bills or notes of a customer to the extent of the balance due such bank from such customer. Nat. Bank v. Ins Co., 104 U. S. 54; Reynes v. Dumont, 130 U. S. 354; Straus v. Tradesman Nat. Bank, 122 N. Y. 379; Clark v. Bank, 160 Mass. 26. Transfer of such an instrument to any other holder as collateral security for the payment of a debt due such holder from the person who transferred the instrument, gives the holder a lien to the extent of the debt. Attenborough v. Clarke, 27 L. J. Ex. 138; Anderson v. Bank, 98 Mich. 543; Stoddard v. Kimball, 6 Cush. 469; Collins v. Martin, 1 Bos. & Pul. 648. The following are cases under the statute: Mersick v. Alderman, (Conn. 1905) 60 Atl. 109. In this case plaintiff was the indorsee and holder of a note and the owner of the claim it was indorsed to secure. The defendants were the makers. Held, that the plaintiff's assignor was a lien holder, and a holder for value to the extent of his lien, and to that extent a holder in due course. The plaintiff succeeds to the rights of the assignor and holder in due course, whether he be a holder in due course or not; see sec. 60. Payne v. Zell, 98 Va. 294; Brooks v. Sullivan, 129 N. C. 190; Redfern v. Rosenthal, 85 L. T. 313, 86 L. T. 855 (under the corresponding section of the Bills of Exchange Act). If the securities are sold to pay the debt, the purchaser, if he be a holder in due course, under sec. 54, would be entitled to recover the full face value under sec. 59, although he paid a less amount for them.

Sec. 30. **Want of consideration, effect of.**—Absence or failure of consideration is matter of defense as

against any person not a holder in due course;[1] and partial failure of consideration is a defense pro tanto[2] whether the failure is an ascertained and liquidated amount or otherwise.[3]

1—It is the invariable rule of the law merchant that as between immediate parties want of consideration is always available as a defense. The defendant may show by parol that there was insufficient consideration, that the consideration was the performance of a certain agreement which has not been performed, or that the consideration has failed in some other way. Reeves v. Kelly, 30 Mich. 132; Taylor v. Dansby, 42 Mich. 82; Maltz v. Fletcher, 52 Mich. 484; Manistee Nat. Bank v. Seymour, 64 Mich. 59; Farwell v. Ensign, 66 Mich. 600; Shaw v. Stein, 79 Mich. 77; Macomb v. Wilkinson, 83 Mich. 486; Funk v. Chambers, 95 Mich. 508; Keidan v. Winegar, 95 Mich. 430; Van Tuyle v. Pratt, 101 Mich. 38; Perkins v. Brown, 115 Mich. 41; Kelley v. Guy, 116 Mich. 43; English v. Yore, 123 Mich. 702; Keystone Mfg. Co. v. Forsyth, 126 Mich. 98; Brown v. Smedley, (Mich. 1904) 98 N. W. 856.

When the want of consideration is total it affects the validity of the instrument, in its entirety, when it is partial it affects the validity of the instrument *pro tanto*. Allaire v. Hartshorne, 21 N. J. L. 665. If a person who sues on a note is bound by the equities existing between the maker and the indorser the consideration for the indorsement is a material question. Kelly v. Freedman, 56 Mich. 321. Lack or failure of consideration is a good defense against any holder bound by the equities existing between maker and payee. Sutton v. Beckwith, 68 Mich. 303. But if the maker says to the proposed purchaser of his note that it is all right and that he will pay it at maturity, he is estopped after its purchase in reliance upon such a statement, from asserting failure of consideration or pleading any other invalidity against it. *Id.*

Where parties exchange their bills, notes or checks although for mutual accommodation, the paper so exchanged is supported by a valuable consideration. Farber v. Nat. Forge and Iron Co., 140 Ind. 54, 39 N. E. 249; Union Trust Co. v. Rigdon, 93 Ill. 459. This is so, although one of such notes is unpaid at maturity and such dishonor is no defense of failure of consideration on the other. Newman v. Frost, 52 N. Y. 422; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46.

2—Sebring v. Hazard, 128 Mich. 330; Stacy v. Kemp, 97 Mass. 166.

The rule is that whenever a party is entitled to go into the question of consideration at

all, he may set up a partial as well as a total failure. This rule does not, however, extend to a case of a note given for an article purchased for much more than it is worth. If the article for which the note was given be of any value at all, the defense of partial failure of consideration is not available. Harness v. Horne, 20 Ind. App. 134, 50 N. E. 395. Courts will not as a rule inquire into the adequacy of the consideration. Shattuck v. Hart, 98 Mich. 559.

3—Partial failure of consideration will not be available as a defense unless the facts are such that the amount to be deducted because of the partial failure can be definitely computed, or unless the amount is liquidated or in the nature of a certain debt. This is the rule of the law merchant in England and in many of the States. Trickey v. Larne, 6 M. & W. 278; Sully v. Frean, 10 Exc. 535; Greenleaf v. Cook, 2 Wheat. 13; Packwood v. Clark, Fed. Cas. No. 10656. The statute has changed this rule.

Partial failure of consideration is available as a defense in some States, although the amount be unliquidated. Wentworth v. Dows, 117 Mass. 14; Davis v. Wait, 12 Ore. 425; Wyckoff v. Runyon, 33 N. J. Law 107. The statute affirms this rule.

See secs. 54-8 as to what is necessary to constitute one a holder in due course.

Sec. 31. **Accommodation party, liability of.**—An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.[1]

1—An accommodation party is liable to a holder for value according to the position he has assumed on the paper, and according to the terms of the contract. If he assumes the position of maker or acceptor he is primarily liable. The accommodation contract stands upon its legal form. Canadian Bank of Commerce v. Coumbe, 47 Mich. 358. An understanding between the accommodation maker of a note and the payee that the latter will take care of it, of which understanding the indorsee had full notice when he took the note, is no defence to an action on the note by the indorsee against the accommodation maker. Thatcher

v. West River Nat. Bank, 19 Mich. 196. Parol proof that a maker of a note was induced to sign it by agreement of the payee that he should not be held liable thereon is inadmissible to vary or contradict the *legal* effect of the instrument. Kulenkamp v. Groff, 71 Mich. 675; Warder & Co. v. Gibbs, 92 Mich. 29; Cristy v. Campau, 107 Mich. 172; Grocers' Bank v. Penfield, 69 N. Y. 502. The fact that an accommodation maker of a note has written his name across the back instead of signing on the face of the note, tends, though not conclusively, to indicate that he did not intend to sign as joint maker but only as surety and is enough to put the original creditor on inquiry. Moynahan v. Hanaford, 42 Mich. 329.

Accommodation paper has no validity until it is negotiated and does not become binding upon the accommodation party until such negotiation, that is, value must have been given by some one before the accommodator can be held. Any accommodation party may withdraw his signature as maker, drawer, acceptor or indorser before the paper has been negotiated. Second Nat. Bank v. Howe, 40 Minn. 390; Patterson v. Bank, 26 Ore. 509, 38 Pac. 818. Where one signs a note for the accommodation of another without the solicitation of the payee or for his benefit, the fact that there was no consideration as to the one so signing does not make him an accommodation maker. Capital Bank v. Des Moines etc., 84 Iowa 561, 51 N. W. 33. Accommodation paper cannot exist without a loan of credit to the accommodated party. Dunn v. Weston, 71 Me. 270. Exchange of paper for the mutual benefit and convenience of the parties constitutes consideration for the paper so exchanged. So a promissory note given by the maker in exchange for a note given to him by the payee is not an accommodation note. Whittier v. Eager, 1 Allen (Mass.) 499. Corporations as a general rule are without the power to become accommodation parties. Beecher v. Dacey, 45 Mich. 92; Steiner v. Steiner Land & Lumber Co., 120 Ala. 128, 26 So. 494; Bacon v. Farmers' Bank, 79 Mo. App. 406; Worthington v. Schuylkill Electric Co., 195 Pa. St. 211, 45 Atl. 927. This section does not apply to corporations nor enlarge their power to become accommodation parties. Oppenheim v. Simon Reigel Cigar Co., 90 N. Y. Supp. 355 (a case under the statute). A partner has no implied authority to bind the firm as an accommodation party and when he does so, any holder with notice of such fact cannot recover against the firm. Heffron v. Hanaford, 40 Mich. 305; Burke v. Wilbur, 42 Mich. 329; National Bank v. Law, 127 Mass. 72; Bank of Fort Madison v. Alden, 129 U. S. 372.

The following cases have been decided under the statute: Willard v. Cook, 21 App. D. C. 237; Black v. Bank of Westminister, 96 Md. 399; Rowe v. Bowman, 183 Mass. 488; Packard v. Windholz,

88 App. Div. 365, 84 N. Y. Supp. 666. Strickland v. Henry, 66 N. Y. App. Div. 23, 73 N. Y. Supp. 12. The facts in this case were that a note was made by defendant for the accommodation of the payee who transferred it before maturity to a third person at a discount of 40%. This in effect made the interest reserved 40 per cent per annum. Held: The note did not represent a legal transaction. It had no legal existence when sold to the plaintiff and, having no legal existence, could not be the subject of sale and purchase. In point of law the sale of accommodation paper is merely a loan of money, the purchaser being the lender, the seller the borrower; and if the sale be at a usurious discount it is invalid. The statute has not changed this rule. In Nat. Citizen's Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422 an accommodation note was discounted by a bank for the indorser with full knowledge that it was accommodation paper. It was not paid at maturity and at the request of the indorser, for whose benefit it was discounted, the time of payment was extended without the knowledge of the maker. Held, the maker was primarily liable and not released.

Article III. Negotiation.

Sec.
32. Negotiation, what constitutes.
33. Indorsement, how made.
34. Indorsement must be of entire instrument.
35. Indorsement, kinds of.
36. Special indorsement; indorsement in blank.
37. Blank indorsement; how changed to special indorsement.
38. When indorsement is restrictive.
39. Restrictive indorsement; effect of; right of indorsee.
40. Qualified indorsement.
41. Conditional indorsement.
42. Indorsement of instrument payable to bearer.
43. Indorsement where payable to two or more persons.
44. Effect of instrument drawn or indorsed to a person as cashier.
45. Indorsement where name of payee is misspelled, etc.
46. Indorsement in representative capacity.
47. Time of indorsement, presumption.
48. Place of indorsement, presumption.
49. Continuation of negotiable character.
50. Striking out indorsement.
51. Transfer without indorsement; effect of.
52. When prior party may negotiate instrument.

Sec. 32. **Negotiation, what constitutes.**—An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to the bearer[1] it is negotiated by delivery; if payable to order[2] it is negotiated by the indorsement of the holder[3] completed by delivery.[4]

1—As to what instruments are payable to bearer see section 11.

2—As to what instruments are payable to order see section 10.

3—Indorsement: See next section.

4—Indorsement is not consummated without delivery in fact, or by what, in legal construction and effect, amounts to delivery. Kinzie v. Farmers' and Mechanics' Bank, 2 Doug. (Mich.) 104; Spencer v. Carstarphen, 15 Col. 445; Daniel's Neg. Inst., 5th ed., sec. 665. In Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999 (a case under the statute) it was held that sections 32-3 state merely how negotiation may be completed, and do not affect section

51, which provides that "where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein." In Day v. Longhurst (1893) 41 W. R. 283 (a case under the corresponding provision of the Bills of Exchange Act) it was held that where bills not payable to bearer were transferred, but not indorsed, to a party as security for a debt and were subsequently indorsed by the transferer, such indorsement constituted the first negotiation under this section.

Nat. Bank v. Pick (N. D. 1904), 99 N. W. 63. In this case this provision of the statute was referred to but was not construed further than that the word "assigns" as used in section 3255 of the Revised Code of 1899 does not include the indorsee of negotiable paper who takes the same before maturity for value, and without notice of defense thereto. The word "assigns" was used in connection with a statute which provided that every contract made by a corporation which had not complied with certain statutory provisions, would be void on behalf of such corporation and its *assigns*.

An executory contract to assign a promissory note on performance of certain conditions does not operate of itself to transfer title. Nat. City Bank v. Torrent, 130 Mich. 259. A parol agreement, although entered into at the time of making negotiable paper, that the payee will not negotiate it, and will renew it, etc., is inadmissible to vary the effect of the paper. Parol evidence is inadmissible to vary the written contract evidenced by the instrument. Hyde v. Tenwinkel, 26 Mich. 93; Cook v. Brown, 62 Mich. 473; Kulenkamp v. Groff, 71 Mich. 675; Hutchinson v. Hutchinson, 102 Mich. 635; Hitchcock v. Frackelton, 116 Mich. 487. Thus, evidence is inadmissible to show that the maker was not to be held liable; Gumz v. Giegling, 108 Mich. 295; that the maker was to be liable only as an indorser, Aultman Taylor Co. v. Gorham, 87 Mich. 233; that the paper was not to be negotiated at all, Heist v. Hart, 73 Pa. St. 286; Knox v. Clifford, 38 Wis. 651; that it was to be negotiated only at a certain bank, Stubbs v. Goodall, 4 Ga. 106; that it would be renewed, United States Nat. Bank v. Geer, 55 Neb. 462, 75 N. W. 1088.

But as between original parties and others taking with notice, a conditional delivery may be shown, Ricketts v. Pendleton, 14 Md. 320; Higgins v. Ridgway, 153 N. Y. 130.

An insane person cannot make a valid assignment of a negotiable instrument during insanity. Evidence that the payee of a negotiable instrument, payable to order, was insane during all the time from the issuance of the paper until the death of the payee is admissible to disprove the validity of the transfer. Hannahs v. Sheldon, 20 Mich. 278.

Sec. 33. **Indorsement; how made.**—The indorsement must be written on the instrument itself or upon a paper attached thereto.[1] The signature of the indorser without additional words, is a sufficient indorsement.[2]

1—"Indorsement is an act whereby a person not being acceptor, or quasi acceptor, surety, or guarantor, writes his name upon the back or face of a duly executed negotiable bill of exchange, promissory note, or cheque, with or without terms of contract, or liability, according to the law merchant, or writes an equivalent contract on a separate paper annexed to the bill or cheque." Bigelow's Bills, Notes and Cheques 83. Indorsement literally signifies a writing on the back. Hartwell v. Hemmenway, 7 Pick. 117; Com. v. Spilman, 124 Mass. 327. The ordinary mode of indorsing a note is by the indorser's writing his name upon the back thereof, but the indorsement may be made upon the face of the note with the same effect as if made upon the back. Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606; Haines v. Dubois, 30 N. J. L. 259; Partridge v. Davis, 20 Vt. 499. The "paper attached thereto" is called "allonge." The indorsement may be on the allonge whenever the interest or convenience of the parties require it. It is not necessary that there should be physical impossibility of writing the indorsement on the instrument itself. Crosby v. Roub, 16 Wis. 645; Folger v. Chase, 18 Pick 63; French v. Turner, 15 Ind. 59. Some of the foreign codes provide that the first indorsement on the allonge must begin on the bill and end on the allonge. This provision is designed to secure identification and to prevent an allonge from being taken from one bill and stuck to another. Chalmers' Bills of Exchange, 5th ed. 107. Full indorsement embraces two contracts; first, transfer of title—an executed contract; second, assumption of personal liability upon performance of conditions precedent—an executory contract. Aniba v. Yeomans, 39 Mich. 171. Departures from the regular form of indorsement—i. e., the mere writing of the indorser's name upon the back of the paper—have been held sufficient to transfer the title, e. g., "I hereby assign the within note to M. & S." Markey v. Corey, 108 Mich. 184; Stevens v. Hannan, 86 Mich. 307; Phelps v. Church, 65 Mich. 232; Green v. Burrows, 47 Mich. 70; Russell v. Klink, 53 Mich. 161; Hall v. Toby, 110 Pa. St. 318; Trust Co. v. Nat. Bank, 101 U. S. 68; Elgin City Banking Co. v. Zelch, 57 Minn. 487; Dunham v. Peterson, 5 N. Dak. 414. But see Aniba v. Yeomans, *supra;* Spencer v. Halpern, 62 Ark. 595, 36 L. R. A. 120. See further as to sufficiency of indorsement War-

der v. Gibbs, 92 Mich. 29; Whitworth v. Pelton, 81 Mich. 98; Marskey v. Turner, 81 Mich. 62. In Thorpe v. Mindeman (Wis. '04) 101 N. W. 417 (a case under the statute) it was held that an indorsement reading "For value received I hereby sell, transfer and assign, the within note and the coupons thereto attached; without recourse," was a good commercial indorsement, and not a mere assignment.

The signature of the indorser is not essential to a valid indorsement. Any substitute for the name, if intended as an indorsement, will meet the requirement of the rule. Thus a payee writes upon the instrument "1, 2, 8" as a substitute for his name, and transfers the instrument; The act is an indorsement. Brown v. Butchers Bank, 6 Hill 443. The maker of a note payable to his own order must indorse it to pass title, but by indorsing his name upon the back of the note and delivering it in that form to the holder, the maker does not become an indorser in the commercial acceptation of that term. He is, nevertheless, the maker of the note, his signature on its back being an essential part of its execution, and his liability continues to be that of a maker only. Ewan v. Brooks-Waterfield, 55 Ohio St. 596.

As to indorsement of non-negotiable notes, see Steere v. Trebilcock, 108 Mich. 464; Merchants' Nat. Bank v. Gregg, 107 Mich. 146.

2—The legal title to a bill or note may be transferred by blank indorsement and the holder has absolute control of and may recover on the instrument by proving the indorsement. Whitworth v. Pelton, 81 Mich. 98. An indorsement in blank by the payee of the instrument is presumed to have been intended as a transfer thereof, but the presumption may be rebutted by parol proof that it was intended to show a receipt of the money from the agent of the maker. Davis v. Morgan, 64 N. C. 570; U. S. Nat. Bank v. Geer, 55 Neb. 462, 75 N. W. 1088, 70 Am. St. R. 390.

Sec. 34. **Indorsement must be of entire instrument.**—The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument;[1] but where the instrument has been paid in part it may be indorsed as to the residue.

1—Indorsement of less than the entire title to an instrument does not operate as a negotiation thereof; e. g., an order by the payee of a note to pay a sum out of it less than the entire sum is not an indorsement thereof. Lindsay v. Price, 33 Tex. 282. The holder of a bill for 100 *l* indorses it "pay to D, or order 30 *l*." This is invalid unless C also acknowledges the receipt of 70 *l*. Hawkins v. Cardy, 1 Ld. Raymond 360. Where two indorsements for parts of the amount of a note were made, both together purporting to transfer the whole, it was held that two vicious indorsements could never constitute a good one. Hughes v. Kiddell, 2 Bay (S. C.) 324.

Sec. 35. **Indorsement, kinds of.**—An indorsement may be either special or in blank; and it may also be either restrictive or qualified or conditional.[1]

1—(Special indorsement, or indorsement in full:)
Pay to Walter Brooks, or order.
Oscar Adams.

(Indorsement in blank.)
Walter Brooks.

(Qualified indorsement.)
Without recourse.
Charles Clark.

(Conditional indorsement.)
Pay to Seth Eaton, or order, on the completion of the Atlas Building.
Aaron Davis.

(Restrictive indorsement.)
Pay Henry Fox, or order, for collection for my account.
Seth Eaton.

Sec. 36. **Special indorsement; indorsement in blank.**—A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer and may be negotiated by delivery.[1]

1—See: sections 11 and 35. Bills of Exchange Act, section 34. Where an instrument is once indorsed in blank, though afterwards indorsed specially, it will still be payable to bearer, though

as against the special indorser himself, title must be made through his indorsement. Habersham v. Lehman, 63 Ga. 383; Johnson v. Mitchell, 50 Tex. 212.

Sec. 37. **Blank indorsement; how changed to special indorsement.**—The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.[1]

1—The reason of the rule embodied in this provision is stated by Mathews, J. in Martin v. Cole, 104 U. S. 37. "The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract and is not in any sense a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less on that account perfectly understood. All its terms are certain, fixed, and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of an indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had writen out the customary obligation of his contract in full." Vincent v. Horlock, 1 Camp. 442; State Nat. Bank v. Haylen, 14 Neb. 482; Beckwith v. Angell, 6 Conn. 317.

A qualified blank indorsement may be changed to a special indorsement. Lyon v. Ewings, 17 Wis. 63.

In Scott v. Calkin, 139 Mass. 529, it was held that an indorsee might write over a blank indorsement, "I guarantee payment of the within note." But in Belden v. Hann, 61 Iowa 42, the contrary was held upon the ground that the effect would be to deprive the indorser of his right to notice in case of non-payment. In the latter case the writing put in above the blank indorsement was, "Guarantee payment at maturity to bearer."

A holder under a blank indorsement cannot fill it up so as to make the note payable in part to one person and in part to another. Erwin v. Lynn, 16 Ohio St. 547.

Sec. 38. **When indorsement is restrictive.**—An indorsement is restrictive,[1] which either:

First, Prohibits the further negotiation of the instrument;[2] or

Second, Constitutes the indorsee the agent of the indorser;[3] or

Third, Vests the title in the indorsee in trust for or the use of some other person.[4] But the mere absence of words implying power to negotiate does not make an indorsement restrictive.[5]

1—A restrictive indorsement limits the first element of the indorser's contract,—transfer of title. See note 1, sec. 33.

2—Thus: "Pay the contents to J. P. only." Power v. Finnie, 4 Call. (Va.) 411.

3—Thus: "For deposit my account", "Pay H. A. Bedfield, cashier, or order, for collection." Locke v. Leonard Silk Co., 37 Mich. 479. "The indorsement for collection does not transfer the title to the note, nor its proceeds to the indorsee, but makes him merely the agent of the indorser to take the necessary steps to secure payment of the instrument for the owner. Locke v. Leonard Silk Co., *supra*; Reading v. Beardsley, 41 Mich. 123; Sutherland v. First Nat. Bank, 31 Mich. 230; Fuller v. Bennett, 55 Mich. 357; Commercial Nat. Bank v. Armstrong, 39 Fed. 684; Nat. B. & D. Bank v. Hubbell, 117 N. Y. 384; Northwestern Nat. Bank v. Kansas City Bank, 107 Mo. 402; Freeman's Nat. Bank v. National Tube Works, 151 Mass. 413.

Liability of banks as indorsees for collection:

On this subject the holdings are at variance, but for the purpose of illustration they may be grouped as follows:

First, the bank with whom paper has been deposited for collection is absolutely liable for any negligence or default of the notary, agent, or correspondent, as well as of its own immediate servants. Simpson v. Waldby, 63 Mich. 439; Finch v. Karste, 97 Mich. 26. This is the rule of the Supreme Court of the United States; and of New York, as established in the leading case of Allen v. Merchants Bank, 22 Wend. 215, and of other states.

Second, the bank is liable only for the exercise of due care in selecting its correspondent bank and is exonerated from all liability beyond making such selection.

Third, the bank is absolutely liable for collections in cases where the primary party is resident at the place of the bank or where the bank undertakes the collection of the paper by its own officers, but where the instrument is to be collected at a point distant, the bank is liable according to the second rule above given. Daniel's Neg. Inst., 5th ed., sec. 341, and cases cited.

It is negligence for a bank to

which paper has been sent for collection, to send it directly to the drawer or maker, and such negligence makes the sender liable for any loss resulting. Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687; First Nat. Bank v. Citizens Bank, 123 Mich. 336.

4—Thus: "Pay C. J. or order, on account of B. G. & S." Blaine v. Bourne, 11 R. I. 119; Hook v. Pratt, 78 N. Y. 371; Sigourney v. Lloyd, 8 B. & C. 622. Such indorsement passes title, but gives notice that the indorsee can collect only, not pass the instrument for his own benefit.

5—Thus: "Pay the within to A. Thatcher," omitting the words, "or order," is not a restrictive indorsement. Leavitt v. Putnam, 3 N. Y. 494. An indorsement is not rendered restrictive by the mention of the consideration for which it is made. Thus, "pay contents to A. B., being part of payment of goods sold him by me." The nature of such an indorsement is not to restrict the payment to a particular person. It is not equivalent to "pay contents to A. B. only." Potts v. Reed, 6 Esp. 57.

Sec. 39. **Restrictive indorsement; effect of; rights of indorsee.**—A restrictive indorsement confers upon the indorsee the right:

First, To receive payment of the instrument;

Second, To bring any action thereon that the indorser could bring;[1]

Third, To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

1—This affirms the rule in Michigan. An agent to whom negotiable paper is indorsed for collection may sue thereon in his own name. Wintermute v. Torrent, 83 Mich. 555; Brigham v. Gurney, 1 Mich. 349; Boyd v. Corbitt, 37 Mich. 52; Moore v. Hall, 48 Mich. 143; Coy v. Stiner, 53 Mich. 42; Watkins v. Plummer, 93 Mich. 215; Benjamin v. Early, 123 Mich. 93. To same effect: Cummings v. Kohn, 12 Mo. App. 585; Wilson v. Tolson, 79 Ga. 137; Regina Flour Mill Co. v. Holmes, 156 Mass. 11; Ward v. Tyler, 52 Pa. St. 393; Roberts v. Parrish, 17 Ore. 583; Smith v. Bayer, (Ore. 1905) 79 Pac. 497 (a case under the statute). In this case it was held that the indorsee had the right to sue in his own

name but the paper was open to all defenses which could have been made if it had remained in the hands of the indorser, and action had been brought by him.

Where a check is indorsed in blank, and deposited with a bank for credit and the bank forwards it for collection to another bank, such latter bank, as against the depositor, can regard the paper as that of the first bank and refuse to surrender it to the depositor. Cody v. City Nat. Bank, 55 Mich. 379.

Sec. 40. **Qualified indorsement.**—A qualified indorsement[1] constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import.[2] Such an instrument [indorsement] does not impair the negotiable character of the instrument.[3]

1—A qualified indorsement limits the second element of the indorser's contract, — personal liability. See note 1, sec. 33.

2—"Pay to M. R. at his own risk," or "indorser not holden," are words of similar import. Rice v. Stearns, 3 Mass. 225; Ticonic Bank v. Smiley, 27 Me. 225; Hankerson v. Emery, 37 Me. 16.

The words used in qualifying an indorsement must be such as clearly express an intention on the part of the indorser to disclaim liability. Fassin v. Hubbard, 55 N. Y. 470. Where the payee writes above his signature the following: "I hereby assign the within note to M & S", he is not relieved from liability as an indorser. Markey v. Corey, 108 Mich. 184.

Where the words "without recourse" follow the name of one and precede the name of another of two indorsers, thus:

Horton
Without recourse
Gage,

parol evidence is admissible to show to which indorser the limitation applies. Corbett v. Fettzer, 47 Neb. 269, and this although a subsequent indorsee took the paper, believing that the limitation applied to the one when it in fact applied to the other. Fitchburg Bank v. Greenwood, 2 Allen 434.

When one has indorsed unqualifiedly, in full, or blank, evidence is inadmissible to show an agreement that the indorsement should have been without recourse. Martin v. Cole, 104 U. S. 30.

"Where the law furnishes such apt, brief, and well known expressions, for making the indorsement accomplish exactly what the parties may desire, wise policy demands that each form of indorsement should conclusively

carry with it the liability which it implies." Dolittle v. Ferry, 20 Kan. 230, 27 Am. Rep. 166.

3—An instrument retains its negotiable character after qualified indorsement. Stevenson v. O'Neal, 71 Ill. 314; Kelley v. Whitney, 45 Wis. 110.

A qualified indorsement is not out of due course of trade, and is not notice to the transferee to put him on inquiry as to any defects in the instrument. Borden v. Clark, 26 Mich. 410; Bisbing v. Graham, 14 Pa. St. 4; Thorpe v. Mindeman (Wis.), 101 N. W. 417 (a case under the statute).

Sec. 41. **Conditional indorsement.**—Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.[1]

1—See Bills of Exchange Act, sec. 33.

A conditional indorsement involves some fact or event upon the occurrence of which the validity of the indorsement is ultimately to depend and which is either to give effect to it or avoid it. The condition may be precedent or subsequent. Story on Prom. Notes, sec. 149. Such indorsement does not affect the negotiability of the instrument, its only effect is to give notice of the consideration to subsequent holders. Tappan v. Ely, 15 Wend. 362.

The distinction between a condition in the instrument and a condition in the indorsement must be observed. The former makes the instrument bad as negotiable paper, the latter does not alter the negotiable character of the instrument.

In his note on the corresponding provision of the Bills of Exchange Act, sec. 33, p. 110, Judge Chalmers says: "It alters the law. It was formerly held that if a bill was indorsed conditionally, the acceptor paid it at his peril if the condition was not fulfilled."

If the condition upon which the indorsement is made be not fulfilled, the title of the indorsee and every subsequent holder becomes void and the right to the instrument reverts to the original indorser. Robertson v. Kensington, 4 Taunt. 30.

Sec. 42. **Indorsement of instrument payable to bearer.**—Where an instrument, payable to bearer, is indorsed

specially it may nevertheless be further negotiated by delivery;[1] but the person indorsing specially is liable as endorser to only such holders as make title through his indorsement.[2]

1—A note on its face payable to bearer or one indorsed in blank by the payee and afterwards transferred by special indorsement is still transferrable by delivery. A party to whom it is so transferred may make title by filling up the blank indorsement to himself and striking out the subsequent ones. Watervliet Bank v. Hoyt, 1 Den. 608; Mitchell v. Fuller, 15 Pa. St. 268.

2—Bates v. Butler, 46 Me. 387.

Sec. 43. **Indorsement where payable to two or more persons.**—Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing his authority to indorse for the others.[1]

1—When the joint payees are partners the indorsement of one will transfer the instrument; when they are not partners the indorsement of all is required to transfer the instrument. Ryhiner v. Feickert, 92 Ill. 305; Wood v. Wood, 16 N. J. L. 428.

Sec. 44. **Effect of instrument drawn or indorsed to a person as cashier.**—Where an instrument is drawn or indorsed to a person as "cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer, and may be negotiated by either the indorsement of the bank or corporation or the indorsement of the officer.[1]

1—The rule of the law merchant is that an instrument payable to or indorsed to a cashier of a bank is payable to the bank of which he is cashier, not to him in his individual capacity. The bank may maintain suit upon such instrument without the cashier's indorsement. Bank v. Troy City Bank, 1 Doug. 457; Garton v. Union City Nat. Bank, 34 Mich. 278; First Nat. Bank v. John-

son, 133 Mich. 700; Bank v. Bank, 29 N. Y. 619; Fleckner v. Bank U. S., 8 Wheat. 338; Folger v. Chase, 18 Pick. 63.

This section settles whatever conflict has heretofore existed as to whether paper payable to or indorsed to the fiscal officer of corporations other than banks was payable to the corporation or to such fiscal officer individually.

Sec. 45. **Indorsement where name of payee is misspelled, etc.**—Where the name of the payee or indorsee is wrongfully designed or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.[1]

1—This is an affirmation of existing law.

The usual and proper way is for the holder to indorse in the wrongly designated or misspelled name and then to add his proper signature. Chalmers Bills of Exchange, 108. A bill was indorsed to J. Smythe, whose true name was T. Smith. Indorsing the bill as J. Smythe was a valid negotiation. Willis v. Barrett, 2 Stark. 29.

One who, while carrying on business on his own account, in the name of a company, incorporated but not organized, receives, in payment of a debt contracted with him in such business, a promissory note payable to the order of the corporation, may, by indorsing the note in his own name, make a valid transfer thereof. Bryant v. Eastman, 7 Cush. 111.

One will be bound by paper made by him in the name he adopts in his business. Salomon v. Hopkins, 61 Conn. 47. An indorsement of a note payable to John P. Reed by and in the name of Joseph P. Reed, he being the person to whom the note was intended to be made payable, was held insufficient to pass title, there being in the town a person whose name was John P. Reed. Bolles v. Stearns, 11 Cush. 320.

Sec. 46. **Indorsement in representative capacity.**—Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.[1]

1—To negative personal liability the indorser in a representative capacity should indorse in the same manner as the maker or acceptor would sign to effect the like purpose. Schmettler v. Simon, 101 N. Y. 554; Towne v. Rice, 122 Mass. 67; Grafton Nat. Bank v. Wing, 172 Mass. 513.

Sec. 47. **Time of indorsement, presumption.**—Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.[1]

1—The instrument is presumed to have been negotiated before maturity unless the contrary appear on the instrument itself. Higgins v. Watson, 1 Mich. 428. Manistee Nat. Bank v. Seymour, 64 Mich. 59; City Bank v. Dill, 84 Mich. 549; Lewis v. Parker, 4 A. & E. 838; Mason v. Noonan, 7 Wis. 609; Smith v. Nevlin, 89 Ill. 193. But contra: Ruddell v. Landers, 25 Ark. 238; Clendennin v. Southerland, 31 Ark. 20.

"It seems that circumstances of strong suspicion short of direct evidence, may rebut the *prima facie* presumption and make it a question for the jury whether the bill was negotiated before or after maturity." Chalmers' Bills of Exchange, 5th ed., 119.

Where defendant alleges that an indorsement was made after maturity, the burden is on him to show the fact. Ranger v. Carey, 1 Met. (Mass.) 369. Indorsement can take effect only from the time it is made and must be governed by the laws then in force. It cannot be made to relate back to the date of the instrument. Daniel's Neg. Inst., 5th ed., sec. 728; Brown v. Hull, 33 Gratt. 23.

Sec. 48. **Place of indorsement, presumption.**—Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.[1]

1—The contract of indorsement is made where delivery is effected, not where the signature is attached. Chapman v. Cottrell, 34 L. J. Ex. 186; Maxwell v. Vansant, 46 Ill. 58.

The law of the place where the indorsement is made governs as to notice to indorsers. Snow v. Perkins, 2 Mich. 238; Glidden v. Chamberlin, 167 Mass. 486; Freese v. Brownell, 35 N. J. L. 285.

Sec. 49. **Continuation of negotiable character.**—An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.[1]

1—Paper negotiable before maturity continues to be negotiable after maturity. "A bill of exchange is negotiable *ad infinitum* until it has been paid by, or discharged, on behalf of the acceptor." Callow v. Lawrence, 3 M. & S. 95; Charles v. Marsden, 1 Taunt. 224; Nat. Bank v. Texas, 20 Wall. 72; Leavitt v. Putnam, 3 N. Y. 494; Britton v. Bishop, 11 Vt. 70; Powers v. Nelson, 19 Mo. 190; McSherry v. Brooks, 46 Md. 103.

Accommodation paper is within this rule. It is negotiable after maturity. Seyfert v. Edison, 45 N. J. L. 393. There is, however, in respect to time of payment, a difference between indorsements made before maturity and indorsements made after maturity. In indorsements before maturity, time of payment is fixed at a future day by the express agreement of the parties; in indorsements after maturity, time of payment is determined by law to be within a reasonable time, on demand. Leavitt v. Putnam, *supra*. The distinction between the rights of the indorsee before maturity and of the indorsee after maturity, is sharp. See sec. 54.

"Where an overdue bill is negotiated it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had." In these words the Bills of Exchange Act affirms the general rule of the law merchant. Bills of Exchange Act sec. 36 (2).

Sec. 50. **Striking out indorsement.**—The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.[1]

1—A party suing as indorsee may strike out all intervening indorsements and aver that the first indorser in blank indorsed immediately to himself. Rand v. Dovey, 83 Pa. St. 280; Mayer v. Jadis, 1 Moody & R. 247; Merz v. Kaiser, 20 La. Ann. 377; Morris v. Cude, 57 Tex. 337; Middleton v. Griffith, 57 N. J. L. 442, 31 Atl. 405. The intervening indorsements need not be stricken out before the trial, but may be after the plaintiff has finished his case. Mayer v. Jadis, 1 Moody & R. 247. Where the plaintiff's own indorsement appears on the paper, he still has the right to sue. Atkinson v. Weidner, 79 Mich. 575; Kerrick v. Stevens, 58 Mich. 297; Collins v. Panhandle Nat. Bank, 75 Tex. 255; Middleton v. Griffith, 57 N. J. L. 442; Royce v. Nye, 52 Vt. 375. Where the plaintiff has indorsed the note to another for collection, he may sue

on the instrument, and it is immaterial whether he strikes out his indorsement or not. Reading v. Beardsley, 41 Mich. 123; Locke v. Leonard Silk Co., 37 Mich. 479; Best v. Nakomis Nat. Bank, 76 Ill. 608. See also New Haven Manuf'g Co. v. N. H. Pulp & Board Co., 76 Conn. 126 (a case under the statute).

When there appears upon the instrument an indorsement by the plaintiff and indorsements subsequent to his, there has been conflict of authority as to whether he can maintain suit without showing a re-transfer to himself. The better view seems to be that he can. Dugan v. U. S., Wheat. 172; Bank of Kansas City v. Mills, 24 Kan. 604; Wickersham v. Jarvis, 2 Mo. App. 279. The holder has no right to strike out the name of a person mentioned in a special indorsement and insert his own name in place thereof. Porter v. Cushman, 19 Ill. 572. Nor can he, by striking out the name, convert such special indorsement into a blank indorsement. Bank of U. S. v. Moore, Fed. Cas. No. 930.

Sec. 51. **Transfer without indorsement, effect of.**—Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer.[1] But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.[2]

1—Where the instrument is transferred without indorsement, the transferee cannot sue and recover in his own name, and he takes the paper subject to all equities to which it was subject in the hands of his transferrer. Robinson v. Wilkinson, 38 Mich. 299; Spinning v. Sullivan, 48 Mich. 5; Minor v. Bewick, 55 Mich. 491; Mattison v. Morris, 40 Mich. 52; Simpson v. Hall, 47 Conn. 417; Osgood v. Artt, 17 Fed. 575; Goshen Nat. Bank v. Bingham, 118 N. Y. 349, 23 N. E. 180. In the last case the failure to indorse was by mistake but it was held that an intention to indorse was not sufficient to cut off equities.

In Meuer v. Phoenix Nat. Bank, 94 App. Div. (N. Y.) 331, 88 N. Y. Supp. 83 (a case under the statute), it was held that where a bank at the request of the holder certified a check not indorsed by the payee, the bank not knowing whom it was being certified for,

the bank was liable on such certification as the holder had obtained title to the check by its delivery to him without indorsement though such delivery destroyed its negotiability and rendered the transferee's title subject to any equities existing between drawer and payee. See also Lawless v. State, 114 Wis. 189 (a case under the statute).

