THE LAW AND PRACTICE OF BANKING.

THE

Law and Practice of Banking

IN

AUSTRALIA AND NEW ZEALAND.

SECOND EDITION.

By

EDWARD B. HAMILTON, B.A.,
JUDGE OF COUNTY COURTS, VICTORIA.

Assisted by
J. G. EAGLESON, B.A., LL.B.,
BARRISTER-AT-LAW.

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PREFACE TO FIRST EDITION.

THE idea of writing this Manual was originally suggested by Mr. Maxwell, who publishes it, and the task of preparing it was undertaken after considerable hesitation, as there already exist several English treatises on the subject of banking law. But there is a complaint, not uncommon amongst bankers and others, that English books when consulted are often found to be perplexing, and at times wholly inapplicable and unpractical. This may probably be attributed to the fact that such works apply to a mode of banking which does not prevai in Australia and New Zealand, where the system in operation is a modification or adaptation of the Scotch, and differs in many striking features from that which is practised in London and generally throughout England.

The object, then, of this Manual, is to give, in a form which may be readily understood, not merely by lawyers, but by practical bankers and men of business, a clear and succinct explanation of the legal questions which are most likely to arise between bankers and their customers in the daily course of banking business in the colonies, and which are therefore most necessary to be properly apprehended by those who have to deal with them.

It is surprising how many points of law, not merely of local interest, but of general importance to all English and colonial bankers, have been determined in cases which arose in these colonies, and which were taken home to the Privy Council on appeal. The law, for instance, that now governs the liabilities of bankers who gratuitously undertake the safe custody of goods deposited with them for that purpose was finally settled by a case that occurred in Victoria (*Giblin* v. *M'Mullen*, *post*, pp. 242, 286, *et seq.*) The principal case on the subject of a banker's duties in collecting mercantile paper is also a Victorian one (*Bank of Van Dieman's Land* v. *Bank of Victoria*, *post*, pp. 241, 244.) The law regulating the status of branch banks was for the first time, it is believed, fully expounded in a case from New South Wales (*Prince* v. *Oriental Bank*, *post*, pp. 251, 289), and the position and authority of bank managers have received valuable elucidation from colonial litigation. But in addition to such cases as those above referred to, there is a considerable body of what may be called Australian law, consisting of colonial decisions, many of which deal with important questions that have not yet been agitated in the English law courts. For instance, the question whether a banker is, in the absence of express authority, justified in paying the overdue bills of a customer accepted payable at his bank, has never, it seems, been raised in England, though it has been the subject of a much-canvassed decision in Victoria (*Wine* v. *Bank of New South Wales*, *post*, pp. 137, 138, 142). A similar remark is applicable to the question whether a banker is entitled to simple interest on an overdraft after his customer's death, and until the overdraft has been paid off—a point which was decided for the first time, it is believed, in South Australia (*South Australian*

Banking Co. v. *Horner*, *post*, p. 156). The list might be easily extended, for New South Wales and New Zealand have also contributed to the solution of novel and difficult points. The writer has accordingly consulted all the law reports published in the colonies to which he has been able to obtain access, and has embodied the results of his investigations in the present work, so far at least as was not inconsistent with its design.

The discussions and explanations in this work are not wholly confined to questions and cases that arose in the colonies, and English decisions have been freely cited wherever a reference to them appeared likely to be useful.

Some subjects which are but briefly dealt with in the standard works on banking are here treated at greater length. The important questions, for instance, which arise as to the effect and operation of bank charters, are dealt with in the fourteenth chapter, and in several sections of the fifteenth. For the fourteenth chapter, the author is indebted to his friend Mr. de Verdon, of the Equity Bar, who contributed the valuable matter which it contains.

The chapters on discounting and collecting mercantile paper, and on letters of credit, and letters of hypothecation, deal with subjects which are of considerable interest to colonial bankers and merchants, but which seem to have received very little attention from English writers. Indeed, as to letters of credit, it is stated in a work of high authority published in London in 1878 (*Chitty on Bills*, 11th ed., p. 365), that they are likely to fall into disuse; a remark which is certainly unfounded as regards Australia.

The Statute law referred to is in general that of Victoria, but it will be found that in many instances there are corresponding provisions in the acts of the other colonies, copied from the Imperial Statute book.*

In conclusion, the author desires to acknowledge his numerous obligations to others, and especially to his friend Mr. Roderick Murchison, of the Bank of New South Wales, to whom he is largely indebted for information and advice.

Melbourne, 1883.

*In the Second Edition, wherever the *Bills of Exchange Act* is mentioned the reference is to the Imperial Statute, which has been adopted in Australia and New Zealand.

PREFACE TO SECOND EDITION.

The First Edition of this work has been for so many years out of print that it has been determined to issue a second, and as much of the matter in the First Edition has become obsolete, the book has been to a large extent re-written.

The author has again to acknowledge his many obligations to Mr. Roderick Murchison, Manager of the Bank of New South Wales. Mr. de Verdon, Q.C., the Commissioner of Titles, revised the Chapter on Bank Charters, which he originally contributed. Much of the matter relating to cheques and banking securities was written by Mr. Eagleson, and for the Index the author is indebted to Mr. O'Dowd, the Sub-Librarian of the Supreme Court. The author has also to thank Mr. Turner, Manager of the Commercial Bank, for revising the Chapter on the Melbourne Clearing House.

Melbourne, 1900.

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New Zealand	Gazette Law Reports, New Zealand. Johnston's Reports. Macassey's Reports. New Zealand Jurist Reports. New Zealand Law Reports.
South Australia ...	South Australian Law Reports.
Victoria	Argus Law Reports. "Argus" (newspaper). Australian Law Times. Australian Jurist Reports. Victorian Law Times. Wyatt and Webb's Reports. Wyatt, Webb, and A'Beckett's Reports. Victorian Reports. Victorian Law Reports.
Queensland	Queensland Law Reports. Queensland Law Journal.
Western Australia ...	Western Australian Law Reports.

LIST OF ABBREVIATIONS

REFERRING TO THE COLONIAL REPORTS.

A.L.R.	...	Argus Law Reports.
A.L.T.	...	Australian Law Times.
A.J.R.	...	Australian Jurist Reports.
Macass. or Mac.	...	Macassey's New Zealand Reports.
N.S.W.L.R.	...	New South Wales Law Reports.
N.Z. Jur.	...	New Zealand Jurist Reports.
N.Z.L.R.	...	New Zealand Law Reports.
N.Z.G.L.R.	...	Gazette Law Reports, New Zealand.
Q.L.J.	...	Queensland Law Journal.
Q.L.R.	...	Queensland Law Reports.
S.A.L.R.	...	South Australian Law Reports.
Sup. Ct. R.	...	Supreme Court Reports, New South Wales.
,, N.S.	...	Same, New Series.
V.L.R.	...	Victorian Law Reports.
V.L.T.	...	Victorian Law Times.
V.R.	...	Victorian Reports.
W. & W.	...	Wyatt and Webb's Reports.
W.W. & A'B.	...	Wyatt, Webb and A'Beckett's Reports.
W.A.	...	Western Australian Law Reports.

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CORRIGENDA.

Page 147, line 19.—Strike out the words "printed in the Appendix."
,, 148, note (*y*).—Strike out the words "in the Appendix."

THE LAW AND PRACTICE OF BANKING.

CHAPTER I.

BANKER AND CUSTOMER.

THE nature of the business of bankers is a part of the law merchant, and is to be judicially noticed by the courts (*a*).

According to Australian practice, bankers may stand towards their customers in various legal relations. The first to be mentioned, is the ordinary one where a customer opens an account at a bank by paying in a sum of money to his credit. In this case the customer in effect lends his money to the banker, and the banker borrows it. The banker and his customer then stand in the common law relation of debtor and creditor. The opening of such an account does not create any Bankers (1) as borrowers.

(*a*) *Per* Lord Campbell, in *Bank of Australasia* v. *Breillat*, 6 M.P.C.C., p. 173.

implied obligation on the part of the bank or of the customer to continue that relation. Either party is at liberty to determine it at any time subject to the rights then existing between them. Thus in the case of an ordinary current account, the bank may refuse to continue it, and may give notice to the customer that they will accept no more deposits from him; while he may at any time withdraw the amount standing to his credit.

(2) As lenders. Another relation in which they stand to each other is the converse of the first. In this case the banker lends his money to the customer. The simplest instance in which a banker appears as a lender, is when he allows an overdraft to a customer. He also lends money in effect when he makes advances against produce shipped, on receipt of the bills of lading and other shipping documents. In such cases the relation of banker and customer is that of creditor and debtor.

(3) As agents. Again, bankers act as agents for their customers. Thus they will frequently undertake to purchase and sell British and foreign securities, and to receive or draw, when due, interest, dividends, pay, or pensions for their constituents, and to obtain payment of coupons, and buy or sell stock and shares for them. They also undertake the collection of bills of exchange and other mercantile paper left with them for that purpose. In these and similar cases the relation of banker and customer is that of agent and principal. After the bank has received the money, it becomes a debtor for the amount, less the commission that may be charged. Where the party for whom the collection is made has a current account, the amount collected will in general be placed to his credit in that account. But if he has

no such account, the bank simply owes him the amount, and is bound to pay it on demand, or in such manner as may be agreed upon.

(4) As depositaries or bailees.

It is common for bankers to receive boxes containing valuables, such as plate, jewellery, shares, deeds, and so forth, for safe custody. These they generally deposit in their strong-rooms along with their own securities. It is not the practice of bankers to make any charge for taking care of a customer's effects in this way, and as they receive no consideration for this service, they are gratuitous depositaries of the property left in their charge. The legal relation in this case between a customer and his bank is that of bailor and bailee. The bank derives no benefit from the gratuitous transaction, and what it does is done solely for the depositor's accommodation. The bank is discharged from all liability by returning the article deposited to the depositor, or to anyone authorised by him to receive it.

(5) As buyers of negotiable paper.

Bankers also, as part of their ordinary business, are in the habit of buying or discounting bills of exchange. They may purchase them from their usual customers, or from other parties, and they will, as a rule, negotiate all approved mercantile paper.

(6) As sellers of same.

Again, they often sell negotiable paper. They, for example, issue when requested drafts on their own branches or correspondents, and then sell these drafts to their regular customers or to other persons who may have occasion to purchase them in order to transmit money to distant places.

(7) As trustees.

The last relation that need be mentioned is that in which a banker may be placed in a fiduciary or semi-fiduciary position, with respect to customers or others.

Take the simple case of a deposit in the joint names of several persons at a bank. If the banker improperly delivered the money so deposited to one of the co-depositors, he could not be sued at law, inasmuch as action could not be brought by all the depositors as one of them had received the money. But the banker in that case would be a trustee for all the depositors, and might be proceeded against in equity for breach of his trust (*b*).

Or, again, suppose a bank to have discounted a bill, and that the drawer has, on its dishonour, paid a part of its amount to the bank. In such a case, the bank would be clearly entitled as holder of the bill to sue the acceptor for the full amount of it, but having been paid a part by the drawer, they can only sue the acceptor with regard to that part as trustees for the drawer (*c*).

Transactions which do not create the relation of banker and customer.

It occasionally happens that a bank becomes the holder of a person's money, and a debtor to him in respect of it, without there being any obligation on its part to honour his cheques. Thus, where a father was in the habit of sending remittances to a bank for the use of his son, and the bank received them for that purpose, it was held that this did not constitute the relation of banker and customer between the bank and the son, and that the latter could not recover damages for the bank's refusal to honour his cheque. The bank was simply the father's agent, and the son's

(*b*) See *per* Lord Campbell in *Brandon* v. *Scott*, 26 L.J., Q.B., 163; *Nichol* v. *London Chartered Bank*, 4 V.L.R. (L.), 324. The so-called "trust accounts" that were recently opened in certain banks when they stopped payment, appear to have created the relation of bailor and gratuitous bailee between the customer and the bank rather than that of *cestui que trust* and trustee.

(*c*) *Thornton* v. *Maynard*, L.R. 10, C.P., 695; 44 L.J., C.P., 382.

debtor for the amount, but not his banker (*d*). In another case, where a person owed money, and made an arrangement with his creditor's banker to send the latter a sum of money out of which he was to pay the creditor and retain the residue for the use of the sender, it was held that the relation of banker and customer was not thereby established, and that the banker was not bound to honour cheques against the residue of the fund (*e*). And where the only transaction between an individual and the bank is the collection of a negotiable instrument, such individual is not a customer in the ordinary sense (*ee*).