2—Defenses which have come to the notice of the transferee before he secures the indorsement of the transferrer, are not cut off by securing such indorsement. Osgood v. Artt, *supra*; Whistler v. Forster, 32 L. J. C. P. 161; Goshen Nat. Bank v. Bingham, *supra*. But in Beard v. Dedolph, 29 Wis. 136, it was held that though indorsement, as well as delivery before maturity, was necessary to cut off equities existing between maker and payee before delivery, a *bona fide* holder of such note by delivery only is protected against everything subsequent to such delivery, especially if the note be afterwards indorsed by him; such indorsement being held to relate back to the time of delivery, as to an equity *outside of the note itself*. But compare with this case: Sackett v. Montgomery, 57 Neb. 424, 77 N. W. 1083; State v. Stebbins, 132 Mo. 332, 33 S. W. 522; Kampmann v. McCormick, 24 Tex. Civ. App. 462, 59 S. W. 832. See also Day v. Longhurst (1893), 41 W. R. 283 (a case under the corresponding provision of the Bills of Exchange Act).

Sec. 52. **When prior party may negotiate instrument.**—Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.[1]

1—See Bills of Exchange Act, sec. 37.

This section should be construed in connection with section 49. Attenborough v. Mackenzie, 25 L. J. Ex. 244; Curtis v. Sprague, 51 Cal. 239; Oliphant v. Vannest, 58 N. J. L. 162.

One of several joint makers of a promissory note to whom it is assigned by the payee, cannot by its indorsement before maturity to a third party convey any right, except to bring suit for contribution, the appearance of his name as one of the makers being sufficient notice to his indorsee. Stevens v. Hannan, 86 Mich. 305, 88 Mich. 13.

Article IV. Rights of the Holder.

Sec.
53. Right of holder to sue; payment.
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Sec. 53. **Right of holder to sue; payment.**—The holder of a negotiable instrument may sue thereon in his own name[1] and payment to him in due course discharges the instrument.[2]

1—The holder of negotiable paper may sue thereon in his own name, even though the paper be restrictively indorsed to him. See sec. 39 and note. The possession of a negotiable instrument payable to bearer, or indorsed in blank, is *prima facie* evidence of ownership. Wilson Sewing Machine Co. v. Spears, 50 Mich. 534; Barnes v. Peet, 77 Mich. 391; Battersbee v. Calkins, 128 Mich. 569.

A bank holding a note as collateral security may sue on it in its own name. Lobdell v. Mechanics and Mnfrs. Bank, 33 Mich. 408; Hilton v. Waring, 7 Wis. 418; Curtis v. Mohr, 18 Wis. 645. Where the plaintiff has acquired the equitable title to the promissory note he sues upon prior to bringing suit, the indorsement of the same over to him by his vendor is a mere matter of form and may be made at the time of the trial. Brown v. McHugh, 35 Mich. 50. The note sued on in this action was secured by mortgage, and the plaintiff had taken an assignment of the debt and securities. The note was not formally indorsed over by the payee until the trial came on.

Non-ownership of the note at the time suit is brought on it is a complete defense. Hannahs v. Sheldon, 20 Mich. 278; Hovey v. Sebring, 24 Mich. 232; Reynolds v. Kent, 38 Mich. 246; Coon v. Dennis, 111 Mich. 450; Hogan v. Dreifus, 121 Mich. 453. In this case the court said: "It is settled in this state that the possession by the plaintiff of a promissory note sued on and its production by him upon the trial is presumptive evidence of his title or right to sue upon it, and the

plaintiff need not be the real or beneficial owner to entitle him to recover, but the maker of the note has a right to rebut such presumption and show that the plaintiff has no title, or that he did not acquire title until after the commencement of suit and thus defeat recovery thereon in such action."

It seems that such exceptions to the general rule as exist, exist by reason of the provision of the code requiring suit to be brought in the name of the real party in interest. By statute in some of the states action will lie upon a negotiable instrument by the equitable owner in his own name and the possession of the note is itself evidence of such ownership. Hudson etc. v. Wier, 29 Ala. 294; Garner v. Cook, 30 Ind. 331; Harriman v. Hill, 14 Me. 127; Guest v. Rhine, 16 Tex. 549. An indorsee suing on a note must prove his title thereto. Spicer v. Smith, 23 Mich. 96. The authority by which the indorsement was made must be proved as well as the fact of indorsement. Neither the statute allowing the note to be given in evidence under the money counts, nor the rule, (circuit court rule 8, former rule 79) dispensing with proof of execution when not denied under oath relieves the plaintiff from proving the indorsement. Redmond v. Stansbury, 24 Mich. 445; Hinkley v. Weatherwax, 35 Mich. 510; Hamilton v. Powers, 80 Mich. 313; St. Johns Table Co. v. Brown, 126 Mich. 592; Newton v. Principaal, 82 Mich. 271. In this case it was held that where an indorsee claims title through an indorsement made by an agent in the firm name, the burden is upon him to prove the authority of the agent.

Proof of indorsement is not necessary in a case where it appears that plaintiffs were successors to the firm to which the note was made payable. Gray v. Willcox, 56 Mich. 58. The plaintiffs were Francis Gray, William C. Gray, and Homer C. Nellis, a firm doing business under the firm name of F. Gray & Co., and successors to F. Gray, O'Farrell & Co., the payees named in the note. The note did not bear the indorsement of F. Gray, O'Farrell & Co. See also: Bellis v. Lyons, 97 Mich. 398; Hall v. Wortman, 123 Mich. 304.

Where a note is payable to order, and the payee without having indorsed it, loses it, he can recover in a suit against the maker, and at common law the suit could not be defeated by the fact that the note was in possession of a third person. Hoil v. Rathbone, 98 Mich. 323; McKinney v. Hamilton, 53 Mich. 497. In New Haven Mfg. Co. v. N. H. Pulp and Board Co., 76 Conn. 126 (a case under this section of the statute) it was held that mere possession of a note indorsed in blank was sufficient evidence of ownership to support suit.

2—A payee in a note who has discounted it and so received payment on it is estopped from af-

terwards disputing such payment, whatever the case might be with an indorser who had come into possession of it. Haughton v. Maurer, 55 Mich. 323.

In order to constitute payment by the maker before maturity a valid defense against a subsequent indorsee, the maker must show that the indorsee had notice of the payment. Yenney v. Central City Bank, 44 Neb. 402.

Payment of a certified check by a bank in due course to a *bona fide* holder entitled to payment, discharges the check, and the payee who has received payment but has repaid the money to the bank when threatened with suit cannot maintain an action against the bank on its certification. Poess v. Twelfth Ward Bank, 86 N. Y. Supp. 857 (a case under the statute).

Sec. 54. **Holder in due course; what constitutes.**—A holder in due course[1] is a holder who has taken the instrument under the following conditions:

First, That it is complete and regular upon its face;[2]

Second, That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;[3]

Third, That he took it in good faith[4] and for value;[5]

Fourth, That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.[6]

1—Holder in due course is a term employed in the Bills of Exchange Act, section 29 (1), and adopted here as a substitute for the more involved term "*bona fide* holder for value without notice before due." In substance this section is declaratory of the common law.

2—Paper is not complete and regular upon its face when it itself furnishes evidence that it has been taken from the possession of its maker before intention to part with it had been fully formed, and that the maker still designed to add some provision or formality to give the paper validity and effect. Thus, it appeared on the face of the paper of a corporation that it was designed that the president of the corporation should sign the same. A blank space was left for his signature and it was indicated by the word "president" being printed thereon. Davis Sewing Machine Co. v. Best, 105 N. Y. 59.

As to the right to fill up blanks in incomplete instruments, see section 59 and note.

The effect of an irregularity appearing on the face of the paper cannot be avoided by subsequent correction. Losee v. Bissel, 76 Pa. St. 459.

The transfer of a post dated note on the day of its date does not furnish cause for suspicion or put the indorsee on inquiry or subject him to equities existing between the parties. Brewster v. McCardel, 8 Wend. 478.

As to post dated checks see Mayer v. Mode, 14 Hun 155.

3—Although a note does not lose its negotiable character after maturity, if it be transferred after maturity it is subject to all equities in the hands of any holder because the face of the instrument itself gives the holder notice that the instrument has been dishonored. McKenna v. Kirkwood, 50 Mich. 544. The motives of a purchaser, good or bad, of a past due note are unimportant. He gets no better title than his vendor had. Church v. Clapp, 47 Mich. 257; Simons v. Morris, 53 Mich. 155; City Bank v. Dill, 84 Mich. 549.

A person who acquires paper after maturity from one who had become a holder in due course before maturity is protected because of the good title of his transferrer. Barker v. Lichtenberger, 41 Neb. 751, 60 N. W. 79.

A note transferred on the day it matures is transferred before maturity. Cont'l Nat. Bank v. Townsend, 87 N. Y. 8. A note transferred on the last day of grace is transferred before maturity. Crosby v. Grant, 36 N. H. 273. *Contra*: Pine v. Smith, 11 Gray 38. Conversely, suit brought on a note on the last day of grace, is prematurely brought, as the party has all that day in which to make payment. Wiesinger v. First Nat. Bank, 106 Mich. 291.

A note payable in instalments is overdue in its entirety when the first instalment is overdue. It becomes subject to equities as soon as any instalment is overdue and unpaid. Hart v. Stickney, 41 Wis. 630; Vinton v. King, 4 Allen 562. The transferee of a note on which interest is overdue does not take the note subject to equities. A note matures only, when by its terms the principal becomes due. Patterson v. Wright, 64 Wis. 289; Kelley v. Whitney, 45 Wis. 110.

4—Lack of good faith alone will prevent one from being a holder in due course. Thus, where one purchased a promissory note for $300, the maker whereof was in fair credit and able at the time to respond, paying therefor $5, it was held that the element of good faith necessary to a holder in due course was entirely lacking. DeWitt v. Perkins, 22 Wis. 451. The words "good faith" refer only to the case of the indorsee. Helmer v. Krolick, 36 Mich. 373. In this case it was held that the motives and interests of the seller of the paper

are unimportant in determining the rights of the buyer. Haugan v. Sunwall, 60 Minn. 367, 62 N. W. 398; Barnum v. Phenix, 60 Mich. 388. In this case it was said: "It has always been the law of this state that a person obtaining negotiable paper for a valuable consideration and before maturity, is protected in its acquisition, unless obtained in bad faith."

5—One who purchases, at less than its face value, a note of a person employed by the original parties to negotiate it, is not on that account any the less a holder for value. Vinton v. Peck, 14 Mich. 287; Henriques v. Savings Bank, 84 Mich. 168.

A bank which discounts a note for a customer, crediting the proceeds thereof to his account, is not a *bona fide* purchaser for value, unless such credit was drawn upon before the maturity of the note and before notice of facts invalidating it in the hands of the payee. Drovers' Nat. Bank v. Blue, 110 Mich. 31; First Nat. Bank v. Wills Creek Coal Co. id. 447; Fredonia Nat. Bank v. Tommei, 131 Mich. 674; Garrison v. Union Trust Co. (Mich.) 102 N. W. 978; Albany Co. Bank v. People's Ice Co., 92 N. Y. App. Div. 47, 615; 86 N. Y. Supp. 773, 1128 (a case under the statute). In this case the facts were similar to those in Drover's Nat. Bank v. Blue, *supra*. It was held that the bank was not a holder in due course. To same effect: Citizens State Bank v. Cowles, 180 N. Y. 346 (a case under the statute).

6—As to what constitutes notice of defect, see section 58.

The following cases illustrate the various circumstances required to constitute a holder in due course: Gibson v. Miller, 29 Mich. 355; Hull v. Swarthout, 29 Mich. 249; Tilden v. Barnard, 43 Mich. 376; Barnum v. Phenix, 60 Mich. 388; Davis v. Seeley, 71 Mich. 209; Miller v. Ottaway, 81 Mich. 196; Williams v. Keyes, 90 Mich. 290; First Nat. Bank v. Shue, 119 Mich. 560; Stevens v. McLachlan, 120 Mich. 285; Texarkana Nat. Bank v. Stillwell, 121 Mich. 154; Glines v. State Savings Bank, 132 Mich. 638. See the following cases under the statute: Ketcham v. Govin, 71 N. Y. Supp. 991, 35 Misc. 375; Benedict v. Kress, 89 N. Y. Supp. 607, 97 App. Div. 65; Greeser v. Sugarman, 76 N. Y. Supp. 922, 37 Misc. 799; Karsch v. Pottier etc. Co., 81 N. Y. Supp. 782, 82 App. Div. 230; Packard v. Windholz, 84 N. Y. Supp. 666, 88 App. Div. 365; M. Groh's Sons Co. v. Schneider, 68 N. Y. Supp. 862, 34 Misc. 195; German American Bank v. Cunningham, 89 N. Y. Supp. 836, 97 App. Div. 244; Black v. Bank of Westminster, 96 Md. 399; White v. Dodge (Mass. 1905) 73 N. E. 549; Nat. Bank v. Pick (N. D. 1904) 99 N. W. 63; Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724; Rowe v. Bowman, 183 Mass. 488; Mehlinger v. Harriman, 185 Mass. 245; Mass. Nat. Bank v. Snow (Mass. 1905) 72 N. E. 959; McNamara v. Jose, 28

Wash. 461; Keegan v. Rock (Iowa 1905) 102 N. W. 805.

Payee as holder in due course. Boston Steel and Iron Co. v. Steuer, 183 Mass. 140 (a case under the statute). The facts involved were these: A check made payable to the plaintiff was handed by the drawer to her husband to be delivered by him to the payee in payment of a debt to become due from the drawer to the payee. The husband fraudulently turned the check over to the payee in payment of a debt due from him. The check was accepted by the payee in good faith in payment of the husband's debt. Held, that the payee was a holder in due course. The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a *bona fide* purchaser of it at common law with all the rights incident to a purchaser thereof for value, without notice. He is likewise a holder in due course within this section of the statute. See Herdman v. Wheeler [1902] 1 K. B. 361 (a case under the Bills of Exchange Act). The payees of a note given to a certain person as their agent, and by him transmitted to them, cannot claim to hold it as merely *bona fide* purchasers. Rickle v. Dow, 39 Mich. 91; Johnston Harvester Co. v. Miller, 72 Mich. 265.

Sec. 55. **Holder in due course; when person not deemed.**—Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.[1]

1—As to paper payable on demand see section 9. Paper payable on demand reaches its maturity within a reasonable time after its issue. After the lapse of such time it is deemed overdue. Losee v. Duncan, 7 Johns. 70; LaDue v. First Nat. Bank, 31 Minn. 33, 16 N. W. 426; see section 73 and notes. There is no certain rule by which it can be determined what constitutes a reasonable time as the term is here used. See section 2. The cases furnish illustrations rather than rules and are severally determined on the special facts and circumstances involved. Carll v. Brown, 2 Mich. 401. It will be found that time ranging from one week to several months is considered as a reasonable time according to circumstances.

Transfer made within a reasonable time after date: Mitchell v. Catchings, 23 Fed. 710; Thurston v. M'Kown, 6 Mass. 428; Wethey v. Andrews, 3 Hill 582; Pindar v. Barlow, 31 Vt. 529.

Transfer not made within a reasonable time after date: Paine v. Central Vermont R. Co., 14 Fed.

269; Nevins v. Townsend, 6 Conn. 5; Hemmenway v. Stone, 7 Mass. 58; Herrick v. Woolverton, 41 N. Y. 581; LaDue v. First Nat. Bank, *supra*. In this case it was said: "In view of the well known fact that Bills of Exchange are not always transmitted immediately for payment, but first pass through the hands of several intermediate holders in the ordinary course of business, and in other cases are purchased by travelers to be carried by them instead of currency or coin, to be negotiated as occasion may require, we are not disposed to lay down any narrow rule on this subject."

Sec. 56. **Notice before full amount paid.**—Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.[1]

1—Dresser v. Mo. etc. Co., 93 U. S. 92. Action on three promissory notes for the aggregate amount of ten thousand dollars. William Irwin was the payee. Before maturity the notes were transferred to plaintiff for a valuable consideration, a part of which, $500, the plaintiff paid. Before making further payment he was notified that there was fraud in the inception of the notes and was directed to pay no further part of the consideration. It was held that he was entitled to recover only the amount paid before receipt of notice of infirmity. The case is governed by the rule that the portion of an unperformed contract, which is completed after notice of the fraud, is not within the principle which protects a *bona fide* holder. The principle applies to a bank which discounts a note, placing the proceeds to the credit of the assignor and, before it honors checks drawn against this account, obtains knowledge of facts invalidating the note in the hands of such assignor. After receiving such notice it pays at its peril. Drovers' Nat. Bank v. Blue, 110 Mich. 31; Fredonia Nat. Bank v. Tommei, 131 Mich. 674. The reason of the rule is that the credit by the bank of the proceeds of a note to the account of a customer is not of itself payment. It is simply the promise by the bank to pay such proceeds to the customer by honoring his checks or drafts in the ordinary way pursued by banking institutions. Albany Co. Bank v. People's Ice Co., 92 N. Y. App. Div. 47, 86 N. Y. Supp. 1128 (a case under the statute).

Sec. 57. **When title defective.**—The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud,[1] duress,[2] or force and fear,[3] or other unlawful means, or for an illegal consideration,[4] or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.[5]

1—See sec. 29 (2) Bills of Exchange Act.

One whose title is defective must be distinguished from one who has no title at all and who can give none, as, for instance, a person making title through a forged indorsement. Chalmers' Bills of Exchange, 5th edition, 92. Fraud as used in this section is of two kinds; 1st, fraud, amounting to a want of contract, or fraud in esse contractus (Bigelow); and 2nd, fraud in the inducement. They should be sharply distinguished. There are two kinds of fraud practised in the execution of an instrument, the first is where the instrument is misread to the party signing it, or where there is a surreptitious substitution of one instrument for another, or where by some other trickery or device a party is made to sign an instrument which he did not intend to execute. The second consists in inducing a party to sign an instrument or execute it by misrepresentations or fraudulent representations as to collateral matters, or as to the nature or value of the consideration. Papke v. G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910. Fraud amounting to a want of contract, or fraud in esse contractus, is well illustrated in Brown v. Reed, 79 Pa. St. 370, where the instrument involved was in the following form:

North East, April 3d, 1872.

Six months after date I promise to pay to J. B. Smith or order TWO HUNDRED AND FIFTY DOLLARS for value received, with legal interest, without defalcation or stay of execution.

T. H. Brown.

bearer $50.00 *when I sell by worth of Hay & Harvest Grinders, appeal, and also without*

Agent for Hay and Harvest Grinders.

The instrument upon which the plaintiff sought to recover was the left hand part of the above, the right hand part having been

cut off at the place indicated by the vertical line. Porter v. Hardy, 10 N. D. 551, 88 N. W. 458, illustrates fraud practised in substantially the same manner. There can be no recovery on such instruments at the suit of any one, but the party whose name and signature appears upon such paper must have been free from negligence in order to escape liability. Gibbs v. Linabury, 22 Mich. 479; Anderson v. Walter, 34 Mich. 113; Soper v. Peck, 51 Mich. 563; First Nat. Bank v. Deal, 55 Mich. 592; Beard v. Hill, 131 Mich. 246. In Soper v. Peck it is said "The party will not be liable unless his own negligence was so gross as to preclude his defending against a *bona fide* purchaser. See Holmes v. Trumper, 22 Mich. 427; Walker v. Ebert, 29 Wis. 194; Keller v. Ruppold, 115 Wis. 636; Baldwin v. Bricker, 86 Ind. 222; But see Bedell v. Herring, 77 Cal. 572. The following additional provision appears in the Wisconsin Act: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

Fraud in the inducement. This kind does not amount to a want of contract, nor create a defense as against a holder in due course. Lenheim v. Fay, 27 Mich. 70; Campbell v. Skinner, 30 Mich. 32; Shaw v. Stein, 79 Mich. 77; Hunt v. Rumsey, 83 Mich. 136; Beath v. Chapoton, 115 Mich. 506; First Nat. Bank v. Johnson, 133 Mich. 700; Slacom v. Wishart, 3 McLean 517, Fed. Cas. No. 12933; Smith v. Livingston, 111 Mass. 342; Clothier v. Adriance, 51 N. Y. 322; Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724 (a case under the statute). A cashier's check was endorsed over by the plaintiff, when the plaintiff was partially intoxicated, to one Maxwell as the result of a gambling transaction. It was held that the indorsee, under this section, had a defective title and that the bank was liable under sec. 90 because when the bank paid the amount to the indorsee it had knowledge of the facts and had been told by the plaintiff to cancel the check. See also Keegan v. Rock (Ia. 1905) 102 N. W. 805, (a case under the statute).

2—Whether a negotiable instrument executed under duress is void in the hands of a holder in due course is a question upon which decisions are in conflict. In Michigan, it has been held that duress is not a defense against a holder in due course. Farmers & Mechanics Bank v. Butler, 48 Mich. 192.

In accord with this view are: Beals v. Neddo, 1 McCrary 206; Clark v. Pease, 41 N. H. 414.

Opposed, are: Palmer v. Poor, 121 Ind. 135; Barry v. Equitable Life Society, 59 N. Y. 587; Berry v. Berry, 57 Kan. 691. Daniel's Neg. Inst. 5th ed. sec. 858.

As to what constitutes du-

ress see Beath v. Chapoton, 115 Mich. 506; Barger v. Farnham, 130 Mich. 487; Jones Co. v. Board of Education, 51 N. Y. Supp. 950.

3—These words were inserted in the Bills of Exchange Act as equivalent to the technical term "duress" which is a term unknown to the Scotch law. Chalmers' Bills of Exchange, *supra*. The introduction of these words into the American Act shows with what fidelity it follows the English Statute.

4—As to illegality of consideration see note 1, sec. 27.

5—Where a note has been diverted or negotiated in violation of an agreement under which it was given such negotiation constitutes a breach of faith and amounts to a fraud upon the maker. German American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836 (a case under the statute). See also M. Groh's Sons Co. v. Schneider, 34 N. Y. Miss. 195, 68 N. Y. Supp. 862 (a case under the statute).

Sec. 58. **Notice of defect; what constitutes.**—To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.[1]

1—This section was construed in McNamara v. Jose, 28 Wash. 461. The court said: "The holder's title to the paper is not to be overthrown by slight circumstances. He does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith; his rights are to be determined by the simple test of honesty and good faith, not by a speculative inquiry into diligence or negligence. Although he may have been negligent in taking the paper and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide* his title will prevail."

In Valley Savings Bank v. Mercer, 97 Md. 478, the court in construing this section held that mere suspicion of defect of title or knowledge of circumstances which would excite such suspicions in the mind of a prudent man or gross negligence on the part of the taker of the note at the time of transfer will not defeat his title. This section was also construed in Unaka Nat. Bank v. Butler, (Tenn., 1904) 83 S. W. 655. Other cases under this section are: Ketcham v. Govin, 35 N. Y. Misc., 375, 71 N. Y. Supp.

991; Mass. Nat. Bank v. Snow (Mass. 1905) 72 N. E. 959; Black v. First Nat. Bank (Md.) 54 Atl. 88. Negligence, however gross, is not equivalent to notice, but merely evidence of bad faith. New York Iron Mine v. Citizens' Bank, 44 Mich. 344; Mace v. Kennedy, 68 Mich. 389; Davis v. Seeley, 71 Mich. 209; Stevens v. McLachlan, 120 Mich. 285; Glines v. State Savings Bank, 132 Mich. 638; Hotchkiss v. Nat. Bank, 21 Wall. 354; Goodman v. Simonds, 20 How. (U. S.) 343; Phelan v. Moss, 67 Pa. St. 59; Seybel v. Nat. Currency Bank, 54 N. Y. 288.

The following Michigan cases illustrate circumstances amounting to notice of defect: Miller v. Finley, 26 Mich. 249; Borden v. Clark, 26 Mich. 410; Lenheim v. Fay, 27 Mich. 70; McNamara v. Gargett, 68 Mich. 454; Abele v. McGuigan, 78 Mich. 415; Carpenter v. Greenop, 84 Mich. 49; Stevens v. Hannan, 86 Mich., 305, 88 Mich. 13; Lockwood v. Noble, 113 Mich. 418; Conrad v. Manning's Est., 125 Mich. 77.

The following cases illustrate circumstances falling short of notice of defect: Vinton v. Peck, 14 Mich. 287; Howry v. Eppinger, 34 Mich. 29; Bottomley v. Goldsmith, 36 Mich. 27; Chicago & N. E. R. R. Co. v. Edson, 41 Mich 673; Shaw v. Clark, 49 Mich. 384; Cristy v. Campau, 107 Mich. 172; Drovers' Nat. Bank v. Potvin, 116 Mich. 447.

The agents' knowledge of a defect is knowledge of the principal. Tilden v. Barnard, 43 Mich. 376; Johnston Harvester Co. v. Miller, 72 Mich. 2
Thompson v. Union Trust Co.,
Mich. 508. Knowledge of
president of a corporation,
payee in a note, of a defect
the note cannot be imputed
the bank through him as its ca
ier. State Savings Bank v. Mo
gomery, 126 Mich. 327; Peopl
Savings Bank v. Hine, 131 Mi
181. See also World Mfg. Co.
Cycle Co., 123 Mich. 623.

Where a note is given in t
firm name by a member of t
firm the presumption is that it
given for partnership purpos
Carrier v. Cameron, 31 Mich. 37
Nichols v. Sober, 38 Mich. 67
Stevens v. McLachlan, *sup*
Where one partner gives a fi
note for his private debt the p
son taking such note with kno
edge of the fact is charged wi
notice that it is given for an u
authorized purpose and cann
hold the other partners. Heffr
v. Hanaford, 40 Mich. 305; Rc
erts v. People, 55 Mich. 36
Towle v. Dunham, 76 Mich. 2
84 Mich. 268; Carpenter v. Gree
op, *supra;* Mechanics Bank
Barnes, 86 Mich. 632.

Where the paper of a corpor
tion appears on its face
have been duly issued in co
formity with the charter, a *bo*
fide holder can enforce the sam
Genesee Co. Savings Bank
Mich. Barge Co., 52 Mich. 43
But a person taking a note fro
an officer of a corporation for t
officer's individual obligation
with knowledge that it is n
given for corporation purpos
does so at his peril. *Prima fac*

the act is unauthorized, and unless the holder can show special authority he cannot enforce the paper against the corporation. New York Iron Mine v. First Nat. Bank, 39 Mich. 644; McClellan v. Detroit File Works, 56 Mich. 579; Merchants Nat. Bank v. Detroit Knitting & Corset Works, 68 Mich. 620; Wilson v. Metropolitan El. R'y, 120 N. Y. 145. But see Doe v. N. W. Coal etc. Co., 78 Fed. 62; Cheever v. Pittsburg etc. R. Co., 150 N. Y. 59.

Sec. 59. **Holder in due course; rights of.**—A holder in due course[1] holds the instrument free from any defect of title of prior parties and[2] free from defenses available to prior parties among themselves,[2] and may enforce payment of the instrument for the full amount thereof[3] against all parties liable thereon.[4]

1—A payee may be a holder in due course. See note 3, sec. 54.

2—Although the instrument is invalid as between the immediate parties the holder in due course takes it discharged of equities. Elliott v. Miller, 8 Mich. 132; Hunter v. Parsons, 22 Mich. 96; Miller v. Finley, 26 Mich. 249; Wright v. Irwin, 33 Mich. 32; Howry v. Eppinger, 34 Mich. 29; Helmer v. Krolick, 36 Mich. 371; Spinning v. Sullivan, 48 Mich. 8; Barnum v. Phenix, 60 Mich. 388; Davis v. Seeley, 71 Mich. 209; Evans v. Struhrburg, 78 Mich. 145; Chapman v. Remington, 80 Mich. 552; Little v. Mills, 98 Mich. 423; First Nat. Bank v. Housknecht, 121 Mich. 313.

This section of the statute has been referred to in the following cases: White v. Dodge, 73 N. E. 549; Greeser v. Sugarman, 37 N. Y. Misc. 799, 76 N. Y. Supp. 922; Albany Co. Bank v. Peoples' Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 1128; Nat. Bank of Commerce v. Pick (N. D. 1904) 99 N. W. 63; German American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. Supp. 836; Unaka Nat. Bank v. Butler (Tenn. 1904) 83 S. W. 655; McNamara v. Jose, 28 Wash. 461; Ketcham v. Govin, 35 N. Y. Misc. 375, 71 N. Y. Supp. 991.

This provision effects a change in the law of those states where it has been held that a negotiable instrument given on account of a gambling transaction is void even in the hands of an innocent holder for value. Wirt v. Stubblefield, 17 App. Cas. D. C. 283 (a case under the statute). In this case the court said: "The leading object of the act has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form as fully as possible all the law upon

the subject, to avoid conflict of decisions and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute was to free the negotiable instrument as far as possible from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all of the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute as against the original maker or acceptor."

3—This provision settles a point over which the decisions have been in conflict. In Vinton v. Peck, 14 Mich. 287, Judge Campbell said,—"The maker of a note has no concern with the amount paid for it by a *bona fide* purchaser." In Cromwell v. County Sac, 96 U. S. 51, (6 Otto) the court declares the rule to be: "A purchaser of a negotiable security before maturity in cases where he is not chargeable personally with fraud is entitled to recover its full amount against its maker though he may have paid less than its par value, whatever may have been its original infirmity * * * * * * *. This rule in no respect impinges upon the doctrine that one who makes only a loan upon such paper or takes it as collateral security for a precedent debt may be limited in his recovery to the amount advanced or secured." This rule, however, has not met with unanimous approval. Opposed to it are: Holcomb v. Wyckoff, 35 N. J. L. 13 Bank v. McNair, 116 N. C. 550, 21 S. E. 389; Harger v. Wilson, 63 Barb. 237; Oppenheim v. Farmers & Mechanics Bank, 97 Tenn. 19. In McNamara v. Jose, 28 Wash. 461, it was ruled that the holder could recover the full amount under this provision of the statute. In Mersick v. Alderman, (Conn. 1905) 60 Atl. 109, (a case under the statute) the right of a holder in due course to recover the full amount was recognized, but it was held one who takes the paper as collateral security for a debt will be limited in his recovery to the amount of the debt. For cases where notice of defect or fraud is received before full payment see sec. 56 and note.

4—The Wisconsin Act has the following additional provision: "Except as provided in sections 1944 and 1945 of these statutes, and also in cases where the title of the person negotiating such instrument is void under the provisions of sections 1676-25 (sec. 57) of this Act."

Sec. 60. **When subject to original defenses.**—In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as

if it were non-negotiable.[1] But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.[2]

1—Of this section Mr. Crawford makes the following explanation: "It was not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various States relating to set-off and counterclaim. In an act designed to be uniform in the various States, no more can be done than fix the rights of holders in due course."

The law merchant is not more explicit than the statute in defining the defenses which may be urged against negotiable instruments, wisely leaving it, within certain broad, general rules, to be determined from the status of each case, what kind of defense is available and to what extent it may be carried.

There are two general classes of defenses, absolute or real, equities or personal. The former is so named because it applies to an instrument unenforceable in whose hands soever it may be. It is also called a real defense because it lies against the *res*—the thing itself. The latter is so named because it is available against certain persons only, and because of this fact the name personal has been applied to it instead of equities.

The following analysis of defenses (see Ames' Cases on Bills and Notes) exhibits comprehensively, but perhaps not completely, the classification which the law merchant recognizes:

I Absolute or Real.
- (1) Incapacity to contract.
  - (a) Infancy.
  - (b) Coverture in some jurisdictions.
  - (c) Insanity.
  - (d) Intoxication.
  - (e) Corporate incapacity.
- (2) Fraud (amounting to want of contract, in esse contractus, see section 57).
- (3) Illegality when contract is declared void by statute.
- (4) Discharge of Instrument by
  - (a) Alteration (see. sec. 126).
  - (b) Cancellation (see sec. 125).
  - (c) Payment, renunciation or release at or after maturity (see sec. 124).

II Equities or Personal
- (1) Fraud (in the inducement). See sec. 57.

(2) Duress (Some courts hold otherwise. See sec. 57).
(3) Want or failure of consideration either total or partial (see sec. 59).
(4) Illegality unless instrument is declared void by statute (see sec. 59).
(5) Payment, renunciation, or release before maturity.
(6) Discharge of party secondarily liable by discharge of prior party (see sec. 122).

This provision of the statute seems to allow all defenses, whether collateral or inherent.

Whether only such equities prevail against an indorsee as are attached to the note itself or whether those arising out of collateral matters may also be asserted is a question upon which the courts have disagreed.

The weight of authority is that such collateral matters may not be asserted against a transferee of over due paper. Daniel Neg. Inst., 5th ed., sec. 725.

In the leading case of Burrough v. Moss, 10 B. & C. 558, the facts were that a promissory note was made by the defendant, payable to one Fearn and by him indorsed to the plaintiff after it became due. The defendant insisted upon his right to set off, against the plaintiff's claim, a debt due the defendant from Fearn at the time of the transfer. It was held that the indorsee of an over due bill or note is liable to such equities only as attach on the note or bill itself, and not to claims arising out of collateral matters. This case has been generally followed in the United States and was reaffirmed in England in Whitehead v. Walker, 10 M. & W. 695, where the indorsee received the bill with notice of the set off; and in Oulds v. Harrison, 28 Eng. L. & Eq. 524, where the bill was indorsed for the express purpose of defeating the set off. See Nat. Bank v. Texas, 20 Wall (U. S.) 72; Weader v. First Nat. Bank, 126 Ind. 111, 25 N. E. 887; Davis v. Miller, 14 Gratt. 8; Simpson v. Hall, 47 Conn. 417; Tinsley v. Beall, 2 Ga. 134; Long v. Rhawn, 75 Pa. St. 128.

Other states have held that such set-offs are available as a defense. McKenn v. Kirkwood, 50 Mich. 544; McDonald v. MacKenzie, 24 Ore. 573, 14 Pac. 866; Foot v. Ketchum, 15 Vt. 258, 40 Am. Dec. 678; Armstrong v. Chadwick, 12 Mass. 156.

Any set-off between antecedent parties, which arises after the transfer, cannot be asserted against the indorsee. Davis v. Miller, 14 Gratt. 8; Henderson v. Johnson, 22 Tex. Civ. App. 381; 55 S. W. 35.

2—This is an exception to the general rule stated in the first half of the section. Whenever any person has acquired the paper as a holder in due course, he can transfer his title to others who will also take free from equities though they may have

knowledge of infirmities in the instrument Wood v. Starling, 48 Mich. 592; Shaw v. Clark, 49 Mich. 384. The principle is that the promise being good to the prior indorsee or holder, free from objection on the ground of fraudulent or illegal consideration, such indorsee or holder has the power of transferring it to others with the same immunity, as an incident to the legal right which he had acquired in the instrument. Kinney v. Kruse, 28 Wis. 183; Simon v. Merritt, 33 Iowa 537. Jennings v. Carlucci, 87 N. Y. Supp. 475 (case under the statute), in which plaintiff's assignor, in due course, transferred a note to the plaintiff after maturity. It was held that the same title passed to the plaintiff as his assignor had and defenses available between the original parties were not available against the plaintiff. See also the following cases decided under the statute: Mersick v. Alderman (Conn. 1905) 60 Atl. 109; Black v. First Nat. Bank, 96 Md. 399; Bryan v. Harr, 21 App. Cas. (D. C.) 190.

Where a payee becomes a purchaser from a *bona fide* holder he takes it subject to all equities and defenses originally existing against it; as against him there is a personal defense. Kost v. Bender, 25 Mich. 515; Andrews v. Robertson, (Wis.) 87 N. W. 190 (a case under the statute).

The full import of this provision may be illustrated thus: A note is invalid in the hands of A., the payee, by reason of fraud in the inducement; A. transfers it to B. under circumstances that make B. a holder in due course; B. transfers it for a valuable consideration to C., who has full knowledge of the fraudulent inducement; C. may enforce the note against the maker relying on the fact that B. was a holder in due course. If A. should thereafter become the holder for a valuable consideration, he could not recover on the note.

The Wisconsin Act inserts the word "duress" after the word "fraud" in the second sentence and substitutes the words "such holder" for the words "the latter."

Sec. 61. **Holder in due course; who deemed.**—Every holder is deemed prima facie to be a holder in due course,[1] but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course.[2] But the last mentioned rule does not apply in

favor of a party who became bound on the instrument prior to the acquisition of such defective title.[3]

1—Bryan v. Harr, 21 App. Cas. (D. C.) 190; German Am. Nat. Bank v. Cunningham, 97 App. Div. 244; 89 N. Y. Supp. 836; Karsch v. Pottier & Stymus Mfg. etc. Co. 82 App. Div. 230, 81 N. Y. Supp. 782; Benedict v. Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; Packard v. Windholtz, 88 App. Div. 365, 84 N. Y. Supp. 666 (cases arising under the statute).

2—The holder of a negotiable instrument is presumed to be a holder in due course until evidence on the part of the defendant shows that the instrument had a fraudulent or illegal inception; thereupon the burden is on the holder to show that he acquired the instrument in good faith and for value and without notice or that some person under whom he claims so acquired it. Paton v. Coit, 5 Mich. 505; Polhemus v. Ann Arbor Savings Bank, 27 Mich. 44; Tilden v. Barnard, 43 Mich. 376; Bottomley v. Goldsmith, 36 Mich. 27; Conley v. Winsor, 41 Mich. 253; Mace v. Kennedy, 68 Mich. 389; Goodrich v. McDonald, 77 Mich. 486; City Bank v. Dill, 84 Mich. 549; Horrigan v. Wyman, 90 Mich. 121; Little v. Mills, 98 Mich. 423; French v. Talbot Paving Co., 100 Mich. 443; Rice v. Rankans, 101 Mich. 378; Drovers' Nat. Bank v. Blue, 110 Mich. 31; Drovers' Nat. Bank v. Potvin, 116 Mich. 474. Stevens v. McLachlan, 120 Mich. 285; Tatam v. Haslar, 23 Q. B. D. 345 (a case under the corresponding provision of the Bills Exchange Act). In Brown v. Feldwert, (Ore. 1905) 80 Pac. 414 the court said that section 61 would seem to require "where fraud has been shown in the inception, the purchaser of a note must show affirmatively, among other things, that he had no notice of such or any other infirmities at the time he acquired it." To the same effect: Consolidation Nat. Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. Supp. 353; Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. Supp. 1043; Keegan v. Rock (Iowa 1905) 102 N. W. 805; Lucker v. Iba, 54 N. Y. App. Div. 566, 66 N. Y. Supp. 1019; M. Groh's Sons Co. v. Schneider, 34 Misc. 195, 68 N. Y. Supp. 862 (cases under the statute).