It is proposed to discuss in the course of this book many of the duties and liabilities that arise from these various relationships. But before entering upon the subject, it may not be inappropriate shortly to mention several matters which spring from the general relation of banker and customer, and which may be conveniently dealt with at the outset.

Bankers answer inquiries as to a customer's solvency.

Although the transactions between a bank and its customers are generally regarded as confidential, it is the ordinary practice of bankers to make, on behalf of constituents, inquiries of other banks as to the solvency of their customers. They also answer such inquiries when addressed to them by other banks, but not when addressed to them by private individuals who are not customers. Such inquiries are made and answered as a matter of courtesy and convenience among bankers. They are made in confidence, and on the understanding that no undue or improper use will be made of the answers. The answer of the bank is a privileged

(*d*) *Robinson* v. *Oriental Bank*, 3 V.R. (L.), 177.

(*e*) *Stewart* v. *Bank of Australasia*, 9 V.L.R., 240.

(*ee*) *Mathews* v. *Williams*, 63 L.J.Q.B., 494.

A bank is not liable for its manager's misrepresentation of a customers solvency ;

communication, and an action for libel could not be maintained in respect of any statements it contained, unless they were both false and prompted by malice (*f*). Though the making and answering such inquiries appears to be within the scope of a manager's authority, the bank, it seems, would not be answerable for a fraudulent representation by him as to the state of a customer's solvency. For a representation as to credit

(*f*) *Robshaw* v. *Smith*, 38 L.T., 423; *M'Nickle* v. *Bank of N. S. Wales*, 2 N.S.W. R., 7. The following excellent advice on this subject is taken from Mr. Rae's well-known book, *The Country Banker* (4th ed., p. 185) :—"There is perhaps no more difficult or delicate task which the manager of a bank has constantly to perform, than to give expression to his opinion, in confidence, of the position and trustworthiness of a customer. When that position is intimately known to the bank, either by the evidence of the man's balance-sheet, or the possession of his deeds, or bonds, or shares, for safe custody, there is no difficulty; and the manager has no hesitation in giving his opinion in confident terms and in the plainest English. But occasions continually arise where the facts required are not so clear. Your knowledge of the person enquired about, for example, may be at second hand. If so, you have equally to guard against doing an injury to the man's credit, and leading the enquirer into a false security. But whatever shape your answer may take in such a case, you must make it clear that it is based on hearsay only, and that you have no personal knowledge of the party's means. There is no reason why you should assume the responsibility of giving as your own the opinion of others, which, however honest, may nevertheless be fallacious and misleading. You may, on your own responsibility, report the man enquired about to be respectable, or a shrewd man in business, or a man who appears to have credit in the trade for the amount named; or even that you yourselves occasionally trust him for such a sum without security; all this you may properly and prudently say, if you can do so in accordance with the facts. Such statements will not prejudice your customer, and they will put it upon the enquirer to judge for himself and draw his own conclusions. If, on the other hand, the individual enquired about is neither respectable nor shrewd; if he is short of capital and of small credit with the trade, you must say so; but you will say so "on report." You will state the facts, so far as they have reached you, must be signed by the party to be charged. It is not enough, if it is signed by his agent only, and for the purposes of answering such questions the manager is not the bank, but merely its agent (*g*).

But the manager may be liable.

It has been held that, though the bank answering the inquiry is not liable, yet the manager, who signs the

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without indorsing them as your own. If you neglect this precaution, the person thus adversely reported upon may take proceedings against your bank for defamation, if your report should reach his ears, which it may possibly do; because the absolute confidence with which a banker imparts such information, although widely respected, is violated at times. But in such event, if it is apparent to the Court that you have simply stated the truth, as far as it was known to you, without malice, you have no cause to fear the result. Proceedings which have their inception in a thirst for something like blood-money, are more likely to end in a verdict, which shall be in closer neighbourhood to a farthing than a thousand pounds. The action brought against your bank by Grindley & Co. for misrepresentation was of an opposite kind; they sued you, not for giving too bad, but for giving too good an opinion of your then customer, Gabriel White. Your manager, in reply to an enquiry from the bankers of the Grindleys, had given it as his opinion that White was undoubted for the amount named; but White unfortunately failed a few weeks afterwards; whereupon Grindley & Co. brought their action, on the ground that they had trusted White with many hundred pounds' worth of goods, on the strength of the bank's opinion. In their declaration they went a step beyond this, and roundly charged the bank with having given this opinion, with the nefarious object of compassing a reduction of its own debt. It happened, however, that when White failed, he owed the bank rather more than when your manager gave his opinion, and the plaintiffs were non-suited. If your manager had given a less unqualified opinion as to the position of White—if he had put it more upon current report and less upon his own assertion—White would have had no ground for complaint; the Grindleys would have had no ground for an action; and the bank would have been spared the annoyance of being charged with an act of baseness of which it was entirely guiltless."

(*g*) *Instruments Act* 1890, s. 128. *Swift* v. *Jewesbury*, L.R. 9, Q.B., 301; 43 L.J.Q.B., 56.

answer, may become responsible to the customer of the bank that makes the inquiry. For it seems that such an answer, if fraudulent, will be regarded as made with a distinct intention to deceive the person on whose behalf the inquiry was made, and for whom the misrepresentation was intended (*h*). But, if such an answer professed to be, in terms, a confidential communication, intended only for the use of the banker to whom it was addressed, and if the manager who wrote it did not know, when he wrote it, that the information was asked for on behalf of, or would be communicated to a customer of the bank making the inquiry, he would not be liable to that customer for any fraudulent statement in the answer (*i*).

He is not liable to a customer unless he knew the answer was intended for customers.

Is a banker bound to keep a customer's account secret?

The question has been raised, but not decided, whether a duty is imposed by law upon a banker, to keep secret, not the state of a customer's solvency, but the state of his account. In one instance, a bill accepted, payable at a bank, was dishonoured. The manager, however, at the request of the holder, told him how much the customer's balance fell short of the amount of the bill. The holder then paid in the deficiency, and presented the bill again, when it was paid. The judge, at the trial of an action brought by the customer against the bank, said that the banker had no right to go further than say "not sufficient assets," and the customer obtained a verdict which was never disturbed (*j*). However, there was in that case something more than a mere disclosure; there was an apparent understanding between the holder and the

(*h*) *Swift* v. *Jewesbury, ubi supra.*

(*i*) *Hosegood* v. *Bull*, 36 L.T., N.S., 617.

(*j*) *Foster* v. *Bank of London*, 3 F. & F., 214.

manager to give the holder an advantage over other creditors of the customer, or, at all events, to prejudice the latter for the benefit of the holder. A banker may, it is true, be under a moral duty, or an honourable obligation, not to reveal the condition of an account, except upon a proper occasion, but it is another question whether he is under a binding contract or a legal obligation not to do so. From one case it may be inferred that there is such an obligation. But the decision is not conclusive, for at the trial the question of duty (which is a question not of fact, but of law), appears to have been left to the jury, who found that the obligation to secrecy did exist. The Court, however, did not disturb the finding. Assuming the existence of a legal duty on a banker not to disclose the state of a customer's account except upon a reasonable and proper occasion, then if he does disclose it, it will be for a jury to say whether, under the circumstances, it was reasonable and proper to make the disclosure. At all events, it seems that it is the banker's duty to abstain from revealing anything which might prejudice his customer, and that if he makes a disclosure which causes a loss to the customer, the latter may bring an action and recover damages against the banker; but it is conceived that such an action could not be successfully maintained unless special damage could be proved (*k*).

May reveal state of the account on a proper occasion.

In legal proceedings a banker is as a witness bound to answer qnestions about a customer's account, as his knowledge of the customer's affairs does not come within the protection afforded to information derived

Banker's knowledge of customer's affairs is not privileged.

(*k*) *Hardy* v. *Veasey*, L.R., 3 Ex., 107; 37 L.J., Ex., 76; *Foster* v. *Bank of London*, 3 F. & F., 214.

from privileged communications such as those between a solicitor and his client, which cannot be divulged even in a court of law without the express consent of the client (*l*). A common instance in which a banker is obliged to disclose his customer's affairs is where money in the hands of a bank is attached under the garnishee clauses contained in Acts of Parliament or Rules of Court.

Again, under the 109th section of *The Companies Statute* 1890, which empowers the Court to summon before it persons whom it deems capable of affording information as to the estate or dealings of a company which is being wound up, a bank officer may be compelled to produce the bank books relating to the account of a customer (*m*). The Court, too, has power, when a bank is being wound up to allow shareholders to inspect the books and papers of the company, notwithstanding the existence of a secrecy clause in the articles of association to the effect that no shareholder or creditor should have a right to see the books. In such a case it would be the duty of the persons inspecting not to divulge any information they acquired, and the Court would restrain them by injunction from making any improper use of the information so obtained (*n*).

Bank books as evidence.

It is, perhaps, convenient to refer here to the subject of a banker's books considered as *primâ facie* evidence of the matters contained in them. Indeed, one great use of a pass-book is to furnish the customer with a

(*l*) *Lloyd* v. *Freshfield*, 2 C. & P., 325.

(*m*) *Forbes' Case*, 41 L.J., Ch., 647; *Bloxam's Case*, 36 L.J., Ch., 687; *Re Smith & Co.*, L.R. 4, Ch. 421.

(*n*) *Re the Birmingham Banking Co.*, 35 L.J., Ch., 150.

check upon the bank. The entries in the books operate as admissions by the bank, and the balancing of the pass-books is in point of law equivalent to a stated account, and is in general binding on the bank. Such entries, however, are only *primâ facie* evidence against the bank, and are open to explanation and correction if an error has been committed (*o*).

Serious inconvenience used to be occasioned to bankers, and also to the public, by reason of the necessity which frequently arose of removing the ledgers and other account books from the banks for the purpose of producing them in legal proceedings. But it has always been held by judges that great trust and credit may be safely placed in the statements in bankers' books. "Bankers," says *Parke, B.* (*p*), "are in general persons of great respectability, and we believe it may be said universally are incapable of lending themselves to any concealment or suppression of the truth in order to promote or assist a fraud." Acting, perhaps, upon this view, and recognising the inconvenience referred to, the Imperial Parliament passed an Act, which has been adopted in Victoria, to facilitate the proofs of transactions recorded in the ledgers and the other account books which are kept by bankers. This has been accomplished, first, by rendering the entries in bankers' books admissible in evidence, and, secondly, by allowing copies of the entries to be used instead of producing the originals. The provisions of the Victorian Act are now embodied in the *Evidence Act* 1890 (*q*).

(*o*) *Shaw* v. *Picton*, 4 B. & C., 715; *Snead* v. *Williams*, 9 L.T., N.S., 115.

(*p*) *Bellamy* v. *Majoribanks*, 21 L.J. Ex., p. 77.

(*q*) See the sections of this Act in the Appendix.

Similar statutes are in force in other colonies. The Victorian Act renders the books of a bank which is both a bank of deposit and a bank of issue (*r*), *primâ facie* evidence of the matters recorded in them, provided certain requirements of the Act are complied with. The books themselves need not be produced in legal proceedings. Copies of the entries are sufficient. But before such copies can be used notice of the intention to use them must be given to the other parties to the proceedings. The person who receives such a notice can obtain inspection of the original entries if he desires to do so. A judge has power, if he sees sufficient reason, to order that the copies shall not be admissible in evidence, and no bank can be compelled to produce its books unless the judge makes an order requiring it to do so. The Act does not apply to bank books that are out of the jurisdiction of the Court, which has no power to order a bank in London or in Tasmania to produce its books in Victoria (*s*). In proceedings in England a judge has power to order inspection of bank books which are in Scotland (*t*).

It has been said that great caution should be exercised by judges in making orders for the inspection of the books of a bank. The examination of the books is only allowed for the purpose of the trial, and the order will not be wider than is absolutely necessary (*u*). An order will not be made if it would have the effect of giving to the party a discovery of documents or entries which he is not entitled to see before the

(*r*) *R.* v. *Shipp*, 14 L.R., 198; 9 A.L.T., 220.

(*s*) *Bank of Australasia* v. *Pollard*, 8 V.L.R. (L.), 66; 3 A.L.T., 103.

(*t*) *Kissane* v. *Link*, (1896) 1 Q.B., 574.

(*u*) *Arnott* v. *Hayes*, 36 Ch. D., 731.

trial (*v*). The Court will not, as a general rule, make an order for the inspection before trial of the banking account of persons who are in no way concerned with the litigation and who have not been made parties to the action (*w*).

Effect of the Act.

These enactments and decisions have conferred on bank book-keeping an importance in law which it did not formerly possess, and accordingly it will be necessary in some instances to refer to it at greater length than is usual. The bank books are merely the private memoranda of the banker, in which he may enter what he pleases. Formerly, no entry in them was binding on him or on his customer before it was communicated to the latter. Such entries after they had been so communicated were only binding on the banker and his customer, and not upon others, but now they are admissible as *primâ facie* evidence of the transactions therein recorded in all legal proceedings, civil or criminal (*x*).

Proof of no account at bank.

In order to prove that a person has no account at a bank, it is sufficient to produce a witness who has derived his knowledge of the fact from an investigation of the books without adducing further or other evidence of their contents (*y*).

Pay-in slip evidence.

If a debtor be directed by the person to whom the money is owing to pay the amount to his credit in a

(*v*) *Parnell* v. *Wood*, (1892) P.D., 137 : *South Staffordshire Tramway Co.* v. *Ebbsmith*, (1895) 2 Q.B., 669.

(*w*) *Pollock v. Garle*, (1898) 1 Ch., 1.

(*x*) *R.* v. *Greenland*, L.R. 1, C.C., 65 ; 10 Cox C.C., 77.

(*y*) *R.* v. *Miller*, 7 Sup. Ct. R., L., 185 ; *R.* v. *Wright*, 4 W.W. & A'B., (L.), 243.

bank, then the duplicate deposit slip, initialled or signed by the bank clerk, is admissible in evidence to prove the due payment to the creditor of the debt (*z*).

The Australian Banking system.

In the Victorian Act, passed in 1890 to consolidate the laws relating to banks and currency, it is enacted that its provisions shall apply "to every company, firm, or individual" engaged in the ordinary business of banking in Victoria (*a*). From this it might be inferred that there are at least two classes of banks in Australia, viz., incorporated or joint stock banks, and private or unincorporated banks, similar to the private banks in England, which are owned and managed by individuals or by banking partnerships. Such an inference would, however, be incorrect. The banking business of Australia is carried on by large banking corporations, which were originally created by charters from the Crown, or by Colonial Statutes, or under the various Acts for the formation of companies with limited liabilities. Private banks, though lawful, are unknown (*b*).

In England, private banks are generally local institutions, and in the main confine their business to dealings with manufacturers and residents in their immediate neighbourhood. Some of them have branches at other places, but usually they transact their distant

(*z*) *Casey* v. *Wentworth*, Knox., 16.

(*a*) *Banks and Currency Act* 1890, s. 3; and see *Addy* v. *Foreign &c. Bank of Australasia*, 16 V.L.R., 186; 12 A.L.T., 22.

(*b*) For a full account of the business of the English private banks the readers is referred to the well-known work of Mr. Rae, *The Country Banker*. In 1893 there were 190 private banks in England and Wales, of which 74 were in London.

business through the agencies of other bankers or correspondents.

The Australian banks are managed by directors chosen by the shareholders. The directors appoint managers, by whom the general business of the bank is conducted.

All banks of any importance have numerous branches, and these branch banks are to be found in every small town throughout Australia. The business of the branches is entrusted to local managers. These branches carry on all the business which, in England, would be transacted by private banks. The branches are frequently inspected by officers from the head office, who are sent down, from time to time, to examine strictly into the proceedings of the various local managers and to report upon them.

CHAPTER II.

Pass-Books and Current Accounts.

§ 1. PASS-BOOKS.

Pass-books.

When a customer opens an account at a bank by paying in a sum to his credit on an ordinary current account, he is, if he desire it, presented with a book, called a pass-book, in which are entered the amounts that are from time to time lodged to his credit, and also the amounts that are disbursed by the bank to meet his drafts on it. On the left page are entered the sums which he has paid in, and with which the bank is debited, and on the right the payments which have been made by the bank on his behalf, and with which it is credited. At intervals the customer takes or sends his pass-book to the bank to be made up and balanced by the proper officials, after which it is returned to the depositor. In England it is usual for the bank to return the pass-book accompanied by all the cheques which have been paid by the bank since the last balancing, but this practice is not common in Australia.

Current account ledger.

The entries in the pass-book are taken from another account, which is kept by the bank in a book called the Current Account Ledger. In this book every customer has a separate account, consisting of two columns on the same page, namely, a credit column and a debit column. In the credit column are entered all sums received by the bank from him or on his behalf, while the debit column is posted from his cheques or drafts which have been paid by the bank. In the Current Account Ledger, in short, the customer is credited with the amount of his deposits, and debited with the amount of his cheques. The pass-book is a copy of the customer's account in the ledger, but with the sides of that account reversed. Thus the credit side of the ledger account is the debit page of the account in the pass-book, and *vice versa.* The reason assigned for this in Gilbart's work on banking, is that the ledger is the bank's account against the customer, and the pass-book the customer's account against the bank.

Pass-book as evidence against a bank.

Entries in the pass-book are *primâ facie,* but not conclusive, evidence against a bank that the moneys therein mentioned have been duly paid to or by it. But the entry of a credit is only available as an admission or receipt, and if made erroneously may be explained and put right. Therefore, if a bank clerk make a mistake, as for instance, by entering the same sum twice over in favour of the customer, the error may be shown by the bank, and the customer will not be allowed fraudulently to extort more than is due to him (*a*).

As evidence for a bank.

On proof that the pass-book has been in the custody of the customer and returned by him without objection to any of the entries, it becomes *primâ facie* evidence

(*a*) *Shaw* v. *Picton,* 4 B. & C., 715.

for the bank and against the customer of the correctness of those entries (*b*).

Mistaken entries.

Where a banker alleges and a customer denies that an entry has been made by mistake, the question is one of fact for a jury (*c*).

Forgery of pass-book.

If a person concoct a fictitious pass-book, with intent to defraud, he may be indicted for forgery (*d*). Thus the secretary of the Society of Antient Shepherdesses delivered to the society a book purporting to be their bank pass-book, in which he had made false entries, for the purpose of making it be believed that he had paid into the bank certain sums, which, however, he had misappropriated. It was held that he was guilty of forging an accountable receipt (*e*).

Origin of pass-books.

It may not be uninteresting to add that, in the early days of banking, pass-books were unknown. It was then usual for the customer to pay periodical visits to his banker for the purpose of settling the account between them. They went through the account together, and when satisfied of its correctness they each signed it and certified it to be correct. Subsequently the practice of giving a pass-book to the customer became common. The earliest allusion to it occurs in a letter written in 1715 to Mr. Child, the banker, by one of his customers, who requested to be supplied with a pass-book. Even to this day some London bankers at balancing time send in the pocket of each

(*b*) *Commercial Bank of Scotland* v. *Rhind*, 3 Macq. H. L. 643; *Devaynes* v. *Noble*, 1 Mer. 530, 535.

(*c*) *Smead* v. *Williams*, 9 L.T.N.S. 115.

(*d*) *R.* v. *Smith*, 31 L.J., M.C. 154; L. & C. 168.

(*e*) *R.* v. *Moody*, 31 L.J., M.C. 156; L. & C. 173.

pass-book a slip stating the balance to the debit or credit of the customer. The customer then signs the slip and returns it with the pass-book to the bank, which retains it as a voucher (*f*).

§ 2. CURRENT ACCOUNTS.

Current accounts.

Money deposited with a banker by his customer on a current account is a loan from the latter to the former, and the relation between them is, as already stated, the common law one of debtor and creditor (*g*). But the loan is of a peculiar nature. When a man lends his watch or his horse to a friend, he expects that identical watch or horse to be returned. He does not part with his property in the thing lent. But it is otherwise with respect to money paid into a bank. Such money ceases to be the property of the customer. It becomes the absolute property of the banker, who may do what he likes with it. It is a portion of his assets. All the sums paid into the bank on general deposit by the same or different depositors form one blended fund, which constitutes a portion of the property and capital of the bank. Thereafter each depositor has only a debt owing to him from the bank, a chose in action, not any specific money or right to any specific money. The banker is not a trustee for the customer. For he may employ the money as his own and make what profit he can of it, which, if he were a trustee, he could not do without a breach of

(*f*) Van de Linde's *Lectures on Book-keeping*, delivered before the London Institute of Bankers, 2nd ed., p. 86.

(*g*) *Foley* v. *Hill*, 2 H.L.C. 28.

trust. Therefore a bank cannot avail itself of the statutory provisions for the relief of trustees by paying into court a deposit, respecting which they have notice that there are conflicting claims (*h*). A banker is, however, bound to return an equivalent for the deposit of the money with him by honouring his customer's drafts or orders to pay. The relation, then, of a banker and a customer who pays money into the bank is the ordinary one of debtor and creditor, with the superadded obligation on the part of the banker to honour the customer's cheques to the extent of the balance which he has in the bank; and that relation is not altered by an agreement to allow interest on such a balance (*i*). Accordingly it follows, that if the money so deposited remains for six years in the banker's hands without any payment by him of the principal or allowance of interest, the *Statute of Limitations* is an effectual bar to its recovery by the customer, if the banker chooses to rely upon the Act (*j*).

Relation between banker and customer.

Statute of Limitations.

Unclaimed balances.

But it is not the practice of respectable banks to avail themselves of the statute except in cases where they have reason to believe that they are exposed to an unfair or fraudulent demand which has already been satisfied. Balances which have not been operated on for six years, are treated as existing debts. Each of them is entered in the Current Account Ledger in use for the time being, and will be paid over to any

(*h*) *Re Sutton's Trusts*, 12 Ch. D. 175.

(*i*) *South Australian Insurance Co.* v. *Randall*, L.R. 3, P.C. pp. 109, 110; *Foley* v. *Hill*, 2 H.L.C. 28.

(*j*) *Pott* v. *Clegg*, 16 M. & W. 321; *Foley* v. *Hill*, 2 H.L.C. 28.

person who is able to give satisfactory proof that it belongs to him (*k*).

Bank not entitled to debit customer with his debts to it.

A banker is not, it seems, at liberty to debit a customer in his account with every pecuniary demand the bank may have against him.

A banker is not, it has been held, entitled to debit his customer's account with a debt due from the customer in the absence of any authority from the latter to do so. He cannot, for instance, debit the customer

(*k*) In connection with the subject of unclaimed balances and the *Statute of Limitations*, the following extract from the *Banking and Insurance Record* of 19th June, 1893, will be read with interest :—"In our January issue we alluded to a deposit receipt of the Bank of New South Wales thirty-nine years old as having come to light, and having been presented at the head office in Sydney for payment, and having been paid on presentation without question. We have to record another instance of the adage 'Safe as the bank.' During the last few days several bank notes have been presented at the head office in Sydney for payment. These notes, bearing the 'image and superscription' of the Bank of New South Wales, and dated 1st January, 1824, for twenty Spanish dollars, have come to light from other parts of the world, and have been duly cashed on a gold basis of £5 each on presentation. We have seen these notes, and their state of preservation is marvellous, considering their age and the experiences they have gone through. Few among the residents in other colonies know that in the parent colony, New South Wales, at one time the currency was Spanish dollars, then, as now, the currency of China and the Phillipine Islands. . . . . . . The following is a reproduction of the wording of the note just cashed by the Bank of New South Wales :—

P. & Co. of the B.N.S.W.

Bank of New South Wales. No. 30,081.

On Demand We Promise to pay A. K. MACKENZIE or Bearer TWENTY SPANISH DOLLARS.

Sydney, 1st day of January, 1824. No. 30,081.

$ TWENTY. For the President and Company of the Bank.

No. 30,081 W. WALKER, J. OXLEY. } Directors.

Entd. J. C. Philps.

with the costs incurred in preparing securities on which advances have been made, unless the customer assent (*l*). Nor could he debit a customer for whom he has discounted a bill which has been dishonoured with the cost of legal proceedings against the acceptor, although the customer may have to make provision for the bill (*m*).

Right to set off past due bills against proceeds of bills discounted.

A bank may, however, in an action brought against it by a casual customer to recover a deposit, set off the amount of past due bills of his which it holds. Where a person who was not a regular customer, and kept no current account, offered a bill for discount which the bank agreed to take, it was held that the bank had a right to set off against the proceeds of this bill the amount of a past due bill to which the person in question was a party, but which he did not know to be in possession of the bank (*n*). But where a person who had no account with a bank paid in money *specially* to meet certain cheques, not knowing that the bank was the holder of an overdue promissory-note of his, it was held that the bank could not set off the amount of the note against the money so paid in ; for, when money is entrusted to a banker for a special purpose, it is his duty either to apply it to that purpose, or to return it to the customer (*o*).