3—The fact that one who held possession of a note for the payee put it into circulation in fraud of the payee's rights is no defense in a suit by the holder against the maker; nor does it change the burden of proof so as to require the plaintiff to show in the first instance that he is a *bona fide* holder for value. The fraud in putting a note into circulation which will operate as a defense or change the burden of proof, in such an action, must be fraud against the maker. Kinney v. Kruse, 28 Wis. 183.

Article V. Liabilities of Parties.

Sec.
62. Liability of maker.
63. Liability of drawer.
64. Liability of acceptor.
65. When person deemed indorser.
66. Liability of irregular indorser.
67. Warranty; where negotiation by delivery etc.
68. Liability of general indorsers.
69. Liability of indorser where paper negotiable by delivery.
70. Order in which indorsers are liable.
71. Liability of agent or broker.

Sec. 62. **Liability of maker.**—The maker of a negotiable instrument by making it engages that he will pay it according to its tenor,[1] and admits the existence of the payee and his then capacity to indorse.[2]

1—The contract of the maker speaks from the instrument itself. Evidence is inadmissible to show any understanding or agreement other than that imported by it. Thus, one who indorsed a promissory note before it was uttered and before the payee had indorsed it—being liable thereon as a joint maker (see section 66) —cannot in an action against him on the note give evidence that he was induced to sign the note by the promise of the payee that he should not be liable thereon. Gumz v. Giegling, 108 Mich. 295.

Evidence of a parol agreement to reduce the amount agreed to be paid is incompetent. Phelps v. Abbott, 114 Mich. 88.

Evidence of an oral agreement to renew a note is inadmissible. Wood's Sons Co. v. Schaeffer, 173 Mass. 443; Hall v. First Nat. Bank, 173 Mass. 16; Heist v. Hart, 73 Pa. St. 289.

Where the signature is in the usual place, the lower right hand corner, the intention is thereby fixed, the signing in that way is an execution of the note as a matter of law. If the signature be not in the proper place, a question of fact arises as to whether the due execution of the instrument was intended. The burden of proof to show due execution under such circumstances is on the holder. Bigelow, Bills, Notes and Cheques, 41.

Where one of two or more persons who execute a note adds to his signature the word "surety," he is not the less liable as maker. Inkster v. First Nat. Bank. 30 Mich. 143; Dart v. Sherwood, 7 Wis. 446; Hoyt v. Mead, 13 Hun 327. See Ballard v. Burton, 64

Vt. 387; Hubbard v. Gurney, 64 N. Y. 457; see note 8, sec. 19.

The liability of the maker is controlled by the law of the place of execution of the note unless it is made payable elsewhere when the law of that place will control. Strawberry Point Bank v. Lee, 117 Mich. 122; Central Trust Co. v. Burton, 74 Wis. 329.

2—The maker is estopped to deny the existence of the payee and his then capacity to indorse, so if he is sued by an indorsee of the payee he cannot defend on the ground that the payee being an infant, married woman, etc., had no capacity to indorse. Wolke v. Kuhne, 109 Ind. 313; Castor v. Peterson, 2 Wash. 204, 26 Pac. 223. It has been held that the maker may show the insanity of the payee at the time the paper was executed. Peaslee v. Robbins, 3 Metc. (Mass.) 164, but this holding has been criticised and disapproved.

Where a note, made payable to a foreign corporation which has not, at the time of execution and delivery, complied with the laws relative to the conditions which would authorize doing business within the state, was transferred to a purchaser, before maturity, for value and without notice, it was held, under this provision, that the defendant by giving the note, which was not the subject of statutory prohibition, thereby conclusively admitted as to third parties, purchasing before maturity and in good faith, the legal existence of the payee and its authority to take such note and transfer it by indorsement. McMann v. Walker, 31 Col. 261, 72 Pac. 1055.

When the payee is a fictitious or non-existing person, the instrument is payable to bearer. See section 11.

When the note is payable to a firm the maker is estopped from denying the existence of such firm, Griener v. Ulerey, 20 Iowa 266, or that the name of the firm was indorsed by an infant partner, Dulty v. Brownfield, 1 Pa. St. 497.

The maker of a note will not be permitted to show that the payee was not the real party in interest at the time the note was executed. Johnson v. Conklin, 119 Ind. 109.

Sec. 63. **Liability of drawer.**—The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any

subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.[1]

1—The drawer is ordinarily liable as a secondary party but is liable as a primary party if,

1st, his drawing is fraudulent, that is, if he had no reasonable expectation that his draft would be honored,

2nd, if he draws on himself. If he draws on a partnership of which he is a member, this is equivalent to drawing on himself,

3rd, if he draws on a fictitious or non-existing person or a person not having capacity to contract. See section 116.

From the Colorado Act the word "subsequent" is omitted.

Sec. 64. **Liability of acceptor.**—The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance,[1] and admits:

First, The existence of the drawer,[2] the genuineness of his signature,[3] and his capacity[4] and authority to draw the instrument,[5] and

Second, The existence of the payee and his then capacity to indorse.[6]

1—Before acceptance the drawee is not liable on the instrument and is a stranger to it. He could himself discount the instrument and transfer it to a *bona fide* holder who could sue and hold the drawer. Attensborough v. McKenzie, 36 Eng. L. & Eq., 562.

The acceptor of a bill like the maker of a note is primarily liable. His engagement runs not only to each of the indorsers but to the drawer himself. Heuertematte v. Morris, 101 N. Y. 63.

An acceptance is not a collateral engagement to pay the debt of another. It is an absolute engagement to pay the money to the holder of the bill; and the engagements of all the other parties are merely collateral. *Prima facie* every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and is, of itself, an express appropriation of those funds for the use of the holder. The case may indeed be otherwise, and then the acceptor, in fact, pays the debt of the drawer, but as between himself and the payee, it is not a

collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor and he cannot resort to the drawer, but upon a failure of due payment of the bill. Raborg v. Peyton, 2 Wheat. 385.

2—The acceptor is required to know that there is such a person as the one who purports to draw the bill. Cooper v. Meyer, 10 B. & C. 468, 21 E. C. L. 202. If the drawer be dead at the time of acceptance, the acceptor is precluded from setting up the fact. Ashpitel v. Bryan, 3 B. & S. 474, 113 E. C. L. 474.

3—The acceptor is estopped from denying the genuineness of the drawer's signature. He is bound to know, when he accepts the instrument, that such signature is genuine. He is presumed to know the handwriting of his correspondent and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act and can neither repudiate the acceptance nor recover the money from a *bona fide* holder to whom he has paid it. National Park Bank v. Ninth National Bank, 46 N. Y. 77; Garland v. Jacomb, L. R. 8 Ex. 216.

If a bill be drawn by an agent, the drawee, by his acceptance, admits the genuineness of the agent's signature and his authority to draw, Robinson v. Yarrow, 7 Taunt. 455, 1 Moore 150; but he does not admit the authority of the agent to indorse the same bill, although it is made payable to the order of his principal and is indorsed by the same agent in the name of the principal. Story on Bills, sec. 262.

The acceptor does not admit the genuineness of the signature of the indorser even though the bill be drawn to the order of the drawer. First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296, 38 N. E. 739; Williams v. Drexel, 14 Md. 566.

The acceptor does not admit the genuineness of the body of the bill. He is not presumed to know the handwriting in the body of the instrument. So if he pays a bill or check that has been raised and he is not himself negligent he can recover from the person to whom he paid it, the excessive amount. White v. Continental Nat. Bank, 64 N. Y. 317.

4—As he admits the legal capacity of the drawer to draw the bill, he cannot set up as a defense that the drawer was an infant, Taylor v. Croker, 4 Esp. 187; or a married woman, Cowton v. Wickersham, 54 Pa. St. 302; or a corporation having no legal authority to draw the bill, Halifax v. Lyle, 2 Welsby, Hurl. & G. (Exch.) 446.

5—He admits that he has funds of the drawer in his hands to pay the bill, so after acceptance he is estopped from asserting against a *bona fide* holder that the acceptance was given without consideration. Heuertematte v. Morris, 101 N. Y. 63. As between himself and the drawer it is only *prima facie* evidence that he has such funds in his hands and he

may show that the acceptance was merely for accommodation and after paying the bill may recover from the drawer in an action for money had and received. Christian v. Keen, 80 Va. 369.

6—So, he is estopped from setting up that at the time of acceptance the payee was an infant, Jones v. Darch, 4 Price 300; a lunatic or a married woman, Smith v. Marsack, 6 C. B. 486; or a corporation without legal capacity or existence, Brickley v. Edwards, 131 Ind. 3, 30 N. E. 708.

Note that the acceptor "admits," the indorser "warrants." (See sec. 67, 68.)

Sec. 65. **When person deemed indorser.**—A person placing his signature upon an instrument, otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.[1]

1—Under this section a party may assume some other liability such as guarantor or surety but he must indicate his intention to that effect by some appropriate expression. See sec. 19, subd. 6 and note; sec. 66.

Sec. 66. **Liability of irregular indorser.**—Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser[1] in accordance with the following rules:

First, If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties;[2]

Second, If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer;[3]

Third, If he signs for the accommodation of the payee he is liable to all parties subsequent to the payee.[4]

1—This changes the law in Michigan and in some other states and settles the conflict in the decisions as to the liability of the irregular or anomalous indorser.

In Michigan a person placing his name on the back of a note before delivery and before indorsement by the payee has been held liable as a joint maker.

Wetherwax v. Paine, 2 Mich. 555; Rothschild v. Grix, 31 Mich. 150; Herbage v. McEntee, 40 Mich. 337; Stewart v. First Nat. Bank, 40 Mich. 348; Sibley v. Muskegon Nat. Bank, 41 Mich. 196; Moynahan v. Hanaford, 42 Mich. 329; Robbins v. Brooks, 42 Mich. 62; Greusel v. Hubbard, 51 Mich. 95; Fay & Co. v. Jenks & Co., 78 Mich. 312; Tredway v. Antisdel, 86 Mich. 82; Allison v. Circuit Judge, 104 Mich. 141; Gumz v. Giegling, 108 Mich. 295; Dow Law Bank v. Godfrey, 126 Mich. 521; McGraw v. Union Trust Co., (Mich.) 99 N. W. 758; Citizens' Bank v. Platt (Mich.), 97 N. W. 694. The same rule applies where one indorses a note payable to the maker at the time of execution and before delivery, even though his indorsement follows that of the payee. Peninsular Savings Bank v. Hosie, 112 Mich. 351. Or where a party indorses after the payee has indorsed but writes his name above that of the payee. Sweet v. Woodin, 72 Mich. 393; Logan v. Ogden, 101 Tenn. 392. Some of the other state courts follow the same rule as the Michigan court. Union Bank v. Willis, 8 Metc. (Mass.) 504; Childs v. Wyman, 44 Me. 441. In the case last cited the irregular indorser added to his signature, the words, "without recourse." The court rejected these words as mere surplusage, being words applicable to an indorser, not to an original promisor.

Other courts have held him liable as indorser: as first indorser, Blakeslee v. Hewett, 76 Wis. 341; as second indorser, Phelps v. Vischer, 50 N. Y. 69; Eilbert v. Finkbeiner, 68 Pa. St. 243. Other courts have held him liable as guarantor. Ranson v. Sherwood, 26 Conn. 437; Webster v. Cobb, 17 Ill. 459; Knight v. Dunsmore, 12 Iowa 35; Chandler v. Westfall, 30 Tex. 477.

Mr. Crawford says that the rule adopted in the statute was taken from the Civil Code of California, section 3117 of which is as follows: "One who indorses a negotiable instrument before it is delivered to the payee, is liable to the payee thereon as an indorser." Crawford's Ann. Neg. Inst. Law 64. The rule of the statute accords with the intent of the parties in nearly every case. When one "backs" a note to enable the maker to procure the same to be discounted, he does so for the purpose of lending security to the maker just as he would if the note were made payable to his order and he indorsed it for the accommodation of the maker. In the transaction of lending his credit to the maker he takes no thought of whether he or some other person is named as payee. In neither case does he intend to pay the note except in the event of the maker's failure so to do.

It matters little, however, whether the irregular indorser be regarded as maker, guarantor or technical indorser provided the rule as to his relation be uniform. The statute has settled a vexa-

tious conflict without conceivable injury to any interest.

In some jurisdictions the relation of the irregular indorser to the paper has been determined from the face of the paper itself (no parol evidence being admitted to explain his status); in others, from oral evidence showing his true relation thereto. Thus the Supreme Court of the United States holds the irregular indorser an original promisor, a guarantor or an indorser according to the nature of the transaction and the understanding of the parties. Oral evidence is admissible to show the intent and undertaking. If the indorsement was made to give the maker credit with the payee or if the indorser participated in the consideration of the note, he is to be considered a joint maker, If the indorsement was after the note was delivered to the payee at the request of the maker to procure further indulgence or forbearance for the maker, he can be held only as guarantor, and there must be legal proof of a consideration to uphold the promise unless it be shown that he was connected with the inception of the note. If the note was intended for discount and the indorsement was to be inoperative until after the payee indorsed, he is liable only as second indorser. Good v. Martin, 95 U. S. 90. In New York, testimony was admissible to show that the indorsement was made to give the maker credit with the payee and thus make the indorser liable to the payee.

The statute seems to fix absolutely the status of the irregular indorser and thus excludes parol testimony to vary his liability. The only question of fact would seem to be,—did the person, "not otherwise a party to the instrument," place his signature thereon "before delivery." But see Kohn v. Consolidated etc. Co., *infra*.

A statute of Connecticut similar but somewhat more comprehensive in terms was construed in Spencer v. Allerton, 60 Conn. 410, wherein it was held that parol evidence was inadmissible, the status of the anomalous indorser being absolutely fixed by the statute.

This section was considered by the Supreme Court of New York in Kohn v. Consolidated Butter & Egg Co., 30 Misc. 725, 63 N. Y. Supp. 265, but the case was outside the statute in that it was alleged that the maker made and delivered the note to the payee and that "*thereafter* the other defendants indorsed the note." McAdam, J., said: "The true intention of indorsers as between themselves can always be shown by oral evidence. To go further and decide that the statute intended to create an incontestable liability against irregular indorsers would be to impute to the legislative wisdom a design repugnant to every notion of judicial procedure, especially in a provision enacted in the interests of law reform."

2—Thus if it is drawn by A payable to B, or order and is in-

dorsed by C before delivery to B, C is liable as indorser to B and all subsequent parties. Leonard v. Draper, (Mass. 1905) 73 N. E. 644 (a case under the statute).

3—Thus if it is drawn by A payable to A or order and indorsed by B, and subsequently delivered to C, B is liable to C and all subsequent parties.

4—Thus if it is drawn by A payable to B, or order, and indorsed by C before the payee indorses but for his accommodation, and the payee then gets it discounted, C is liable to all parties subsequent to B, the payee, but not liable to the payee. Mr. Crawford says that this subdivision was added to provide for a case where, the payee being unable to enforce payment, there might be a question whether the indorser would be liable to a person claiming under the payee. Crawford's Ann. Neg. Inst. Law, *supra*.

The following cases involve this section and hold the anomalous signer liable as indorser: Corn v. Levy, 97 App. Div. 48, 89 N. Y. Supp. 658; McLean v. Bryer, 24 R. I. 599; Downey v. O'Keefe, (R. I. 1905) 59 Atl. 929; Jenkins & Sons v. Coomber, [1898] 2 Q. B. 168 (a case under the Bills of Exchange Act.)

Sec. 67. **Warranty; where negotiation by delivery, etc.** —Every person negotiating an instrument by delivery or by a qualified indorsement warrants:[1]

First, That the instrument is genuine and in all respects what it purports to be;[2]

Second, That he has a good title to it;[3]

Third, That all prior parties had capacity to contract;[4]

Fourth, That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.[5]

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.[6] The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.[7]

1—See Bills of Exchange Act, sec. 58 (3).

Compare secs. 62, 63 and 64. The maker, the drawer, the acceptor *admits*.

These warranties are implied by

law from the mere fact of delivery or sale of the instrument.

2—The transferrer impliedly warrants that all prior signatures are genuine and that the instrument has not been altered and that it is based on a good and valid consideration. If it turn out that any signatures thereto were forged, the vendee may recover what he has paid to his vendor, as he has not received what he bargained for and his consideration has failed. Aldrich v. Jackson, 5 R. I. 218; Allen v. Clark, 49 Vt. 390.

Where a bill has been raised and the vendee recovers only the original amount he may recover the difference from his vendor. Jones v. Ryde, 1 Marsh. 157, 5 Taunt. 488. The transferrer may, however, at the time of sale expressly refuse to warrant the genuineness of the instrument and such refusal will prevail over the implied warranty. Bell v. Dagg, 60 N. Y. 528. There is an implied warranty in the sale of commercial paper that it is what it purports to be, the same as in the sale of ordinary chattels. Hannun v. Richardson, 48 Vt., 508.

In Meyer v. Richards, 163 U. S. 385, bonds were sold by one person to another, buyer and seller regarding them as lawful obligations, when in fact they were void. The court in holding that the seller must refund to the buyer the amount paid, said: "Both in England and in the United States the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law, relating to the sale of goods and chattels. So, also, the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold."

So where an instrument is void for usury between the original parties, though the vendor have no knowledge of such fact, he is liable to the vendee for the amount paid. Challiss v. Crum, 22 Kan. 157; Giffert v. West, 33 Wis. 617. In New York the contrary has been held in Littauer v. Goldman, 72 N. Y. 506, but this case was criticized and disapproved in Meyer v. Richards, *supra*, and in Wood v. Sheldon, 42 N. J. L. 421.

There seems to be a conflict as to whether there is an implied warranty on the part of the vendor, of the solvency of the maker. The correct rule would seem to be that where commercial paper is transferred by delivery or quali-

fied indorsement and the maker is insolvent at the time, which fact is not known to the vendor, the loss should fall on the vendee. Roads v. Webb, 91 Ma. 406, 40 Atl. 128; Hecht v. Batcheller, 147 Mass. 335. In Bicknall v. Waterman, 5 R. I. 43, this rule was followed, the court saying: "The well known common-law principle, applicable alike to sales and exchanges of personal things, is, that fraud or warranty is necessary to render the vendor or exchanger liable, in any form, for a defect in the quality of the thing sold or exchanged. Applying this principle to the sale or exchange of the note of a third person, transferred by indorsement without recourse or by delivery merely, the vendee or person taking it in exchange takes the risk of the past or future insolvency of the maker, or other party to it; unless indeed, in case of past insolvency, the vendor or exchanger is guilty of the fraud of passing it off with knowledge of that fact."

There is no implied warranty in the case of a vendor or qualified indorser of a bill of exchange that it was drawn against funds or that it was not drawn for accommodation. In re Hammond, 6 DeGex, M. & G. 699; People's Bank v. Bogart, 81 N. Y. 101.

3—Meriden Nat. Bank v. Gallaudet, 120 N. Y. 298; Gompertz v. Bartlett, 23 L. J. Q. B. 65.

4—Thus, where a corporation had no authority to issue certain bonds, the bonds being therefore valueless, the transferrer was compelled to refund the consideration. Rogers v. Walsh, 12 Neb. 28. Likewise, where a prior indorsement was that of an infant. Lobdell v. Baker, 3 Metc. (Mass.) 469.

The indorsement by a corporation of a promissory note, passes the property therein and the want of power of the corporation to indorse is no defense to a subsequent indorser who by his indorsement warrants the genuineness of the paper, his own property therein and the capacity of all preceding parties to contract. Willard v. Crook, 21 App. (D. C.) 237 (construing this section).

5—Thus where a person transfers notes knowing that the maker is insolvent and does not communicate such fact to his transferee, the latter may hold him responsible. People's Bank v. Bogart, 81 N. Y. 106.

The vendor impliedly warrants that the note, if it is overdue, has not been paid. Howell v. Wilson, 2 Blackf. (2d) 418; Daskam v. Ullman, 74 Wis. 474.

6—The warranties of the qualified indorser extend to all subsequent holders; those of the transferrer by delivery to his immediate transferee only.

7—In affirmation of the general rule the statute exempts such securities from the implied warranties of the transferrer. Otis v. Cullom, 92 U. S. 448. In this case municipal bonds payable to bearer were under consideration. The

action was against the vendor of these bonds, which had been held void, because the legislature had no power to pass the acts in pursuance of which the bonds were issued. The court held that there could be no recovery in the absence of an express warranty.

Sec. 68. **Liability of general indorsers.**—Every indorser who indorses without qualification warrants to all subsequent holders in due course:

First, The matters and things mentioned in subdivisions one, two and three of the next preceding section;[1] and

Second, That the instrument is at the time of his indorsement valid and subsisting.[2]

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor,[3] and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it.[4]

1—The indorser warrants that the instrument is genuine and that it has not been altered. Fish v. First Nat. Bank, 42 Mich. 203; Packard v. Windholtz, 84 N. Y. Supp. 666, (a case under the statute); Leonard v. Draper (Mass. 1905), 73 N. E. 644, (a case under the statute). But this rule has not been applied to an indorser for collection. In United States v. Am. Exchange Nat. Bank, 70 Fed. Rep. 232, a draft was indorsed for collection and the collection agent paid over the money to his principal before it was discovered that the payee's indorsement had been forged. It was held that in such a case the indorsement by the collecting agent, who has no proprietary interest, does not import any guaranty of the genuineness of all prior indorsements, but only of the agent's relation to the principal, as stated upon the face of the draft; and as this relation is evident upon the face of the draft itself, the payer cannot claim to have been misled by the indorsement of the agent, or any right to rely upon that indorsement as a guaranty of the genuineness of the payee's indorsement. The same was held where a check was raised and the collecting agent paid over the money before discovery of that fact. National Park Bank v.

Seaboard Bank, 114 N. Y. 28. See First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723.

As the statute applies to every indorser who indorses without qualification it includes indorsers for collection and thus makes a change in the law. Under the statute a bank indorsing paper forwarded for collection would be liable as a general indorser though the prior indorsement was for collection or for deposit.

2—An indorser of a promissory note always warrants the existence and legality of the contract which he assigns; therefore, he cannot urge in defense of a suit by the indorsee against him that the note was made on the Lord's Day, Prescott Nat. Bank v. Butler, 157 Mass. 548, or that the note was given for a gaming debt, Unger v. Boas, 1 Harr. 601.

3—An indorser of a promissory note which contains a stipulation for a reasonable attorney's fee in case of suit is as much liable for the attorney's fee as for the principal of the note. Benn v. Kutzschan, 24 Ore. 28, 32 Pac. 763.

As a rule, parol evidence is inadmissible to change the legal import of the indorsement and convert it into an undertaking resting on outside conditions. Ortmann v. Canadian Bank of Commerce, 39 Mich. 518; Doolittle v. Ferry, 20 Kan. 230; Johnson v. Glover, 121 Ill. 286; Charles v. Denis, 42 Wis. 56; Martin v. Cole, 104 U. S. 37.

4—The conditional obligation of the indorser becomes absolute when the note has become dishonored and the necessary proceedings have been taken. His contract, whether in blank or in full, is determined by law. Charles v. Denis, 42 Wis., 56. He has no right to require the holder to sue the maker or drawer; it is his duty to take up the instrument. Day v. Ridgway, 17 Pa. St. 303.

The holder of indorsed paper has a right to rely on the contract of the indorser that the paper will be paid by the maker at maturity and he is not bound to anticipate and make provision for a breach of the contract. Bartlett v. Isbell, 31 Conn. 296.

Sec. 69. **Liability of indorser where paper negotiable by delivery.**—Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.[1]

1—Indorsement is not necessary to pass an instrument payable to bearer or indorsed in blank, but if the holder choose to put his name on the back he becomes as much bound as an indorser as if the instrument had been made payable to him or order. Brush v. Administrators, etc., 3 Johns. 439; Tam v. Shaw, 10 Ind. 469;

Cover v. Myers, 75 Md. 406, 23 Atl. 850; Smith v. Rawson, 61 Ga. 208.

By indorsing a non-negotiable note a payee does not become liable as an indorser. Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

Sec. 70. **Order in which indorsers are liable.**—As respects one another, indorsers are liable prima facie in the order in which they indorse,[1] but evidence is admissible to show that as between or among themselves they have agreed otherwise.[2] Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.[3]

1—Successive indorsers are *prima facie* liable in the order in which they indorse and not as cosureties, and this applies to accommodation indorsers as well as to indorsers for value. For example, where a second indorser of a promissory note pays and takes up the note, he becomes a holder for value and may maintain an action to recover the amount thereof of the first indorser although both are accommodation indorsers. Kelly v. Burroughs, 102 N. Y. 93; Harrah v. Doherty, 111 Mich. 175; Greusel v. Hubbard, 51 Mich. 95; McGurk v. Huggett, 56 Mich. 187; Farwell v. Ensign, 66 Mich. 600; Brewer v. Boynton, 71 Mich. 254; McCarty v. Roots, 21 How. (U. S.) 432; Wolf v. Hostetter, 182 Pa. St. 292, 37 Atl. 988; Russ v. Sadler, 197 Pa. St. 51; Easterly v. Barber, 66 N. Y. 433.

2—Parol evidence is admissible to show that by agreement among themselves they were to be cosureties, Farwell v. Ensign, 66 Mich. 600; Shufelt v. Moore, 93 Mich. 564; or that their undertaking was joint, Harrah v. Doherty, 111 Mich. 175. But parol evidence is inadmissible to show that what stands as a clear and unambiguous contract of indorsement was not intended to be such. An agreement made at the time of indorsement that the indorser was not to be liable is inadmissible, as the indorsement must stand upon its legal import. Hitchcock v. Frackelton, 116 Mich. 487; Phelps v. Abbott, 114 Mich. 88; Kulenkamp v. Groff, 71 Mich. 675. If one indorser as the result of a mistake sign before another, this may be shown. Rhinehart v. Schall, 69 Md. 352.

3—This changes the common-law rule which was that where joint payees indorsed they were only jointly liable. Lane v. Stacy, 8 Allen 41; Russ v. Sadler, 197 Pa. St. 51, 46 Atl. 903.

Sec. 71. **Liability of agent or broker.**—Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-seven of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.[1]

1—Worthington v. Cowles, 112 Mass. 30. Action to recover back money paid by plaintiff to defendants for a promissory note signed by one Hanson, the indorsement upon which was forged. The defendants were note brokers who sold the note for Hanson and paid him the purchase money, less commissions, before the forgery was discovered. Held: that to relieve an agent from liability upon an implied warranty of the genuineness of a promissory note sold by him, which afterwards proves to be forged, the transaction must have been such that the purchaser understood, or ought as a reasonable man to have understood, that he was dealing with the principal.

Lyons v. Miller, 6 Gratt. (Va.) 439.

Article VI. Presentment for Payment.

Sec.
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Sec. 72. **Want of demand on principal debtor; effect of.**—Presentment for payment is not necessary in order to charge the person primarily liable on the instrument,[1] but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part.[2] But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.[3]

1—This is an affirmation of the general rule. The primary party is liable, by the terms of his contract, without any demand prior to commencement of suit. Harrisburg Trust Co. v. Shufeldt, 78 Fed. 292; Greeley v. Whitehead, 35 Fla. 523, 17 So. 643; Howard v. Boorman, 17 Wis. 459; Hills v. Place, 48 N. Y. 520. The

rule applies to one who has guaranteed the payment of the instrument by the maker or acceptor. Presentment for payment, either to the principal debtor or to the guarantor, is not a condition precedent to the liability of the guarantor of payment. Roberts v. Hawkins, 70 Mich. 566; Walton v. Mascall, 13 M. & W. 452; Gage v. Lewis, 68 Ill. 605. The rule applies to the accommodation maker; although he is a surety in fact, he is liable without presentment for payment. Torrey v. Foss, 40 Me. 74; American Nat. Bank v. Junk Bros. 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492.

This provision should not be considered as an absolute rule. It is to be construed in connection with sections relating to qualification of acceptance. Obviously it was not designed to change the general rule that the acceptor may, by the terms of a qualified acceptance, make presentment for payment a condition precedent to his liability.

The Wisconsin Act omits the remainder of this sentence.

2—As against the maker of a note payable at a bank or other particular place it is not necessary to allege or prove presentment or demand for payment at such a place. Reeve v. Pack, 6 Mich. 240; McIntyre v. Mich. State Ins. Co., 52 Mich. 188; Howard v. Boorman, 17 Wis. 459. The only consequence of neglect to make presentment for payment at the place named is to relieve the primary party from damages and costs incident on suit brought without such presentment. Such neglect will bar interest and costs, not the cause of action. But if actual loss or damage has attended failure to make presentment at the place named, such loss or damage may be offset against the instrument. Cox v. Nat. Bank, 100 U. S. 713; Armistead v. Armisteads, 10 Leigh. 525; Bank v. Zorn, 14 S. C. 444. The bringing of a suit upon a certificate of deposit, which is held to be a promissory note payable on demand, is a sufficient demand of payment. Beardsley v. Webber, 104 Mich. 88; Tripp v. Curtenius, 36 Mich. 494; Curran v. Witter, 68 Wis. 16; Lynch v. Goldsmith, 64 Ga. 42; Hunt v. Divine, 37 Ill. 137. Some courts have made this distinction between a promissory note payable on demand and a certificate of deposit: in the case of a note the maker might be sued without a demand, but in the case of a certificate of deposit, a demand for payment must be made. Riddle v. First Nat. Bank, 27 Fed. 503; Pardee v. Fish, 60 N. Y. 265; Shute v. Pacific Nat. Bank, 136 Mass. 487; McGough v. Jamison, 107 Pa. St. 336.

In the New York Act this additional clause appears between the words "maturity" and "such": "and has funds there available for that purpose." Concerning these words Mr. Crawford says: "They were added by the laws of 1898, chap. 336. They seem to be superfluous. It is difficult to see how a man can be *able* to pay,

unless he has the funds with which to make such payment. Besides, if taken literally, they impose a condition not deemed necessary by the courts. If, for example, the 'special place' where the paper is payable is the office of the maker or acceptor, this provision requires that he have the funds there, and it would not be enough that he have them in bank. The interpolation is not only at variance with the decisions on the subject, but is contrary to good sense, and to the practice of the business world." Crawford's Ann. Neg. Inst. Law, 72.

3—Demand upon the real maker is necessary to charge the irregular indorser. Peck v. Easton, 74 Conn. 456 (a case under the statute). The statute changes the rule in Michigan in this regard.

Demand is necessary although the indorser has become the personal representative of the maker. Magruder v. Union Bank, 3 Pet. 90; so too, to charge the accommodation indorser, although the indorsement was made for the sole purpose of giving the note credit and currency. Buck v. Cotton, 2 Conn. 126; so too, where the maker has become insolvent, Lawrence v. Langley, 14 N. H. 70; so too, where the indorser has received security. Moses v. Ela, 43 N. H. 557; Whittier v. Collins, 15 R. I. 44.

This provision of the statute was referred to in In re Swift, 106 Fed. 65.

Sec. 73. **Presentment where instrument is not payable on demand.**—Where the instrument is not payable on demand, presentment [1] must be made on the day it falls due.[2] Where it is payable on demand, presentment must be made within a reasonable time after its issue,[3] except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

1—Presentment and demand are usually spoken of as a single act; they are, however, separate and distinct acts, and both acts must be performed in order to fix the liability of secondary parties. The demand must be made according to the tenor of the instrument. Thus, a holder demands payment in gold coin on presentment of an instrument payable in silver. Due presentment is not made. Langenberger v. Kroeger, 48 Cal. 147.

2—As to date of maturity see section 87.

In Ryerson v. Tourcotte, 121 Mich. 78, it was held that where orders were payable only on the tenth day of each month, it was unnecessary to make presentment

to the drawee on that day, if payment had been refused on earlier presentment on the ground that the drawee did not owe the drawer.

In case of paper payable in instalments, demand for each instalment is necessary to charge the indorser. Eastman v. Turman, 24 Cal. 380.

3—See sec. 2.

No delay is reasonable beyond that which would fairly be required in the ordinary course of business without special inconvenience to the holder or by special circumstances of the particular case. Phoenix Ins. Co., v. Gray, 13 Mich. 191; Carll v. Brown, 2 Mich. 401; Home Savings Bank v. Hosie, 119 Mich. 116.

In England a note payable on demand has been regarded as a continuing security whether it be with or without interest, immediate payment not being contemplated by the parties; so if payment be not demanded within any definite time, the holder is not chargeable with neglect and the instrument is not considered overdue. Brooks v. Mitchell, 9 M. & W. 15. In this case two years was not considered unreasonable time. Chartered Bank v. Dickson, L. R. 3 P. C. 574. The same rule prevailed in New York prior to the statute. Wheeler v. Warner, 47 N. Y. 519; Parker v. Stroud, 98 N. Y. 379; Shutts v. Fingar, 100 N. Y. 541. In the United States as a general rule, the courts have followed the rule embodied in the statute. Martin v. Winslow, Fed. Cas. No. 9172; Perry v. Green, 19 N. J. L. 61; Bassenhorst v. Wilby, 45 Ohio St. 333, 13 N. E. 75; Field v. Nickerson, 13 Mass. 131. In the case last cited seven months' delay in making presentment was held to discharge the accommodation indorser, who had been told by one of the makers that payment was not to be demanded immediately.

As overdue instruments are made payable on demand by section 9, the requirements of this section apply to such paper.

A statute of Massachusetts provided that a note payable on demand should be considered overdue if presentment and demand of payment were not made within sixty days from the date thereof. This was the statutory definition of reasonable time as applied to notes payable on demand. In Merritt v. Jackson, 181 Mass. 69 (a case under the statute), it was held that in the absence of any evidence of usage of trade or facts of the particular case to bring it within the provisions of the Negotiable Instruments Law, defining reasonable time (sec. 2) a demand on a promissory note payable on demand must be made within sixty days of the date in order to hold an indorser, and this, too, although the statute first above referred to was repealed by the Negotiable Instruments Law.

The presentment for payment of a note payable on demand is presumptively within a reasonable time; an indorser, to raise the issue that its presentment was de-

layed for an unreasonable time must plead and prove such matter as a defense. German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. Supp. 142 (a case under the statute). The ordinary certificate of deposit, when it is negotiable, has been considered as a continuing security and immediate demand of payment is not contemplated; so the indorser remains liable on the certificate although demand be not made within the time required in the case of other negotiable instruments. Birch v. Fisher, 51 Mich. 36; Nat. Bank v. Washington County Nat. Bank, 5 Hun, 605. In this case the certificate was not presented until seven years after its issue.

When the material facts are admitted or not in dispute, the question as to what constitutes a reasonable time is one of law for the court, Turner v. Iron Chief Mining Co., 74 Wis. 355; Parker v. Reddick, 65 Miss. 242; when the facts are complicated and conflicting the question is one for the jury, under instructions from the court. Muilman v. D'Equino, 2 H. Black. 565.

Sec. 74. **Sufficient presentment; what constitutes.**—Presentment for payment, to be sufficient, must be made:

First, By the holder, or by some person authorized to receive payment on his behalf;[1]

Second, At a reasonable hour on a business day;[2]

Third, At a proper place, as herein defined;[3]

Fourth, To the person primarily liable on the instrument, or, if he is absent or inaccessible, to any person found at the place where the presentment is made.[4]

1—Mere possession of a negotiable instrument payable to bearer or indorsed in blank, is sufficient to entitle one to make presentment and demand. Jackson v. Love, 82 N. C. 405. Payment to such person is always good unless the payer knows that the holder is not rightfully possessed of the instrument, Sussex Bank v. Baldwin, 17 N. J. L. 487. But possession of a note payable to the order of a third person and not indorsed by him, is not sufficient to entitle the holder to demand payment. Barnett v. Ringgold, 80 Ky. 289; Doubleday v. Kress, 50 N. Y. 413. Any duly authorized agent of the holder may make presentment and the authorization need not be in writing. Hartford Bank v. Stedman, 3 Conn. 489; Hartford Bank v. Barry, 17 Mass. 93. Upon the holder's death presentment should be made by his personal representative, even

though the note has been specifically bequeathed. Crist v. Crist, 1 Carter (Ind.) 570.

One to whom negotiable paper has been transferred as collateral security or as a pledge, must make presentment for payment, give notice, etc., otherwise he will make the paper his own and will be liable for any loss sustained by reason of his neglect. Jennison v. Parker, 7 Mich. 355; Phoenix Ins. Co. v. Allen, 11 Mich. 501; Whitten v. Wright, 34 Mich. 92; Peacock v. Pursell, 14 C. B. (n. s.) 728.

In the case of foreign bills there may be two presentments, one by the holder or his agent in the usual way, the other by a notary or other proper person for the purpose of protest. This might also occur in the case of inland bills or promissory notes, but as to these protest is permissible, not compulsory.

Mr. Bigelow says that for the purpose of fixing the liability of secondary parties, presentment must be made by one who can compel, not merely receive, payment. Bigelow, Bills, Notes and Cheques, 124. No authority is cited to support the statement and the distinction assumed seems unwarranted in view of the statute which declares presentment *sufficient* if made by some person "authorized to *receive* payment" on behalf of the holder.