Such bills cannot be set off against a deposit for a special purpose.

May set off overdraft bearing interest.

And in an action against a bank to recover money which a customer had deposited at a small rate of

(*l*) *Whyte* v. *Bank of N. S. Wales*, 2 Sup. Ct., R.L. 17.

(*m*) *Hall* v. *Mercantile Bank*, Grant on Banking, on p. 231, 3rd ed.

(*n*) *Coulls* v. *E. S. & A. C. Bank*, 6 S.A.L.R. 44 ; *National Bank of New Zealand* v. *Hislop*, 1 L.R.C.A. 47.

(*o*) *Chamberlain* v. *E. S. & A. C. Bank*, 4 V.L.R., (L.) 45.

interest, it was held that the bank might set off against the amount claimed an overdraft, with interest upon it, at a higher rate than is allowed on deposits (*p*).

Debiting customer with cheques.

With regard to cheques, bankers should debit a customer in his pass-book, not from the date of the cheque, but from the time of payment, as it is paid, not when drawn, but when cashed (*q*).

Rule for appropriation of payments.

Difficulties sometimes arise as to the application of funds paid in by a customer. The rule at common law for the appropriation of payments is substantially as follows :—If the payer appropriates the payment to the discharge of any particular debt, the payee must be content with that destination of the money. If the payer does not appropriate the payment, the payee may do so at any time before the appropriation is communicated to the debtor, and he may appropriate it to an unsecured rather than to a guaranteed debt. If neither the one nor the other appropriates, then, whenever sufficient comes in to liquidate prior debts, they are satisfied in order of date (*r*).

Applies to bank accounts.

This rule applies to banking transactions. The various items of deposit by a customer, and of payment by the bank, constitute a running account between the bank and the customer. The debt constituted by the first payment into the bank is extinguished, or reduced, by the first payment out. The first item on the debit side of the account is extinguished or reduced by the

(*p*) *Ware* v. *London & Chartered Bank*, 2 A.J.R. 70.

(*q*) *Garden* v. *Bruce*, L.R. 3, Ex. 300; 37 L.J.C.P 112.

(*r*) See *per* Bacon, V.C., in *Kinnaird* v. *Webster*, 10 Ch. D. 139; *Hooper* v. *Keay*, 1 Q.B.D. 178; *Kirby* v. *Duke of Marlborough*, 2 M. & S., 18, cf. *Ex parte Dickin*, L.R. 20, Eq. 767; *Williams* v. *Rawlinson*, 3 Bing. 71.

first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Thus, if a customer, on opening an account, lodges 1000*l.* on the 1st of May, and 3000*l.* on the 15th, and draws out 1500*l.* on the 16th, it will be considered that the whole of the first deposit was drawn out, and part of the second (*s*). The rule, therefore, that if at the time of payment the debtor neglects to appropriate the money, the creditor may afterwards do so, appears to be qualified to this extent in banking transactions, that, in the absence of any special arrangement to the contrary, the appropriation of each payment into a current account in a bank is made by the mere act of entering the items in the order of time without any further act by either of the parties (*t*), and their ignorance of the existence of this rule will not prevent its operation (*u*).

There may be, however, some exceptions to this rule. Thus it has been held that if a trustee mix the trust funds with his own money by paying it to the credit of his private account, he will be taken to have drawn out his own moneys in preference to the trust funds (*v*).

Separate accounts of same customer.

If a customer has more than one account at a bank, he may, on making a deposit, declare to what account it shall be carried, and the bank is bound to comply

(*s*) *Clayton's Case*, 1 Mer. 606; *Henniker* v. *Wigg*, 4 Q.B. 792; *Beal* v. *Caddick*, 2 H. & N. 326, 26 L.J., Ex. 356; *Brown* v. *Adams*, L.R. 4 Ch. 746.

(*t*) *Devayne* v. *Noble*, 1 Mer. 541.

(*u*) *Merriman* v. *Ward*, 1 J. & H. 371.

(*v*) *Re Hallet's Estate*, 13 C. D. 696; *Hancock* v. *Smith*, 41 Ch. D. 456.

with his instructions. If he neglect to do so, the bank, it seems, may make the appropriation within a reasonable time (*w*). Where two or more accounts are kept in the same right, and one is overdrawn and the other is in credit, the bank has a right to set one account off against the other (*x*). In short, whatever number of accounts are kept by a customer in his own right constitute but one account (*y*); and, therefore, if a customer gives security to cover his liabilities to the bank, it is not open to him, in the absence of some special agreement, to say that such security is only applicable to one account (*z*). But a trust account and a private account cannot be consolidated or treated as one account by the bank (*a*).

Accounts at separate branches.

A customer may have accounts at more than one branch. If a customer opens one account at branch A, and another at branch B, the bank is entitled to blend the two accounts and treat them as one, without giving him notice, and so on for any number of similar accounts, as they are mere subdivisions of one general account with the bank. If the customer's account at A is overdrawn, while that at B is in funds, the bank may set off the overdraft at A against the balance in the customer's favour at B, and is only liable to him for the difference (*b*). But before treating the accounts

(*w*) *Simpson* v. *Ingham*, 2 B. & C. 73.

(*x*) *Pedder* v. *Preston*, 31 L.J.C.P. 291; *Hancock* v. *Smith*, 41 Ch. D. 456.

(*y*) *Garnett* v. *McKewan*, L.R. 8, Ex. 10; *Pedder* v. *Preston*, 31 L.J.C.P. 291.

(*z*) *Re European Bank*, L.R. 8, Ch. 41.

(*a*) *Ex parte Kingston*, L.R. 6, Ch. 632; 40 L.J.B. 91.

(*b*) *Garnett* v. *McKewan*, L.R. 8, Ex. 10, 42 L.J., Ex. 1.

in this way the bank ought, as a rule of practice though not as a matter of legal obligation, to give notice of its intention to do so; for if it did not the customer might draw on his account at B a cheque, which it would mortify him to find dishonoured.

Appropriation to meet dishonoured notes.

Where bankers discounted for a customer a note given to him, as they knew, for his accommodation, which was dishonoured by the maker, and they were afterwards directed by the customer to look to him for payment, it was held that they were not bound to appropriate to the payment of the note partial payments or credits less than its full amount, and that until payments of equal or greater amounts reached their hands, the maker remained liable (*c*).

Money paid in for a specific purpose cannot be appropriated.

But where money is paid into a bank for a specific purpose, as for instance, to take up a bill, it cannot be applied to any other object by the bank. It could not be applied in reduction of an overdraft granted to the customer who paid it in. If the bill was dishonoured, the customer, or his official assignee if he became insolvent, might bring an action and recover damages against the bank for its breach of duty. The bank should return the money if it refuses to apply it as required (*d*).

Where money was paid in by a customer to take up specified bills, and he died before they came to maturity, it was held that the indorsers of the bills were not

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(*c*) *Commercial Bank* v. *Gibbons*, 4 Sup. Ct. R., L. 223 cf.; *Kinnaird* v. *Webster*, 10 Ch. D. 139.

(*d*) *Hill* v. *Smith*, 13 L.J., Ex. 243; 12 M. & W. 618; *Farley* v. *Turner*, 26 L.J., Ch. 710; *Chamberlain* v. *English, Scottish, and Australian Chartered Bank*, 4 V.L.R. (L.), 45; *Reid* v. *Bank of New Zealand*, 3 N.Z. Jur., N.S. 40.

entitled to have the money so paid in applied in satisfaction of the bills, as they were not parties to the agreement between the bank and its customer (*e*). Where a customer, by agreement with his bank, had paid a sum of money into a separate account as security for bills drawn by and discounted for him by the bank, and not then due, it was held, on the insolvency of the customer, that the bank, and not the assignee in insolvency, was entitled to the money, inasmuch as it had been specifically appropriated to secure the bills (*f*).

(*e*) *Hill* v. *Royds*, L.R. 8, Eq. 290 cf.; *Moore* v. *Bushell*, 27 L.J., Ex. 3.

(*f*) *Chartered Bank of India* v. *Evans*, 21 L.T.N.S. 407.

CHAPTER III.

CURRENT ACCOUNTS—(*continued*).

IT is proposed to deal in this chapter with some accounts of a more special nature than those already referred to.

§ 1. HUSBAND AND WIFE.

Account opened in the name of a wife alone.

A bank may, with the sanction of a husband, open and keep an account for him in the name of his wife. For instance, a husband may allow his wife to open an account in a bank, and may lodge to her credit or allow her to lodge sums of money belonging to him in order that she may have funds at her disposal for the payment of tradesmen and others on account of household expenses. She will then be regarded as his agent. She will not acquire any title at law or in equity to the money. When such an account is opened, it is, in effect, a contract with the husband, but not with his wife, that the bank will honour the cheques of the latter as the agent of the former. It is an ordinary case of an agency account opened by a husband with bankers for the purpose of convenience, and in the event of the husband's death the money then remaining in the bank will belong to his estate and not to his wife's. If a cheque, drawn by the wife, were dishonoured, and an action at law were brought for dishonouring it, that action could only be brought in the name of the husband, who alone could sue at law (*a*).

Account in joint names of husband and wife.

Again, an account might be opened in the joint names of a husband and wife, authorising the bank to cash cheques drawn by either of them. In that event, it is presumed that the bank might be sued at law by the husband alone, or by him and his wife jointly, for the dishonour of a cheque (*b*).

Where such a joint account is opened, the question may arise, in the event of the husband's death, whether his executors or his wife is entitled to the fund. In one case it was held that the mere transfer by a husband of his current account into the joint names of himself and his wife, cheques to be drawn by either, did not of itself give her the right by survivorship to the balance, and that on the death of the husband his executors were entitled to it. As the account was kept in their joint names, and operated on by both, merely for the purpose of more conveniently managing the husband's affairs, she had no claim to it. It was held to be simply an agency account, and that the husband might at any time have caused it to be transferred into his own name (*c*). But if the husband clearly intended the balance of the account to be a provision for his wife in the event of his death, it would on the occurrence of that event

(*a*) *Lloyd* v. *Pughe*, L.R., 8 Ch. 88, more fully reported in 27 L.T., N.S. 250.

(*b*) *Dicey on Parties*, p. 183.

(*c*) *Marshall* v. *Crutwell*, L.R., 20 Eq. 328, 44 L.J.C. 504; *Williams* v. *Davies*, 33 L.J., Prob. Cas. 127, 3 Swab. & T. 437; cf. *Talbot* v. *Cody*, I.R. 10 Eq. 138.

become her property. Thus, in one case, a current account was opened in the joint names of a husband and wife, and the greater portion of the money paid into it was derived from the wife's separate income. The husband drew on the account for his own private expenses, and also paid for large investments made, some of them in his own name and some of them in the joint names of himself and his wife, by drawing on that account. The wife outlived her husband, and it was held that she was entitled by the right of survivorship to receive the amount to the credit of the joint account at the time of her husband's death, the court coming to the conclusion from the whole of the circumstances of the case that it was intended by both parties that whichever survived was to become the owner of the joint account and the joint investments (*d*).

Wife's money paid into husband's account.

In another case a married lady received a bank draft for a sum of money which was her separate property. It was not convenient for her to receive payment of the draft, so she indorsed it to her husband in order that he might obtain the money for her. He handed the draft to his bankers, and they by his direction collected the money and placed it to the credit of his deposit account. The husband died suddenly a few days afterwards. In an action by the widow against the executors to recover the amount of the draft, it was held that she was entitled to it, the Court being satisfied that she never intended to make the money a present to her husband (*e*).

(*d*) *Re Young*, 28 C.D. 705.

(*e*) *Green* v. *Carlile*, 4 Ch. D. 822.

Money deposited by a husband does not come within the meaning of the words "goods and chattels" in the 44th section of *The Marriage Act* 1890. Accordingly where justices made orders for the maintenance of a deserted wife, and for the seizure of her husband's goods and chattels, and for the appropriation of the proceeds to the payment of her allowance, it was held that the manager of a bank, who refused to deliver over money standing to the credit of the husband, could not be convicted of disobedience to the order of the magistrates (*f*).

Credit balance not liable to seizure for maintenance of a wife.

§ 2. MARRIED WOMAN WITH SEPARATE PROPERTY.

Every married woman having property for her separate use is empowered to enter into contracts respecting it as she might have done if unmarried (*g*). She may, therefore, open an account in her own name at a bank. Her husband would not be liable to the bank for her in respect of her transactions with it. She, however, may sue or be sued at law (*h*).

But even independently of the statutes, and before they were passed, a married woman possessing property of her own which was not subject to a restraint upon anticipation could bind it by her bills, notes, and other engagements. She could open an account or several

(*f*) *Curtayne* v. *Mitchell*, 5 A.J.R. 134.

(*g*) *Re Shakspeare*, 30 C.D. 169; *Married Women's Property Act* 1890.

(*h*) *Married Women's Property Act* 1890, s. 4; *M'Intosh* v. *Tenkin*, 4 V.L.R. (L.) 127.

accounts, such as a private account, and an administration account, and give bankers a lien on her estate (*i*).

Precautions which may be adopted.

Some bankers are in the habit of declining to accept the account of a married woman without previously obtaining the written consent of her husband; but this precaution, though advisable in many instances, is not necessary in the case of a married woman opening an account which is to consist of the money derived from her separate estate, and owned by her in her own right and independently of the control of her husband.

But before allowing a married woman to overdraw a bank should, as a matter of prudence, be satisfied that she is entitled to separate property which is not subject to a restraint against anticipation. For in any action to recover the amount of the overdraft it would be necessary for the bank to prove that at the time when the overdraft was granted she was possessed of such property (*j*), and the remedy of the bank would be restricted to it (*k*). The restraint against anticipation is only effectual during marriage, but the removal of the restraint by the death of the husband would not render the property liable for the claim of the bank, because it would then cease to be held as separate property (*l*).

(*i*) *London Chartered Bank of Australia* v. *Lempriere*, L.R. 4, P.C. 572; S.C., 1 V.R. (E.) 191; See *Summers* v. *City Bank*, L.R., 9 C.P. 581, 43 L.J.C.P. 261.

(*j*) *The Colonial Bank* v. *Kerr*, 15 V.L.R. 4; *Leake* v. *Driffield*, 24 Q.B.D. 89.

(*k*) *Scott* v. *Morley*, 20 Q.B.D. 132; *Married Women's Property Act* 1892, s. 22.

(*l*) *Pelton* v. *Harrison* (1891), 2 Q.B.D. 422; *Leake on Contracts*, 3rd ed., 481, 483.

§ 3. INFANTS' ACCOUNTS.

Savings banks.

Accounts are not unfrequently opened with infants. In the *Savings Banks Act* 1890, s. 23, and in the *Post Office Act* 1890, s. 70, express sanction has been given to dealings with them, and the receipts of minors attested by one witness are declared to be a sufficient discharge when their deposits are repaid to them (*m*).

Other banks.

An infant may, like any other person, lend his money to a banker and open a bank account. But it is clear that he is not liable to be sued at law for money borrowed by him (*n*). Therefore, a bank should not allow an infant to overdraw. If an action was brought against him for the overdraft, he could plead his infancy and defeat it. He may, however, make a binding promise to pay a debt, or may ratify his contract after he comes of age. All promises of an infant and all ratifications of an infant's contracts made by him after he attains his majority must, in order to bind him, be in writing, and must be signed by him (*o*). It is not necessary that there should be a witness to the signature.

Even if an infant were to obtain an overdraft by fraudulently representing himself to be of full age, he

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(*m*) See also *Nixon* v. *Savings Bank of N. S. Wales*, 2 S.C.R., 288.

(*n*) *Leake on Contracts*, 3rd ed., p. 475.

(*o*) *Instruments Act* 1890, s. 215, enacts that "No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith"; see, also, *McFerran* v. *McFerran*, 15 N.Z.L.R., 292.

could not be made liable in an action at law for the fraud (*p*).

He may be liable in equity.

But equity will in some cases interfere, and compel an infant to make restitution where he has obtained an advantage by a fraudulent representation as to his age. Thus, in one case, a young man, who from his appearance might have been taken to be more than twenty-one years of age, obtained money from a bank on a cash credit account on entering with others into a cash credit bond in the usual way. In order to obtain the credit he fraudulently represented himself to be of age. By means of the fraud he procured the money. Subsequently, on attaining his majority he became insolvent. It was held that the fraudulent representation rendered him, though an infant, liable in equity for the debt, and the bank was allowed to prove against his estate for the amount of its claim (*q*).

An infant does not bind himself by drawing a cheque or by accepting or indorsing a bill of exchange. If the cheque or bill be dishonoured the holder cannot recover the amount of it from the infant. Where a cheque or bill is drawn or indorsed by an infant, the drawing or indorsement entitles the holder to receive payment of the bill or cheque (*r*). A bank may, therefore, safely honour the cheques of an infant customer. Indeed, it could not refuse to honour them without exposing itself to the risk of an action at the suit of the infant. For contracts made with an infant, though not binding on him, are binding on all other

(*p*) *Leake on Contracts*, 3rd ed., p. 470.

(*q*) *Ex p. Unity Joint Stock Banking Association*, 27L. J., Bank., 33; 3 D. & J., 63; cf., *Campbell* v. *Ridgely*, 13 V.L.R., 701.

(*r*) *Bills of Exchange Act*, s. 22.

parties to them who are of full age so long as the contracts are not avoided by the infant. For example, a female infant may maintain an action for the breach of a promise to marry her, but she is not bound by her own promise to marry (*s*).

§ 4. JOINT ACCOUNTS.

Accounts are frequently opened and deposits made in the joint names of several customers, especially in the case of executors, trustees and partners. Before proceeding to deal with each of these cases separately, it is proposed to offer a few remarks on joint accounts in general.

It has been said to be part of the law merchant, that bankers shall not pay to one of several customers who have a joint account without the consent of the others. As a rule, a person may pay a debt to one of several with whom he has contracted jointly. But in the case of money paid into a bank upon a joint account, it is usually implied from the nature of the reasons that induce parties to open such accounts, and from the relation between banker and customer, that it shall not be withdrawn without the joint order of all (*t*). It is not, therefore, advisable to cash cheques drawn on a joint account, unless they are signed by all the parties to the account. For if the money be wrongfully paid to one, the bank may remain

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(*s*) *Leake on Contracts*, 3rd ed., p. 476. As to the law in England, see *The Infants Relief Act* 1874. As to the non-liability of an infant on his promissory note, see *Matheson* v. *Aitken*, 7 N.Z.L.R., 94; *Re Soltykoff*, (1891) 1 Q.B., 413.

(*t*) *Husband* v. *Davies*, 10 C.B., 645; *Innes* v. *Stephenson*, 1 M. & R., 145.

liable to the others. Therefore, it is a prudent precaution on the part of a banker to obtain special directions in writing, signed by all the depositors, specifying the persons by whom cheques are to be signed, in all cases where it is intended that the money may be drawn by any number of the joint depositors less than all.

If one of the joint depositors dies, the survivor or survivors are entitled to the money (*u*).

Overdrafts by joint depositors.

Should a joint account be overdrawn, each of the parties to it is liable to the bank for the whole of the overdraft. For all the joint debtors should be sued together. The judgment and writ of execution charge all the defendants jointly, and the whole amount may be levied against one only. Thus any one of the joint debtors may be compelled to pay the whole amount of the overdraft to the bank. But he is entitled to contribution from the other debtors, and can obtain it by an action at law.

Death of joint debtor.

Upon the death of one joint debtor, the legal liability to pay off the overdraft devolves upon the survivors. Consequently, the whole legal liability may fall upon the last surviving debtor, and, after his death, upon his personal representatives. The personal representatives of those who pre-decease him are not liable to the bank (*v*).

§ 5. EXECUTORS AND ADMINISTRATORS' ACCOUNTS.

Death of customer leaving a will.

When a customer of a bank dies, leaving a will, the bank may lawfully pay the credit balance of his

(*u*) *Downes* v. *Bank of New Zealand*, 13 N.Z.L.R., 723.

(*v*) *Leake on Contracts*, 3rd ed., pp. 372-374.

account to the executors named in the will before probate of the will is granted to them. For the right of an executor to the estate of the testator is derived from the will, and the property is vested in him immediately on the testator's death. He is deemed to be in possession of it from that time, and may pay or receive payment of debts before probate is granted (*w*). But should probate be refused to the person to whom the payment has been made, the bank will have paid the money to the wrong man, and may have to pay it over again to the person to whom probate may be granted. It is prudent, therefore, for the bank to insist upon production of the probate before paying the money to the executors.

A married woman may be appointed executrix of a will, but she cannot act in that capacity, or obtain probate, without the consent of her husband (*x*). Yet where a bank paid over the money of the testator to a married woman as executrix, at her request, but before probate, and without any knowledge on the part of the bank that the husband objected to his wife undertaking the office of executrix, the payment was held valid, and the bank was not compelled to pay it over again (*y*).

Though two or more executors are in law regarded as one person, yet the acts of each one of them are generally treated as the acts of all of them. Accordingly, one executor may release or pay, or may receive payment of a debt, and such transactions, in the absence

(*w*) 1 *Williams on Executors*, 5th ed., p. 203.

(*x*) *Williams on Executors*, 8th ed., p. 223.

(*y*) *Pemberton* v. *Chapman*, E. B. & E., 1,056; 27 L.J., Q.B., 429.

of fraud, are binding on the other executors, although they disapprove of them (*z*).

Death of customer without a will.

If a customer dies without a will, the bank should not allow any operation on the account until letters of administration are granted to administrators of the estate of the deceased, and are produced to the bank. The authority of an administrator is derived from the grant to him of the letters of administration, and, therefore, as a general rule, acts done by him before the grant, such as the release of a debt due to the testator, are not binding (*a*). But after the grant his powers and duties are similar to those of an executor. Payment to an administrator would be perfectly valid, though a will exist and be afterwards proved (*b*).

Executorship accounts after probate.

Effect of title of the accounts.

After probate or letters of administration have been obtained, it is common for the executor or administrator to open an account, headed as an executorship or administratorship account. The only effect of this is to give the bank notice of the character in which the customer holds the money, and that the funds may be subject to the equitable rights of legatees, next-of-kin, creditors or others. If overdrafts be allowed by the bank on such an account the executor is personally liable. The bank would acquire no claim against the estate of the deceased unless the executor was authorised by the will to raise money on the security of that estate. Execution would not issue against the assets

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(*z*) *Smith* v. *Everett*, 27 Beav., 484; 29 L.J., Ch., 236; *Child* v. *Thorsley*, 16 C.D., 151.

(*a*) See *Williams on Executors*, 8th ed., p. 638, *et seq.*

(*b*) *Prosser* v. *Wagner*, 1 C.B., N.S., 289; 26 L.J., C.P., 81.

of the testator, but only against the executor's property (*c*).

Nature of the accounts.

It seems, therefore, that an account opened by the executors as such may be, in legal effect, the same as an ordinary joint account, and if it is desirable that it should be operated on by one only of several executors, it would be prudent on the part of the bank to have the arrangement reduced into writing.

Breaches of trust.

A banker should refuse to pay the cheque of an administrator or executor if he becomes aware that it has been drawn for the purpose of committing a breach of trust. If he should connive at a fraud he might be held liable for the misconduct of the customer (*d*). For instance, if the executor had an overdraft at the bank, and, if the bank allowed him to draw cheques upon the funds of the testator, and pay them into his own account in order to reduce or pay off his overdraft, the bank could be forced to repay all the money which was so applied (*e*).

Executors may endorse testator's bills, &c.

An executor or administrator may endorse and negotiate the bills and notes of which the deceased was holder, as effectually as the deceased could do so. The endorsement by an executor renders him personally liable, and gives no claim against the assets, although purporting to be made in his representative

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(*c*) *Farhall* v. *Farhall*, L.R. 7, Ch., 123; *Bailey* v. *Finch*, L.R. 7, Q.B., 34; *Farhall* v. *Farhall*, L.R. 7, Eq., 8; cf., *Cutter* v. *Barber*, 1 W. & W., L., 128.

(*d*) *Gray* v. *Johnson*, L.R., 3 H.L., 1.

(*e*) *Wilson* v. *Moore*, 1 My. & K., 337; 36 R.R., 272; *Child* v. *Thorley*, 16 Ch. D., at p. 155; *Ex p. Morier*, 12 Ch. D., 491.

character (*f*). But he can endorse the bills "without recourse," and thereby exempt himself from liability upon them.

Where an executor joined in signing cheques on an executorship account to enable his co-executor to invest the money at a higher rate of interest than would be obtained from the bank, he was held liable for the mis-appropriation of the funds by the co-executor, who applied them to unauthorised purposes (*g*).

§ 6. TRUSTEES' ACCOUNTS.

It is usual for trustees to open a trust account, headed as such, in order to pay trust moneys into that account and keep them separate from their own private funds. A bank is not bound to open such an account, but if it does, the money paid in to that account belongs to the trust, and the banker cannot set it off against an overdraft on the trustees' private account (*h*).