2—In the case of paper not payable at bank, presentment is made within a reasonable time if made at an hour at which, taking into consideration the habits of the community or district in which he lives, the maker may reasonably be expected to be in condition to attend to ordinary business. Farnsworth v. Allen, 4 Gray, 453; Estes v. Tower, 102 Mass. 65; Wilkins v. Jadis, 2 B. & Ad. 188. Presentment should be made within hours not given over to rest. What might be a reasonable hour in one community might be an unreasonable hour in another. The difference between country residence and urban residence, in the hours of retiring and rising, will affect the reasonableness of the hour of making presentment. The question whether a presentment is within reasonable time cannot be made to depend on the private and peculiar habits of the maker of a note, not known to the holder; but it must be determined by a consideration of the circumstances which, in ordinary cases, would render it seasonable or otherwise. Farnsworth v. Allen, *supra*. If presentment be made at the place of business of the payer it must be during the hours when such places are usually open. Dana v. Sawyer, 22 Me. 244; Triggs v. Newnham, 1 Car. & P. 631; Waring v. Betts, 90 Va. 46. As to time of presentment of paper payable at a bank see sec. 77.

3—See next section.

4—Presentment to the clerk of an acceptor or promisor at his office or place of business is sufficient without showing any special authority given to the clerk.

Stewart v. Eden, 2 Caines (N. Y.) 121; Draper v. Clemens, 4 Mo. 52; Stainback v. Bank, 11 Gratt. 260.

To render an indorser liable on a note signed by one who affixes the word "agent" to his name without disclosing his principal, payment must be demanded of and refused by the agent. Demand on the principal is not sufficient. Stinson v. Lee, 68 Miss. 113, 9 L. R. A. 830, 24 Am. St. R. 257; Hall v. Bradbury, 40 Conn. 32.

Sec. 75. **Place of presentment.**—Presentment for payment is made at the proper place:

First, Where a place of payment is specified in the instrument and it is there presented;[1]

Second, Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;

Third, Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;[2]

Fourth, In any other case if presented to the person to make payment wherever he can be found,[3] or if presented at his last known place of business or residence.

1—Secondary parties will be discharged unless presentment be made at the place specified in the instrument, but primary parties will not be affected by failure of presentment at the specified place unless the place be especially restricted by the words "only and not elsewhere," or words of similar import. Cases arise where the drawer of a bill of exchange designates in the instrument the place of payment, and the decisions are that in such case both the drawer and the indorser will be discharged unless the bill be there presented for payment at maturity; but the same decisions hold otherwise as to the maker of a note and the acceptor of a bill. Cox v. Nat. Bank, 100 U. S. 704; Struthers v. Kendall, 41 Pa. St. 214, 80 Am. Dec. 610; Brooks v. Higby, 11 Hun, 235; Wolcott v. Van Santvoord, 17 Johns. 248. In Regan v. Sorenson (N. D. 1904), 100 N. W. 1093 (a case under the statute), it was held that where the notary presented a note—made payable to one Grondahl "at

his store in Fargo, North Dakota" —at the store to some person connected therewith, it was a sufficient presentment to charge the payee indorser, although there was no personal demand made on the maker.

2—If presentment be made within office hours at the place of business of the payer, though there be no one there to answer, it is sufficient to charge the indorser. Wallace v. Crilley, 46 Wis. 577; West v. Brown, 6 Ohio St. 542.

If the party presenting the paper for payment find the place of business closed but the payer has a residence in the place where his business is conducted, which can be found with reasonable diligence, presentment must be made at such residence. Farnsworth v. Mullen, 164 Mass. 112, 41 N. E. 131; Reinke v. Wright, 93 Wis. 368, 67 N. W. 737. See also Sulzbacher Bros. v. Bank of Charleston, 86 Tenn. 201.

Presentment at the place of business within business hours is sufficient unless the place has been permanently closed. Baumgardner v. Reeves, 35 Pa. St. 250.

The presumption that a note which specifies no place of payment is to be paid where the note is dated, at the residence of the person liable upon it, is one that applies to indorsers. McIntyre v. Mich. State. Ins. Co., 52 Mich. 188. But see Blodgett v. Durgin, 32 Vt. 361.

The making and dating of a promissory note at a particular place is not equivalent to making it payable there nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker, if such place of business or residence be known or can be ascertained by due diligence in making inquiry. Anderson v. Drake, 14 Johns. 114; Oxnard v. Varnum, 111 Pa. St. 193.

If the primary party has changed his residence to another place within the state the holder is bound to use due diligence in endeavoring to ascertain the new place of residence and make presentment there, but if the change of residence is to a place without the state, the holder is not bound to inquire further or take further steps. Nailor v. Bowie, 3 Md. 251; Taylor v. Snyder, 3 Den. 145; Foster v. Julien, 24 N. Y. 28.

It has been held that diligence must be exercised to obtain payment even where the primary party has absconded. Pierce v. Cate, 12 Cush. 190; *contra*, Lehman v. Jones, 1 Watts & Sarg. 126; Duncan v. McCullough, 4 Serg. & R. 480.

The place of presentment and demand is immaterial if the maker or acceptor, on demand made, expressly or impliedly refuses to pay. Parker v. Kellogg, 158 Mass. 90, 32 N. E. 1038.

3—In King v. Cromwell, 61 Me. 244, demand made on the street was held sufficient to charge the indorser. The court said: "It would seem that such a demand

would be more satisfactory than a mere formal ceremony of a demand gone through at his place of residence during the maker's absence." But see King v. Holmes, 11 Pa. St. 456.

Sec. 76. **Instrument must be exhibited.**—The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.[1]

1—The instrument must be exhibited in order that the maker or acceptor may be able to judge (1st) of the genuineness of the instrument; (2d) of the right of the holder to receive payment; and (3d) that he may immediately reclaim possession of the instrument upon paying the amount. Waring v. Betts, 90 Va. 46; Musson v. Lake, 4 How. (U. S.) 262; Hansard v. Robinson, 7 B. & C. 90; Freeman v. Boynton, 7 Mass. 483. In the case last cited demand was held insufficient because it appeared that the party demanding payment did not have the bill with him. If, on demand of payment, the exhibition of the instrument is not asked for, and the party to whom demand is made declines on other grounds, a formal presentment by actual exhibition of the paper is considered waived. Waring v. Betts, *supra;* Lockwood v. Crawford, 18 Conn. 361; King v. Cromwell, 61 Me. 244; Fall River Union Bank v. Willard, 5 Met. (Mass.) 216.

In case the instrument has been lost, presentment of a copy with offer of indemnity will be sufficient. Hinsdale v. Miles, 5 Conn. 331. When the maker pays the instrument he has a right to its possession and also a right to receive any collaterals which have been deposited with the holder as security for its payment. He may refuse to pay unless such collaterals are tendered with the note. Ocean Nat. Bank v. Fant, 50 N. Y. 474.

Sec. 77. **Presentment where instrument payable at bank.**—Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.[1]

1—In the case of paper payable at a bank actual presentment and exhibition of the paper is not required and obviously is not possible. Presentment of such paper stands upon a footing of its own and differs from presentment and demand as understood in other cases. Presentment of paper payable at bank is complete on the concurrence of two facts: 1st, presence of the paper at maturity in the bank; 2d, knowledge of the bank of such fact. See Martin v. Smith, 108 Mich. 278; Chicopee Bank v. Philadelphia Bank, 8 Wall. 641. This case affords an interesting illustration of the rule above stated. The facts were: a letter in which a bill had been transmitted, was, when brought from the post office to the bank, lain down with other papers on the cashier's desk and before being taken up or seen by the cashier had slipped through a crack in the desk and so disappeared. The fact of the bill being thus physically present in the bank did not of itself amount to presentment, because it was there without knowledge of the bank of such fact. This rule of presentment applies 1st, to paper payable at bank (generally); 2nd, to paper payable at a specified bank; 3d, to paper payable at a specified bank but lodged with the holder's bank for collection. Paper payable at bank is payable at any bank in the place of payment and may be lodged for payment accordingly. Hazard v. Spencer, 17 R. I. 561. But to lodge paper with a trust company would not be a sufficient demand. Nash v. Brown, 165 Mass. 384. Paper on its face payable at a designated bank may be lodged by the holder thereof with his own bank for collection. In such a case the practice is for the bank with which the paper is lodged to notify the maker, drawee or acceptor, as the case may be, that it holds such paper for collection and requests acceptance or payment. Paper thus lodged with the holder's bank and left until maturity will satisfy the rule for presentment. Mechanics Bank v. Merchants Bank, 6 Metc. (Mass.) 13; West v. Brown, 6 Ohio St. 542. If the bank designated has branches, presentment should be made at that branch where the maker keeps his account. Prince v. Oriental Bank, 3 L. R. App. Cas. 325; Woodland v. Fear, 7 El. & B. 519.

Presentment as used in this section was clearly designed to include demand. Presentment made after banking hours is good if there have been no funds of the maker at the bank during the day, and there is a proper officer at the bank to whom presentment can be made. Salt Springs Bank v. Burton, 58 N. Y. 432. If the maker has funds at the bank any time during business hours and then withdraws them, no presentment having been made, the indorsers are discharged, because no valid presentment could be subsequently made though an officer were in the bank after busi-

ness hours. Id. Authorities are at variance as to when suit may be brought on a dishonored note payable at a bank. It has been held that the maker has until expiration of banking hours to provide funds for payment and suit cannot be commenced until then, but if payment is demanded and refused, right of action accrues at the close of such banking hours. Church v. Clark, 21 Pick. 310. It has been held, on the other hand, that suit cannot be brought until the day following the dishonor of the paper. Blackman v. Nearing, 43 Com. 56. It has been held also that suit may be brought as soon as payment is refused. Humphrey v. Sutcliffe, 192 Pa. St. 336.

German-American Nat. Bank v. Milliman, 31 N. Y. Misc. 87, 65 N. Y. Supp. 242 (a case under the statute). It was sought, in this case, to charge the maker with protest fees, the protest having been made before four o'clock on the day of maturity. The note was presented at the bank at which it was made payable at 10 o'clock A. M. and also at 3:30 P. M. There were no funds provided for payment at the time of either presentment. After the second presentment the note was protested, but before the close of banking hours the maker deposited sufficient funds to make his account cover the note. It was held that although demand for payment had been previously made, and the note protested for non-payment, the protest became of no avail on deposit of the amount of the said note and interest, and the maker cannot be compelled to pay the protest fees thus incurred. Sutherland, J., said: "In my opinion it was not the intention of the legislature by sec. 135 (77) to change the law as it stood up to that time, giving the maker of the note all of the banking hours to meet his note payable at the bank."

Sec. 78. **Presentment where person primarily liable is dead.**—Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if, with the exercise of reasonable diligence, he can be found.[1]

1—The statute makes definite the proper course to be pursued in the case of the death of the maker or acceptor and affirms the general rule, Gower v. Moore, 25 Me. 16; Toby v. Maurian, 7 La. 493; and does not recognize the exception made by certain courts in cases where the representative of the deceased is exempt from suit for a certain period. Hale v. Burr, 12 Mass. 86; Orien-

tal Bank v. Blake, 22 Pick. 206; Landry v. Stansbury, 10 La. Ann. 484. Hale v. Burr is criticized in Gower v. Moore, 25 Me. 16, wherein it is held that knowledge of the indorser that the note would not be paid on presentment, that the maker had died and that his estate was insolvent, would not relieve the holder from his obligation to make presentment. Presentment to the personal representative of the deceased is required even though the indorser and personal representative are one and the same person. Magruder v. Union Bank, 3 Pet. 87. It has been held that if there be no personal representative presentment should be made at the former residence or place of business of the deceased. Bank of Washington v. Reynolds, Fed. Cas. No. 954.

Sec. 79. **Presentment to persons liable as partners.**—Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.[1]

1—Presentment to and demand on one of the partners primarily liable on an instrument is sufficient, inasmuch as each partner represents the partnership. Before dissolution it would not be necessary to make demand on the several partners, nor could it be necessary after dissolution, for the partnership as to all antecedent transactions continues until they are closed. Crowley v. Barry, 4 Gill. (Md.) 194; Mt. Pleasant Branch Bank v. McLeran, 26 Iowa 306; Fourth Nat. Bank v. Heuschen, 52 Mo. 207; Coster v. Thomason, 19 Ala. 717; Gates v. Beecher, 60 N. Y. 518. When one partner is dead presentment should not be made to his personal representative but to the survivor. Cayuga County Bank v. Hunt, 2 Hill 635.

Sec. 80. **Presentment to joint debtors.**—Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.[1]

1—There is some authority to the effect that presentment to and demand upon one of the joint makers is sufficient to charge the indorser. Harris v. Clark, 10 Ohio 6; Greenough v. Smead, 3 Ohio St. 416; but the statute is declaratory of the general rule of

the law merchant. Arnold v. Dresser, 8 Allen 435; Shutts v. Fingar, 100 N. Y. 539; Blake v. McMillen, 33 Iowa 150.

"Where the joint debtors are at different places at the maturity of the note, and it could only be presented to one, due diligence would only require its presentment to the others in such time as they could be reached; and the impossibility of presenting to all on the day of maturity would excuse non-presentment to those at other places." Daniel, Neg. Inst., 5th ed., sec. 595. See sec. 84.

Sec. 81. **When presentment not required to charge the drawer.**—Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.[1]

1—See Bills of Exchange Act, sec. 46 (2) (c).

Failure to make presentment and to give notice of dishonor cannot be successfully interposed as a defense in an action against the drawer (of a check) when he had no funds in the bank and had no expectation that the check would be paid. Carson, Pirie, Scott & Co. v. Fincher (Mich.), 101 N. W. 844; Compton v. Blair, 46 Mich. 1. But see note 3, sec. 187, distinction between drawer of check and drawer of bill.

The mere fact that the drawer of a bill has no funds in the hands of the drawee will not excuse presentment if the drawer had a right to expect or require the bill to be accepted or paid. Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696; Welch v. B. C. Taylor Mfg. Co., 82 Ill. 579. See sec. 63.

Drawing without funds of the drawer in the hands of the drawee is presumptively fraudulent, but the presumption may be overcome by showing reasonable grounds for belief on the part of the drawer that his draft would be honored notwithstanding the want of funds. Reasonable ground for drawing is the test. Harness v. Davies Co. Savings Assn., 46 Mo. 357, and cases *supra*. Reasonable ground for drawing may relate to the time of drawing or to the time of presentment. If at the time of drawing the drawer has funds in the hands of the drawee but withdraws them, presentment is not necessary to charge him with liability, but if the drawer has funds in the hands of the drawee when the bill is presented, but did not when the bill was drawn, he is entitled to notice. Gage Hotel Co. v. Union Bank, 171 Ill. 531. Where a bill is accepted for the accommodation of the drawer, presentment to the acceptor is not necessary to charge the drawer.

Sec. 82. **When presentment not required to cha indorser.**—Presentment for payment is not requi order to charge an indorser where the instrume made or accepted for his accommodation and he reason to expect that the instrument will be paid sented.[1]

1—This section deals with cases where the indorser is the primary debtor. In such cases he is not entitled to presentment, demand or notice any more than he would have been had he appeared on the paper in his true character. The reason is obvious, no one is bound to indemnify him. We Mitchell, 22 Fed. 871; A Bank v. Junk Bros., 94 T 30 S. W. 753, 28 L. R. Holman v. Whiting, 19 A Witherow v. Slayback, 1 660; McVeigh v. Bank, 785.

Sec. 83. **When delay in making presentment is e** —The delay in making presentment for payment cused when the delay is caused by circumstances the control of the holder, and not imputable to fault, misconduct or negligence. When the cause o ceases to operate, presentment must be made with able diligence.[1]

1—For example, delay in the mail, Pier v. Heinrichshoffen, 67 Mo. 163; Windham Bank v. Norton, 22 Conn. 213; see sec. 107; delay caused by war, House v. Adams, 48 Pa. St. 261; delay caused by illness, Wilson v. Senier, 14 Wis. 411. But, as was said in the case last cited, the illness must not only be shown to have been sudden, but likewise so severe as to have prevented the ow agent from employing person to make the pre or to give the notice, as to have preclud possibility of his doing self; and then it must b that the proper steps we as soon as the disability moved.

Sec. 84. **When presentment may be dispensed** Presentment for payment is dispensed with:

First, Where, after the exercise of reasonable dil presentment as required by this act cannot be mad

Second, Where the drawee is a fictitious person;[2]
Third, By waiver of presentment, express or implied.[3]

1—Reasonable diligence is all that is required. The holder is not expected to do the impossible, but the burden is upon him to show that he has exercised such reasonable diligence. Martin v. Grabinski, 38 Mo. App. 359. It is impossible to define what constitutes reasonable diligence, because it depends upon the circumstances of each particular case. It is clear that the holder must take all steps which are likely to give him information as to the whereabouts of the party to whom presentment is to be made. He must make all reasonable efforts to discover the residence of the maker or acceptor. Merely consulting the directory is not sufficient when other sources of accurate information may be within convenient reach. If the instrument be put into the hands of a notary to be presented by him, the holder should give him all the facts within his knowledge as to the whereabouts or place of business or residence of the maker or acceptor. Reasonable diligence is not exercised if the holder omits to inquire of the indorsers or other parties to the instrument as to the whereabouts of the principal debtor. Smith v. Fisher, 24 Pa. St. 222. If, after due diligence has been exercised, the maker, his place of business or residence cannot be found, presentment will be excused. Insolvency of the maker will not excuse presentment. Reinke v. Wright, 93 Wis. 368. It has been held that in case the maker is insolvent when the note falls due and is without property sufficient to pay it the holder has an immediate right of action against the indorser without presentment and demand. Forbes v. Rowe, 48 Conn. 413; Hawkinson v. Olson, 48 Ill. 277; Couch v. First Nat. Bank, 64 Ind. 92. But under this holding the insolvency must be absolute and so notorious as to leave no doubt of the fact. Oliver v. Munday, 3 N. J. L. 982.

What is due diligence is a question of law when the facts are admitted or clearly established; it is a mixed question of law and fact when the facts are in dispute. Fourth Nat. Bank v. Heuschen, 52 Mo. 207; Bank of Columbia v. Lawrence, 1 Pet. 578.

2—Smith v. Bellamy, 2 Starkie 223.

3—Waiver of presentment need not be in any particular form; any language or conduct from which it appears that a waiver is intended, is sufficient. Quaintance v. Goodrow, 16 Mont. 376, 41 Pac. 76.

Where an indorser makes a parol promise to pay the note at the time of his indorsement, he has been held to have waived presentment. Annville Nat. Bank v. Kettering, 106 Pa. St. 531. See *contra*: Davis v. Gowan, 19 Me. 447.

If the waiver be embodied in the instrument itself, it becomes a part of the contract and subsequent indorsers become parties to it and are bound by it. Lowry v. Steele, 27 Ind. 170. If the waiver be written in connection with the signature of an indorser it affects only him. Woodman v. Thurston, 8 Cush. 157. But see Parshley v. Heath, 69 Me. 90.

In re Swift, 106 Fed. 65 (a case under the statute). The facts were, a firm had given a note indorsed by one partner. Shortly before maturity the indorser held a conference with the holder and declared that neither the firm nor he could pay at maturity. Subsequently, and before the maturity of the note, the partnership assigned for the benefit of creditors. It was held that the indorser had impliedly waived presentment.

Congress Brewing Co. v. Habenicht, 83 App. Div. 141, 82 N. Y. Supp. 481 (a case under the statute). The defendant was indorser of a demand note. Some time before demand was made, the payee informed the indorser of the amount of the maker's then indebtedness and the indorser said he would see the maker and if the latter did not make his account good "he would go and shut him up." Held, not a waiver of demand.

Sec. 85. **When instrument dishonored by non-payment.**—The instrument is dishonored by non-payment when:

First, It is duly presented for payment and payment is refused or cannot be obtained; or

Second, Presentment is excused and the instrument is overdue and unpaid.[1]

1—This section is entirely consistent with the proposition that a note payable at a bank is not dishonored provided funds to meet it are deposited before the close of banking hours. German-American Nat. Bank v. Milliman, 31 N. Y. Misc. 87, 65 N. Y. Supp. 242 (a case under the statute). See sec. 77.

Sec. 86. **Liability of party secondarily liable, when instrument dishonored.**—Subject to the provisions of this act, when the instrument is dishonored by non-payment an immediate right to recourse to all parties secondarily liable thereon accrues to the holder.[1]

1—If the instrument has been dishonored and proper notice given to the indorser, his conditional liability is changed into an

absolute liability, his status is changed from that of mere surety to that of principal debtor.

Though the holder have in his hands collateral security for the payment of the paper, the indorser cannot compel him to sue the maker or to enforce his security. If the indorser desires the benefit of any security held by the creditor, he must pay the debt, fulfill the contract and enforce his right of subrogation to such securities. First Nat. Bank v. Wood, 71 N. Y. 405; German-American Bank v. Milliman, 31 N. Y. Misc. 87, 65 N. Y. Supp. 242 (a case under the statute). The note involved in this case was payable at a bank. Defendant contended that the note was not dishonored if funds were deposited in the bank at any time before the close of banking hours although demand was made earlier in the day and payment refused. Sutherland, J., speaking for the court said,—"This section is not inconsistent with the defendant's position, because the note is not dishonored absolutely if the deposit is made before the close of banking hours. If sec. 144 (86) is to be construed as applying to notes payable at a bank, it might be argued, with much force, that the legislature intended to permit an indorser to be sued on the day the note falls due, and even before the close of banking hours provided an early demand be made. I hardly think any such startling innovation was intended."

This section does not apply to a guaranty of collection and other conditional guaranties. In such cases, further steps must be taken to fix the liability of the guarantor. There is no right of action against the guarantor until the holder has first made due effort to collect from the principal debtor. Cowles v. Peck, 55 Conn. 251; Summers v. Barrett, 65 Ia. 292. A distinction must be made between a right of recourse and a right of action. The holder's right of action against the drawer or indorser dates from the time when notice of dishonor is or ought to be received by such drawer or indorser. Castrique v. Barnabo [1884] 6 Q. B. 498.

Sec. 87. **Time of maturity.**—Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for pay-

ment before twelve o'clock noon on Saturday when that entire day is not a holiday.[1]

1—This changes the law in Michigan and repeals 4871-2 C. L. 1897, in virtue of which, as well as of the law merchant, grace has prevailed in Michigan. This section differs from the corresponding section of the Bills of Exchange Act sec. 14 (1) by which days of grace are preserved. In addition to those states which have adopted the negotiable instruments law (see introduction), California, Illinois, Maine, Minnesota and Vermont have abolished days of grace. The Massachusetts Act has, in addition to the first sentence, the following: —"except that three days of grace shall be allowed upon a draft or bill of exchange made payable within this commonwealth at sight, unless there is an express stipulation to the contrary." The New York Act as amended 1898 (see introduction) contains the additional words "or becoming payable" after the words "instrument falling due." The Colorado Act substitutes the following for the third sentence,—"Instruments falling due on any day, in any place where any part of such day is a holiday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment during reasonable hours of the part of such day which is not a holiday."

In the North Carolina Act another provision is added, as follows,—"The laws now in force in this state with regard to days of grace shall remain in full force and shall not be construed to be repealed by this act."

The Wisconsin Act omits the last sentence.

By virtue of sec. 4880 C. L. 1897, as amended by laws of 1903, 420, promissory notes falling due on Saturday are presentable for payment and payable on the next secular day or business day succeeding such Saturday, unless such succeeding day is a legal holiday, in which case they are payable on the next succeeding day. Notes maturing on Sunday, are payable on Monday. Hitchcock v. Hogan, 99 Mich. 124.

Sec. 88. **Time; how computed.**—Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the date of payment.[1]

1—This is declaratory of the common law rule. Campbell v. French, 6 T. R. 200; Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 163.

According to the law merchant a month means a calendar month. A note dated January 1, payable one month after date, matures (grace excluded) February 1. One dated January 31, payable one month after date matures (grace excluded) February 28; 29th if leap year. Roehner v. Knickerbocker, *supra*.

When the last day of grace falls upon a non-business day, the paper reaches maturity on the next preceding business day. Capital Nat. Bank v. Am. Exc. Nat. Bank, 51 Neb. 707.

Sec. 89. **Where instrument payable at bank.**—Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.[1]

1—This section settles a matter which has been the subject of disagreement among the courts. Some courts have held that there is no implied authority for a bank to pay a third party a note made payable at its place of business simply because of the fact that the maker has funds sufficient for that purpose. Grissom v. Commercial Nat. Bank, 87 Tenn. 350, 3 L. R. A. 273; Ridgely Nat. Bank v. Patton, 109 Ill. 479; Nat. Exchange Bank v. Nat. Bank, 132 Mass. 151. Other courts have maintained the rule aptly stated by Rapallo, Judge, in Indig v. Nat. City Bank, 80 N. Y. 106, in these words: "A note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank." State Bank v. McCabe, (Mich.) 98 N. W. 20; Lazier v. Horan, 55 Iowa 75; First Nat. Bank v. Hall, 119 Ala. 64, 24 So. 526; Bedford Bank v. Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560.

The statute follows, in effect, the words above quoted.

In case the bank is holder of paper there payable it is its right to apply to the payment of the note any funds standing to the credit of the maker, unless such funds are specially applicable to some particular purpose. Dawson v. Real Estate Bank, 5 Pike 284; Alpena Nat. Bank v. Greenbaum, 74 Mich. 157. It has been held that it is its *duty* as well as its right to make such application, because the note is, in effect, a draft on the bank in favor of the holder and in discharge of the indorser. German Nat. Bank v. Foreman, 138 Pa. St. 474; Commercial Bank v. Henninger, 105 Pa. St. 496. But see Mechanics & Traders Bank v. Seitz Bros., 150 Pa. St. 632, wherein it is

held that while a bank which has discounted a promissory note may appropriate funds in its hands belonging to any party to the note, to the payment of the note when payment is not made at the time and place named, yet it is not bound to do so as to any party except the maker. But inasmuch as the maker is liable to the indorser, he cannot require the bank to appropriate the indorser's funds to the payment of his own note nor complain if the bank refuses so to do.

Sec. 90. **Payment in due course; what constitutes.**—Payment is made in due course when it is made at or after the maturity of the instrument [1] to the holder thereof in good faith and without notice that his title is defective.[2]

1—See Bills of Exchange Act, sec. 59.

A payment before maturity is not in the usual course of business and if the paper should subsequently get into the hands of a *bona fide* holder before maturity he could enforce a second payment, Williams v. Keyes, 90 Mich. 290; Wheeler v. Guild, 20 Pick. 545; Watson v. Wyman, 161 Mass. 96.

2—The party having actual possession of the instrument is the one *prima facie* entitled to receive payment. The party paying cannot assume that the paper has not been transferred and make payment to the original holder without demanding the return of the instrument. If he does so, and the instrument has been transferred, though he take a receipt from the party to whom he pays the amount, he will be liable to pay it again to a *bona fide* holder. Dutton v. Ives, 5 Mich. 515; Williams v. Keyes, *supra;* Markey v. Corey, 108 Mich. 184; Brooke v. Struthers, 110 Mich. 562; Wilson v. Campbell, 110 Mich. 580; Texarkana Nat. Bank v. Stillwell & Co., 121 Mich., 154; Bloomer v. Dau, 122 Mich. 522; Wheeler v. Guild, *supra;* Davis v. Miller, 14 Gratt. 1.

If an instrument has been lost and the party primarily liable has notice of such fact, he should require the person presenting it to establish his identity and his title to the note. Page Woven Wire Fence Co. v. Pool, 133 Mich. 323.

Drinkall v. Movins State Bank, (N. D. 1901) 88 N. W. 724 (a case under the statute). This case involved the question of the defendant's notice when it paid the check that the holder's title was defective.

See sec. 2, "holder."

Article VII. Notice of Dishonor.

Sec.		Sec.	
91.	Notice of dishonor, to whom must be given.	107.	When sender deemed to have given due notice.
92.	By whom given.	108.	Deposit in post-office, what constitutes.
93.	Notice given by agent.	109.	Notice to antecedent parties, time of.
94.	Effect of notice given on behalf of holder.	110.	Where notice must be sent.
95.	Effect where notice is given by party entitled to give notice.	111.	Waiver of notice.
96.	When agent may give notice	112.	Whom affected by waiver.
97.	When notice sufficient.	113.	Waiver of protest.
98.	Form of notice.	114.	When notice dispensed with.
99.	To whom notice may be given.	115.	Delay in giving notice, how excused.
100.	Notice when party is dead.	116.	When notice need not be given to drawer.
101.	Notice to partners.	117.	When notice need not be given to indorser.
102.	Notice to joint parties.	118.	Notice of non-payment where acceptance refused.
103.	Notice to bankrupt.	119.	Omission to give notice of non-acceptance, effect of.
104.	Time within which notice must be given.	120.	When protest need not be made; when must be made.
105.	Where parties reside in same place.		
106.	Where parties reside in different places.		

Sec. 91. **Notice of dishonor; to whom must be given.** —Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.[1]

1—This section follows the Bills of Exchange Act, sec. 48, and is declaratory of the common law. Daniel, Neg. Inst., 5th ed., sec. 970.

Knowledge that the paper has been dishonored is not enough to charge the secondary party; notice is absolutely requisite. Union Bank v. Magruder, 7 Pet. 287; Bank v. McVeigh, 29 Gratt. 546; Juniata Bank v. Hale, 16 S. &

R. 157. The same results follow from the omission to give notice as from the omission to make demand of payment. A party discharged from liability on the instrument by omission to give notice of dishonor is discharged from liability on the debt evidenced by the instrument. Bridges v. Berry, 3 Taunt. 131; Jones v. Savage, 6 Wend. 659; Woodcock v. Bennet, 1 Cow. 711.

The rule of the section does not apply to guarantors who are not discharged by omission to give notice. Roberts v. Hawkins, 70 Mich. 566; Hungerford v. O'Brien, 37 Minn. 306. But the same person may be guarantor and indorser of a negotiable instrument; in such case failure to give him notice of dishonor will discharge him as indorser but not as guarantor. Daniel Neg. Inst., 5th ed., sec. 1754.

The indorsee is only required to give notice to his immediate indorser who may then notify antecedent indorsers and secure himself; so the notary need not make any inquiry as to the residence of any of the indorsers except the last. Wood v. Callaghan, 61 Mich. 402; West River Bank v. Taylor, 34 N. Y. 128; Linn v. Horton, 1 Wis. 157. But such indorsee could look for indemnity only to the party to whom he had given notice unless notice to other antecedent parties had been given, which would inure to him.

This section has been referred to in the following cases arising under the statute: Ebling Brewing Co. v. Reinheimer, 32 N. Y. Misc. 594, 66 N. Y. Supp. 458; Fonseca v. Hartman, 84 N. Y. Supp. 131; Peck v. Easton, 74 Conn. 456. In the case last cited a party indorsing before delivery to the payee was held entitled to notice of dishonor.

Sec. 92. **By whom given.**—The notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.[1]

1—See Bills of Exchange Act, sec. 49 (1).

For about fifty years the question was in doubt whether a party other than the holder could give valid notice. In Tindal v. Brown, 1 T. R. 167 (1786) it was held that no party could give a valid notice unless he were a holder at the time. This rule was disapproved in Chapman v. Keane, 3 A. & E. 193, 30 E. C. L. 69 and the rule embodied in the statute was declared to be the true rule and in accordance with the practice in commercial circles. Aus-

ten v. Miller, Fed. Cas. No. 661; Bank of Utica v. Smith, 18 Johns. 230; Cromer v. Platt, 37 Mich. 132. A mere stranger cannot give valid notice. Chanoine v. Fowler, 3 Wend. 173; Lawrence v. Miller, 16 N. Y. 235. A party who cannot in any event bring an action on the instrument is deemed a stranger. Harrison v. Ruscoe, 15 M. & W. 231, 15 L. J. Ex. 110; Traders' Nat. Bank v. Jones, 93 N. Y. Supp. 768 (a case under the statute). Notice by the drawee who has refused acceptance is not sufficient. Stanto v. Blossom, 14 Mass. 116.

Sec. 93. **Notice given by agent.**—Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.[1]

1—Notwithstanding a party, who cannot in any event bring an action on the instrument, cannot give valid notice on his own behalf (see preceding section), he may nevertheless give notice as agent of any party who is entitled to give notice. Traders' Nat. Bank v. Jones, 93 N. Y. Supp. 768 (a case under the statute); Drexler v. McGlynn, 99 Cal. 143, 33 Pac. 773; Renick v. Robbins, 28 Mo. 339. Some cases are to the effect that the acceptor "or any party to the bill" may give valid notice independent of any question of agency, Rosher v. Kieran, 4 Camp. 87; Douglas v. Bank, 97 Tenn. 133. But the doctrine of these cases so far as it is to be accepted can only be explained on the ground that the acceptor was the authorized agent of the holder in the matter; otherwise the doctrine is unsound. There must be an agency, if the notice is not given by an indorser, at the time of giving the notice and in the act of doing it. New York Co. v. Selma Sav. Bank, 51 Ala. 305; Bigelow Bills, Notes & Cheques, 144. In giving notice, a notary public acts as the agent of the party he serves, not as a public officer. Bank v. Ober, 31 Kan. 599, 3 Pac. 324. But a notice made out by a notary public and signed, by mistake, with the name of the maker instead of with his own name without the authority of the maker is insufficient. Cabot Bank v. Warner, 10 Allen 522. A bank which receives paper for collection is deemed the holder thereof for the purpose of giving notice of dishonor. Burnham v. Webster, 19 Me. 232; Crocker v. Getchell, 23 Me. 392; Blackeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105. Manchester Bank v. Fellows, 28 N. H. 302; Worden v. Nourse, 36 Vt. 756.

Sec. 94. **Effect of notice given on behalf of holder.**—Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.[1]

1—Lysaght v. Bryant, 9 C. B. 46; Chapman v. Keane, 3 Ad. & El. 193; Stafford v. Yates, 18 Johns. 327.

The section deals with notice by inurement. Illustration:—A note is dishonored while in the hands of Gage, as holder; he gives notice in due form to all secondary parties; he transfers the note to Horton who in turn transfers to Irwin. The notice given by Gage inures "for the benefit" of Horton and Irwin.

Again: Adams, Brooks, Clark and Davis are successive indorsers on a note dishonored in the hands of Eaton. Eaton gives notice to Davis and Adams. The notice given to Adams inures "for the benefit" of Brooks, Clark and Davis.

Sec. 95. **Effect where notice is given by party entitled to give notice.**—Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.[1]

1—Illustration: Adams, Brooks, Clark and Davis are successive indorsers of a note dishonored in the hands of Eaton. Eaton gives notice to Davis, Davis to Clark, Clark to Brooks, and Brooks to Adams. The notice given by Brooks to Adams inures, "for the benefit" of Eaton. See cases sec. 94.

Sec. 96. **Where agent may give notice.**—Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time

for giving notice as if the agent had been an independent holder.[1]

1—This section follows the Bills of Exchange Act, sec. 49 (13), and is declaratory of the common law.

An agent to whom a negotiable instrument is intrusted for collection, whether by indorsement or mere delivery, may give notice of dishonor direct to secondary parties thereto, but he is under no obligation so to do. His obligation is to his principal alone and that obligation as a matter of law does not in any case require him to give notice to any one except his principal. Such an agent is treated in the matter of giving notice of non-payment as an indorsee of the note and the reason of this is, that the agent may not know which of the prior parties the principal may desire to hold or where they may be found. The agent is entitled to the usual time to notify his principal of non-payment and the principal to the usual time thereafter to notify antecedent indorsers. But if the agent fails to give notice to his principal in due time, the principal is cut off notwithstanding he may thereafter use due diligence in giving notice to antecedent parties. Rosson v. Carroll, 90 Tenn. 90; Ohio Life Ins. Co. v. McCague, 18 Ohio 54; Farmers' Bank v. Vail, 21 N. Y. 485; Firth v. Thrush, 8 B. & C. 387.

The rule applies to the several branches of the same bank. For the purpose of giving notice of dishonor each of the branch banks is considered as an independent indorsee. For example, a bill of exchange was indorsed by plaintiffs to the Portmadoc Branch of the National Provincial Bank from whence it was sent to the Pwllheli Branch of the same bank, by whom it was indorsed to the head establishment of the bank in London. The bill was duly presented and dishonored. It was then returned with notice of its dishonor by that day's post from the bank in London to the branch bank at Pwllheli; from thence to the branch bank at Portmadoc and from the Portmadoc bank to the plaintiffs, who gave notice to the defendant indorser. The notice was sufficient. Clode v. Bayley, 12 M. & W. 51; Bray v. Hadwen, 5 M. & S. 68; Fielding & Co. v. Corry [1898] 1 Q. B. 268 (a case under corresponding provision of the Bills of Exchange Act).

Sec. 97. **When notice sufficient.**—A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication.

A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.[1]

1—In connection with the corresponding provision of the Bills of Exchange Act there is added: "The return of a dishonored bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour." (Sec. 49 (6). Concerning this added provision Mr. Chalmers says: "This subsection approves a common practice of collecting bankers which was previously of doubtful validity." The practice is peculiar to England.

According to the law merchant the written notice should be signed or at least it should indicate from whom it proceeds. Bank v. Dibrell, 91 Tenn. 301; Klockenbaum v. Pierson, 16 Cal. 375; Walmsley v. Acton, 44 Barb. 312; Walker v. State Bank, 8 Mo. 705. In providing that the notice need not be signed, the statute changes the law. Inasmuch as the entire notice may be oral, (see next subsection) the provision that an imperfect or invalid written notice may be supplemented or made valid by oral communication is natural and consistent.

The law requires that the notice should describe the dishonored paper with such particularity as will apprise the person to whom the notice is given of the instrument in question. Dodson v. Taylor, 56 N. J. L. 19. A misdescription which does not mislead is immaterial.

Misdescription as to amount: A note of $200 described as note of $175 with interest, not misleading. Snow v. Perkins, 2 Mich. 238. A note of $1,400 erroneously described as a note of $1,457, but correctly described in other respects, not misleading, there was no other note signed by the person named in the notice and indorsed by the person to whom the notice was sent. Bank of Alexandria v. Swann, 9 Pet. 33.

Misdescription as to date: Note dated July 20th, incorrectly described as dated Sept. 20th, correct in other respects, except as to omission of holder's name, not misleading, Mills v. Bank, 11 Wheat. 431. The cases are only illustrative. Each case is to be determined on the special facts involved. The test is, was the party misled?