Banks when liable for customer's breach of trust.

When an account is so opened a banker may be held liable for a breach of trust by his customer in drawing a cheque on that account for the purpose of misapplying the proceeds, if the banker is privy to the intent of the customer to misapply the trust money. But he ought not to refuse to honour the cheque of a trustee or executor on grounds of mere suspicion. He should have clear and positive reasons for such refusal

(*f*) *Leake on Contracts*, 3rd ed., p. 1077. But see *Bills of Exchange Act*, s. 26.

(*g*) *Jones* v. *Taylor*, 2 V.R. (E.), 15; and see *Evans* v. *Bear*, L.R., 10 Ch., 76.

(*h*) *Ex. p. Kingston*, L.R., 6, Ch. 639.

Nature and amount of notice to affect the bank.

(*i*). Indeed, Lord Westbury seems to have thought that a banker could not refuse to honour a trustee's cheques on the ground that he had reason to believe that it was given in promotion of an unlawful or improper purpose, and that if a banker did incidentally become aware that a trustee had drawn a cheque to effect a breach of trust, he would have no right to refuse payment unless the bank was itself to derive a benefit from the transaction (*k*). For as a general rule a banker is not called on to inquire how the customer obtains the money that he pays into an account, nor is he to inquire for what purpose moneys are drawn out of that account, nor has he a right to enter into a semi-judicial investigation as to what rights may exist between the customer and other parties. It is, however, clear that if the trustee sought to discharge his own debt to the bank out of the trust funds in the hands of the bank, the bank would, in many cases, be affected with knowledge of the unlawful character of the transaction, and would be compelled to refund. In short if a banker receives money in payment of a debt which he knows or has good reason to believe does not belong to the person who pays it, he cannot retain it against the person to whom it belongs (*l*). A bank cannot pay one man's debt with another man's money.

Accordingly, where a bank transferred a sum of

(*i*) *Gray* v. *Johnston*, L.R., 3 H.L., 1; *Union Bank* v. *Murray-Aynsley*, 14 N.Z.L.R., 720; cf., *Tassel* v. *Cooper*, 9 C.B., 509.

(*k*) *Gray* v. *Johnson*, L.R., 3 H.L. 14; *Newman* v. *Bank of N. S. Wales*, 12 S.C.R., 289; *Dixon* v. *Bank of N. S. Wales*, 17 N.S.W. L.R. (Eq.), 355.

(*l*) *Wilson* v. *Moore*, 1 My. & K., 337; 36 R.R., 272; and see *Piercy* v. *Finney*, L.R. 12 Eq., at p. 75; *Child* v. *Thorley*, 16 Ch. D., at p. 155.

money from a trust account to the account of one of the beneficiaries under the trust, and thereby obtained payment of a debt due to the bank, it was held that the trustees were entitled to have the fund replaced by the bank (*m*).

Where a customer had a private account at a bank, and was permitted to overdraw it upon condition of his introducing to the bank the account of a trust estate of which he was a trustee, and the bank, at the request of the customer, transferred some of the trust moneys to the customer's account, which was then overdrawn, it was held, on the insolvency of the customer, that the bank was liable to the persons entitled to the trust funds, for the amount so paid into the customer's account (*n*).

Again, where the treasurer of a county kept his private account at a bank, and also paid the rates into another account at the same bank, and then by cheques transferred a portion of the rate account into his own in reduction of his overdraft, the bank was compelled to refund to the county the moneys improperly transferred by the treasurer to his private account (*o*).

Where bank has no notice of any breach of trust.

But if a trustee, without the knowledge of the bank, pays trust moneys into his own account and misapplies them, the bank, if it has no grounds for suspecting a breach of trust, will not be compelled to repay such trust moneys to the beneficiaries to whom they really belong. It may deal with such funds as if they

(*m*) *Bridgman* v. *Gill*, 24 Beav., 302; *Foxton* v. *Manchester, &c., Bkg. Co.*, 44 L.T., N.S., 406.

(*n*) *Bodenham* v. *Hoskins*, 2 De G. M. & G., 903.

(*o*) *Re Kingston*, L.R. 6 Ch., 632. See also *Union Bank* v. *Murray-Aynsley*, 14 N.Z.L.R., 741.

belonged to the customer, and may retain them in discharge of his liabilities to the bank.

The following case affords an illustration of this principle. A trustee paid a large sum of trust money into his private account, which was then overdrawn. He kept no trust account at the bank, but the bank was aware that the money so paid in consisted of trust funds. The bank advised the trustee that the amount had been placed to his credit, and it was left in his private account, on which he continued to draw. Some years afterwards the trustee became insolvent, his account then being largely overdrawn. It was held that the bank, having no suspicion that the trustee was insolvent or intended to commit any breach of trust when he paid the trust money into his own account, was not bound to restore it to the trust estate (*p*).

Accordingly, if a customer receives trust money for investment and places it in a separate account, the bank will be at liberty to treat such money as belonging to the customer, and to set it off against his own overdrawn account or other liability to the bank unless it has notice of the trust (*q*).

Where trustee is a bank manager.

Where a local bank manager, who was also one of two trustees who kept their trust account at his bank, cashed a cheque drawn on the trust account, and misappropriated the proceeds, it was held that the bank

(*p*) *Coleman* v. *The Bucks and Oxon Bank*, (1897) 2 Ch., 243; and see *Budge* v. *Bank of N. S. Wales*, 11 N.S.W. L.R., 385, 392; *McMillan* v. *Bank of New Zealand*, N.Z.L.R. 1 S.C., 322; *Downes* v. *Bank of New Zealand*, 13 N.Z.L.R., 723.

(*q*) *Union Bank* v. *Murray-Aynsley*, (1898) A.C., 693; *Dixon* v. *Bank of N. S. Wales*, 17 N.S.W. L.R. (Eq.), 355.

could not debit the trust account with the amount of the cheque (*r*). It was a breach of trust of which the bank must be deemed to have had notice through its officer.

Trust accounts for a special purpose.

If a trust account be opened at a bank for the especial purpose of receiving the proceeds of certain acceptances, and if one of those acceptances be handed to the bank for collection by the drawer, drawn and endorsed by him for that account, they will be bound to place the proceeds of the bill when paid to the credit of that account, and cannot apply them in reduction of an overdraft of the drawer (*s*).

Payment to one of several trustees.

Payment by bankers to one of several trustees does not discharge the bankers as against the other trustees, unless it was authorised or sanctioned by them (*t*).

If a trustee deposit trust deeds as securities by way of equitable mortgage to cover his liabilities to the bank, the deposit will pass no interest whatever to the bank in the securities, and it is wholly immaterial whether the bank had notice of the trust or not (*u*).

Appropriation of payments in trust accounts.

If a trustee pays the trust money into his private account, and mixes it with his own money and draws it out by cheques in the usual manner, the ordinary rule of appropriation—viz., that the money first paid in is first drawn out—does not apply. It will be

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(*r*) *McMahon* v. *Brewer*, 18 N.S.W. L.R. (Eq.), 88 ; but see *Nichol* v. *London Chartered Bank*, 4 V.L.R. (L.), 324.

(*s*) *Reid* v. *Bank of New Zealand*, 3 N.Z. Jur., N.S., 40.

(*t*) *Stone* v. *Marsh*, 6 B. & C., 551 ; *Lawson* v. *Commercial Bank, &c.*, 22 S.A.L.R., 56, 74.

(*u*) *Manningford* v. *Toleman*, 1 Coll., 670 ; *Stackhouse* v. *Lady Jersey*, 1 J. & H., 721 ; and see *Cooper* v. *Commercial Banking Co.*, 20 N.S.W. L.R., 75.

assumed that the trustee drew out his own money rather than the trust money (*uu*). Where a trustee has paid in to his account and has improperly applied the trust moneys of two or more *cestuis que trust*, if a conflict arises between them as to whose money has been misused, then the ordinary rule for the appropriation of payments applies. It will be assumed that the trust money first paid in was first drawn out (*v*).

§ 7. PARTNERSHIP ACCOUNTS.

It is usual for partners to open an account in the name of the partnership. A cheque to bind the firm should be drawn in its name, inasmuch as the law implies no authority to one partner to bind the partnership in any other name than that of the firm (*vv*). Each partner is entitled to draw a cheque and to sign it with the name of the firm, and the bank is bound to honour the cheque unless signed by a partner whose signature has not been furnished to it. A partner in the absence of special authority from his co-partners, cannot render them liable to a bank in respect of an account opened by him in his own name instead of the name of the firm, although such account be for the purposes of the firm (*w*).

Partners can bind partnership only by its name.

(*uu*) *In re Hallett's Estate*, 13 Ch. D., 696; *Seeley* v. *Mercantile Bank*, 18 V.L.R., 485; 14 A.L.T., 64.

(*v*) *Hancock* v. *Smith*, 41 L.J. Ch. D., 456; cf., *Re Stenning*, (1895) 2 Ch., 433; *M'Mahon* v. *Fetherstonhaugh*, (1895) Ir. R., 83.

(*vv*) *Kirk* v. *Blurton*, 9 M. & W., 284; the marginal note in that case is wrong. See *Smith's Mercantile Law*, 8th ed., p. 42; and *Wilson* v. *Joshua*, 6 S.C.R., 319. If a partner stop the firm's cheque the bank should not pay it. *Lindley on Partnership*, 5th ed., p. 133.

(*w*) *Alliance Bank* v. *Kearsley*, L.R. 6, C.P., 433.

But where a partnership account was kept in the name of one of the partners on behalf of the firm, it was held that the firm might maintain an action for the dishonour of a cheque drawn and signed by the partner in whose name the account was kept (*x*).

Where the ordinary business of a mercantile or trading firm renders it necessary to draw or accept bills, a partner has an implied authority to do so in the name of the firm. But where such instruments are not required or usual in the ordinary course of business, as is generally the case in non-mercantile firms, a partner is not authorised to draw or accept them for the firm. Now, post-dated cheques are, in effect, bills of exchange (*y*). Banks, therefore, should be cautious about paying them when drawn in the name of a firm which, according to the usual course of its business, would not draw bills of exchange. A firm of solicitors, for example, would not be liable to the bank for the amount of a post-dated cheque drawn in their name by one only of the partners, *without the authority of the others* (*z*). A bank, therefore, if it paid the cheque, could not debit them with the amount of it, unless it was so drawn with their consent.

Post-dated cheques of a firm.

If a bank, by gross negligence, enabled one partner to obtain possession of the money belonging to the firm in fraud of the other members, the bank would not be entitled to charge the firm with the amount (*a*).

(*x*) *Cook* v. *Seeley*, 2 Ex., 749.

(*y*) *Hinchcliffe* v. *Ballarat Banking Co.*, 1 V.R. (L.), 229; 1 A.J.R., 169.

(*z*) *Forster* v. *Mackreth*, L.R. 2 Ex., 163; *Garland* v. *Jacomb*, L.R. 8 Ex., 216; *Hoffnung* v. *Simpson*, 2 N.S.W. L.R., 133 (a firm of auctioneers).

(*a*) *Re Riches*, 4 DeG. J. & S., 501; 34 L.J.B., 10.

In the absence of a special agreement, a bank has no lien upon the separate balance or securities of a partner, for the money due to it on the partnership account (*b*). And if a partner give security for his private account, the bank will not be entitled to treat it as a security for the partnership account also (*c*).

Squatting and farming partnerships.

It has been held, both in Victoria and New South Wales, that the power of drawing bills and borrowing money by a partner, so as to bind the firm, is incidental to a squatting partnership, at least for the purpose of defraying the current expenses of the business (*d*). But this, it is apprehended, is not the case in farming partnerships; in which, it seems, one partner could not bind another by a bill of exchange in the name of the firm (*e*).

Banks not bound to inquire into propriety of transfers of money into private accounts of partners.

Occasionally all the partners of a firm have a right to draw cheques on the partnership account for their own private use. The individual partners may also keep their private or their trust accounts with the same bankers. The bankers are not bound, nor would it be prudent of them to inquire into the propriety of any transfer of funds from one of these accounts to another. If, however, they have distinct notice, express or presumptive, that some breach of duty is taking place

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(*b*) *Watts* v. *Christie*, 11 Beav., 548; *Cavender* v. *Bulteel*, L.R. 9 Ch., 79.

(*c*) *Ex p. McKenna*, 30 L.J.B., 20; 3 DeG. F. & J., 629.