Sec. 98. **Form of notice.**—The notice may be in writing or merely oral, and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment.[2]

It may in all cases be given by delivering it personally or through the mails.[2]

1—The rule as to sufficiency of notice of dishonor has undergone a number of changes before assuming the generally recognized form now expressed in the statute. The law merchant has always required that the indorser be apprised of the paper dishonored. The first rule on the subject important to refer to, required that the notice should apprise the indorser in express terms or by necessary implication of the dishonor of the paper. Solarte v. Palmer, 7 Bing. 530, 1 Bing. N. C. 194. Any notice failing to show that the paper had been dishonored was deemed insufficient.

Then it was held that the notice was sufficient if it showed by reasonable intendment that the bill had been presented to the acceptor and not paid by him and if that would be inferred by any man of business. The doctrine of reasonable intendment was duly established. Armstrong v. Christiani, 5 C. B. 687; Everard v. Watson, 1 El. & Bl. 801.

A notice containing a statement that the instrument had not been paid was held sufficient and whether preceding steps had been taken was a matter of evidence to be established at the trial. Mills v. Bank, 11 Wheat., 431. A notice declaring that a note is *unpaid* and the holders look to the indorser for payment is sufficient. Cromer v. Platt, 37 Mich. 132.

The Bills of Exchange Act provides that notice shall be sufficient in form if it *intimate* that the bill has been dishonored; the section above, if it *indicate* that it has been dishonored. Both statutes follow the rule of reasonable intendment.

No particular form of notice is required. The object of the notice is to inform the party to whom it is sent, that the instrument has been dishonored and that the holder looks to him for payment. Any form in which these facts are communicated is sufficient. Bank v. McVeigh, 29 Gratt. 558; Dodson v. Taylor, 56 N. J. L. 11.

A notice that a note has been *protested* for non-payment and that the holders look to the indorser for payment was deemed not sufficient in Platt v. Drake, 1 Doug. 296; followed in Newberry v. Trowbridge, 4 Mich. 390; overruled in Burkam v. Trowbridge, 9 Mich. 209, distinguished in Spies v. Newberry, 2 Doug. 424; Snow v. Perkins, 2 Mich. 238.

It is not necessary to state in terms that the holder looks for payment to the party to whom notice is sent. Notice that the instrument is dishonored for non-payment is in itself sufficient notice that the indorser is looked to for payment. Nelson v. First Nat. Bank, 69 Fed. 798.

It is not necessary that a copy of a foreign bill should accompany the notice of its dishonor. At-

water v. Streets, 1 Doug. (Mich.) 455.

The section is referred to in Second Nat. Bank v. Smith, 118 Wis. 18; Am. Exch. Nat. Bank v. American Hotel Co., 92 N. Y. Supp. 1006.

2—This changes the prior rule which required personal notice where the parties resided in the same place. Notice sent through the mail was insufficient in such cases if it did not in due time actually reach the indorser to whom it was addressed. Newberry v. Trowbridge, 4 Mich. 390; Nevius v. Bank, 10 Mich. 547; Cabot Bank v. Warner, 10 Allen 522; Insurance Co. v. Wilson, 29 W. Va., 547.

If the parties live in different places it has always been held that notice deposited in the post office in due time was sufficient through it never reached the addressee. Lindenberger v. Beall, 6 Wheat. 104; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177.

Many exceptions have been engrafted onto the rule that where parties reside in the same place notice by mail is insufficient unless actually received by the addressee in due time. One of the most important of these exceptions is made in the case of persons living or doing business in a place where there is a daily delivery of letters through mail carriers. In such a case it is the rule that if the notice be deposited in the post office in time to be delivered the same day it will be sufficient. Walters v. Brown, 15 Md. 292; Shoemaker v. Mechanics Bank, 59 Pa. St. 83. Again, an indorser who has received notice by mail from a holder living in a different town may give valid notice by mail to a prior indorser living in the same town as himself. Eagle Bank v. Hathaway, 5 Met. (Mass.) 213.

Sec. 99. **To whom notice may be given.**—Notice of dishonor may be given either to the party himself or to his agent in that behalf.[1]

1—This is similar in language and identical in effect with sec. 49 (8) of the Bills of Exchange Act and is declaratory of the common law.

Agent within the meaning of this section is one who is authorized to make and indorse paper for his principal, or to transact his banking business, or to act as the general agent in the conduct of his principal's business, or to liquidate the affairs of his principal, or to have general charge of his principal's acts and dealings with his bank and management of the principal's paper handled by the bank. Fassin v. Hubbard, 55 N. Y. 465; Persons v. Kruger, 60 N. Y. Supp. 1078. But an attorney or solicitor without being specially empowered in

that behalf is not such an agent as is authorized to receive notice. Louisiana State Bank v. Ellery, 4 Mart. (n. s.) 87.

Authority to indorse negotiable paper has been held to carry with it authority to receive notice of its dishonor. Firth v. Thrush, 8 B. & C. 387; but there is authority to the contrary. Louisiana State Bank v Ellery, *supra;* Valk v. Gaillard, 4 Strob. 99; Story on Prom. Notes, sec. 309; Crosse v. Smith, 1 M. & S. 545.

Notice given to a secretary of one company is not notice to another company of which he is also secretary unless it comes to him under circumstances which make it his duty to communicate it. Fenwick & Co. re, 86 L. T. (n. s.) 193 (a case under the corresponding provision Bills of Exchange Act).

The section is referred to in Am. Exch. Nat. Bank v. American Hotel Victoria Co., 92 N. Y. Supp. 1006; Mohlman Co. v. McKane, 69 N. Y. Supp. 1046.

Sec. 100. **Notice when party is dead.**—When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if, with reasonable diligence, he can be found.[1] If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.[2]

1—Goodnow v. Warren, 122 Mass. 83; Dodson v. Taylor, 56 N. J. L. 11; Bank v. Darling 91 Hun 236; Cayuga Co. Bank v. Bennett, 5 Hill 236.

Notice to one of several executors or administrators is notice to all. Beals v. Peck, 12 Barb. 245. Notice to an executor named but not qualified is sufficient. Shoenberger's Ex'r v. Lancaster Savings Institution, 28 Pa. St. 459; Drexler v. McGlynn, 99 Cal. 143. But notice to a person afterwards appointed administrator is not sufficient. Mathewson v. Strafford Bank, 45 N. H. 104. Notice should be addressed to the personal representative by his name, not by his office merely, as "Executors J. M. Quimby, deceased," although notice addressed as last above is good if the personal representative actually and duly receives it. Smalley v. Wright, 40 N. J. L. 471.

2—Stewart v. Eden, 2 Caines (N. Y.), 121; Goodnow v. Warren, *supra;* Merchant's Bank v. Birch, 17 Johns. 25; Massachusetts Bank v. Oliver, 10 Cush. 557.

Sec. 101. **Notice to partners.**—Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.[1]

1—Notice to any member of a firm is sufficient either before or after dissolution. A partnership, though dissolved, must be treated as still in existence so far as the question of demand, protest and notice is concerned, and the acts of one partner in such cases must be considered as binding on all. Fourth Nat. Bank v. Heuschen, 52 Mo. 207; Fourth Nat. Bank v. Altheimer, 91 Mo. 190; Hubbard v. Matthews, 54 N. Y. 50; Brown v. Turner, 15 Ala. 832. If one partner die, notice to the surviving partner or partners will bind the estate of the deceased partner. Slocomb v. de Lizardi, 21 La. Ann. 355.

Sec. 102. **Notice to joint parties.**—Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.[1]

1—People's Bank v. Keech, 26 Md. 521; Boyd v. Orton, 16 Wis. 495; Miser v. Trovinger's Exr's, 7 Ohio St. 281 The distinction between joint parties who are partners and joint parties who are not partners rests upon the fact that partners are but one person in legal contemplation; that each partner acting in such capacity is not only capable of performing what all can do but by such acts necessarily binds them all; that as an incident to such joint relations all the partners are affected by the knowledge of one; hence notice to one is notice to all. But these things do not pertain to the relation of joint parties who are not partners. The law does not create the relation of agency between them. While their act in making the contract is joint each cannot perform what all can do nor by his individual act bind his co-contractors; all of such joint contractors are not affected by the knowledge of one of them. Gates v. Beecher, 60 N. Y. 523. If there be no agency of their own making between joint indorsers, not partners, notice to a part of the number will not bind even them; since they are liable only jointly with the rest. Jarnagin v. Stratton, 95 Tenn. 621.

Sec. 103. **Notice to bankrupt.**—Where a party has been adjudged a bankrupt or an insolvent, or has made an

assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.[1]

1—See Bills of Exchange Act, sec. 49 (10), concerning which Mr. Chalmers says: "All that had been decided before the act was that notice given to the bankrupt in ignorance that a trustee had been appointed was sufficient." The act enlarged the rule in this respect. This section is somewhat more comprehensive than the corresponding provision of the English Act.

The Kentucky Court of Appeals and the Supreme Court of Tennessee have held that notice to the assignee of an indorser who had made an assignment would bind the indorser and his estate. Callahan v. Bank of Kentucky, 82 Ky. 231; American Nat. Bank v. Junk Bros., 94 Tenn. 634. The Supreme Court of Ohio disapproved the holding and refused to follow it, making a distinction between an assignee under a voluntary general assignment and an assignee in bankruptcy. House v. Vinton Nat. Bank, 43 Ohio St. 346. In this case two judges dissent from the majority opinion, and approve the rule of Callahan v. Bank of Kentucky.

Sec. 104. **Time within which notice must be given.**—Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the time fixed by this act.[1]

1—It is settled that the holder may send notice of dishonor upon its happening and need not wait until the close of business hours. Bank of Alexandria v. Swann, 9 Pet. 33; Lenox v. Roberts, 2 Wheat. 373; Coleman v. Carpenter, 9 Pa. St. 178; *Ex parte* Moline, 19 Ves. Jr. 216. In Kennedy v. Thomas [1894] 2 Q. B. 759, (a case under corresponding provision of the Bills of Exchange Act) it was held that where an acceptor refused payment at any time within the day on which the bill fell due the holder might give immediate notice of dishonor to drawer and indorser but could not commence suit against them or the acceptor until after the expiration of the last day of grace.

Paper payable at a bank is not absolutely dishonored before the close of banking hours. If demand should be made before the close of banking hours and there were no funds provided for payment of the paper, the holder could not treat the paper as dishonored and give notice accord-

ingly. German-American Bank v. Milliman, 31 N. Y. Misc. 87, 65 N. Y. Supp. 242 (a case under the statute).

Sec. 105. **Where parties reside in same place.**—Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:[1]

First, If given at the place of business of the person to receive notice it must be given before the close of business hours on the day following;[2]

Second, If given at his residence, it must be given before the usual hours of rest on the day following;[3]

Third, If sent by mail, it must be deposited in the post-office in time to reach him in the usual course on the day following.[4]

1—In the giving of notice of dishonor the law merchant only required that *reasonable diligence* should be used but it interpreted reasonable diligence to be confined in point of time to the day of dishonor and the first secular day following. The occurrence of non-secular days while reducing the period of grace increased the time for giving notice. Farnsworth v. Mullen, 164 Mass. 112; Bank of Utica v. Bender, 21 Wend. 643. The statute has confirmed this rule except as to the matter of grace. The holder may send notice on a non-secular day but is not required to do so. The indorser is not bound to open the letter containing the notice or to act on it until the next day. Deblieux v. Bullard, 1 Rob. (La.) 66. If there be several indorsers the holder may notify any of them he sees fit but he has no more time in which to notify the first than the last indorser. For example there are four successive indorsers of a dishonored promissory note. The maximum time the holder has to give notice is two days, but if notice were given to the indorsers in succession, the maximum time for giving the first indorser notice would be five days. Notice by holder to first indorser five days after dishonor would not be good. See sections 94, 109.

2—Adams v. Wright, 14 Wis. 408; Rowe v. Tipper, 13 C. B. 249; Lockwood v. Crawford, 18 Conn. 361; Barker v. Webster, 10 Iowa, 593.

3—Rosson v. Carroll, 90 Tenn. 90. If service be properly made at the place of business or residence it is immaterial that the

party to be notified did not in fact receive the notice. Adams v. Wright, *supra*. In the case of personal notice the rules governing presentment for payment apply. See sec. 74.

4—See note 2, sec. 98. See note 1, sec. 106.

Sec. 106. **Where parties reside in different places.**—Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

First, If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or, if there be no mail at a convenient hour on that day, by the next mail thereafter;[1]

Second, If given otherwise than though [through] the postoffice, then within the time that notice would have been received in due course of mail if it had been deposited in the postoffice, within the time specified in the last subdivision.[2]

1—The status of the unwritten law on the subject covered by this subsection is thus stated by Earl, J., in Smith v. Poillon, 87 N. Y. 590: "It is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor would be given by the next post after dishonor, on the same day, if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places, between which there was a mail, the notice could be posted the next day after the dishonor or notice of dishonor. Some of the authorities hold that the party required to give the notice may have the whole of the next day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this state. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reasonable application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law." To the same

effect: Lawson v. Farmers' Bank, 1 Ohio St. 206; Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105; Corbin v. Planters' Nat. Bank, 87 Va. 666; Brown v. Jones, 125 Ind. 375; Hawkes v. Salter, 4 Bing. 715.

Stainback v. Bank, 11 Gratt. 260. This was an action against the indorser of a bill drawn on a drawee in London, and protested for non-acceptance April 5th. Notice was sent in a mail leaving Liverpool, April 19, by a Cunard steamship, that being the first steamship leaving England for the United States after the dishonor of the bill. But between the 5th and the 19th several sailing packets left England for the United States. It was the usage of the London post-office to forward all mail by the Cunard line unless specially directed to be forwarded by other vessels. The indorser defended on the ground that the notice should have been sent by one of the sailing packets departing from England on an earlier day than the steamship. The sending of the notice by the first steamship that left England for the United States after the dishonor of the bill was held to be within the stringent rule requiring that notice be sent by the first mail.

Notice must be sent by the first ship bound to any port of the United States, and it is not sufficient to send it by the first ship bound for the port where the indorser resides. Fleming v. McClure, 1 Brevard (S. C.) 428. Indorser resided in Charleston, S. C. Holder, in England, waited for ship sailing for Charleston, S. C., by which he sent notice. In the meantime there were several sailings of mail ships for other ports of the United States. Held: notice not seasonably sent.

Fielding & Co. v. Corry [1898] 1 Q. B. 268 (a case under corresponding provision of the Bills of Exchange Act), Mohlman v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046 (a case under this section).

2—The holder need not send the notice by mail. He may send it by special messenger, and if he does so it is sufficient if it be served within the time it would have been received in due course by mail as provided in subsection "first." It has been held that although the notice by messenger reaches the party after the time it would have been received in due course it is nevertheless sufficient if served within business hours. Bancroft v. Hall, Holt. 476, 3 E. C. L. 190; Corbin v. Planters' Bank, 87 Va. 666.

The statute would seem to be mandatory in requiring notice "given otherwise than through the post office" to be served within the time it would have been received in due course of mail.

Sec. 107. **When sender deemed to have given due notice.**—Where notice of dishonor is duly addressed and

deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.[1]

1—Shelburne Falls Nat. Bank v. Townsley, 107 Mass. 444; Farmers' Bank v. Gunnell, Adm'x, 26 Gratt. 137; Wooley v. Lyon, 117 Ill. 244; Phelps v. Stocking, 21 Neb. 443; Shed v. Brett, 1 Pick. 401; Stocken v. Collin, 7 M. & W. 515, 10 L. J. Ex. 227; State Bank v. Soloman, 84 N. Y. Supp. 976 (a case under the statute).

All who deal in mercantile paper are presumed to assent, and even to expect, that such information as they want will be communicated through the medium of the post office. And thus the post office becomes their agent; and if it happen to fail from any unexpected cause, he who made the right use of it by placing his letter there, properly directed, has done all his duty, and the consequences must fall upon him who has to receive. Shred v. Brett, *supra*.

Sec. 108. **Deposit in postoffice; what constitutes.**—Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department.[1]

1—Wood v. Callaghan, 61 Mich. 402; Johnson v. Brown, 154 Mass. 105; Casco Nat. Bank v. Shaw, 79 Me. 376.

It has been held that delivery of notice to an official letter carrier is the full equivalent of depositing it in a receiving box or in the post office. Pearce v. Langfit, 101 Pa. St. 507. The rule of the foregoing case is not within the terms of the statute. Mr. Crawford says that it was not deemed wise to adopt this rule. Crawford's Ann. Neg. Inst. Law, 97.

Sec. 109. **Notice to antecedent parties; time of.**—Where a party receives notice of dishonor he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.[1]

1—It is an established principle of mercantile law that if the holder of a bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given, in

due time, by the other parties, it will inure to the benefit of the holder, and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. And it is no objection to such notice that it is not in fact received so soon by the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he receives it. And the same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. Linn v. Horton, 17 Wis. 151; Corbin v. Planters' Nat. Bank, 87 Va. 666; Seaton v. Scovill, 18 Kan. 433. See note, sec. 94.

Sec. 110. **Where notice must be sent.**—Where a party has added an address to his signature, notice of dishonor must be sent to that address;[1] but if he has not given such address, then the notice must be sent as follows:

First, Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters;[2] or

Second, If he live in one place and have his place of business in another, notice may be sent to either place;[3] or

Third, If he is sojourning in another place, notice may be sent to the place where he is so sojourning.[4] But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.[5]

1—An indorser has the right to designate, when he indorses, a place to which notice shall be sent. Notice must be addressed to him at the place designated in order to bind him. So held where an indorser added to his signature the words, "214 E. 18th St.," and the notice was addressed "City of New York." Bartlett v. Robinson, 39 N. Y. 187, and it was so held notwithstanding a statute which provided that notices of non-payment, etc., may be served by depositing them * * * in the post office * * * directed to the indorser at *such city or town*. This statute, it was said, was not intended to and did not abridge the right of such indorser

to designate the place within such town or city to which notice should be sent.

Peters v. Hobbs, 25 Ark. 67; Eastern Bank v. Brown, 17 Me. 356.

2—Citizens Nat. Bank v. Cade, 73 Mich. 449; Northwestern Coal Co. v. Bowman, 69 Iowa 150.

The general rule is that notice must be sent to the place where the indorser will be most likely to receive it. American Bank v. Junk Bros., 94 Tenn. 624; Bank of America v. Shaw, 142 Mass. 290; Casco Bank v. Shaw, 79 Me. 376. In view of this rule the true interpretation of this subsection would seem to be this: that notice must be sent to the post office nearest the indorser's place of residence, but if he is accustomed to receive his letters at another post-office, and that fact is known to the holder, notice should be sent there, and not that the holder has the option to send to the one or the other. See the following cases in which this subdivision was referred to but not construed. Ebling Brewing Co. v. Reinheimer, 66 N. Y. Supp. 458; Mohlman Co. v. McKane, 60 App. Div. 546, 69 N. Y. Supp. 1046; Fonseca v. Hartman, 84 N. Y. Supp. 131.

3—Montgomery County Bank v. Marsh, 7 N. Y. 481; Simms v. Larkin, 19 Wis. 412.

4—Sojourning signifies a temporary residence as that of a traveler in a foreign land; to live, and not at home; it applies to temporary as contra distinguished from permanent residence. Wittenbrock v. Mabius, 10 N. Y. Supp. 733, 57 Hun, 146; Henry v. Ball, 14 U. S. (1 Wheat.) 1. Thus, a senator or member of the House having an abode in Washington during the session of Congress is "sojourning" there and notice may be sent to such temporary abode. Chouteau v. Webster, 6 Met. (Mass.) 1; Tunstall v. Walker, 2 Smedes & M. 638; Bank of Commerce v. Chambers, 14 Mo. App. 152. But see Bayly's Adm'r v. Chubb, 16 Gratt. 284; Walker v. Stetson, 14 Ohio St. 89.

5—Notice is good if actually received by the indorser. A party who receives notice in due time cannot object to the means employed. Dicken v. Hall, 87 Pa. St. 379; Terbell v. Jones, 15 Wis. 253.

Notice by telegraph is good if delivered in due season. Fielding v. Corry, [1898] 1 Q. B. 268.

Sec. 111. **Waiver of notice.**—Notice of dishonor may be waived, either before the time of giving notice has arrived,[1] or after the omission to give due notice,[2] and the waiver may be express or implied.[3]

1—Any conduct on the part of the indorser calculated to induce, and inducing, the holder to omit serving him with regular notice

of non-payment, will have the effect to waive it. Hale v. Danforth, 46 Wis. 554; Boyd v. Bank, 32 Ohio St. 526; Glaze v. Ferguson, 48 Kan. 157; Tailer v. Murphy Furnishing Co., 24 Mo. App. 420. A promise by the indorser before the maturity of the note to pay the same is a waiver of all steps. Sigerson v. Mathews, 20 How. (U. S.) 496; Gove v. Vining, 7 Met. (Mass.) 212.

Waiver, at or before maturity, of presentment and notice upon an instrument indorsed by a partnership may be by one of the partners as agent of the others, and this even though the partnership is dissolved, since it does not create a new liability. Seldner v. Mount Jackson Nat. Bank, 66 Md. 488; Star Wagon Co. v. Swezey, 52 Iowa 391. But it seems that waiver after maturity, the firm being discharged for want of presentment or notice, would not revive its obligation. Daniel Neg. Inst., 5th ed., sec. 1109a, and cases cited.

An oral waiver of notice may be revoked before the time of giving notice has expired. Second Nat. Bank v. McGuire, 33 Ohio St. 295, 31 Am. Rep. 539.

2—Notice is waived by a subsequent promise to pay the note, with full knowledge of all the facts. Burden of proof, however, is on the plaintiff to show that the indorser had such knowledge. State Bank v. McCabe (Mich. 1904), 98 N. W. 20; Newberry v. Trowbridge, 13 Mich. 263; Parsons v. Dickinson, 23 Mich. 56; Woods v. Dean, 32 L. J. Q. B. 1.

A promise to pay made by the indorser after maturity and after he is discharged for want of demand or notice is binding in analogy with the promise to pay a debt barred by the statute of limitations. Rindge v. Kimball, 124 Mass. 209; Ross v. Hurd, 71 N. Y. 14; Oxnard v. Varumn, 111 Pa. St. 193.

The indorser to be bound by such subsequent promise must have knowledge of the laches and all the material facts constituting such laches. Parks v. Smith, 155 Mass. 26. But it is not necessary he should understand the legal effect of such laches.

3—The waiver need not take any particular form. Any language, whether oral or written, or any understanding between the parties, is sufficient if it can be seen that a waiver was intended. Quaintance v. Goodrow, 16 Mont. 376, 41 Pac. 76; Schwartz & Sons v. Widmer, 90 Md. 136 (a case under the statute). See In re Swift, 106 Fed. 65, in which, section 84, subdivision 3, a provision identical with this except that it applies to presentment, was construed.

Sec. 112. **Whom affected by waiver.**—Where the waiver is embodied in the instrument itself, it is binding upon all parties;[1] but where it is written above the signature of the indorser, it binds him only.[2]

1—A waiver embodied in the instrument is a part of the contract and applies to every indorser of the paper. Phillips v. Dippo, 93 Iowa 35; Farmers' Bank v. Ewing, 78 Ky. 266; Lowry v. Steele, 27 Ind. 168; Jacobs v. Gibson, 77 Mo. App. 244; Woodward v. Lowry, 74 Ga. 148.

2—"Such an indorsement is sometimes spoken of as a facultative indorsement. It relates only to the indorser's liability, and does not otherwise affect the negotiation of the bill. Such stipulations are resorted to when the payment of the bill is doubtful, and the drawer or indorser wishes to save expense in case of its return." Chalmers' Bills of Exchange, 5th ed., 40. Some courts have held, contrary to the general rule, that such an indorsement dispenses with the necessity of notice to all subsequent indorsers. Daniel, Neg. Inst., 5th ed., sec. 1092 a; Parshley v. Heath, 69 Me. 90; Johnson v. Parker, 86 Mo. App. 660; Farmers' Exchange Bank v. Altura & Co., 129 Cal. 263. The statute settles the rule.

Sec. 113. **Waiver of protest.**—A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.[1]

1—Strictly, protest is a single step in fixing the liability of secondary parties and pertains only to foreign bills of exchange. Practically, however, it has long since come to be used as a term including all the steps necessary to charge the indorser.

The general rule of the law merchant on the subject is embodied in this section. Union Bank v. Hyde, 6 Wheat. 572; Johnson v. Parsons, 140 Mass. 173; First Nat. Bank v. Hartman, 110 Pa. St. 196; Coddington v. Davis, 1 N. Y. 186; First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866.

A waiver of notice will not be construed to extend beyond the plain and clear import of the terms used and will not include waiver of demand. Voorhies v. Atlee, 29 Iowa 49; Drinkwater v. Tebbetts, 17 Me. 16; Backus v. Shipherd, 11 Wend. 629; Sprague v. Fletcher, 8 Ore. 367.

Sec. 114. **When notice dispensed with.**—Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to, or does not reach, the parties sought to be charged.[1]

1—The law does not require actual notice. It requires reasonable efforts, made in good faith, to give it. And if sufficient inquiries have been made, and information received upon which the holder has a right to rely, a mistake as to the nearest post office or usual post office does not deprive him of his remedy. He has done all that the law requires, and the notice thus sent fixes the liability of the indorser as effectually as if he had actually received it. Lambert v. Ghiselin, 9 How. (U. S.) 552.

The meaning of reasonable diligence as used in this section is thus interpreted by the Supreme Court of New York in Brewster v. Schrader, 26 Misc. 480, 57 N. Y. Supp. 606: "The reasonable diligence required by the statute in giving notice, depends upon the circumstances of each particular case. The question of what is reasonable diligence must be determined with reference to what would have suggested itself as necessary, under the existing circumstances, to the man of ordinary prudence and intelligence." The section is referred to in Fonseca v. Hartman, 84 N. Y. Supp. 131. See Studdy v. Beesty, 60 L. T. (n. s.), 647 (a case under the corresponding provision of the Bills of Exchange Act).

Merely consulting directories is not reasonable diligence in making inquiry. The information they afford may be misleading. Their help may be invoked, but their error, though it may excuse the notary, will not charge the indorser. Bacon v. Hanna, 137 N. Y. 379.

Sec. 115. **Delay in giving notice; how excused.**—Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.[1]

1—Thus delay caused by war whereby communication was cut off so that notice could not be sent, James v. Wade, 21 La. Ann. 548; Norris v. Despard, 38 Md. 487. This section deals with what is known as temporary excuse for taking a given step in fixing the liability of the secondary party. See note, sec. 83.

Sec. 116. **When notice need not be given to drawer.**—Notice of dishonor is not required to be given to the drawer in either of the following cases:

First, where the drawer and drawee are the same person;[1]

Second, Where the drawee is a fictitious person or a person not having capacity to contract;[2]

Third, Where the drawer is the person to whom the instrument is presented for payment;[3]

Fourth, Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;[4] or

Fifth, Where the drawer has countermanded payment.[5]

1—Where the drawer and drawee are the same person the bill is in legal effect a promissory note and no notice to the drawer is necessary. Planters' Bank v. Evans, 36 Tex. 592. Where a bill of exchange is drawn by one partnership on another and the two have a common partner, notice of the dishonor of the bill is not necessary to charge the drawers. New York, etc. Co. v. Selma Sav. Bank, 51 Ala. 305; Gowan v. Jackson, 20 Johns. 176.

2—Smith v. Bellamy, 2 Starkie, 223; Wyman v. Adams, 12 Cush. 210.

3—This subdivision applies to the case of a drawer who has been appointed executor or trustee of the drawee's estate. Presentment for payment having been made to him in his representative capacity he gets actual knowledge of the dishonor of the paper. Further notice would be superfluous. Knowledge of the dishonor in such a case amounts to notice. Caunt v. Thompson, 7 C. B. 400, 62 E. C. L. 399; Groth v. Gyger, 31 Pa. St. 271; Magruder v. Union Bank, 3 Pet. 87.

4—Where the drawer has no right to expect that the acceptor will pay the bill, as where it is an accommodation bill, so that he could not be damnified by want of notice, notice is not necessary. Sharp v. Bailey, 9 B. & C. 44; Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696; French v. Bank of Columbia, 4 Cranch, 141.

The mere fact that the drawee has no funds of the drawer in his hands will not dispense with due presentment and notice. All that is required is that the drawer have reasonable grounds to expect that his draft will be honored. Cathell v. Goodwin, Har. & Gill (Md.) 468.

5—Sutcliffe v. M'Dowell, 2 Nott. & McC. 251.

Sec. 117. **Where notice need not be given to indorser.**—Notice of dishonor is not required to be given to an indorser in either of the following cases:

First, Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument;[1]

Second, Where the indorser is the person to whom the instrument is presented for payment;[2]

Third, Where the instrument was made or accepted for his accommodation.[3]

1—The indorser, aware that the drawee is a fictitious person, has all the knowledge that the paper cannot be accepted and will not be paid that he could acquire from notice; hence notice is properly dispensed with. In case the drawee were a person lacking capacity to contract and the indorser were aware of the fact at the time he endorsed, his knowledge that acceptance or payment could not be compelled is as complete as notice could make it.

2—Hull v. Myers, 90 Ga. 674. In re Swift, 106 Fed. 65 (a case under this subdivision of the statute).

3—Webster v. Mitchell, 22 Fed. 871; American Nat. Bank v. Junk Bros., 94 Tenn. 624; Morris v. Birmingham Nat. Bank, 93 Ala. 511, 9 So. 606.

Where one, as indorser, procures the note of another to be discounted by a bank for his credit, and at the time the discount is effected makes a distinct promise to the bank to pay the note at maturity, his liability is absolute, not conditional, and protest and notice of non-payment are unecessary. Sieger v. Second Nat. Bank, 132 Pa. St. 307.

Sec. 118. **Notice of non-payment where acceptance refused.**—Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.[1]

1—De La Torre v. Barclay, 1 Stark, 7; Campbell v. French, 6 T. R. 200.

Sec. 119. **Omission to give notice of non-acceptance; effect of.**—An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.[1]

1—This section affirms the rule declared in Dunn v. O'Keefe, 5 M. & S. 282, wherein Lord Ellenborough said: "No authority has pronounced that a bill of exchange shall be a void security, in the hands of an innocent indorsee, who has no knowledge that the bill has ever been dishonoured, because a former holder has omitted to give notice to the drawer that the drawee has refused acceptance."

The Wisconsin Act contains this further provision: "But this shall not be construed to revive any liability discharged by such omission."

Sec. 120. **When protest need not be made; when must be made.**—Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required, except in the case of foreign bills of exchange.[1]

1—Foreign bills defined, section 131. See sections 154-162 and notes as to protest generally. The statute affirms the law merchant in requiring protest of foreign bills only.

Article VIII. Discharge of Negotiable Instrumen

Sec.		Sec.	
121.	How instrument discharged.	125.	Cancellation unintent burden of proof.
122.	Discharge of person secondarily liable on.	126.	Alteration of instru effect of.
123.	Rights of party paying instrument.	127.	Material alteration, constitutes.
124.	Renunciation by holder.		

Sec. 121. **How instrument discharged.**—A negot instrument is discharged:

First, By payment[1] in due course by or on beha the principal debtor;[2]

Second, By payment in due course by the party ac modated, where the instrument is made or accepte accommodation.[3]

Third, By the intentional cancellation thereof by holder;[4]

Fourth, By any other act which will discharge a si contract for the payment of money;[5]

Fifth, When the principal debtor becomes the h of the instrument at or after maturity in his own ri

1—Payment and surrender of a negotiable instrument at the right time,—at or after maturity (sec. 90), to the right person—the holder—by the right person,—the principal debtor or his agent in that behalf,—extinguishes the liability of all parties to the instrument.

The possession of a promissory note by the maker makes a *prima facie* case of payment, it throws the burden upon the plaintiff to prove non-payment. Page Woven Wire Fence C Pool, 129 Mich. 57.

As to what constitutes pa see Morris v. Morris, 5 171; Appledorn v. Streete Mich. 9; Sherwood v. M Bank, 94 Mich. 78; State v. Byrne, 97 Mich. 7.

Whether a note given in r al of another note is to b garded as payment of th note when the old note is r ed, is a question in conflict Child v. Pellet, 102 Mich.

it was held that unless there was evidence of a contrary intention, renewals at banks ought always to be regarded as payment, because the banks themselves so regard them. To the same effect is Citizens Commercial & Savings Bank v. Platt, (Mich.) 97 N. W. 694. But see McMorran v. Murphy, 68 Mich. 246. To the contrary see Daniel's Neg. Inst., 5th ed., sec. 1266 and cases cited.

Where the old note is surrendered the renewal note, according to the probable weight of authority, does not constitute payment of the old, but the giving up of the old note is a mere conditional surrender, and upon nonpayment of the new, the obligation of the old is revived, Daniel's Neg. Inst., 5th ed., sec. 1266 *a*.

The intention of the parties will, however, always be allowed to control. If the renewal note be *intended* as payment of the old, although the old be not surrendered, it will be *considered* as payment. Hotchin v. Secor, 8 Mich. 494; Sage v. Walker, 12 Mich. 425; Dodge v. Stanton, id. 408; Brown v. Dunckel, 46 Mich. 29; Riverside Iron Works v. Hall, 64 Mich. 165; Ellis v. Ballou, 129 Mich. 303; See also Dudgeon v. Haggart, 17 Mich. 273; Burchard v. Frazer, 23 Mich. 228; Matter of the Utica Plowing Co. 154 N. Y. 268.

When a debtor gives his note for a preëxisting or contemporaneous debt it amounts to conditional payment, not to an extinguishment of the debt. Breitung v. Lindhaur, 37 Mich. 217; Marinette Iron Works Co. v. Cody, 108 Mich. 381; Smalley v. Gearing, 121 Mich. 190; Philadelphia v. Neill, (Pa. 1905) 60 Atl. 1033.

The law does not raise a presumption of non-payment but of payment when due. Bailey v. Gould, Walk. Ch. 478; Bassett v. Hathaway, 9 Mich. 28; George v. Ludlow, 66 Mich. 176.

When the holder of a bill of exchange, acting for the accommodation of the drawer, sends it to a bank for collection and the bank, when the bill comes to maturity, passes the amount to the credit of the holder, this is not such a payment as discharges the acceptor; but the bank succeeds to the rights of the holder and may maintain an action on the bill against the acceptor. Pacific Bank v. Mitchell, 9 Met. (Mass.) 297.

2—When an agent makes payment on behalf of the principal debtor the instrument is discharged. But when an indorser makes part payment to the holder not as agent for the principal debtor, such a payment is not a defense to the principal debtor; he is liable for the whole amount notwithstanding such payment. Madison Square Bank v. Pierce, 137 N. Y. 444. See sec. 123 as to payment by party of secondary liability.

3—See Lancey v. Clark, 64 N. Y. 209.

4—See sec. 125.

5—Thus a release of one joint maker by the holder 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 cases. Daniel Neg. Inst., 5th ed., sec. 1294. Crawford v. Roberts, 8 Ore. 324; but according to Shaw v. Pratt, 22 Pick. 305, such a release, to operate as a discharge, must be under seal.

6—This subdivision was construed in Schwartzman v. Post, 94 App. Div. 474, 84 N. Y. Supp. 922, 87 Id. 872. In this case the holder of a note for $5,000 surrendered it to the maker upon payment by the latter of $3,250 and a promise to pay the balance. It was held that under this provision of the statute the holder was precluded from later maintaining an action against the maker on the note to recover the balance due. The court said: "The words 'in his own right,' merely exclude such a case as that of a maker acquiring the instrument in purely a representative capacity." The corresponding provision of the Bills of Exchange Act was construed in Nash v. De Freville [1900] 2 Q. B. 72. In this case A. gave B. certain notes as security upon his promise not to negotiate the same, and later gave renewal notes but did not ask for the return of the old notes. B. again agreed not to negotiate the notes but later transferred all of them to C. A. paid the amount of the notes to B. but did not get the notes back at the time. Later B. again obtained the notes from C. by fraudulently giving C. his check which was worthless. B. returned the notes to A. and then absconded. A., thinking the transaction closed, burned the notes. It was held that inasmuch as B. got title to the notes from C. fraudulently, he could give A. no better title than he had, and A's possession of the notes did not discharge the same. It was held further that the words "in his own right" must mean something more than 'not in a representative capacity,' as executor, for instance. Collins, J., said: "I think 'in his own right' must mean having a right not subject to that of any one else—good against all the world."

Sec. 122. **Discharge of person secondarily liable on.**—A person secondarily liable on the instrument is discharged:

First, By any act which discharges the instrument;[1]

Second, By the intentional cancellation of his signature by the holder;[2]

Third, By the discharge of a prior party;[3]

Fourth, By a valid tender of payment made by a prior party;[4]

Fifth, By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;[5]

Sixth, By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument,[6] unless made with the assent of the party secondarily liable,[7] or unless the right of recourse against such party is expressly reserved.[8]

1—Farmers & Mechanics Bank v. Kingsley, 2 Doug. (Mich.) 379. See preceding section.

2—Bank of Scotland v. Dominion Bank [1891] App. Cas. 592.

3—This is the rule of the law merchant and is general in its application; whatever discharges the maker of a note or the acceptor of a bill discharges the indorsers, and the discharge of an indorser releases all indorsers subsequent to him. Brewer v. Boynton, 71 Mich. 254; Gunnis etc. v. Weigley, 114 Pa. St. 194; Shutts v. Fingar, 100 N. Y. 539. In the case last cited it is said: "Whatever discharges a prior indorser discharges all subsequent indorsers, for the reason that he stood between them and the holder, and on making payment each one could have had recourse against him but from which his discharge precludes them. The contracts of the parties to a note are said to be like the links of a pendant chain, if the holder dissolves the first every link falls with it."

But this rule does not apply where a prior party is discharged by the holder's failure to give him due notice, such discharge not affecting the indorser whose liability has become fixed, West River Bank v. Taylor, 34 N. Y. 128. Nor, where the party primarily liable is discharged because of lack of capacity to contract, as an infant or a married woman.

Where the holder has allowed the statute of limitations to run against the maker of a note, the indorser is discharged. Bridges v. Blake, 106 Ind. 332. But see Villars v. Palmer, 67 Ill. 204.

4—The creditor, who declines to accept a valid tender of payment for which the surety is obligated, discharges the surety. Sears v. VanDusen, 25 Mich. 351; Joslyn v. Eastman, 46 Vt. 258.

The Wisconsin Act has this additional provision: "4 *a*. By giving up or applying to other purposes collateral securities applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes."

Noble v. Murphy, 91 Mich. 653, involves a case similar to the foregoing provision.

5—Release of the principal debtor discharges the drawer and indorsers; as it takes away their right of reimbursement. Montgomery v. Sayre, 100 Cal. 182, 34 Pac. 646. But if the holder in making such release expressly reserves his right of recourse against the drawer and indorsers they will not be discharged, as their rights and remedies are thus, by implication, reserved against the party primarily liable. Boatman's Sav. Bank v. Johnson, 24 Mo. App. 317; Gloucester Bank v. Worcester, 10 Pick. 528; Tombeckbe Bank v. Stratton, 7 Wend. 429.

6—The surety's promise cannot be enlarged in the slightest particular without his consent; so any extension of time given to his principal, no matter how short, will discharge him. Bullock v. Taylor, 39 Mich. 137; Barron v. Cady, 40 Mich. 259; Stevens v. Oaks, 58 Mich. 343; Walter A. Wood etc. Co. v. Oliver, 103 Mich. 326; First Nat. Bank v. Walker, 115 Mich. 434; Hitchcock v. Frackelton, 116 Mich. 487.

In order to discharge the indorser by giving time to the maker, there must be a contract to that effect, express or implied, that is, the holder must have put it out of his power for the time being to proceed against the maker. Peninsular Sav. Bank v. Hosie, 112 Mich. 351; Continental Life Ins. Co. v. Barber, 50 Cor 567.

The agreement for extension time must be supported by a co sideration, otherwise it will unenforceable and will not su pend the creditor's right to su Briggs v. Norris, 67 Mich. 32 McInerney v. Lindsay, 97 Mic 238; Morse v. Blanchard, 1 Mich. 37; Shayler v. Gidding 122 Mich. 659.

Part payment of the debt a tually due is not sufficient co sideration for an extension time. Briggs v. Norris, *supra*.

The taking by the creditor, a new note, payable on deman does not operate as an extensio of time. Continental Life Ins. C v. Barber, 50 Conn. 567; Mer man v. Barker, 121 Ind. 7 Board of Education v. Fonda, N. Y. 350. But when the ne note is payable at a future da the right of action on the o is suspended and a surety is di charged. Pomeroy v. Tanner, N. Y. 547; Okie v. Spencer, Whar. 253; Bangs v. Moshe 23 Barb. 478. But see *contr* Austin v. Curtis, 31 Vt. 64; Whi ney v. Goin, 20 N. H. 354.

Where two parties appear joint makers on a note, althoug one is in fact a mere suret a fact unknown to the holder, a extension given to the princip debtor will not discharge th surety who appears ostensibly a joint maker. Gano v. Heat 36 Mich. 440.

The individual promise of on member of a banking firm to r

lease an accommodation indorser from liability on a note held by the firm, and to pay the note from means in his hands belonging to the maker, cannot be construed as a promise of the firm and will not exonerate the indorser from liability on the note. Webber v. French, 102 Mich. 638.

7—Where a party secondarily liable gives his consent to an extension he is not discharged. Pimental v. Marques, 109 Cal. 406, 42 Pac. 159; Bishop v. Eaton, 161 Mass. 496, 37 N. E. 665. The burden of proving that the indorser gave such consent is on the party seeking to charge him. Sibeneck v. Anchor Sav. Bank, 111 Pa. St. 187.

In the Wisconsin Act the following provision stands as a substitute for subdivision 6, *supra:* "By an agreement binding on the holder to extend the time of payment or to postpone the holder's right to enforce the instrument unless made with the assent, prior or subsequent, of the party secondarily liable, unless the right of recourse against such party is expressly reserved, or unless he is fully indemnified."

8—Where the right of recourse against the secondary party is reserved, he is not discharged, because the objection that the surety's rights are thereby postponed, does not exist. Indorsers are discharged by an extension of time without reservation of the right of recourse against them, because their contract is impaired; they cannot step in and pay the instrument until after the expiration of the period of extension, so that their right of recourse against the principal debtor is postponed; but if the agreement for extension expressly reserves the right of the holder against the indorsers, the indorsers can step in immediately, pay the instrument, take it from the holder and sue their principal for reimbursement. They have thus lost nothing and their right of reimbursement has not been postponed. Big Rapids Nat. Bank v. Peters, 120 Mich. 518; Bank v. Simpson, 90 N. C. 467; Sawyers v. Campbell, 107 Ia. 397, 78 N. W. 56; Hodges v. Elyton Land Co., 109 Ala. 617, 20 So. 23; Boaler v. Mayor, 19 C. B. (n. s.) 76, 115 E. C. L. 76; Hagey v. Hill, 75 Pa. St. 108. In the case last cited the court said: "The ground upon which an agreement to give time to the maker, made by the holder without the consent of the indorsers, upon a valid consideration, is held to be a discharge of the indorsers, is solely this, that the holder thereby impliedly stipulates not to pursue the indorsers, or to seek satisfaction from them in the intermediate period. It can never apply to any case where a contrary stipulation exists between the parties. Hence, if the agreement for delay expressly saves and reserves the rights of the holder in the intermediate time against the indorsers, it will not discharge the

latter. In such case the very ground of the objection is removed, for their rights are not postponed against the maker if they should take up the note."

Sec. 123. **Rights of party paying instrument.**—Where the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent endorsements, and again negotiate the instrument,[1] except:

First, Where it is payable to the order of a third person and has been paid by the drawer;[2] and

Second, Where it is made or accepted for accommodation, and has been paid by the party accommodated.[3]

1—This section is obscured by the arrangement of the clauses containing the exceptions, but its true meaning will be apparent by reading it thus,—Where the instrument is paid by a party secondarily liable thereon it is not discharged, but the party so paying it is remitted to his former rights as regards all prior parties, except; where it is made or accepted for his accommodation and has been paid by the party accommodated, and he may strike out his own and all subsequent indorsements and again negotiate the instrument, except where it is payable to the order of a third person and has been paid by the drawer.

Where a party secondarily liable pays or discharges the instruments its character as a valid, subsisting obligation is not destroyed. The party making such payment always has the right of recourse against all prior parties. So when an indorser makes payment to the holder, it is not such payment as discharges the instrument, but is, in effect, a repurchase of the paper. All indorsers subsequent to the party making payment are discharged and their names should be stricken out if the paper is again negotiated. French v. Jarvis, 29 Conn. 343; Coleman v. Dunlap, 18 S. C. 591; Fenn v. Dugdale, 40 Mo. 63. See Thurston v. Prentice, 1 Mich. 193; McDonough v. Heyman, 38 Mich. 334; Hanish v. Kennedy, 106 Mich. 455; Twelfth Ward Bank v. Brooks, 63 App. Div. (N. Y.) 220, 71 N. Y. Supp. 388 (a case under the statute). In this case the second indorser paid the amount of the instrument to the holder. It was held that such payment was no defense to the first indorser, unless he could show that

such payment had been made for him.

2—Where the drawer pays a bill payable to the order of a third person, the bill is not discharged and he may sue the acceptor and recover on the instrument, save that the acceptance was for the drawer's accommodation. The drawer of a bill, who pays it, may leave it in the hands of the indorsee to whom he makes payment and have the indorsee sue upon it for his benefit. Williams v. James, 15 Ad. & El. (n. s.) 499. But although the drawer upon paying the instrument may sue the acceptor on the bill, he cannot reissue it, if it is payable to the order of a third person. Gardner v. Maynard, 7 Allen 456.

A bill cannot be indorsed or negotiated after it has once been paid, if such indorsement or negotiation would make any of the parties liable, who would otherwise be discharged. Beck v. Robley, 1 H. Bl. (n.) 89.

3—Where the instrument is paid by the party for whose accommodation it was made, it is absolutely discharged the same as if paid by the maker or acceptor. The negotiability of a note ceases after its payment by the party who should rightfully pay it. Bleen v. Lyford, 70 Me. 149; Cottrell v. Watkins, 89 Va. 801; Merrill v. First Nat. Bank, 94 Cal. 59; Cook v. Lister, 32 L. J. C. P. 121; 13 C. B. (n. s.) 549. See also Canadian Bank v Coumbe, 47 Mich. 358.

Where a joint maker, who is really a surety, takes up the note, he cannot sue the principal debtor on the note but may sue him as for money paid to his use. McClatchie v. Durham, 44 Mich. 435. This is equally true where an accommodation acceptor pays the instrument. First Nat. Bank v. Maxfield, 83 Me. 576. A surety can waive the statute of limitations and pay a note that has been kept alive as to his joint maker and enforce it against him. McClatchie v. Durham, *supra*.

Where a person indorsing for the accommodation of an accommodation maker and a real maker, is compelled to pay the note, he can sue the maker and the accommodation maker jointly, the rule as to contribution between co-sureties not applying in such a case. Hanish v. Kennedy, 106 Mich. 455.

See as to the rights of indorsers and sureties: Myres v. Yaple, 60 Mich. 339; Nash v. Burchard, 87 Mich. 85; Bliss v. Est. of Plummer, 103 Mich. 181.

Where the acceptors of a bill have paid the same, they cannot recover the amount from the payee on the ground that they paid it under a mistake of fact as to the value of their security from the drawers; their remedy is against the drawers. First Nat. Bank v. Burkham, 32 Mich. 328.

Sec. 124. **Renunciation by holder.**—The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor, made at or after the maturity of the instrument, discharges the instrument; but a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.[1]

1—Where an obligee delivers up the obligation, which he holds against another party, with the intent and for the purpose of discharging the debt, where there is no fraud or mistake alleged or proved, such surrender operates, in law, as a release and discharge of the liability thereon, nor is any consideration required to support such a transaction, when it has been fully executed. Larkin v. Hardenbrook, 90 N. Y. 333; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168. In the case last cited the court said that the delivery of a promissory note by the holder to the maker, with the intention of transferring to him the title to the note, is an assignment of the note and a discharge of the obligation to pay it.

The corresponding provision of the Bills of Exchange Act, sec. 62 (1) was construed in Edwards v. Walters, C. A. [1896] 2 Ch. 157. The facts were that there was an oral renunciation of a note, the note was delivered, not to the maker, but to a devisee of the maker. The devisee had real estate of the maker in her hands and such real estate was liable for the payment of the debt. The devisee had for some time paid interest on the note. Notwithstanding these circumstances it was held that delivery to such devisee was not sufficient under sec. 62 of the Act (124) as a renunciation, because the acceptor or maker did not include a legatee or devisee, though the legal personal representatives might be so included. The same section of the Bills of Exchange Act was also construed in In re George, 44 Ch. D. 627. The facts were these: the payee of a note about to die wished to destroy the note in suit, but it could not be found. He then declared to the maker of the note in the presence of two other persons that he wished to give the note to him. The nurse of the payee was then sent for and the payee told her he wanted the note destroyed. He made the nurse promise that she would see that the note was destroyed

and that she would testify that it was his wish that it should be destroyed. He told her to write it down, which she did as follows, "30th Aug., 1899. It is by Mr. George's dying wish that the checque (sic.) for £2,000 of the money lent to Mrs. Francis be destroyed as soon as found. Mr. George is perfectly conscious and in his sound mind." (signed nurse T.) It was held that the acts of the payee did not constitute a renunciation as required by the statute. Chitty, J., said: "Now it is plain that what must be in writing is an absolute and unconditional renunciation of rights. It is not necessary to put those words in; but that must be the effect of the document. Then the document is not to be a note or memorandum of the renunciation or of an intention to do it, but it must be itself the record of the renunciation." This case was followed in Leask v. Dew, 92 N. Y. Supp. 891. The facts were these: The note in suit was found after the death of the payee among his papers enclosed in an envelope together with a writing signed by him addressed to his executors as follows: "New York, Nov. 25, 1901. To my executors. Gentlemen: The enclosed note I wish to be cancelled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders. Truly yours, Oliver Buckingham. Witness, Frank W. Woglam." The court referred to the provisions of the Bills of Exchange Act and the provisions of the Negotiable Instruments Law and said: "It is readily seen that these two statutes in character and import are alike, the only difference is change in the form of phraseology, but it affects neither the sense nor the construction." The court followed the rule of construction adopted in In re George and said: "There is some obscurity in the provisions of our statute. In its first sentence it provides for the renunciation of the rights of the holder against any party to the instrument which may be made before, at, or after its maturity; in the second sentence, it provides for an absolute and unconditional renunciation of the rights of the holder against the principal debtor at, or after the maturity of the instrument, and discharges the instrument. The first relates to the party; and second, to the instrument. It is somewhat difficult to see how there could be an absolute discharge of a party to an instrument without discharging the instrument as an obligation, so far as he is concerned. We do not clearly perceive why this distinction should have been made. It is immaterial, however, to the rights of the parties to the present action. The instrument of renunciation contains no express declaration of the testator to renounce his rights in the note against the party, or of his right to enforce it as a subsisting obligation. The expression is, 'I wish (the note) to be cancelled in case of my death.' There is

nothing in these words which can be construed as expressing a renunciation of any rights either against the party or upon the instrument. Had it been delivered to the defendant during the lifetime of the testator, it would not have precluded the latter at any time upon maturity from enforcing the note. There is nothing indicating an intent upon his part not to enforce it during his lifetime. There was no delivery of it, to anybody, and while, doubtless, it was sufficiently authenticated to accomplish a renunciation, it had no operative effect whatever, as it did not fall within the statute or comply with its terms."

Sec. 125. **Cancellation unintentional; burden of proof.**—A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.[1]

1—Lyndonville Nat. Bank v. Fletcher, 68 Vt. 81; Humboldt Bank v. Rossing, 95 Ia. 1; Wilkinson v. Johnson, 3 B. & C. 428; Raper v. Birkbeck, 15 East 17; Novelli v. Rossi, 2 B. & Ad. 757.

Sec. 126. **Alteration of instrument; effect of.**—Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.[1] But when an instrument has been materially altered and is in the hands of a holder, in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.[2]

1—A material alteration of an instrument is one which changes the legal effect of the instrument, is made with intent and has become final, is made without consent, is made by a party to it or by one in lawful possession or custody of it. Such an alteration releases all parties not assenting. Wait v. Pomeroy, 20 Mich. 425; Holmes v. Trumper, 22 Mich. 427; Aldrich v. Smith,

37 Mich. 468; Bradley v. Mann, id. 1; Glover v. Green, 96 Ga. 126, 22 S. E. 664; Hulburt v. Hall, 39 Neb. 889, 58 N. W. 538; Horn v. Newton City Bank, 32 Kan. 518; Hoffman v. Planters Nat. Bank, 99 Va. 480, 39 S. E. 134 (a case under the statute).

Where an instrument appears to have been altered, the burden is upon the party producing it to show that it was in the shape in which he produced it at the time he received it. Willett v. Shepard, 34 Mich. 106; Simpson v. Stackhouse, 9 Pa. St. 186. In the latter case the court said: "Without a presumption to sustain him, the maker would in every case be defenseless. It may be said that the holder, with such a presumption against him, would also be defenseless. But it is his fault to take such a note. As bills and notes are intended for negotiation, and as payees do not receive them when clogged with impediments to their circulation, there is a presumption that such an instrument starts fair and untarnished, which stands until it is repelled; and the holder ought, therefore, to explain why he took it branded with marks of suspicion, which would probably render it unfit for his purposes. The very fact that he receives it, is presumptive evidence that it was unaltered at the time, 'and to say the least, his folly or his knavery raised a suspicion which he ought to remove. The maker of a note cannot be expected to account for what may have happened after it left his hands,' but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it." See Baent v. Kennicut, 57 Mich. 268.

An indorser's consent to an alteration need not be in writing. Parsons v. Dickinson, 23 Mich. 57; Stewart v. First Nat. Bank, 40 Mich. 348. See also Johnson v. Johnson's Est., 66 Mich. 525.

Where an instrument has been negligently executed by the maker, that is, where blanks are left which may be filled in, without giving the paper a suspicious appearance, the general rule is that the maker will be liable on the instrument if any such alteration is made. First State Bank v. Webster, 121 Mich. 149; Weidman v. Symes, 120 Mich. 657; Noll v. Smith, 64 Ind. 511. But see Wait v. Pomeroy, 20 Mich. 425; Greenfield's Sav. Bank v. Stowell, 123 Mass. 203.

In England the rigid rules applied to cases of alteration by some party to the instrument have also been applied to spoliation or alteration made by a stranger. Master v. Miller, 4 T. R. 320, 2 H. Bl. 140.

In the United States the more liberal view that spoliation or alteration by a stranger does not vitiate the instrument has prevailed. White Sewing Machine Co. v. Dakin, 86 Mich. 581; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115; Union Nat. Bank v. Roberts, 45

Wis. 373; United States v. Spalding 2 Mason 478, Fed. Cas. No. 16365.

This question was raised in Jeffrey v. Rosenfield, 179 Mass. 506 (a case under the statute). The court left the question in doubt, saying: "Quære, whether sec. 124 (sec. 126) of the Negotiable Instruments Law relating to alteration should be construed as the English Bills of Exchange Act probably would be that the effect of a material alteration by whomsoever made would be to avoid the paper as to all parties except those consenting and subsequent indorsers or whether the rule laid down in Massachusetts (in Drum v. Drum, 133 Mass. 566) and generally followed in the United States should be applied that a material alteration of a note by a stranger will not avoid it. But considering the state of the law at the time of the passage of the Negotiable Instruments Law we should hesitate to say that the effect of sec. 124 (sec. 126) is not only to avoid a note in case of a material alteration but to cancel the debt for which it was given and to deprive the party to the benefit of any security he may have taken."

2—This provision makes a material change in the law of Michigan and most of the states.

Heretofore a holder in due course could not recover on an instrument which had been materially altered, because the original contract had been destroyed and the altered contract was not the contract of the maker. Wait v. Pomeroy, 20 Mich. 425; Holmes v. Trumper, 22 Mich. 427; Bradley v. Mann 37 Mich. 1; Mersman v. Werges 112 U. S. 141; Greenfield Sav. Bank v. Stowell, 123 Mass. 196.

Scholfield v. Earl of Londensborough [1896] A. C. 514 (a case under the corresponding provision of the Bills of Exchange Act). In this case a bill for £500 was, after acceptance, raised by the drawer to £3500, this being made possible by the drawer's leaving certain spaces which he could later fill up and by the bill's being stamped higher than for £500. It was held that the acceptor was liable to the *bona fide* holder only for the original amount of the bill and he owed no duty of precaution to the holder and was chargeable with no negligence.

The following cases have arisen under the statute: Bryan v. Harr, 21 App. D. C. 190; Mass. Nat. Bank v. Snow (1905) 72, N. E. 959; Muscovitz v. Duetsch, 92 N. Y. Supp. 721; Mut. Loan Ass'n v. Lasser, 81 App. Div. 138, 80 N. Y. Supp. 1112.

Sec. 127. **Material alterations; what constitutes.**—Any alteration which changes:

First, The date;[1]

Second, The sum payable, either for principal [2] or interest;[3]

Third, The time [4] or place [5] of payment;

Fourth, The number or the relations of the parties;[6]

Fifth, The medium of currency in which payment is to be made.[7]

Or which adds a place of payment where no place of payment is specified,[8] or any other change or addition, which alters the effect of the instrument in any respect,[9] is a material alteration.

1—Johnson v. Johnson's Est., 66 Mich. 525; Woods v. Steele, 6 Wall. 80.

2—It is a material alteration whether the amount be increased or lessened, whether it be beneficial to the maker or not. People v. Brown, 2 Doug. (Mich.) 9; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115; Aetna Bank v. Winchester, 43 Conn. 391; Hewins v. Cargill, 67 Me. 554. In the case last cited, the amount was reduced from $500 to $400.

3—Any alteration which will affect the interest, making it payable at a greater or less rate, making the instrument bear interest when it originally did not, or changing the time when interest should begin to run, is a material alteration. Holmes v. Trumper, 22 Mich. 427; Swift v. Barber, 28 Mich. 503; Bradley v. Mann, 37 Mich. 1; Willett v. Shephard, 34 Mich. 106; Baent v. Kennicutt, 57 Mich. 268.

Where a note is made payable with interest but the rate is not specified, an insertion of 7%, the legal rate, is not a material alteration. First Nat. Bank v. Carson, 60 Mich. 432. Nor is the addition of the word "annual" to an interest clause of a note made payable in less than two years a material alteration, as it does not change the liability but only shows that interest is to be earned at the stipulated rate by the year and does not require the interest to be paid at the end of a year from the date of the note. Leonard's Adm'r v. Phillips, 39 Mich. 182.

4—Jourdan v. Boyce, 33 Mich. 302; Wyman v. Yeomans, 84 Ill. 403; Lewis v. Kramer, 3 Md. 265; Miller v. Gilleland, 19 Pa. St. 119.

5—Ballard v. Ins. Co., 81 Ind. 239; Bank v. Lockwood, 13 W. Va. 392.

6—It is not a material alteration to add the name of another maker. Gano v. Heath, 36 Mich. 440; Union Banking Co. v. Martin's Est., 113 Mich. 521; Merseman v. Werges, 112 U. S. 139; Brown-

ell v. Winne, 29 N. Y. 400; Babcock v. Murray, 58 Minn. 385. To the contrary: Sullivan v. Rudisill, 63 Ia. 158.

The addition of a surety is not a material alteration. Miller v. Finley, 26 Mich. 248. Obviously the statute changes this rule. The addition of either a maker or a surety would be a material alteration.

7—As where the word "gold" was added after the word "dollars," Bogarth v. Breedlove, 39 Tex. 561; as where the words "in specie" were added after the sum payable, Darwin v. Rippey, 63 N. C. 318; Angle v. N. W. etc. Ins. Co., 92 U. S. 330.

8—Burchfield v. Moore, 23 L. J. Q. B. 261; Pelton v. Lumber Co., 13 Cal. 21, 45 Pac. 12; Carlton v. Reed, 61 Ia. 166; Whitesides v. Northern Bank, 10 Bush. 501. In the case last cited the indorsee of a bill, which had been accepted generally, caused to be added to the word "accepted" the words "payable at the First Nat. Bank of Franklin." All parties not consenting to the alteration were discharged.

9—The words "or bearer" were added to a note payable to the order of Henry Bromley. It was held not a material alteration. Weaver v. Bromley, 65 Mich. 212. A memorandum on a note qualifying the same was cut off. Held a material alteration. Wait v. Pomeroy, 20 Mich. 425.

In those states where a distinction is made between attested and unattested instruments, the addition of the name of a witness, after delivery, is a material alteration. Brackett v. Mountford, 11 Me. 115; Homer v. Wallis, 11 Mass. 309. In Rowe v. Bowman, 183 Mass. 488 (a case under the statute) the putting on of a revenue stamp and its cancellation, in the name of the maker, was held not a material alteration.

For cases where a simple contract of the common law is fraudulently altered and made a negotiable instrument, see note 1, sec. 57.

TITLE II.

BILLS OF EXCHANGE.

Article I. Form and Interpretation.

Sec.
128. Bill of exchange defined.
129. Bill not an assignment of funds in hands of drawer.
130. Bill addressed to more than one drawee.
131. Inland and foreign bills of exchange.
132. When bill may be treated as promissory note.
133. Referee in case of need.

Sec. 128. **Bill of exchange defined.**—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.[1]

1—The form of the bill is not material provided it be mandatory. Any expression from which an order or direction can be inferred is sufficient. Thus, "Mr. Nelson will much oblige Mr. Webb by paying I. Ruff, or order, on his account, twenty guineas." Ruff v. Webb, 1 Esp. 129. And so, "Please let the bearer have, etc." Biesenthall v. Williams, 1 Duv. (Ky.) 329. "Mr. A. M. W. please pay J. J. $189 and charge the same to me." Jarvis v. Wilson, 46 Conn. 90. But on the other hand, "Mr. Little, please to let the bearer have £7, and place it to my account, and you will much oblige your humble servant," was held not a good bill. Little v. Slackford, M. & M. 171, on the ground that there was no order to pay but that the words simply meant "You will oblige me by doing it."

"No particular form of words is necessary to constitute a bill of exchange." Hasey v. White Pigeon Beet Sugar Co., 1 Doug. 193.

This section is referred to in Amsinck v. Rogers, 93 N. Y. Supp. 87. The instrument in suit was drawn in New York on

a firm in Vienna and was in form: "On demand of this original check (duplicate unpaid) pay to the order, etc." The instrument was held a bill of exchange and not a check.

The section clearly embraces within its terms, a check. McLean v. Clydesdale Banking Co., 9 L. R. App. Cas. 95. (A case under the corresponding provision of the Bills of Exchange Act.)

Sec. 129. **Bill not an assignment of funds in hands of drawee.**—A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.[1]

1—A draft is not an assignment of funds in the hands of the drawee. Grammel v. Carmer, 55 Mich. 201; Edson v. Angell, 58 Mich. 336; Upham v. Clute, 105 Mich. 350; Stone v. Dowling, 119 Mich. 476. But where the draft was drawn for the exact sum claimed to be due from the drawee to the drawer on account of a bill of merchandise, the statement of the account being attached to the draft with the evident purpose of being sent forward with it, it was held an assignment. Moore v. Davis, 57 Mich. 251; distinguishing Grammel v. Carmer, *supra.*

The authorities are in conflict on the general proposition whether the draft operates as an assignment. As to the rule when the drawing is for the whole amount due, see Mandeville v. Welch, 5 Wheat. 277; Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3255; Wheatley v. Strobe, 12 Cal. 92; Bank v. Bogy, 44 Mo. 13; First Nat. Bank v. Dubuque, S. R. Co., 52 Iowa 378; Cutts v. Perkins, 12 Mass. 207. As to rule when the drawing is for part of the amount due: Brill v. Tuttle, 81 N. Y. 457; Throop, etc. Co. v. Smith, 110 N. Y. 90; First Nat. Bank v. Coates, 8 Fed. 540; Harris v. Clark, 3 N. Y. 93; Cowperthwaite v. Sheffield, 1 Sandf. (N. Y.) 416; Christmas v. Russell, 14 Wall. 69; Lowery v. Steward, 25 N. Y. 241; Gibson v. Cooke, 20 Pick. 15. See also Hopkinson v. Forster, L. R. 19 Eq. 74; Schroeder v. Central Bank, 34 L. T. (n. s.) 735.

When for a valuable consideration from the payee, the order is drawn upon a third party, and made payable out of a particular fund then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund, and the drawee is bound after notice of such assignment to apply the fund as it accrues to the payment of the order and to no

other purpose, and the payee may by action compel such application. Brill v. Tuttle, *supra*.

An intention to make an assignment of the funds in the hands of the drawee may be inferred from the circumstances attending the delivery of the draft and the conduct of the parties. Throop Grain Cleaner Co. v. Smith, *supra*. Crawford's Ann. Neg. Insts. Law, 115-16; Fulton v. Gesterding (Fla. 1904) 36 So. 56 (a case under the statute). In this case it was held that a draft for an amount equal to the precise amount of deposit in the drawee's hands did not operate as an assignment. To same effect see: Nelson v. Nelson Bennett Co., 31 Wash. 116, 71 Pac. 749; Wadhams v. Portland etc. Ry. Co. (Wash. 1905), 79 Pac. 597 (cases under this section). As to check operating as an assignment see section 191.

Sec. 130. **Bill addressed to more than one drawee.**—A bill may be addressed to two or more drawees, jointly, whether they are partners or not, but not to two or more drawees in the alternative or in succession.[1]

1—The words, "or in succession," are not included in the Wisconsin Act.

A bill was directed to A, or in his absence to B. It was held good. Anon. 12 Mod. 447. A bill was drawn upon partners and accepted after notice of dissolution had been given. Held, that only the accepting partner was bound. Tombeckbee Bank v. Dumell, 5 Mason 56, Fed. Cas. No. 14081.

Sec. 131. **Inland and foreign bills of exchange.**—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.[1]

1—The statute affirms the well settled rule of the law merchant. Armstrong v. American Exchange Nat. Bank, 133 U. S. 433; Joseph v. Salomon, 19 Fla. 623; Phoenix Bank v. Hussey, 12 Pick. 483; Yale v. Ward, 30 Tex. 18.

The test of determining a foreign bill is whether it appears on its face that it is drawn in one state and payable in another. Some claim has been made that the residence of the drawer and the drawee is the test. Grimshaw v. Bender, 6 Mass. 157, supports that view. The bill in-

volved in this case was drawn by an English merchant living in Manchester, upon an American firm having their domicile in Boston, payable in London. The bill was accepted in Manchester by one of the drawees. The question was, whether the bill was foreign or inland. The court said: "It appears that the bill was drawn on a Boston house, one of which was then at Manchester, in England, but that his domicile was in Boston; and that the acceptance by him in the name of the firm was made at Manchester by which the firm undertook to pay the bill in London. From this statement it is manifest that the remedy contemplated by the parties, in the event of the bill being dishonored, must be sought in this state, where the acceptors lived. From this view of the case the instrument must be considered as a foreign bill, having the same effect as if the payee had sent it to Boston and it had been a cepted, payable in London by t house here, in which case t money must be remitted to Lo don to meet the bill returned the drawer after acceptance." is questionable whether, und the circumstances, this case m be regarded as a dissent fr the general rule above stated.

A check may be a check thou drawn in one country and pa able in another. Heywood Pickering, L. R. 9 Q. B. 42 Roberts v. Corbin, 26 Iowa 31 see sec. 187.

States of the American Uni are foreign to each other. Ba of United States v. Daniel, Peters 32; Commercial Bank Varnum, 49 N. Y. 269.

The only difference betwe foreign and inland bills, is th the former must be protest while the latter need not See sec. 154, Buller v. Crips, Mod. 29.

Sec. 132. **When bill may be treated as a promissor note.**—Where, in a bill, drawer and drawee are the sam person, or where the drawee is a fictitious person, or person not having capacity to contract, the holder ma treat the instrument, at his option, either as a bill of e change or a promissory note.[1]

1—See Bills of Exchange Act, sec. 5 (2); see sec. 19.

Hasey v. White Pigeon Beet Sugar Co., 1 Doug. (Mich.) 193; Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166; Chicago etc. R. Co. v. West, 37 Ind. 211; Com. v. Bu terick, 100 Mass. 12; Planter Bank v. Evans, 36 Tex. 592; M ler v. Thomson, 3 M. & G. 57 Willans v. Ayers, L. R. 3 Ap Cas. 133.

"If both drawer and drawee are fictitious persons the bill might perhaps be treated as a note made by the first indorser." Chalmers' Bills of Exchange Act, 5th ed., 18.

Sec. 133. **Referee in case of need.**—The drawer of a bill and any endorser may insert thereon the name of a person to whom the holder may resort in case of need; that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit.[1]

1—This section is identical with section 15 of the Bills of Exchange Act, q. v. The usual form of such a bill is: "In case of need apply to Messrs. C and D, at E." Chitty on Bills, 165. The reference may relate to non-payment as well as to non-acceptance. The concluding sentence of the section settled the mooted point, whether presentment to the "referee in case of need" is obligatory or optional. Chalmers' Bills of Exchange Act, 5th ed., 38.

Article II. Acceptance.

Sec.
134. Acceptance; how made, etc.
135. Holder entitled to acceptance on face of bill.
136. Acceptance by separate instrument.
137. Promise to accept; when equivalent to acceptance.
138. Time allowed drawee to accept.
139. Liability of drawee retaining or destroying bill.
140. Acceptance of incomplete bill.
141. Kinds of acceptance.
142. General acceptance; what constitutes.
143. Qualified acceptance.
144. Rights of parties as to qualified acceptance.

Sec. 134. **Acceptance; how made, etc.**—The acceptance[1] of a bill is the signification by the drawee of his assent to the order of the drawer.[2] The acceptance must be in writing and signed by the drawee.[3] It must not express that the drawee will perform his promise by any other means than the payment of money.[4]

1—See section 2.

2—Acceptance is usually manifested by writing or stamping the word "accepted" across the face of the paper, and by the drawee's adding his signature thereto. But according to the law merchant no particular form is required. Thus, the drawee's signature alone has been held sufficient. Spear v. Pratt, 2 Hill 582. "Accepted" written upon the paper without the signature of the drawee has been held sufficient. Clearly this would not be an acceptance under the statute. The words, "seen", "honored", "presented", and "acted" have severally been held sufficient to constitute an acceptance. Peterson v. Hubbard, 28 Mich. 197. In this case it was held that the mere writing of the drawee's name across the face was sufficient to constitute an acceptance, and the words "paid on this order $40" written above the signature did not qualify the acceptance or limit it to that amount. But see Cook v. Baldwin, 120 Mass. 317.

The language of the bill and the acceptance, are but parts of an entire contract in writing, all the terms of which are expressed in writing with just as much certainty as if the acceptor was the maker of a note for the amount. Meyer v. Beardsley, 30 N. J. L. 236. Acceptance is re-

garded as a new contract. Superior City v. Ripley, 138 U. S. 93. The drawee as such is under no liability on the instrument to anyone.

3—This affirms the rule in Michigan. C. L. '97, sec. 4873; Elliott v. Miller, 8 Mich. 131; Upham v. Clute, 105 Mich. 350. According to the law merchant an acceptance could be oral or written, and if written could be on the bill itself or on a separate paper. Acceptance by telegram has been held sufficient. North Atchinson Bank v. Garretson, 51 Fed. 168. Cases under the statute are: Izzo v. Ludington, 79 App. Div. 272, 79 N. Y. Supp. 744; Baltimore & O. R. Co. v. First Nat. Bank (Va. 1904), 47 S. E. 837; Nelson v. Nelson Bennett Co., 31 Wash. 116, 71 Pac. 749; Wadhams v. Portland etc. Ry. Co. (Wash.) 79 Pac. 597.

An instructive case on the general proposition of acceptance is Steele v. M'Kinlay, 5 App. Cas. 754, 29 W. R. 17.

4—Russell v. Phillips, 14 Q. B. 891.

Sec. 135. **Holder entitled to acceptance on face of bill.**—The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored.[1]

1—The acceptance here spoken of is what has been known as "proper" acceptance, such acceptance as the holder is entitled to demand.

Sec. 136. **Acceptance by separate instrument.**—Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.[1]

1—Thus, one draws a bill upon another and informs him of the fact of drawing. The drawee makes assurance by letter that the bill will meet with due honor from him. This is an acceptance of the bill by the drawee, and binds such acceptor to any holder who took on the faith of such acceptance. Clarke v. Cock, 4 East 57. In this case Lord Ellenborough said: "It may be for the convenience of mercantile affairs that a bill may be accepted by a collateral writing without the bill itself coming to

the actual touch of the acceptor, which would sometimes create great delay."

In Bank v. Garretson, 51 Fed. 168, one had given assurance that if a certain draft were drawn he would accept the same. See Fairchild v. Feltman, 32 Hun, 398.

Sec. 137. **Promise to accept; when equivalent to acceptance.**—An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.[1]

1—An absolute unconditional authority to make drafts is equivalent to an acceptance of the draft drawn in pursuance of such authority. Bissell v. Lewis, 4 Mich. 450; Ruiz v. Renauld, 100 N. Y. 256; Merchants' Nat. Bank v. Griswold, 72 N. Y. 472. The promise to accept must be unconditional. Germania Nat. Bank v. Taaks, 101 N. Y. 442. The unconditional character of the promise is not impaired by restrictions as to time, amount or purposes. Bank of Michigan v. Ely, 17 Wend. 508. Thus, authority to draw "from time to time as may be necessary for the purchase of lumber" does not constitute a condition, but only an instruction to the agent. Merchants' Bank v. Griswold, *supra*.

When the right to draw is made conditional upon the performance of some act or the existence of certain facts, such act must have been performed or such facts must exist. Bank of Montreal v. Recknagel, 109 N. Y. 482; Bank of Atchinson Co. v. Bohart Commission Co., 84 Mo. App. 421.

The promise may be made before the bill is drawn. Putnam Bank v. Snow, 172 Mass. 569. Or it may be made afterwards. Central Bank v. Richards, 109 Mass. 413.

An oral promise was sufficient at common law. Dull v. Bricker, 76 Pa. St. 255; Scudder v. Union Nat. Bank, 91 N. Y. 406; Jarvis v. Wilson, 46 Conn. 91.

The American rule on the subject is declared in the leading case of Coolidge v. Payson, 2 Wheat. 66, to be: "that a letter written a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. The bill is considered accepted only in case the promise is shown to the person who afterwards takes the bill on the credit of such promise.

Sec. 138. **Time allowed drawee to accept.**—The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation.[1]

1—This is the rule of the law merchant. Case v. Burt, 15 Mich. 82; Connelly v. McKean, 64 Pa. St. 113; Overman v. Hoboken City Bank, 31 N. J. L. 563; Daniel on Neg. Inst., sec. 492.

Sec. 139. **Liability of drawee retaining or destroying bill.**—Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.[1]

1—Acceptance under the circumstances stated in this section has been termed acceptance by conduct. The mere retention of the bill has been construed as not amounting to an acceptance. Mason v. Barth, 2 B. & Ald. 26; Col. Nat. Bank v. Boetcher, 5 Col. 185; Overman v. Hoboken City Bank, 31 N. J. L. 563.

This section of the statute was construed in Westburg v. Chicago, L. & C. Co., 117 Wis. 589, wherein it was held that where conduct in retaining the bill which had been presented for acceptance is substantially tortious and amounts to a conversion of the bill, this is a phase of conduct which this section of the statute has undertaken to define and limit as refusal (not mere neglect) to return the bill. The court added: "In such a case a party must not only have received the bill but must knowingly have received it from the payee, or his authorized agent, and *for acceptance*."