(*d*) *Glass* v. *Higgins*, 2 A.J.R., 10; 2 V.R. (Eq.), 28; *Graham* v. *Murnin*, 1 Sup. Ct. R. (L.), 195; and see *White* v. *Colonial Bank*, 2 A.J.R., 49.

(*e*) *Greenslade* v. *Dower*, 7 B. & C., 635; *Davidson* v. *Stanley*, 2 M. & G., 721.

they ought not to become parties to it, and should refuse to make the transfer (*f*).

Death of a partner.

Upon the death of a partner, the surviving partner has a right to draw cheques on the partnership account (*g*).

Change of partners.

Questions sometimes arise on a change in the partnership as to the liabilities of the members of the new firm for the debts of the old owing to the bank. A new partner does not necessarily become liable to the creditors of the firm for debts incurred by the firm before he became a partner. Nor does a retiring partner cease to be liable for the debts of the old firm, incurred before his retirement. He may, however, be discharged from such debts by an agreement to that effect between himself and the members of the firm, as newly constituted, and the creditors. Such an agreement may be express, or it may be inferred from the course of dealings between the creditors and the firm as newly constituted (*h*). Where a new partner is taken in, or a new firm constituted, and where a bank goes on dealing with the new firm, slight circumstances are sufficient to prove that the bank accepts the new firm as its debtors instead of the old (*i*). If the transactions of the old and the new firms be blended

(*f*) *Backhouse* v. *Charlton*, 8 C.D., 444; *Re Darlington &c. Banking Co.*, 4 De G. J. & S., 581; 34 L.J., B., 10; cf., *Partnership Act* 1891, ss. 11, 12.

(*g*) *Backhouse* v. *Charlton*, *supra.*

(*h*) *Partnership Act* 1891, s. 21.

(*i*) *Ex p. Gibson*, L.R. 4 Ch., 662; *Bilborough* v. *Holmes*, 5 Ch. D., 255; *Re Guthrie, ex p. The Bank of Australasia*, N.Z.L.R., S.C., 425, 429; and see *Colonial Bank of New Zealand* v. *Smith*, 6 N.Z.L.R., 659.

together in the pass-book, the bank will be assumed to have accepted the new firm as its customer in lieu of the old, and the deposits by the new firm will be appropriated in the order of date to the discharge of the liabilities of the old firm in order of date (*k*).

If the firm be indebted to the bank in a current account, and one of the partners retires, and the transactions between the bank and the firm be continued, all subsequent payments by the latter into the bank, will, unless specifically appropriated to other purposes, go in discharge of the old account (*l*).

An ex-partner cannot draw a cheque or endorse a negotiable instrument in the name of the firm, without the authority of his former partners (*m*).

The managing partner of a firm has an implied authority to transfer the account of the partnership from one bank to another, without the express consent of the other members of the firm (*n*).

§ 8.—COMPANIES' ACCOUNTS.

Joint-stock and other public companies frequently open accounts at banks. In dealing with them, some caution is required, for no company can be bound by

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(*k*) *Hooper* v. *Keay*, 1 Q.B.D., 178 ; and see *Bank of Australasia* v. *Flower*, L.R., 1 P.C., 27. See further as to the relations of partners to persons dealing with them, the *Partnership Act* 1891, ss. 9 to 22.

(*l*) *Colonial Bank of New Zealand* v. *Smith*, 6 N.Z.L.R., 659.

(*m*) *Paterson* v. *Hughes*, 2 V.R. (L.), 148.

(*n*) *Beal* v. *Caddick*, 2 H. & N., 326 ; 26 L.J., Ex., 326.

any contract or other dealing which is *ultra vires*. If a banker enter into a contract which is *ultra vires* of the company, he will not be able to enforce it. Banks and all other persons are assumed to have notice of the powers which companies possess, and of the limitations of those powers which are contained either in the public statutes creating the companies (*o*) or in the deeds of settlement, memorandum of association and articles of association, or other documents registered pursuant to the statutes under which the companies have been formed (*p*). In transactions with companies constituted under the *Companies Statute* 1890, it must be borne in mind that their powers are limited by the memorandum of association. These powers cannot be extended by the articles of association, and if there be any inconsistency on this point between the memorandum and the articles then the latter must give way. A contract, or a loan, authorised by the articles, but not by the memorandum, which is the company's charter, could not be ratified by the unanimous assent of the whole corporation (*q*). Bankers, therefore, should carefully consider the memorandum and the articles before they commit themselves to transactions with a company (*r*).

Notice of the company's powers.

Power to mortgage.

It appears that a company entitled to hold property is at liberty to dispose of it with the same freedom as an individual, unless there is something in its consti-

(*o*) *Macgregor* v. *Deal Ry. Co.*, 18 Q.B., 618 ; 22 L.J., Q.B., 69 ; *Shire of Gisborne* v. *Murphy*, 7 V.L.R. (L.), 63.

(*p*) *Anderson* v. *Duke*, 1 A.J.R., 161 ; 1 V.R. (L.), 203 ; *Fontaine* v. *Carmarthen Railway*, L.R., 5 Eq., 321 ; but see *Re Bundaberg &c. Bldg. Soc.*, 9 Q.L.J., 87.

(*q*) *Ashbury Railway Company* v. *Riche*, L.R., 7 H.L., 653.

(*r*) *Bank of South Australia* v. *Benjamin*, 14 A.L.T., 159.

tution to prevent it from so doing. It may, therefore, pledge its property for payment of its debts incurred in the course of its business, unless expressly forbidden to do so; and an express power to borrow an amount not exceeding one-half-of the nominal capital does not negative the general power, nor prevent a company from raising money on depositing its title deeds to property by way of equitable mortgage (*s*).

Charging uncalled capital.

Power to mortgage the "property" or "assets" of a company does not enable the directors to charge the unpaid capital of the company. Capital not paid up is only conditionally the property of the company. The company has no absolute right to it, and the shareholder is under no liability to pay until the calls have been duly made (*t*). In such a case the bank should not take future calls as a security. But under a like power a charge on future book-debts was upheld (*u*). In another case where a bank made an advance on the security of a call actually made but not paid at the time of the advance, it was held that the bank had a valid charge on the proceeds of the call, as this was distinguishable from an attempt to pledge future calls (*v*). But a company may, by its memorandum and articles of association, be empowered to mortgage its uncalled capital (*w*).

(*s*) *Re Patent File Company*, L.R., 6 Ch., 83.

(*t*) *Bank of South Australia* v. *Abrahams*, L.R., 6 P.C., 562; *The Bank of New Zealand* v. *Walter Guthrie & Co.*, 16 N.Z.L.R., 484.

(*u*) *Bloomer* v. *Union Coal Company*, L.R., 16 Eq., 383.

(*v*) *Re Sankey, &c., Co.*, L.R., 9 Eq., 721; *International &c. Co.*, L.R., 10 Eq., 312; see, further, *Jackson* v. *Rainford Co.*, (1896) 2 Ch., 340, and cases there cited.

(*w*) *Re Anglo-Australian Investment Co.*, 16 N.S.W. L.R. (Eq.), 38; (1895) A.C., 244; *Ansted* v. *Land Company of Australasia*, 14 N.S.W. L.R. (Eq.), 330: cf., *The Bank of Australasia* v. *Zohrab*, 10 N.Z.L.R., 340; *Ex p. The Home &c. Co.*, 14 A.L.T., 40.

Notice of directors' powers.

A company does not act in person, but only through directors, who are its agents, and the ordinary doctrines of law relating to principal and agent are applicable to them (*x*). Their authority is generally limited by the articles of association, and bankers must take care not to enter into contracts in excess of that authority. For bankers are presumed to have notice of all limitations imposed on the directors by the articles, or by the deed of settlement of the company, and the company will not be bound by any contract made by the directors in excess of their powers, as set forth in those documents (*y*). Accordingly, where a bank under a letter of credit advanced to directors more money than by the articles of association they were authorised to borrow, it was held that the company was not liable to the bank for the sums so advanced (*z*).

Where there are no express borrowing powers.

But it occasionally happens that a company has no express borrowing powers. The articles or deed of settlement may not contain any clause authorising the directors to borrow. In such a case it is not necessarily *ultra vires* of the company to borrow money from a bank. It may, it seems, do so where a loan is essential for the purpose of enabling the company to carry on its business. For a trading company, like a commercial partnership, has an implied general power to borrow money to an extent which is reasonable and necessary for the purpose of carrying on its business.

(*x*) *Ferguson* v. *Wilson*, L.R., 2 Ch., 77.

(*y*) *Balfour* v. *Ernest*, 5 C.B., N.S., 601; 28 L.J., C.P., 170; *Fontaine* v. *Carmarthen Ry.*, L.R., 5 Eq., 321; *Re County Life Ass. Co.*, L.R., 5 Ch., 288.

(*z*) *Irvine* v. *Union Bank*, 2 Ap. Cas., 366; cf., *Baroness Wenlock* v. *River Dee Co.*, 10 A.C., 354.

This point, it is thought, was first clearly established by a case which arose in New South Wales, and in which the Privy Council upheld the opinion of the Chief Justice against the majority of the Court (*a*). Accordingly, it has been held that in the ordinary course of transactions of a mercantile concern, whether it be an insurance office or anything else, if the company finds itself in temporary difficulties for want of money, it is not beyond the power of the directors to obtain money from bankers for the purpose of preventing the stoppage of the company, although the articles contain no clause expressly empowering the directors to borrow (*b*).

The directors of a bank, therefore, have an implied power to borrow money, in the absence of any express authority in the deed of settlement; and even if some of the stipulations entered into on the occasion of the borrowing were *ultra vires*, the bank would not be discharged from its liability to repay the loan. The only result would be that the stipulations which were *ultra vires* could not be enforced, while those that were *intra vires* would remain operative (*c*).

The doctrine of "subrogation."

But where a bank has advanced money on overdraft to a company that has no borrowing powers, or that has exceeded them, it may not be wholly without remedy. For if the bank can show that any part of the overdraft has been spent in paying the just debts

(*a*) *Bank of Australasia* v. *Breillat*, 6 M.P.C.C., 152.

(*b*) *Gibbs and West's case*, L.R. 10, Eq., 312; *Hamilton Ironworks*, 12 C.D., 707; *Normanby Copper Mining Co.* v. *Corfield*, 1 Q.L.J., Supp., 3.

(*c*) *Bank of Australasia* v. *Breillat*, 6 M.P.C.C., 152; 12 Jur., 182; and see *City Bank* v. *Australasian Paper Co.*, 10 Sup. Ct. R., L., 235.

and liabilities of the company which could be legally enforced against it, the bank may recover so much of the overdraft as has been so employed. To that extent the bank is entitled to have the overdraft treated as a valid loan. The allowance of such a right does not add to the liabilities of the borrowing company—it merely substitutes the bank for the other creditors of the company. To refuse this redress to the bank would simply be to enable the company to pay its creditors with the money belonging to the bank. In such a case the bank is said to be "subrogated" to the rights of those creditors who have been paid with its money (*d*).

Notice of internal proceedings not presumed.

But though banks are taken to know the limits of the authority of directors contained in the public or registered constitution of all statutory corporations, they are not as a general rule presumed to have notice of their *internal* proceedings. A bank in dealing with a company is entitled to take for granted that all matters of internal arrangement have been duly complied with, that all meetings have been held and proper resolutions passed, and that the acting directors and the manager have been duly appointed (*e*). Thus,

(*d*) *Blackburn Building Society* v. *Cunliffe Brooks & Co.*, 22 Ch. D., 61. As to the authority of this decision see s.c. on appeal, 9 Ap. Cas., pp. 866, 867. See also *The Bank of New Zealand* v. *Rose*, 10 N.Z.L.R., 484; *Union Bank* v. *South Canterbury Society*, 13 N.Z.L.R., 489; *Re Lough Neagh Ship Co.*, (1895) Ir. R., 533; *In re Wrexham &c. Ry. Co.*, (1899) 1 Ch., 440; *Cooper* v. *Commercial Banking Co.*, 20 N.S.W. L.R., at p. 82; *Lindley on Companies*, 5th ed., p. 236.

(*e*) *Re Tyson's Reef Co.*, 3 W.W. & A'B., L. 162; *Bank of N. S. Wales* v. *Undaunted &c. Co.*, 1 V.R.L., L., 146; *Anderson* v. *Timur Co.*, 1 V.R.L., 203; *Blair* v. *Duntroon &c. Ry. Co.*, N.Z.L.R. 5 S.C., 309; *Re County Life Ass. Co.*, L.R. 5, Ch., 288; and see *Colonial Bank* v. *Willan*, L.R. 5 P.C., 417; *County of Gloucester Bank* v. *Rudry Colliery*, (1895) 1 Ch., 629; *Re Hampshire Land Co.*, (1896) 2 Ch., 743; *Essendon &c. Association* v. *Kilgour*, 24 V.L.R., 136; 20 A.L.T., 5; 4 A.L.R., 1.

where the acting directors drew on their bank in conformity with the articles, it was held that the bank was justified in cashing their cheques, though it turned out that there had been no appointment of directors at all, but that the promoters of the company had acted in that capacity (*f*).