See State v. Weiss, 91 N. Y. Supp. 276 (a case under the statute). The consensus of authority is that the duty rests on the holder to demand either acceptance or return of the bill and that mere inaction on the part of the drawee has no effect.

The Wisconsin statute adds the words "mere retention of the bill is not acceptance."

Sec. 140. **Acceptance of incomplete bill.**—A bill may be accepted before it has been signed by the drawer,[1] or

while otherwise incomplete or when it is overdue,[2] or after it has been dishonored by a previous refusal to accept,[3] or by non-payment.[4] But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.[5]

1—Bank v. Neal, 22 How. (63 U. S.) 107; Hopps v. Savage, 69 Md. 513.

2—Williams v. Winan, 14 N. J. L. 339.

3—Stockwell v. Bramble, 3 Ind. 428; Leavitt v. Putnam, 3 N. Y. 494; Spaulding v. Andrews, 48 Pa. St. 411.

4—Exchange Bank v. Rice, 98 Mass. 288; Grant v. Shaw, 16 Mass. 344.

5—The liability of the acceptor is primary and of the same nature as that of maker, therefore the same reasons apply to his accepting an incomplete bill as to the maker's signing an incomplete note. A bill is deemed *prima facie* to have been accepted before maturity and within a reasonable time after its issue unless the terms of the bill make the contrary to appear. Roberts v. Bethell, 12 C. B. 778.

Sec. 141. **Kinds of acceptance.**—An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.[1]

1—An acceptance is an engagement to pay the bill according to the tenor of the acceptance. A general acceptance is an engagement to pay according to the tenor of the bill. Cox v. Nat. Bank, 100 U. S. 714. An acceptance to pay when due is general. Sylvester v. Staples, 44 Me. 496.

Whenever possible an acceptance will be construed as general, not qualified. The qualification or condition must be clear and distinct to make out a qualified acceptance. Corbett v. Clark, 45 Wis. 403; Meyer & Co. v. De-Croix (1891), App. Cas. 520 (a case under the corresponding provision of the Bills of Exchange Act). In this case the facts were: Across the face of the bill were stamped in printed letters the words, "accepted, payable at Alliance Bank, London, for H. Meyer & Co., limited." Then fol-

lowed the signatures of two directors of defendant company, and a countersign by the secretary. Above the word "accepted" defendants wrote the words "in favor of Mr. L. Delobbel Flipo only," and between these words and the word "accepted" they wrote "No. 28." The word "order" in the bill had been stricken out, but when or by whom it did not appear. It was held that the words written above the acceptance did not form any part of it and could not be construed as qualifying the acceptance under the act. The court said in substance: If a person writes across a bill that which unqualified would, in the ordinary course, import a clear acceptance of the bill, and intends to qualify its operation, he must do so by plain and intelligible language, and make that qualification sufficiently a part of the acceptance itself to be intelligible in the ordinary course of business.

Sec. 142. **General acceptance; what constitutes.**—An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere.[1]

1—This rule was established in England by Sergeant Onslow's Act, 1 & 2 Geo. IV. Prior to that time there had been conflict as to whether a bill accepted payable at a particular place was qualifiedly accepted, which conflict was settled in Rowe v. Young, 5 Ad. & El. 86, in which case it was held that such an acceptance was qualified, thus making it necessary in an action against the acceptor to aver and prove presentment at such place. In this case the acceptance was in the following language: "Accepted, payable at Sir John Perring & Co., bankers, London." This decision led to the passage of the statute above mentioned which provided that an acceptance payable at a particular place should be deemed a general acceptance unless expressed to be payable there "only, and not otherwise or elsewhere." This statute did not apply to promissory notes. Daniel's Neg. Inst., 5th ed., sec. 519. By weight of authority the rule in the United States is in accord with the provisions of this section. Daniel's Neg. Inst., 5th ed., sec. 520. Wallace v. McConnell, 38 U. S. (13 Pet.) 136; Cox v. Nat. Bank, 100 U. S. (10 Otto) 704.

When a bill is addressed to a drawee in a city generally he may designate a particular place of payment in the same city without making the acceptance qualified. But he cannot designate a place of payment in another town or city without making the acceptance qualified. Myers v. Standart, 11 Ohio St. 29;

Troy City Bank v. Lauman, 19 N. Y. 477; Niagara Bank v. Fairman etc. Mfg. Co., 31 Barb. 403.

Sec. 143. **Qualified acceptance.**—An acceptance is qualified, which is:

First, Conditional; that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;[1]

Second, Partial; that is to say, an acceptance to pay part of the amount for which the bill is drawn;[2]

Third, Local; that is to say, an acceptance to pay only at a particular place;[3]

Fourth, Qualified as to time;[4]

Fifth, The acceptance of some one or more of the drawees, but not of all.[5]

1—Thus, to pay "when goods consigned to me are sold." Smith v. Abbot, 2 Stra. 1152. To pay "when a cargo of equal value is consigned to me." Mason v. Hunt, 1 Doug. 297. "Payable when house is ready for occupancy." Cook v. Wolfendale, 105 Mass. 401. To pay "when lumber is run to market." Lamon v. French, 25 Wis. 37.

A conditional acceptance becomes absolute upon the performance or happening of the condition. Stevens v. Androscoggin Water Power Co., 62 Me. 498. The acceptor is not bound on his acceptance until the performance of the condition. Newhall v. Clark, 3 Cush. 376; Greene v. Duncan, 37 S. C. 239.

Where an order is drawn upon a fund to be paid upon the happening of a condition, which order is accepted, the acceptor cannot either by his own act or by acting in collusion with the drawer of the order defeat the condition and then set up such defeasance as a defense to an action upon the acceptance. Herter v. The Goss & Edsall Co., 57 N. J. L. 42, 30 Atl. 252.

2—Thus "I do accept this bill to be paid half in money and half in bills." Petit v. Benson, 2 Comb 452. A bill for £127 accepted for £100. Wegerslofe v. Keene, 1 Stra. 214.

3—See section 142.

4—A bill drawn at sight was presented to the drawee who wrote he would pay, but could not say when. It was held that where a party upon whom a bill is drawn at sight offers or promises to pay at a future day, that amounts to an acceptance if

acceded to by the holder. Hatcher v. Stalworth, 25 Miss. 376.

A bill drawn November 28th, 1836, payable forty-two months after date was accepted thus, "accepted on condition of its being renewed until November 28, 1844." Russell v. Phillips, 14 Q. B. 891, 68 E. C. L. 891.

A bill accepted according to a contract is regulated by the terms of the contract referred to in the acceptance, although the bill was in its body made payable on a certain day. Kellog v. Lawrence, Laylor's Supp. to Hill and Denio 332.

5—Thus, a bill was drawn on a firm and accepted by one member thereof after dissolution. He only was bound by the acceptance. Tombeckbee Bank v. Dumell, 5 Mason 56, Fed. Cas. No. 14081.

An order drawn upon a committee as an official body may be accepted by the several persons composing the committee. In such a case although a bill may be treated as dishonored if not accepted by all the members of the committee, if accepted by a part, it will be a good acceptance as to them. Smith v. Milton, 133 Mass. 369.

Sec. 144. **Rights of parties as to qualified acceptance.** —The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance.[1] Where a qualified acceptance is taken, the drawer and endorsers are discharged from liability on the bill unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto.[2] When the drawer or an endorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

1—The holder is not bound to receive a qualified acceptance. Boehm v. Garcias, 1 Camp. 425. This was an action on a bill drawn on Lisbon, "payable in *effective* and not in '*vals reals*.'" The drawees offered to accept it payable in *vals denaros*, another sort of currency, which was refused. Defendant proposed to show that *vals denaros* was sufficient to answer what was meant by *effective*. Lord Ellenborough said: "Without considering whether a payment in *denaros* might not have satisfied the term

'*effective*,' an acceptance to pay in *denaros* was not a sufficient acceptance of a bill drawn payable in *effective*."

Wintermute v. Post, 24 N. J. L. 420; Shackelford v. Hooker, 54 Miss. 716; Gibson v. Smith, 75 Ga. 33.

An agent for collection is not authorized to receive anything short of an explicit and general acceptance. Walker v. New York State Bank, 9 N. Y. 582.

Sebag v. Abitbol, 4 M. & S. 462; Gibson v. Smith, *supra*.

2—At common law according to some authorities the drawer and indorsers were not discharged on a bill accepted in part, if the holder protested as to the residue. Daniel's Neg. Inst., 5th ed., sec. 516. The statute makes no such exception and to that extent changes the existing law.

Article III. Presentment for Acceptance.

Sec.
145. When presentment for acceptance must be made.
146. When failure to present releases drawer and indorser.
147. Presentment; how made.
148. On what days presentment may be made.
149. Presentment; where time is insufficient.
150. When presentment is excused.
151. When dishonored by non-acceptance.
152. Duty of holder where bill not accepted.
153. Rights of holder where bill not accepted.

Sec. 145. **When presentment for acceptance must be made.**—Presentment for acceptance must be made:

First, Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument;[1] or

Second, Where the bill expressly stipulates that it shall be presented for acceptance; or

Third, Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

1—This is an affirmation of the common-law rule. Mullick v. Radakissen, 9 Moore P. C. 46. The words, "or in any other case where," are additional to the corresponding provision of the Bills of Exchange Act, sec. 39 (1), and seem superfluous, because in no other case than in bills payable after sight (grace being abolished) could the time when the bill was to be paid depend upon acceptance. Presentment for acceptance of a bill payable a specified time after date is not necessary to charge the drawers and indorsers. Allen v. Suydam, 20 Wend. 321; Plato v. Reynolds, 27 N. Y. 586.

Although presentment for acceptance is optional the holder may make presentment for two purposes, 1st, to secure the liability of the drawee as a party to the bill, in other words to turn the drawee into an acceptor; 2d, in case of non-acceptance to obtain an imme-

diate right of recourse against antecedent parties. Thus, a bill is dated August 1st, 1905, payable three months after date; August 2nd, 1905, the holder presents the bill to the drawee for acceptance; acceptance is refused; the drawer is liable on the bill at once, proper steps having been taken to fix his liability. The holder need not wait until the maturity of the bill as therein stated before suing. Mason v. Franklin, 3 Johns. 202; Weldon v. Buck, 4 Johns. 144; see section 153, and notes.

But if presentment be made in cases not required and acceptance refused notice must be given in the same manner as in cases where acceptance is required. Sweet v. Swift, 65 Mich. 90; United States v. Barker, 4 Wash. C. C. 464, Fed. Cas. No. 14520. It has been held that if presentment for acceptance be made in a case not required the same is nugatory. House v. Adams, 48 Pa. 261. But the rule of this case is peculiar.

It is the duty of banks and other agents to whom paper is forwarded for collection to present the same for acceptance as soon as possible to the end that the drawee may become bound on the instrument. Allen v. Suydam, *supra*.

Sec. 146. **When failure to present releases drawer and indorser.**—Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time.[1] If he fail to do so, the drawer and all endorsers are discharged.[2]

1—Phoenix Ins. Co. v. Allen, 11 Mich. 501. In this case the court said, "the court cannot say as a matter of law that any delay is reasonable beyond that which may be fairly required in the ordinary course of business without special inconvenience to the holder; or by the special circumstances of the particular case."

Phoenix Insurance Co. v. Gray, 13 Mich. 191; Bridgeport Bank v. Dyer, 19 Conn. 136; Wallace v. Agry, 4 Mason 336, Fed. Cas. No. 17096; Walsh v. Dart, 23 Wis. 334.

In Nutting v. Burked, 48 Mich. 241, it was held that a bank draft issued for negotiable purposes was not required to be forwarded at once for acceptance and payment; and delay for a longer time than might be held reasonable in the case of mere private drafts would not discharge the indorsers. Where a person presenting a bill agreed

to present it again for acceptance, no protest could be made without a new demand. Case v. Burt, 15 Mich. 82.

2—This is so although all parties are solvent and no damage is caused by the delay. Allan v. Eldred, 50 Wis. 132; Thornburg v. Emmons, 23 W. Va. 333.

Sec. 147. **Presentment; how made.**—Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf,[1] and

First, Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only;[2]

Second, Where the drawee is dead, presentment may be made to his personal representative;[3]

Third, Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

1—"Comparing presentment for acceptance with presentment for payment, it is clear that the two cases are governed by somewhat different considerations. Speaking, generally, presentment for aceptance should be personal, while presentment for payment should be local. A bill should be presented for payment where the money is. Anyone can then hand over the money. A bill should be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill. Again (except in the case of demand drafts), the day for payment is a fixed day; but the drawee cannot tell on what day it may suit the holder to present the bill for acceptance. These considerations are material as bearing on the question whether the holder has used reasonable diligence to effect pre-

sentation." Chalmers' Bills of Exchange Act, 5th Ed. 137-8.

The holder of the bill making presentment for acceptance should have it in his possession, make an actual exhibit of it to the drawee and request him to accept it. Fall River Union Bank v. Willard, 5 Met. (Mass.) 216. It is not necessary that the notary in making presentment for acceptance should actually produce the bill; it is sufficient if he has it with him ready to produce in case the drawee calls for it. First Nat. Bank v. Hatch, 78 Mo. 13. In making demand for an acceptance, the party ought, if possible, to see the drawee personally or some agent appointed by him to accept; and diligent inquiry must be made for him, if he shall not be found at his house or place of business. Wiseman v. Chiappella, 64 U. S. (23 How.) 368; Sharpe v. Drew, 9 Ind. 281.

Presentment for acceptance of a foreign bill should be made by a notary. First Nat. Bank v. Hatch, *supra.*

Presentment to a clerk in the drawee's counting room is sufficient. Stainback v. Bank, 11 Gratt. 269. Acceptance may be made by the agent but the holder may require the production by him of clear and explicit authority from his principal to accept in his name and without its production may treat the bill as dishonored. Daniel's Neg. Inst. (5th ed.) sec. 487. Refusal to accept when presentment for acceptance is made on day of maturity is equivalent to refusal to pay. Plato v. Reynolds, 27 N. Y. 586. As to reasonable time, see sec. 74; Bank of Utica v. Smith, 18 Johns. 230; Cayuga Bank v. Hunt, 2 Hill 635.

2—Drawers not partners; presentment must be made to each. Willis v. Green, 5 Hill 232; Union Bank v. Willis, 8 Met. (Mass.) 504. Drawers, partners; presentment to any one sufficient. Holtz v. Boppe, 37 N. Y. 634.

3—Presentment in such a case is excused by section 150. An executor or administrator is without authority to bind the estate of decedent by an acceptance. Schmittler v. Simon, 101 N. Y. 554; Roscoe v. McDonald, 91 Mich. 270, 101 Mich. 313.

Sec. 148. **On what days presentment may be made.**—A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-four and eighty-seven of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.[1]

1—See C. L. '97, sec. 4880, as amended, Laws 1903, p. 420.

The Colorado Act substitutes the following for the last sentence: "When any day is in part a holiday, presentment for acceptance may be made during reasonable hours of the part of such day which is not a holiday." The Wisconsin Act omits the last sentence.

Sec. 149. **Presentment; where time is insufficient.**—When the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawers and indorsers.[1]

1—This follows the Bills of Exchange Act, sec. 30 (4) concerning which Judge Chalmers says: "It settles a moot point and perhaps alters the law. Suppose a bill payable one month after date, is drawn in New York on a Liverpool firm, but payable at a London bank. It only reaches the English holder, or his agent, on the day that it matures. He must, nevertheless, present it for acceptance to the drawers in Liverpool. The Act provides that he shall not be prejudiced by so doing. Before the Act the usual practice was to protest the bill in London without any presentment to the drawees—an obviously inconvenient mode of proceeding, for the holder's object is to get the bill paid, and not to run up expenses against the drawer and indorser." Chalmers' Bills of Exchange, 5th ed., 133.

Sec. 150. **When presentment is excused.**—Presentment for acceptance is excused, and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

First, Where the drawee is dead[1] or has absconded, or is a fictitious person, or a person not having capacity to contract by bill;

Second, Where, after the exercise of reasonable diligence, presentment cannot be made;

Third, Where although presentment has been irregular, acceptance has been refused on some other ground.[2]

1—See sec. 147.

Mr. Daniel doubts the rule generally stated that the death of the drawer will not operate as an excuse for non-presentment for acceptance. Daniel's Neg. Inst., 5th ed., sec. 1178. Whatever doubt there may have been on the point is now settled by the statute.

2—This provision is not a codification of existing law but was borrowed from the Bills of Exchange Act, sec. 41 (2) concerning which Judge Chalmers says: "This is perhaps new law and is important having regard to the next sub-section." The subsection referred to is as follows: "The fact that the holder has reason to believe that the bill, on presentment, will be dishonored, does not excuse presentment." Chalmers' Bills of Exchange, 5th ed. 137. The meaning of the provision seems to be unmistakable (—) notwithstanding there is not coupled with it such a provision as is coupled with the corresponding provision of the Bills of Exchange Act, and that is that although presentment was made in such a manner that the drawer was not bound to recognize it, yet if he put his refusal to accept on other grounds, presentment will be excused.

Sec. 151. **When dishonored by non-acceptance.**—The bill is dishonored by non-acceptance:

First, When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

Second, When presentment for acceptance is excused and the bill is not accepted.

Sec. 152. **Duty of holder where bill is not accepted.**—Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

Sec. 153. **Rights of holder where bill is not accepted.**— When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder, and no presentment for payment is necessary.[1]

1—Upon dishonor by non-acceptance the holder may at once bring suit against parties secondarily liable. He need not wait until the maturity of the instrument. See sec. 145; Winthrop v. Pepoon, 1 Bay (S. C.) 468; Watson v. Loring, 3 Mass., 557; Lennox v. Cook, 8 Mass. 460.

Article IV. Protest.

Sec.
154. In what cases protest necessary.
155. Protest; how made.
156. Protest; by whom made.
157. Protest; when to be made.
158. Protest; where made.
159. Protest, both for non-acceptance and non-payment.
160. Protest before maturity where acceptor insolvent.
161. When protest dispensed with.
162. Protest where bill is lost, etc.

Sec. 154. **In what cases protest necessary.**—Where a foreign bill appearing on its face to be such, is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged.[1] Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.[2]

1—Protest from the words "*pro*" and "*testare*" has been given two meanings in this connection. 1st, the bearing of public witness. 2nd, bearing of witness *before* the notary, of facts going to make up the dishonor of the paper.

The word "protest" is applied to the formal instrument made by a notary public, alleging the due presentment and dishonor of a bill, and declaring that said notary does protest the same for non-payment or non-acceptance as the case may be. Platt v. Drake, 1 Doug. (Mich.) 296. Failure to protest discharges the drawer and indorsers. Smith v. Long, 40 Mich. 555; Gale v. Walsh, 5 T. R. 329; Citizens' Sav. Bank v. Hays, 96 Ky. 365, 29 S. W. 20; Smith v. Curlee, 59 Ill. 221; Ocean Nat. Bank v. Williams, 102 Mass. 141; Halliday v. McDougall, 20 Wend. 81; Amsinck v. Rogers, 93 N. Y. Supp. 87 (a case under the statute).

The law conclusively presumes injury to the indorser from failure to protest and give the requisite notice and will not permit

the contrary to be shown. Smith v. Long, *supra*. Protest of a foreign bill is so indispensable that nothing can take its place and none of the facts necessary to the protest can be proved by extraneous testimony. Union Bank v. Hyde, 6 Wheat 572; Joseph v. Salomon, 19 Fla. 623. Mr. Daniel, in discussing the reason why protest of foreign bills is required, says, "The requisition of a protest in the case of foreign bills was in order to afford authentic and satisfactory evidence of due dishonor to the drawer, who, from his residence abroad, would experience a difficulty in making proper inquiries on the subject, and be compelled to rely on the representations of the holder. It also furnishes an indorser with the best evidence to charge an antecedent party abroad; for foreign courts give credit to the acts of a public functionary in the same manner as a protest under the seal of a foreign notary is evidence in our courts of the dishonor of a bill payable abroad." Daniel's Neg. Inst., 5th ed., sec. 927.

2—See sections 120 and 131.

Sec. 155. **Protest; how made.**—The protest must be annexed to the bill, or must contain a copy thereof,[1] and must be under the hand [2] and seal [3] of the notary making it, and must specify:

First, The time [4] and place [5] of presentment;

Second, The fact that presentment was made, and the manner thereof;[6]

Third, The cause or reason for protesting the bill;

Fourth, The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.[7]

1—Fulton v. MacCracken, 18 Md. 528.

2—Although the notary is required to sign the protest, for that is the obvious meaning of "under his hand," his name may be signed by his clerk, for that too is included in the phrase "under his hand," (see Phelps v. Riley, 3 Conn. 266) or it may be printed. It is only necessary that it should be authorized by him. Fulton v. MacCracken, *supra*.

3—Under the law merchant by some authorities the seal of the notary was regarded as an absolute essential. Donegan v. Wood, 49 Ala. 251; by others it was not. Huffaker v. Nat. Bank, 12 Bush 287. In the case last cited it was said: "The notary being

an officer of the state, his official signature is all that is required to the protest."

The seal of the notary proves the genuineness of his signature. Pierce v. Indseth, 106 U. S. 546.

A protest, required by the laws of one State to be under seal, will not be received as evidence in another State without such seal. Bank v. Gray, 2 Hill 227. The Bills of Exchange Act does not require the protest to be made under seal (sec. 51 (1)).

4—The date upon which presentment and demand were made must be stated. Union Nat. Bank v. Williams Milling Co., 117 Mich. 535. But the hour of the day need not be stated, as the certificate imports a presentment during the proper hours of business. Cayuga County Bank v. Hunt, 2 Hill 635; Skelton v. Dustin, 92 Ill. 49.

5—Burbank v. Beach, 15 Barb. 326; Duckert v. Von Lilenthal, 11 Wis. 55. In this case the certificate stated that the note was presented "at Montello" and payment demanded and refused, but it did not state to whom or at what place in the town presentment and demand were made. Held insufficient.

When it is necessary to make presentment at a bank, it is not sufficient to allege presentment to the cashier. Seneca Co. Bank v. Neass, 5 Denio 329.

6—It must appear in the certificate of protest that presentment *and* demand were made. A statement that the notary made *demand* does not comply with the requirement. Musson v. Lake, 4 How. (U. S.) 262. But see Nott's Ex'r. v. Beard, 16 La. 308.

7—This section requires substantially the same particulars to be set out in the protest as have ordinarily been required. See Brooks Notary, 4th ed. 82.

Sec. 156. **Protest; by whom made.**—Protest may be made by:

First, A notary public;[1] or

Second, By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.[2]

1—A notary public is a sort of international officer and the rule has been general to intrust the protest of bills to him. The general rule is that the protest must be made by him in person. Sacrider v. Brown, 3 MacL. 481, Fed. Cas. No. 12205; Ocean Nat. Bank v. Williams, 102 Mass. 141; Cribbs v. Adams, 13 Gray 597; Commercial Bank v. Varnum, 49 N. Y. 269; Carter v. Union Bank, 7 Humph. (Tenn.) 548. Since interest in litigation no longer disqualifies witnesses, a notary public who is cashier

of a bank may legally protest its paper. Nelson v. First Nat. Bank, 69 Fed. 798; Moreland's Assignee et al. v. Citizens' Savings Bank, 97 Ky. 211, 30 S. W. 19. Though such cashier be the maker of a note, he can protest it himself, the note being held by the bank. Dykman v. Northridge, 36 N. Y. Supp. 962, affirmed 153 N. Y. 662.

2—See Todd v. Neals Adm'r, 49 Ala. 266.

Sec. 157. **Protest; when to be made.**—When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.[1]

1—The formal protest need not be made at the time or on the day of presentment and demand, but may be made thereafter if proper steps were taken at the time presentment and demand were made. It is the duty of the notary at the time of making presentment and demand to note on the bill or on the paper attached thereto or in his book the particulars which are to make up the formal protest, viz: the time, the fact of refusal of acceptance or payment as the case may be, and the reason assigned therefor, and his charges of protest, and verify such memoranda by adding his name or initials. This is called *noting*. The notes or memoranda may afterwards be extended into the formal protest. Leftley v. Mills, 4 T. R. 170. The noting must be made on the very day of dishonor, else it cannot be made the basis of the extended protest. Dennistown v. Stewart, 58 U. S., (17 How.) 606; Cayuga Bank v. Hunt, 2 Hill 635. The noting is not protest but may be used in the place of protest if the formal certificate be lost or destroyed without the holder's consent or if the notary should die before extending his notes.

Sec. 158. **Protest; where made.**—A bill must be protested at the place where it is dishonored,[1] except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.[2]

1—This is an affirmation of the general rule. Daniel's Neg. Inst., 5th ed. 935.

2—The Bills of Exchange Act, sec. 51 (6), from which this provision is borrowed, follows in terms the declaratory statute 3 Williams IV Ch. 98, which overturned the rule laid down in Mitchell v. Baring, 4 C. & P. 35, 19 E. C. L. 395.

Sec. 159. **Protest both for non-acceptance and non-payment.**—A bill which has been protested for non-acceptance may be subsequently protested for non-payment.[1]

1—When a bill has been protested for non-acceptance, immediate recourse may be had against drawer and indorsers. See secs. 145 and 153 and notes. Therefore protest for non-payment would not be necessary except for the fact that some of the secondary parties are residents of a foreign country by the laws whereof no right of action accrues on non-payment at maturity. See Introduction, pp. 9 and 10. See Bills of Exchange Act, sec. 51 (3). Concerning this provision Judge Chalmers says: "Protest in such case might be necessary for the purpose of charging a foreign drawer or indorser in his own country. An English Act can only lay down the law for the United Kingdom, though by the comity of nations the duties of the holder would generally be regarded as regulated by the law of the place where they are to be performed. * * * Under some of the Continental codes no right of action arises on non-acceptance; the holder can demand security from antecedent parties, but he is bound to re-present the bill at maturity." Chalmers' Bills of Exchange, 5th ed. 172.

Sec. 160. **Protest before maturity where acceptor insolvent.**—Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and endorsers.[1]

1—In the matter of protest for better security Chalmers says: "When the acceptor of a bill of exchange becomes bankrupt before its maturity, it may be protested for better security," and adds that "the only effect of such a protest is that there may be

an acceptance *supra protest*." Chalmers' Digest Bills, Notes and Checks (Benjamin) 177; Exparte Wackerbath, 5 Ves. Jr. 574; Daniel's Neg. Inst., 5th ed., sec. 530.

This section is borrowed from the Bills of Exchange Act, sec. 51 (5). Mr. Bigelow questions whether this section is the expression of any custom existing in this country.

Protest for better security is not necessary. In re English Bank, 2 Chy. (1893) 438.

Sec. 161. **When protest dispensed with.**—Protest is dispensed with by any circumstances which would dispense with notice of dishonor.[1] Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

1—See sec. 113, 114 and notes. Whatever will excuse notice, will excuse protest.

Sec. 162. **Protest where bill is lost, et cetera.**—Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.[1]

1—Loss of the instrument will not excuse demand and protest. Daniel's Neg. Inst., 5th ed., sec. 1464; Kavanaugh v. Bank, 59 Mo. App. 540. Presentment of a copy is sufficient and protest may be made on the basis of the copy. Hinsdale v. Miles, 5 Conn. 331.

Article V. Acceptance for Honor.

Sec.
163. When bill may be accepted for honor.
164. Acceptance for honor; how made.
165. When deemed to be an acceptance for honor of drawer.
166. Liability of acceptor for honor.
167. Agreement of acceptor for honor.
168. Maturity of bill payable after sight; accepted for honor.
169. Protest of bill accepted for honor, etc.
170. Presentment for payment to acceptor for honor, how made.
171. When delay in making presentment is excused.
172. Dishonor of bill by acceptor for honor.

Sec. 163. **When bill may be accepted for honor.**—Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security and is not overdue, any person not being a party already liable thereon may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn; and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.[1]

1—Acceptance for honor is likewise called acceptance *supra protest*. This is an English custom preserved in the Bills of Exchange Act, sec. 65 (1) and (2), from which the section is borrowed. The object of the provision is to enable a party who is liable on the bill to induce another to intervene for the protection of his credit and permit a ready negotiation of the bill. The holder is not bound to take an acceptance for honor. Before taking such an acceptance, he should cause the bill to be protested and then to be accepted in the manner provided in the

Act. Acceptance for honor may be made by any person not already liable as a party to the bill. The drawee, though refusing to accept the bill generally, may accept it for the honor of the drawer or of any one indorser. The drawee after refusing to accept may intervene through an agent, thus he may request a stranger to the bill to accept for his honor and under his guaranty. Konig v. Bayard, 1 Pet. (26 U. S.), 250. No one but the drawee can accept a bill, but for the honor of one of the parties. May v. Kelly, 27 Ala. 497.

Sec. 164. **Acceptance for honor; how made.**—An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.[1]

1—Compare Bills of Exchange Act, sec. 65 (3), which requires acceptance for honor to be written on the bill. Section 164 permits such an acceptance to be written on a separate paper. The usual form of acceptance for honor is: "Accepted *supra protest* for honor of A." "Accepts S. P.," followed by the signature.

Sec. 165. **When deemed to be an acceptance for honor of drawer.**—Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.[1]

1—The purpose of this section is to fix under all circumstances the person for whose honor the acceptance is made, and thus to define the recourse of the acceptor for honor. The acceptor for honor must state in his acceptance for whose honor he accepts, as his rights against antecedent parties may be materially affected thereby, for if the acceptor for honor should afterwards pay the bill, he will be entitled to recourse for repayment against the person for whose honor he made the acceptance and to all other parties who are liable to that person. Goodall v. Polhill, 1 C. B. 233. 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. Story on Bills, sec. 256.

The acceptor of a bill for the honor of the drawer cannot maintain an action thereon against the drawer without proof of its presentment to the drawee and non-acceptance or non-payment by him, and notice thereof to the drawer. Baring v. Clark, 19 Pick. 220.

An acceptor for the honor of the first indorser may require, as a condition of payment, that the holder shall indorse the bill to him, or otherwise indemnify him. Freeman v. Perot, 2 Wash. C. C. 485, Fed. Cas. No. 5087.

Sec. 166. **Liability of acceptor for honor.**—The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

Sec. 167. **Agreement of acceptor for honor.**—The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him.[1]

1—The acceptor for honor does not assume an absolute liability but a conditional one. To fix his liability certain steps are essential. At maturity the bill must be presented to the drawee, notwithstanding that he has previously refused acceptance. Upon the original drawee's refusal to pay, the bill must be again protested for non-payment and due notice given to the acceptor for honor. Phillips v. Im Thurn, L. R. 1 C. P. 463, 14 L. T. (n. s.) 406; Williams v. Germain, 7 B. & C. 468; Hoare v. Cazenove, 16 East 391; Schofield v. Bayard, 3 Wend. 491.

Whether the acceptor for honor admits the genuineness of the signature of the party for whose honor he accepts has been a controverted question—that he *does* is maintained by the following: Daniel's Neg. Inst., 5th ed., sec. 528; Story on Bills, sec. 262; Byles on Bills (Sharswood ed.) 258, 406; Phillips v. Im Thurn, 18 C. B. (n. s.) 694; that he *does not* is maintained by Parsons on Bills and Notes, 323, citing Wilkinson v. Johnson, 3 B. & C. 428.

Sec. 168. **Maturity of bill payable after sight; accepted for honor.**—Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honor.[1]

1—This section is the same as sec. 65 (5) Bills of Exchange Act, concerning which Judge Chalmers says: "This sub-section brings the law into accordance with mercantile understanding, and gets rid of an inconvenient ruling to the effect that maturity was to be calculated from the date of acceptance for honor (William v. Germaine, 7 B .& C. 468)." Chalmers' Bills of Exchange, 5th ed., 228.

Sec. 169. **Protest of bill accepted for honor, et cetera.**—Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.[1]

1—See Bills of Exchange Act, sec. 67 (1).

Sec. 170. **Presentment for payment to acceptor for honor; how made.**—Presentment for payment to the acceptor for honor must be made as follows:

First, If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity;

Second, If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred six.[1]

1—Doubts having arisen as to the day on which it was requisite to present for payment to the acceptor *supra protest* for honor, or to the referee in case of need, bills which had been

dishonored, Parliament passed a statute in 1836, 6 & 7 William IV, Ch. 58, declaring, "That it shall not be necessary to present such bills of exchange to such acceptors for honor or to such referee until the day following the day on which such bills of exchange shall become due; and that if the place of address on such bill of exchange of such acceptor for honor or of such referee shall be in any city, town or place other than in the city, town or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptor for honor or referee until the day following the day on which such bill of exchange shall become due." Sec. 67 (2) of the Bills of Exchange Act re-enacts this statute in substance. Sec. 170 follows said sub-section.

Sec. 171. **When delay in making presentment is excused.**—The provisions of section eighty-three apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

Sec. 172. **Dishonor of bill by acceptor for honor.**—When a bill is dishonored by the acceptor for honor it must be protested for non-payment by him.[1]

1—The Bills of Exchange Act, sec. 67 (4), from which this section is taken, settled the law in England on the matter covered by the provision. Before that time it was probable but not certain that when a bill of exchange was dishonored by the acceptor *supra protest*, it must have been again protested in order to charge the other parties liable thereon. Chalmers' Bills, Notes and Checks (Benjamin) 178. The section affirms the existing law in the United States. Daniel's Neg. Inst., 5th ed., 527.

Article VI. Payment for Honor.

Sec.
173. Who may make payment for honor.
174. Payment for honor; how made.
175. Declaration before payment for honor.
176. Preference of parties offering to pay for honor.
177. Effect on subsequent parties where bill is paid for honor.
178. Where holder refuses to receive payment *supra protest*.
179. Rights of payer for honor.

Sec. 173. **Who may make payment for honor.**—Where a bill has been protested for non-payment any person may intervene and pay it supra protest for the honor of any person liable thereon, or for the honor of the person for whose account it was drawn.[1]

1—The law merchant limits the right to make payment for honor to bills of exchange and does not extend it even to negotiable promissory notes, Smith v. Sawyer, 55 Me. 141.

A stranger to a bill which has been refused acceptance can at the request and under the guaranty of the drawee who has refused acceptance or payment, pay the bill *supra protest* for the honor of the drawer or an indorser. Konig v. Bayard, 1 Pet. (26 U. S.) 250.

There can be no payment for honor until after dishonor by non-payment, and protest. Deacon v. Stodhart, 2 Man. & Gr. 317; Vandewall v. Tyrrell, 1 M. & M. 87; Wood v. Pugh, 7 Ohio, pt. 2, 156, 164.

The protest for non-payment, though necessary, need not be completed at the time of the payment for honor; it may be extended at a later time. Geralopulo v. Wieler, 10 C. B. 690, 20 L. J. C. P. 105.

Sec. 174. **Payment for honor; how made.**—The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.[1]

1—A stranger may take up a bill for the honor of the parties or any of them and thus acquire the rights of an indorsee, provided he makes the payment after protest, causes a notarial act to be made showing why and for whom he made the payment and gives immediate notice to all parties to whom he intends to resort for indemnity. Gazzam v. Armstrong's Exr., 3 Dana (Ky.) 554. If he fails to notify such parties within a reasonable time, he loses his right of recourse against them. Wood v. Pugh, 7 Ohio, pt. 2, 156. See note, section 173.

Sec. 175. **Declaration before payment for honor.**—The notarial act of honor must be founded on a declaration made by the payer for honor, or by his agent in that behalf, declaring his intention to pay the bill for honor, and for whose honor he pays.

Sec. 176. **Preference of parties offering to pay for honor.**—Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

Sec. 177. **Effect on subsequent parties where bill is paid for honor.**—Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.[1]

1—The payer *supra protest* stands in the shoes, so far as recourse is concerned, of the party for whose honor he pays. For example, a dishonored bill is held by the fourth indorsee. If A pays it *supra protest* for the honor of the acceptor, he has recourse against the acceptor alone. If he pays it for the honor of the first indorser he has recourse against him and against the drawer and acceptor, but indorsers subsequent to the first are discharged. A payer *supra protest* for the honor of the drawer has no recourse against the acceptor if he accepted for the accommodation of the drawer, because the drawer would

not have the right of reimbursement against the accommodation acceptor. McDowell v. Cook, 14 Miss. 420; Gazzam v. Armstrong's Exr. 3 Dana (Ky.) 554. But see Ex parte Swan, L. R. 6 Eq. 344; Daniel's Neg. Inst., 5th ed., sec. 1255.

Sec. 178. **Where holder refuses to receive payment supra protest.**—Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.[1]

1—Before the enactment of the Bills of Exchange Act the proposition covered by this section was undetermined by any adjudication in England. It is one of those propositions which Chalmers states with a "perhaps." Introduction p. 7, Chalmers' Digest (Benjamin) 243. Subsection 7 of section 68 set at rest whatever doubt had theretofore existed as to the right of recourse of the holder who refuses payment *supra protest*. This section is a copy of said subsection.

Sec. 179. **Rights of payer for honor.**—The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.[1]

1—This section follows sec. 68 (6) of the Bills of Exchange Act, which affirmed the practice in England. There were no adjudicated cases on the subject. Chalmers' Digest (Benjamin) 243.

A person desiring to make payment for honor must be ready and offer to do so at the time and place of payment. Denston v. Henderson, 13 Johns. (N. Y.) 322.

Article VII. Bills in a Set.

Sec.
180. Bills in set constitute one bill.
181. Rights of holder where different parts are negotiated.
182. Liability of holder who indorses two or more parts of a set to different persons.
183. Acceptance of bills drawn in sets.
184. Payment by acceptor of bills drawn in sets.
185. Effect of discharging one of a set.

Sec. 180. **Bills in set constitute one bill.**—Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.[1]

1—Because the means of communication were imperfect and uncertain, the custom arose at an early day to make a foreign bill generally in three but sometimes in four separate parts, the better to facilitate the transmission and insure the delivery of the bill to its destined place. To secure the end sought, these separate parts were forwarded by different messengers or by different modes of transportation. The practice was maintained after the reason for it had for all practical purposes ceased. These several parts constitute but one bill which is called a bill in a set. Each part of the set is numbered and contains a reference to the other parts. Downes v. Church, 13 Pet. (38 U. S.) 207. A form of a bill in a set is as follows:

$500.00

New York, August 1, 1905.

At sight of this first of exchange, (second and third unpaid) pay to the order of Solon Clark Five hundred dollars. Value received and charge to the account of Daniel Davis.

To

Seth Eaton,
1009 Marquette Bldg.
Chicago, Ill.

The three parts would be triplicates except the second would state, "Pay this second of exchange, (first and third unpaid)"; the third, "Pay this third of exchange, (first and second unpaid)." Walsh v. Blatchley, 6 Wis. 413; Ralli v. Dennistoun, 6 Ex. 483, 20 L. J. Ex. 278; Holdsworth v. Hunter, 10 B. & C. 449. The condition incorporated in bills in a set—sec-

ond and third unpaid—gives notice that all the parts constitute but one bill. Payment of any part extinguishes the whole. Durkin v. Cranston, 7 Johns. 442; Wells v. Whitehead, 15 Wend. 527.

Sec. 181. **Rights of holders where different parts are negotiated.**—Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill.[1] But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

1—The first indorsement of one set vests in the indorsee the absolute right to the possession of the whole set. Walsh v. Blatchley, 6 Wis. 413.

Sec. 182. **Liability of holder who indorses two or more parts of a set to different persons.**—Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.[1]

1—Holdsworth v. Hunter, 10 B. & C. 449.

Sec. 183. **Acceptance of bills drawn in sets.**—The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.[1]

1—This section is substantially identical with subdivision 4, sec. 71 of the Bills of Exchange Act. It is declaratory of existing law. Holdsworth v. Hunter, 10 B. & C. 449; Bank v. Neal, 22 How. (U. S.) 96. Any one of the set may be presented for acceptance

and, if not accepted, a right of action arises upon due notice against the indorser. Walsh v. Blatchley, 6 Wis. 413; Downes & Co. v. Church, 13 Pet. 205.

Sec. 184. **Payment by acceptor of bills drawn in sets.**—When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.[1]

1—Holdsworth v. Hunter, 10 B. & C. 449.

Sec. 185. **Effect of discharging one of a set.**—Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.[1]

1—Holdsworth v. Hunter, 10 B. & C. 449. See note to section 180.

The Wisconsin Act contains the following additional provisions:

Sec. 1682. Whenever any bill of exchange drawn or indorsed within this state and payable without the limits of the United States shall be duly protested for non-acceptance or non-payment the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same at the current rate of exchange at the time of the demand, and damages at the rate of five per cent upon the contents thereof, together with interest on the said contents, to be computed from the date of the protest; and said amount of contents, damages and interest shall be in full of all damages, charges and expenses.

Sec. 1683. If any bill of exchange drawn upon any person or corporation out of this state, but within some state or territory of the United States, for the payment of money shall be duly presented for acceptance or payment and protested for non-acceptance or non-payment the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay said bill with legal interest according to its tenor and five per cent. damages, together with costs and charges of protest.

TITLE III.

PROMISSORY NOTES AND CHECKS.

Article I.

Sec.
186. Promissory note defined.
187. Check defined.
188. Within what time a check must be presented.
189. Certification of check; effect of.
190. Effect where the holder of check procures it to be certified.
191. When check operates as an assignment.
192. Inconsistent laws repealed.

Sec. 186. **Promissory note defined.**—A negotiable promissory note within the meaning of this act is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determined future time, a sum certain in money, to order or to bearer.[1] Where a note is drawn to the maker's own order, it is not complete until indorsed by him.[2]

1—See Bills of Exchange Act, sec. 83.

The Bills of Exchange Act includes in its definition of a promissory note a note payable "*to* or to the order of a specified person or to bearer," thus embracing instruments which were not negotiable according to the law merchant. In some states a non-negotiable note was held to import consideration by virtue of statutory provision or by interpretation of common law rules. Daniel's Neg. Inst., 5th ed., sec. 163. The statute changes the rule in those states because the statute deals only with negotiable instruments, and so it was held in Yarwood v. Trusts & Guarantee Co. (ltd.), 94 App. Div. 47, 87 N. Y. Supp. 947 (a case under the statute), that a note in the following terms: "I promise to pay Jennie Crawford $5,000 when I die and George Crawford $5,000," imported consideration prior to the act, but

that this section changed such prior law.

In Deyo v. Thompson, 53 App. Div. 9, 65 N. Y. Supp. 459 (a case under the statute), it was held that a note payable to "a specified person" imported no consideration. See Hickok v. Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059 (a case under the statute).

Certificates of deposit in the ordinary form payable to order or to bearer are in legal effect negotiable promissory notes. Cate v. Patterson, 25 Mich. 191; Tripp v. Curtenius, 36 Mich. 494; Birch v. Fisher, 51 Mich. 36; Beardsley v. Webber, 104 Mich. 88; Curran v. Witter, 68 Wis. 16; Trustees etc. v. Lewis, 34 Fla. 424; Kirkwood v. First Nat. Bank, 40 Neb. 484. A certificate of deposit made out to Z or her assigns was held not a negotiable instrument under this statute. Zander v. N. Y. Security & Trust Co., 81 N. Y. Supp. 1151.

Coupon or interest notes are promissory notes. Boyer v. Chandler, 160 Ill. 394.

2—A note payable to the maker's own order satisfies the requirement of the rule that it should be made payable "to another," but only when the note is negotiated. See note 2, sec. 10. This part of the section was referred to, in connection with others, in Hoffman v. Planters' Nat. Bank, 99 Va. 480, 39 S. E. 134.

A note drawn payable to the order of the maker and not indorsed by him is valid against the indorser, although he did not know that it was to be issued without the maker's indorsement. C. L. '97, 4870. Peninsular Savings Bank v. Hosie, 112 Mich. 351.

Sec. 187. **Check defined.**—A check is a bill of exchange drawn on a bank,[1] payable on demand.[2] Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.[3]

1—This section is identical with section 73 of the Bills of Exchange Act, except that the word "bank" is substituted for "banker." The variation is immaterial, as the words are made synonymous by the terms of the statute. See sec. 2.

Sec. 73 of the Bills of Exchange Act was declaratory of then existing law so far as it defined a check as a bill of exchange. McLean v. Clydesdale Banking Co., 9 App. Cas. 95. See note sec. 128. All checks are bills of exchange but not all bills of exchange are checks. A check is distinguishable from a bill in that it is always drawn on a bank. People v. Kemp, 76 Mich.

410; Merchants Bank v. State Bank, 10 Wal. 604; Bull v. Bank, 123 U. S. 105; Rogers v. Durant, 140 U. S. 298; Hopkinson v. Forster, L. R. 19 Eq. 76; Ridgely Bank v. Patton, 109 Ill. 479; N. W. Coal Co. v. Bowman, 69 Ia. 152; Harrison v. Nicollett Nat. Bank, 41 Minn. 488; Amsinck v. Rogers, 93 N. Y. Supp. 87, (a case under the statute) wherein the instrument was held not a check because not drawn on a bank.

2—A check is further distinguishable from a bill in that it is always payable on demand. The courts have been at variance as to whether a draft on a bank payable at a future day is a check or bill of exchange. That such a draft is not a check: Bowen v. Newell, 13 N. Y. 290; Georgia Nat. Bank v. Henderson, 46 Ga. 496; Ivory v. Bank, 36 Mo. 475; Harrison v. Nicollett Nat. Bank, *supra;* Morrison v. Bailey, 5 Ohio St. 13; Minturn v. Fisher, 4 Cal. 36. That such a draft is a check: In re Brown, 2 Story 502, Fed. Cas. No. 1985; Champion v. Gordon, 70 Pa. St. 474; Westminster Bank v. Wheaton, 4 R. I. 30.

A check is a bill of exchange payable on demand and the drawee will be deemed to have accepted it if he does not return it within twenty-four hours after its delivery for acceptance, according to sec. 129. State Bank v. Weiss, 91 N. Y. Supp. 276 (a case under the statute), Unaka Nat. Bank v. Butler, (Tenn.), 83 S. W. 655 (a case under the statute).

3—Presentment and notice of dishonor are required to charge the drawer of a check as well as the drawer of a bill, with this distinction, if the drawer of a check draws without funds in the hands of his bank he is liable as a primary party without notice. Carew v. Duckworth, L. R. 4 Exch. 313; Andrew v. Blackly, 11 Ohio St. 89; First Nat. Bank v. Linn etc., 30 Ore. 296; Industrial Bank v. Bowes, 165 Ill. 70. If the drawee of a bill draws without funds in the hands of the drawee he is liable only presumptively as a primary party, the drawing without funds being only *prima facie* fraudulent. The presumption of fraud arising from a lack of funds in the hands of the drawee may be rebutted. Dolph v. Rice, 18 Wis. 418; Harker v. Anderson, 21 Wend. 372.

There are other distinctions between bills and checks apart from those mentioned in the statute which should be noted. A check is ordinarily intended for payment and, as its name implies, for stopping or closing a transaction; a bill is frequently, perhaps ordinarily, intended as an instrument of credit; a check purports to be drawn against a fund or deposit of the drawer in the hands of his bank; a bill does not necessarily import funds of the drawer in the hands

of the drawee, but may be drawn upon reasonable grounds that the drawee will honor the bill; all checks are intended for prompt presentment, not all bills.

Authority to draw checks does not necessarily include authority to draw bills. Forster v. Macreth, L. R., 2 Exch. 163.

Crossed Checks.—Earlier than 1850 it was the practice of English merchants and bankers to cross checks, that is, to write or stamp across the face of the check some direction as to its payment. See Bills of Exchange Act, sec. 76-81. In Bellamy v. Marjoribanks, 7 Ex. (W. H. & G.) 389, decided in 1852, it was held that the practice of crossing checks did not amount to a fixed custom. In 1856 a declaratory statute was enacted defining the status of crossed checks and providing that a crossed check "shall be payable only to or through some banker," 19 & 20 Vict. ch. 25. In 1858 this statute was amended, 21 & 22 Vict. ch. 79. See Smith v. Bank, 1 Q. B. D. 31, 4 Eng. Rul. Cas. 436. The statutes above named were further amended in 1876, 39 & 40 Vict. ch. 80. This last statute is substantially re-enacted in the Bills of Exchange Act. Bank v. Silke [1891] 1 Q. B. 435, 4 Eng. Rul. Cas. 440. The object of crossing is protection to the drawer or holder and caution to the bank. The English usage is not practiced in the United States. Daniel's Neg. Inst., 5th ed., sec. 1585 *a*.

Sec. 188. **Within what time a check must be presented.**—A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.[1]

1—See sec. 2, *reasonable time.*

This section affirms the rule of the common law. To meet the requirements of this rule a check must, in the absence of special circumstances, be presented for payment not later than the day after it is received if the party receiving the check and the drawee bank are in the same place; if in different places, the check must, in the absence of special circumstances, be forwarded not later than the day after it is received. Freiberg v. Cody, 55 Mich. 108; Holmes v. Roe, 62 Mich. 199; Hamilton v. Lumber Co., 95 Mich. 436; Haggerty v. Baldwin, 131 Mich. 187; Aebi v. Bank (Wis.), 102 N. W. 329 (a case under the statute). In this case the payee of a check, drawn on a bank 17 miles distant, deposited it in his bank Sept. 21 and was credited with the amount. The bank forwarded it to the drawee bank but failed for ten days to make inquiry from the drawee bank and

then found that the check having been lost had never reached the drawee bank. Held, that this delay was not excusable and that the payee indorser was discharged from liability.

As to reasonable time for presentment of a check for payment see Gifford v. Hardell, 88 Wis. 538; Lloyd v. Osborne, 92 Wis. 93; Grange v. Reigh, 93 Wis. 552; Farmers' Nat. Bank v. Dreyfus, 82 Mo. App. 399; Hamlin v. Simpson, 105 Ia. 125; Cox. v. Boone, 8 W. Va. 500; Kershaw v. Ladd, 34 Ore. 375; First Nat. Bank v. Miller, 43 Neb. 791; Willis v. Finley, 173 Pa. St. 28.

The insolvency of the drawee bank is the only circumstance under which the drawer of a check can be injured by failure of presentment within a reasonable time. The drawer is injured only to the extent of the loss suffered by him. Heywood v. Pickering, L. R. 9 Q. B. 428; Little v. Phenix Bank, 2 Hill 425.

If the drawer has no funds upon deposit in the drawee bank or subsequently withdraws them, any delay in presentment or notice to him will be no defense, as he can suffer no loss or damage from such delay. Industrial Bank v. Bowes, 165 Ill. 70; First Nat. Bank v. Linn, etc., 30 Ore. 296; Bell v. Alexander, 21 Gratt. 1.

Where the bank fails before the expiration of the time allotted the payee in which to make presentment, the loss falls on the drawer. Holmes v. Roe, 62 Mich. 199; Kelty v. Bank, 52 Barb. 328; Bickford v. First Nat. Bank, 42 Ill. 238; Simpson v. Pacific etc. Ins. Co., 44 Cal. 139; Wear v. Lee, 87 Mo. 359; Tomlin v. Thornton, 99 Ga. 585.

Failure of the holder to make presentment within a reasonable time discharges the indorser whether he has suffered loss or not. Carroll v. Sweet, 128 N. Y. 19, 27 N. E. 763; First Nat. Bank v. Miller, 43 Neb. 791.

Death of the payee or indorser of a check after it has been negotiated cannot affect its negotiability or prevent the drawee from safely paying it. Brennan v. Merchants' & Mfrs. Nat. Bank, 62 Mich. 343.

A banker as such is bound to honor his customer's check, when duly presented, to the extent of the balance which the customer then has in his hands. Chalmers' Digest 266 (Benjamin). Whether the death of the drawer revokes the authority of the bank to pay the check is a disputed question. Mr. Chalmers states that the authority of a banker to pay a check drawn on him by his customer is determined by notice of the customer's death. This view is supported by: Nat. Commercial Bank v. Miller, 77 Ala. 168. But see Raesser v. Nat. Exchange Bank, 112 Wis. 591. Mr. Crawford explains: "There is no decision directly in point and the views of text writers differ. To meet the difficulty the original draft of the negotiable instrument law submitted to the commissioners contained a provision (which was taken from the statute of Mass.) as follows:

'The death of the drawer does not operate as a revocation of the authority to pay a check if the check is presented for payment within ten days from the date thereof,' but it was thought by the commissioners that this would be objected to in some of the states because of the effect it might have on the estates of decedents."

Sec. 189. **Certification of check; effect of.**—Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.[1]

1—This section, which is declaratory of the common law, makes the certifier primarily liable on the check. The certification of a check is equivalent to the acceptance of a bill. The act of certifying, however, resembles the making of a note rather than the accepting of a bill, for example: 1st. The holder of a check presents it to the drawee bank and demands and receives $500, the amount of the check, the transaction leaves the bank with $500 less of cash and $500 less of liability and unconcerned with the fact that Peter has paid Paul. 2nd. The holder demands and receives not currency but a certificate of deposit, the transaction leaves the bank with liability to the drawer decreased but with liability to the holder of the certificate correspondingly increased, the bank is not affected by the fact that Paul took its promissory note instead of its currency. 3rd. The holder requests that the check be certified, the bank complies with the request, the drawer's account is debited $500, the liability of the bank is reduced $500, which is offset by its outstanding obligation, and Peter is discharged of liability as effectually as he was when Paul took the certificate of deposit.

By the law merchant of this country the certificate of a bank that a check is good is equivalent to an acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for his satisfaction and that they will be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding as its notes of circulation, a certificate of deposit payable to the order of the depositor or any other obligation it can assume. The object of certifying a check as regards both parties is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important

function until in the course of business it goes back to the bank for redemption and is extinguished by payment. Justice Swayne, Merchants' Bank v. State Bank, 10 Wallace 648; Drovers' Nat. Bank v. Provision Co., 117 Ill. 106.

The certifier is liable to a holder without notice notwithstanding a statute making it unlawful for any officer, clerk or employee of a bank to certify a check unless the amount thereof stands to the credit of the drawer upon the books of the bank and providing for the punishment of an offender against the provisions of the statute. Union Trust Co. v. Preston Nat. Bank (Mich.), 99 N. W. 399.

Sec. 190. **Effect where the holder of check procures it to be certified.**—Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.[1]

1—The holder of a check procuring it to be certified loses in case of the bank's failure. The drawer procuring it to be certified loses in case of the bank's failure. Where the holder procures it to be certified the drawer and the indorsers are discharged. Minot v. Russ, 156 Mass. 458; First Nat. Bank v. Leach, 52 N. Y. 350; Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 27 N. E. 533. 'Herein lies the difference between the certification of a check procured by the holder and the acceptance of a bill; in the latter case when payment is duly demanded from the acceptor and refused and notice of non-payment given, the drawer and indorser are held; in the case of certification, the drawer and indorsers are discharged. Minot v. Russ, *supra;* Born v. First Nat. Bank, 123 Ind. 78; Brown v. Leckie, 43 Ill. 497; First Nat. Bank v. Whitman, 94 U. S. 343; Metropolitan Nat. Bank v. Jones, *supra;* Larson v. Breene, 12 Col. 480; Mutual Nat. Bank v. Rotge, 28 La. Ann. 933; Nat. Commercial Bank v. Miller, 77 Ala. 168. But if an indorser requests or consents to a certification he is not discharged. Mutual Nat. Bank v. Rotge, *supra.*

Where the drawer procures certification of his own check before delivery he is not discharged. Minot v. Russ, *supra;* Metropolitan Nat. Bank v. Jones, *supra;* Oyster & Fish Co. v. Bank, 51 Ohio St. 106, 36 N. E. 833; Born v. First Nat. Bank, *supra.* The same rule applies when the payee before delivery to him requests the drawer to procure the check to be certified. Randolph Nat. Bank v. Hornblower, 160 Mass. 401, 35 N. E. 850. In Meuer v. Phenix Nat. Bank, 94 App. Div.

331, 88 N. Y. Supp. 83 (a case under the statute), it was held that where a bank at the request of the holder certified a check not indorsed by the payee, the cashier not knowing or inquiring for whom it was being certified, the bank was liable on such certification, as the holder got title to the check by its delivery to him without indorsement, though such delivery destroyed its negotiability. See Cullinan v. Union Surety & Guaranty Co., 79 App. Div. 409, 80 N. Y. Supp. 58 (a case under the statute).

Sec. 191. **When check operates as an assignment.**—A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.[1]

1—Whether, in the absence of statute, a check operates as an assignment of any part of the funds in the hands of the drawee is a disputed question. That the check does not operate as an assignment: Brennan v. Merchants & Manufacturers Nat. Bank, 62 Mich. 343; McIntyre v. Farmers and Merchants Bank, 115 Mich. 255; Sunderlin v. Mecosta Co. Savings Bank, 116 Mich. 281; Bank of the Republic v. Millard, 10 Wall. 152; First Nat. Bank v. Whitman, 94 U. S. 343; Laclede Bank v. Schuler, 120 U. S. 511; Florence Mining Co. v. Brown, 124 U. S. 385; St. Louis etc. R. R. Co. v. Johnston, 133 U. S. 566; Fourth St. Bank v. Yardley, 165 U. S. 634; O'Conner v. Mechanics Bank, 124 N. Y. 324; Maginn v. Dollar Savings Bank, 131 Pa. St. 362; Creveling v. Bloomburg Nat. Bank, 46 N. J. Law, 255; Nat. Commercial Bank v. Miller, 77 Ala. 172; Pickle v. Muse, 88 Tenn. 380. That the check operates as an assignment: Simmons Hardware Co. v. Bank, 41 S. C. 177, 19 S. E. 509; Fonner v. Smith, 31 Neb. 107, 28 Am. St. 510; Gordon v. Muchler, 34 La. Ann. 604; Wyman v. Ft. Dearborn Nat. Bank, 181 Ill. 279; Roberts v. Austin Corbin & Co., 26 Ia. 315; Blades v. Grant Co., Dep. Bank, 101 Ky. 163, 40 S. W. 246; Coates v. Doran, 83 Mo. 337; Ripley Nat. Bank v. Latimer, 64 Mo. App. 321; Raesser v. Nat. Exchange Bank, 112 Wis. 591. In this case the court said that prior to the enactment of the negotiable instrument law it was settled in Wisconsin that the giving of a check for value on an ordinary bank deposit would be construed to intend an assignment of the funds *pro tanto* as between the maker and the payee.

Nat. Bank v. Berrall (N. J. 1904), 58 Atl. 189 (a case under the statute). The court said, in

this case, that the statute affirmed the law as it had been established in New Jersey, and that the holder of a check has no contract with the bank on which it is drawn and no legal right to exact payment; Baltimore and Ohio R. Co. v. First Nat. Bank (Va. 1904), 47 S. E. 837 (a case under the statute).

Even in those jurisdictions where the giving of a check does not operate as an assignment of the fund, it has been held that the parties may, by agreement, create such an assignment that the actual intention of the parties will prevail, and that such agreement may be oral or written. Fourth St. Bank v. Yardley, 165 U. S. 634; Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83; First Nat. Bank v. Clark, 134 N. Y. 368. As to the liability of the drawee bank to the drawer for refusing to honor the check see Atlanta Nat. Bank v. Davis, 96 Ga. 334; Schaffner v. Ehrman, 139 Ill. 109; Patterson v. Marine Nat. Bank, 130 Pa. St. 419; Bank of Commerce v. Goos, 39 Neb. 437.

Sec. 192. **Inconsistent laws repealed.**—All acts and parts of acts inconsistent with the foregoing provisions of this act are hereby repealed.

Approved June 16, 1905.

APPENDIX.

BILLS OF EXCHANGE ACT, 1882.

45 AND 46 VICT., CH. 61.

An act to codify the law relating to bills of exchange, cheques, and promissory notes.

[18*th August*, 1882.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

PRELIMINARY.

1. Short title.

This act may be cited as the Bills of Exchange Act, 1882.

2. Interpretation of terms.

In this act, unless the context otherwise requires—

"Acceptance" means an acceptance completed by delivery or notification.

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

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

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

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

"Bill" means bill of exchange, and "note" means promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

PART II.

BILLS OF EXCHANGE.

Form and Interpretation.

3. Bill of exchange defined.

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

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

(3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (*a*) an indication of a particular fund out of which the drawee is to re-imburse himself or a particular account to be debited with the amount, or (*b*) a statement of the transaction which gives rise to the bill, is unconditional.

(4) A bill is not invalid by reason—

(*a*) That it is not dated;

(*b*) That it does not specify the value given, or that any value has been given therefor;

(*c*) That it does not specify the place where it is drawn or the place where it is payable.

4. Inland and foreign bills.

(1) An inland bill is a bill which is, or on the face of it purports to be—(*a*) both drawn and payable within the British Islands, or (*b*) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

For the purposes of this act "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man,

Guernsey, Jersey, Alderney, and Sark, and the Islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

5. Effect where different parties to bill are the same person.

(1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee.

(2) Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note.

6. Address to drawee.

(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

(2) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative, or two or more drawees in succession, is not a bill of exchange.

7. Certainty required as to payee.

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

(2) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being.

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

8. What bills are negotiable.

(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

(2) A negotiable bill may be payable either to order or to bearer.

(3) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

(4) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

(5) Where a bill, either originally or by indorsement, is expressed

to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.

9. Sum payable.

(1) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—

(*a*) With interest.

(*b*) By stated instalments.

(*c*) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

(*d*) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill.

(2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

(3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof.

10. Bill payable on demand.

(1) A bill is payable on demand—

(*a*) Which is expressed to be payable on demand, or at sight, or on presentation; or

(*b*) In which no time for payment is expressed.

(2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand.

11. Bill payable at a future time.

A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable—

(1) At a fixed period after date or sight.

(2) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.

12. Omission of date in bill payable after date.

Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is

inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date.

13. Ante-dating and post-dating.

Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance or indorsement, as the case may be.

(2) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

14. Computation of time of payment.

Where a bill is not payable on demand, the day on which it falls due is determined as follows:

(1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace:

Provided that—

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

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

(2) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for non-delivery.

(4) The term "month" in a bill means calendar month.

15. Case of need.

The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment.

*34 and 35 Vict. ch. 17.

Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit.

16. Optional stipulations by drawer or indorser.

The drawer of a bill, and any indorser, may insert therein an express stipulation—

(1) Negativing or limiting his own liability to the holder;

(2) Waiving as regards himself some or all of the holder's duties.

17. Definition and requisites of acceptance.

(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

(2) An acceptance is invalid unless it complies with the following conditions, namely:

(*a*) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

(*b*) It must not express that the drawee will perform his promise by any other means than the payment of money.

18. Time for acceptance.

A bill may be accepted—

(1) Before it has been signed by the drawer, or while otherwise incomplete:

(2) When it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment:

(3) When a bill payable after sight is dishonored by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.

19. General and qualified acceptances.

(1) An acceptance is either (*a*) general or (*b*) qualified.

(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

In particular an acceptance is qualified which is—

(*a*) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated:

(*b*) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn:

(*c*) Local, that is to say, an acceptance to pay only at a particular specified place:

An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere:

(*d*) Qualified as to time:

(*e*) The acceptance of some one or more of the drawees, but not of all.

20. Inchoate instruments.

(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he thinks fit.

(2) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given.

Reasonable time for this purpose is a question of fact.

Provided that if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

21. Delivery.

(1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

(2) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

(*a*) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be:

(*b*) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill be in the hands of a holder in due course a valid

delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

(3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

Capacity and Authority of Parties.

22. Capacity of parties.

(1) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

(2) Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto.

23. Signature essential to liability.

No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such:

Provided that—

(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm.

24. Forged or unauthorized signature.

Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

25. Procuration signatures.

A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by

such signature if the agent in so signing was acting within the actual limits of his authority.

26. Person signing as agent or in representative capacity.

(1) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

(2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument shall be adopted.

The Consideration for a Bill.

27. Value and holder for value.

(1) Valuable consideration for a bill may be constituted by—

(*a*) Any consideration sufficient to support a simple contract;

(*b*) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

(2) Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

(3) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.

28. Accommodation bill or party.

(1) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

29. Holder in due course.

(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it. under the following conditions; namely,

(*a*) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact:

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not), who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

30. Presumption of value and good faith.

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

(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill, is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

Negotiation of Bills.

31. Negotiation of bill.

(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

(2) A bill payable to bearer is negotiated by delivery.

(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.

32. Requisites of a valid indorsement.

An indorsement in order to operate as a negotiation must comply with the following conditions, namely:—

(1) It must be written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient.

An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognized, is deemed to be written on the bill itself.

(2) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

(3) Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.

(4) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described adding, if he thinks fit, his proper signature.

(5) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

(6) An indorsement may be made in blank or special. It may also contain terms making it restrictive.

33. Conditional indorsement.

Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.

34. Indorsement in blank and special indorsement.

(1) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

(2) A special indorsement specifies the person to whom, or to whose order, the bill is to be payable.

(3) The provisions of this Act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.

(4) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

35. Restrictive indorsement.

(1) An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed "Pay D. only," or "Pay D. for the account of X.," or "Pay D. or order for collection."

(2) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

(3) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.

36. Negotiation of overdue or dishonoured bill.

(1) Where a bill is negotiable in its origin it continues to be negotiable until it has been (*a*) restrictively indorsed or (*b*) discharged by payment or otherwise.

(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

(3) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4) Except where an indorsement bears date after the maturity of the bill, every negotiation is prima facie deemed to have been effected before the bill was overdue.

(5) Where a bill which is not overdue has been dishonoured any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course.

37. Negotiation of bill to party already liable thereon.

Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of this Act, re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable.

38. Rights of the holder.

The rights and powers of the holder of a bill are as follows:

(1) He may sue on the bill in his own name:

(2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

(3) Where his title is defective (*a*) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (*b*) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

General Duties of the Holder.

39. When presentment for acceptance is necessary.

(1) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

(2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

(3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

(4) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.

40. Time for presenting bill payable after sight.

(1) Subject to the provisions of this Act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

(2) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

(3) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.

41. Rules as to presentment for acceptance, and excuses for non-presentment.

(1) A bill is duly presented for acceptance which is presented in accordance with the following rules:

(*a*) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue:

(*b*) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

(*c*) Where the drawee is dead, presentment may be made to his personal representative:

(*d*) Where the drawee is bankrupt, presentment may be made to him or his trustee:

(*e*) Where authorized by agreement or usage, a presentment through the post office is sufficient.

(2) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

(*a*) Where the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill:

(*b*) Where, after the exercise of reasonable diligence, such presentment cannot be effected:

(*c*) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

(3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

42. Non-acceptance.

(1) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.

43. Dishonour by non-acceptance and its consequences.

(1) A bill is dishonoured by non-acceptance—

(*a*) When it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

(*b*) When presentment for acceptance is excused and the bill is not accepted.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer

and indorsers accrues to the holder, and no presentment for payment is necessary.

44. Duties as to qualified acceptances.

(1) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

(2) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

(3) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

45. Rules as to presentment for payment.

Subject to the provisions of this Act, a bill must be duly presented for payment. If it be not so presented the drawer and indorsers shall be discharged.

A bill is duly presented for payment which is presented in accordance with the following rules:—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due.

(2) Where the bill is payable on demand, then, subject to the provisions of this Act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable.

In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

(3) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

(4) A bill is presented at the proper place:—

(*a*) Where a place of payment is specified in the bill and the bill is there presented.

(*b*) Where no place of payment is specified, but the address

of the drawee or acceptor is given in the bill, and the bill is there presented.

(c) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

(d) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

(5) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

(7) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(8) Where authorized by agreement or usage a presentment through the post-office is sufficient.

46. Excuses for delay or non-presentment for payment.

(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with,—

(a) Where, after the exercise of reasonable diligence, presentments as required by this Act, cannot be effected.

The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment, express or implied.

47. Dishonour by non-payment.

(1) A bill is dishonoured by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

48. Notice of dishonour and effect of non-notice.

Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged;

Provided that—

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

(2) Where a bill is dishonoured by non-acceptance, and due notice of dishonor is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

49. Rules as to notice of dishonour.

Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of dishonour may be given by an agent either in his own name, or in the name of any party entitled to give notice whether that party be his principal or not.

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(*a*) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(*b*) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post-office.

50. Excuses for non-notice and delay.

(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with—

(*a*) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged:

(*b*) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(*c*) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment:

(*d*) As regards the indorser in the following cases, namely (1) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation.

51. Noting or protest of bill.

(1) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

(2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

(4) Subject to the provisions of this Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

(5) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

(6) A bill must be protested at the place where it is dishonoured: Provided that—

(*a*) When a bill is presented through the post-office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

(*b*) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

(7) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

(*a*) The person at whose request the bill is protested:

(*b*) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence.

52. Duties of holder as regards drawee or acceptor.

(1) When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.

(2) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

(3) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him.

(4) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it.

Liabilities of Parties.

53. Funds in hands of drawee.

(1) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this Act is not liable on the instrument. This sub-section shall not extend to Scotland.

(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favor of the holder, from the time when the bill is presented to the drawee.

54. Liability of acceptor.

The acceptor of a bill, by accepting it—

(1) Engages that he will pay it according to the tenor of his acceptance:

(2) Is precluded from denying to a holder in due course:

(*a*) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

(*b*) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement;

(*c*) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement.

55. Liability of drawer or indorser.

(1) The drawer of a bill by drawing it—

(*a*) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(*b*) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

(2) The indorser of a bill by indorsing it—

(*a*) Engages that on due presentment it shall be accepted and

paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(*b*) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

(*c*) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto.

56. Stranger signing bill liable as indorser.

Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course.

57. Measure of damages against parties to dishonoured bill.

Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:

(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—

(*a*) The amount of the bill:

(*b*) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

(*c*) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.

(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.

(3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

58. Transferor by delivery and transferee.

(1) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery."

(2) A transferor by delivery is not liable on the instrument.

(3) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.

Discharge of Bill.

59. Payment in due course.

(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

(2) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged; but

(*a*) Where a bill payable to, or to the order of, a third party is paid by drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill:

(*b*) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

(3) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged.

60. Banker paying demand draft whereon indorsement is forged.

When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

61. Acceptor the holder at maturity.

When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged.

62. Express waiver.

(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor the bill is discharged.

The renunciation must be in writing, unless the bill is delivered up to the acceptor.

(2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation.

63. Cancellation.

(1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

64. Alteration of bill.

(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers.

Provided that,

Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

Acceptance and Payment for Honour.

65. Acceptance for honour supra protest.

(1) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) A bill may be accepted for honour for part only of the sum for which it is drawn.

(3) An acceptance for honour supra protest in order to be valid must—

(*a*) Be written on the bill, and indicate that it is an acceptance for honour:

(*b*) Be signed by the acceptor for honour.

(4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

66. Liability of acceptor for honour.

(1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

(2) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.

67. Presentment to acceptor for honour.

(1) Where a dishonoured bill has been accepted for honour supra protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the

bill must be forwarded not later than the day following its maturity for presentment to him.

(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment.

(4) When a bill of exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him.

68. Payment for honour supra protest.

(1) Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

(3) Payment for honour supra protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

(4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

(5) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

(6) The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up, he shall be liable to the payer for honour in damages.

(7) Where the holder of a bill refuses to receive payment supra protest he shall lose his right of recourse against any party who would have been discharged by such payment.

Lost Instruments.

69. Holder's right to duplicate of lost bill.

Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to

indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so.

70. Action on lost bill.

In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question.

Bill in a Set.

71. Rules as to sets.

(1) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.

(2) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills.

(3) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.

(4) The acceptance may be written on any part, and it must be written on one part only.

If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill.

(5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

(6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

Conflict of Laws.

72. Rules where laws conflict.

Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

Provided that—

(*a*) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

(*b*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom.

(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

(4) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

(5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

PART III.

CHEQUES ON A BANKER.

73. Cheque defined.

A cheque is a bill of exchange drawn on a banker payable on demand.

Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

74. Presentment of cheque for payment.

Subject to the provisions of this Act—

(1) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

(2) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

(3) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

75. Revocation of banker's authority.

The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

(1) Countermand of payment:

(2) Notice of the customer's death.

Crossed Cheques.

76. General and special crossings defined.

(1) Where a cheque bears across its face an addition of —(*a*) the words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable;" or (*b*) two parallel transverse lines simply, either with or without the words "not negotiable;" that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

77. Crossing by drawer or after issue.

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

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

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

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

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

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

78. Crossing a material part of checque.

A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing.

79. Duties of banker as to crossed cheques.

(1) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

(2) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

Provided that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be.

80. Protection to banker and drawer where cheque is crossed.

Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

81. Effect of crossing on holder.

Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

82. Protection to collecting banker.

Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

PART IV.

Promissory Notes.

83. Promissory note defined.

(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

(2) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

(3) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

(4) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note.

84. Delivery necessary.

A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer.

85. Joint and several notes.

(1) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenour.

(2) Where a note runs "I promise to pay" and is signed by two or more persons it is deemed to be their joint and several note.

86. Note payable on demand.

(1) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

(2) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and the facts of the particular case.

(3) Where a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.

87. Presentment of note for payment.

(1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable.

(2) Presentment for payment is necessary in order to render the indorser of a note liable.

(3) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice.

88. Liability of maker.

The maker of a promissory note by making it—

(1) Engages that he will pay it according to its tenour;

(2) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.

89. Application of Part II to notes.

(1) Subject to the provisions in this Part, and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indors-

er of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.

(3) The following provisions as to bills do not apply to notes; namely, provisions relating to—

(*a*) Presentment for acceptance;

(*b*) Acceptance;

(*c*) Acceptance supra protest;

(*d*) Bills in a set.

(4) Where a foreign note is dishonoured, protest thereof is unnecessary.

PART V.

SUPPLEMENTARY.

90. Good faith.

A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.

91. Signature.

(1) Where, by this Act, any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where by this Act any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

92. Computation of time.

Where, by this Act, the time limited for doing any act or thing is less than three days, in reckoning time, non-business days are excluded.

"Non-business days" for the purposes of this Act mean—

(*a*) Sunday, Good Friday, Christmas Day:

(*b*) A bank holiday under the Bank Holidays Act, 1871, or acts amending it:

(*c*) A day appointed by Royal proclamation as a public fast or thanksgiving day.

Any other day is a business day.

93. When noting equivalent to protest.

For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.

94. Protest when notary not accessible.

Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill.

The form given in Schedule 1 to this Act may be used with necessary modifications, and if used shall be sufficient.

95. Dividend warrants may be crossed.

The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend.

96. Repeal.

The enactments mentioned in the second schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

97. Savings.

(1) The rules in bankruptcy relating to bills of exchange, promissory notes, and cheques, shall continue to apply thereto notwithstanding anything in this Act contained.

(2) The rules of common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.

(3) Nothing in this Act or in any repeal effected thereby shall affect—

(*a*) The provisions of the Stamp Act, 1870,* or acts amending it, or any law or enactment for the time being in force relating to the revenue:

(*b*) The provisions of the Companies Act, 1862,† or acts amending it, or any act relating to joint stock banks or companies:

(*c*) The provisions of any act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively:

(*d*) The validity of any usage relating to dividend warrants, or the indorsements thereof.

98. Saving of summary diligence in Scotland.

Nothing in this Act or in any repeal effected thereby shall extend or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

99. Construction with other acts, etc.

Where any act or document refers to any enactment repealed by this Act, the act or document shall be construed, and shall operate, as if it referred to the corresponding provisions of this Act.

100. Parol evidence in judicial proceedings in Scotland.

In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parol evidence: Provided that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenour of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignation, or to find such caution as the court or judge before whom the cause is depending may require.

This section shall not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sesennial prescription.

FIRST SCHEDULE.

Form of protest which may be used when the services of a notary cannot be obtained.

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*33 and 34 Vict. c. 97.

†25 and 26 Vict. c. 89.

Know all men that I, A. B. (householder), of in the county of , in the United Kingdom, at the request of C. D., there being no notary public available, did on the day of 188 at demand payment (or acceptance) of the bill of exchange hereunder written, from E. F., to which demand he made answer (state answer, if any). Wherefore, I now in the presence of G. H. and J. K. do protest the said bill of exchange.

(Signed) A. B.

G. H. } Witnesses.
J. K. }

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

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