Again, where the deed of settlement permitted the directors of a company formed under the repealed Act, 7 & 8 Vict., c. 110, to borrow such sums of money as they might be empowered to borrow by a resolution passed at a general meeting, it was held that the bank were entitled to assume that such a resolution had been passed, and they recovered the amount that had been advanced to the directors (*g*).

Unless perhaps where such proceedings should be registered.

It may, however, be different where the internal proceedings are required by law to be registered. Notice of them might then be imputed. Thus, where the directors of a company incorporated under *The Companies Statute* 1864, were forbidden to borrow beyond a certain amount, unless their powers were enlarged by a special resolution passed at a general meeting, it was held that a bank which advanced money to them under a letter of credit in excess of their power to borrow, was not entitled to recover the amount; and that the bank was not justified in assuming that such a resolution had been passed, inasmuch as, in that event, a copy of it ought in regular course to have been forwarded to the Registrar-General and recorded by him, as directed by the Act:

(*f*) *Mahoney* v. *East Holyhead Co.*, L.R. 7, H.L., 869; cf., *McIvor Gold Mine Co.* v. *Hughes*, 4 W.W. & A'B., L., 111.

(*g*) *Royal British Bank* v. *Turquand*, 6 E. & B., 327; *Horton* v. *Bank of New Zealand*, 7 N.Z.L.R., 582.

the fact that it was not to be found amongst his records was apparently regarded as notice to the bank that the borrowing powers of the directors had not been enlarged (*h*). In a like case, therefore, before money is advanced as a loan to the company, search should be made at the office of the Registrar-General, to ascertain whether such a resolution has been registered.

Ratification of a loan in excess of directors' powers.

An advance made, or overdraft allowed, to a company in excess of the amount which the directors are authorised to borrow, may be ratified by the company, if it be not *ultra vires* of the company to borrow (*i*); and such a ratification may be inferred from the fact that the shareholders have not objected to the advances or overdraft at general meetings (*k*). But a loan that is *ultra vires* of the company could not be ratified, even by the unanimous consent of the whole body of shareholders; and an action in respect of it against the company could not be successful (*l*).

Advances on cheques informally drawn may be ratified.

Cheques informally drawn may be ratified. Thus it seems that if a payment was made on a cheque informally signed by one director instead of two, it might be subsequently ratified, if the payment was duly passed as correct; and the informality in the mode of payment would not then vitiate it. Provisions as to the mode of signing cheques are in some cases at all

(*h*) *Irvine* v. *Union Bank*, 2 Ap. Cas., 366, 379.

(*i*) *Irvine* v. *Union Bank*, 2 Ap. Cas., 366; *The Union Bank* v. *South Canterbury Building Co.*, 13 N.Z.L.R., 489.

(*k*) *City Bank* v. *Australian Paper Co.*, 10 Sup. Ct. R., L., 235.

(*l*) *Ashbury Co.* v. *Riche, &c.*, L.R., 7 H.L., 653; *Ashbury* v. *Watson*, 30 C.D., 376.

events directory and not imperative (*m*). The difference between an imperative and a directory enactment is this—that anything done contrary to an imperative enactment is void, while what is done contrary to a directory enactment is irregular only, and not void—it should not be done, but, when done, it is valid.

But where a bank knew that a manager had been authorised to draw on it at a meeting of the board, at which less than a quorum of directors attended, it was held that the bank could not recover advances made on the manager's drafts, though they had been subsequently ratified by a quorum, but without consideration, as the company was not bound either by the loan as originally contracted nor as subsequently ratified without consideration (*n*).

Directors may be personally liable for the advances they get for the company.

Directors who authorise a bank to cash the cheques of a company, may render themselves personally liable on an implied warranty, that they have the powers which by their conduct they represent themselves to have (*o*). Where a company had exhausted its borrowing powers, and the directors obtained a loan, they were held personally liable to the lender on an implied warranty that they had not exhausted their borrowing powers (*p*). Again, two directors of a

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(*m*) *Bank of New South Wales* v. *Moyston*, 4 W.W. & A'B., L., 234; 1 A.J.R., 131; *Re Norwich Yarn Co.*, 25 L.J., Ch., 601, 608; *Ex p. Bignold*, 22 Beav., 142; cf., *Re General Provident Ass. Co., Ex p. National Bank*, L.R., 14 Eq., 507. The name of a limited company must be on its cheques. *Comp. Stat.* 1890, s. 41.

(*n*) *Colonial Bank* v. *Loch Fyne &c. Co.*, 3 W.W. & A'B., L., 168.

(*o*) *Richardson* v. *Williamson*, L.R. 6 Q.B., 277; cf., *Firbank's Exors.* v. *Humphreys*, 18 Q.B.D., 54.

(*p*) *English S. and A. C. Bank* v. *Gunn*, 10 S.C.R.L., 244; cf.

mining company, who did not form a quorum, and could not bind the company, wrote to the company's bank a letter, in which they stated that a particular person had been legally appointed manager, and was authorised to draw cheques. When this letter was transmitted the company's account was overdrawn, and the manager had not been legally appointed. The directors were held liable to the bank on an implied warranty, that the manager had authority to draw and was properly appointed by a sufficient number of directors (*q*).

If the bank had full notice of the extent of a director's authority, there could, it is apprehended, be no misrepresentation or warranty of that authority.

Implied warranty does not extend to representations of law.

Nor does the doctrine on which directors are held liable on an implied warranty extend to an incorrect statement of a matter of law. It is limited to misrepresentations of fact (*r*).

Mere notification of how cheques are to be drawn is not a warranty.

But a notice from directors merely informing the bank of the mode in which cheques are to be drawn and signed does not amount to a guarantee on their part of the company's account at the bank. Cheques so drawn are cashed on the credit of the company (*s*).

The preceding meagre observations are all that can be offered in the small space at the author's disposal.

McCollin v. *Gilpin*, 5 Q.B.D., 390; *Weeks* v. *Probert*, L.R. 8 C.P., 427.

(*q*) *Cherry* v. *Colonial Bank*, 4 W.W. & A'B. (L.), 177; L.R., 3 P.C., 24; *Lakeman* v. *Mountstephen*, L.R. 7, H.L., at p. 25.

(*r*) *Per* Mellish, J., in *Beattie* v. *Lord Ebury*, L.R. 7, Ch., 777; 41 L.J., Ch., 804.

(*s*) *Beattie* v. *Lord Ebury*, L.R. 7 H.L., 102; *City Bank* v. *Allen*, 1 N.S.W.R., 179.

The subject is difficult and highly technical, and it will not be safe for bankers, where any puzzling questions arise, to attempt to decide them for themselves, and they are strongly recommended to consult their professional advisers upon such matters, and to obtain their assistance and advice (*t*).

§ 9. CORPORATION ACCOUNTS.

Corporations could not at common law bind themselves except by contracts under their seals. But municipal corporations and others are frequently authorised by statutes to contract with the same formalities as private individuals, and also to keep accounts and overdraw at their banks. Thus, by the *Local Government Act* 1890, councils of municipalities may obtain temporary accommodation from banks by overdrafts of their current accounts.

Blending several accounts.

If a corporation, for its own convenience, keeps separate accounts for different heads of expenditure, the bank can treat them as one blended account. Thus, where a corporation undertook, in addition to its ordinary municipal duties, the management of public baths and washhouses, and also performed the functions of a board of health, and then opened separate accounts at its bank, viz., "The Corporation Account," "The Baths and Washhouses Revenue Account," and "The Local Board of Health Account," it was held that the three accounts were to be treated as one; and that as the bank was indebted to the corporation for a balance to their credit in the first account, while the two others

(*t*) For a full discussion of the subjects glanced at, the reader is referred to the works of Lindley, L.J., and Chadwick-Healey on the Law of Companies.

were overdrawn, the amount of the overdrafts might be set off against the amount of the balance in the first account (*u*).

Borrowing powers.

Most of the remarks which have already been made regarding the necessity of ascertaining that joint-stock companies and their directors do not exceed their borrowing powers are, it is apprehended, applicable to dealings with corporations and their governing bodies. Municipal corporations in Victoria are created by Act of Parliament for particular purposes and with special powers. Like other corporations so created they are limited as to all their powers by the purposes of their corporation as defined by the Act. But no banker advancing money to such a corporation would be bound to ascertain that all the internal formalities had been complied with, *e.g.* that proper notices of a meeting had been given, or that the necessary resolutions had been duly passed, though he would be bound to know the extent of the powers conferred by the Act (*v*). He would also be bound to see that all formalities essential to the constitution of the contract itself were complied with, *e.g.* that the seal was attached and attested by the proper persons in those particular cases where the contract must be under seal (*w*).

There appears to be one important distinction between

(*u*) *Pedder* v. *Preston*, 12 C.B., N.S., 535 ; cf., *Horton* v. *Bank of New Zealand*, 7 N.Z.L.R., 582.

(*v*) *Shire of Gisborne* v. *Murphy*, 7 V.L.R. (L.), 63.

(*w*) *Ibid*, *per* Stephen, J., p. 70 ; *Barker* v. *Municipal Council of Clunes*, 2 W. & W. (L.), 315 ; *Newey* v. *Rutherford*, 3 V.L.R. (L.), 340 ; *London* v. *Shire of Wodonga*, 6 A.L.T., 271. As to loans to municipalities in New South Wales, see *Re Municipal District of Lambton*, 17 N.S.W., L.R., 187 ; *Municipal Council of Sydney* v. *McBeath*, 2 N.S.W. L.R., 142 ; *Same* v. *Evers*, *ibid*, 151.

trading companies and municipal or other corporations. A trading company will in general be assumed to possess no powers except those which are expressly or impliedly conferred upon it by its constitution, while a municipal or other corporation will be assumed to possess all corporate powers except those which are denied to it by its constitution (*x*). But if on the true construction of a statute creating a corporation, it appears to be the intention of the Legislature, express or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore void (*y*).

Subrogation.

The doctrine of "subrogation," explained in the preceding section relating to companies, applies in the case of statutory corporations (*z*).

Liability of councillors.

In Victoria a municipal council may obtain an overdraft from its bankers, but if it fails to repay it within the financial year, the loan becomes illegal, and the bank cannot recover it from the municipality. But the councillors become personally liable to repay the bank. They are liable to penalties if they pay off the overdraft out of the municipal funds. No such overdraft is allowed to exceed one-half of the income of the

(*x*) *Lindley on Companies*, 5th ed., 164; *Re The Metropolitan &c. Bldg. Soc.*, 7 V.L.R. (Eq.), 86.

(*y*) *Per* Blackburn, J., *Ashbury Ry. Co.* v. *Riche*, L.R. 9 (Ex.), 262; L.R. 7 H.L., 673; and see *Shire of Gisborne* v. *Murphy*, 7 V.L.R. (L.), at p. 71, *per* Higinbotham, J.; *Re Hokitika Tramway Co.* v. *County of Westland*, N.Z.L.R. 2 C.A., 464.

(*z*) *Baroness Wenlock* v. *River Dee Co.*, 10 A.C., 354; *ante* p. 53.

preceding year (*a*). If any councillor consents to pay any part of such an overdraft out of any municipal moneys after the expiration of the finanicial year, he may be compelled, at the suit of any ratepayer, to refund to the municipality the amount so paid (*b*).

These provisions are practically inoperative. Every year an Act is passed to indemnify councillors for borrowing money on overdraft contrary to law, and to authorise them to liquidate such overdrafts out of the funds of the succeeding year.

§ 10. GOVERNMENT ACCOUNTS.

Some caution and vigilance are required in dealing with Government accounts, and banks should be careful not to allow them to be overdrawn by the public officials in whose names they are kept, unless such officials have a clear authority to overdraw. For example, if an account is opened by a public officer for the purpose of lodging the daily collections of his department, which, at the end of the week, or other fixed time, are to be transferred by his cheque to the Treasury, the bank should not allow the account to be overdrawn. If it does, it cannot recover the amount of the overdraft from the Government. In one case an officer of the Government opened such an account for his department, and the cashier who was sent to lodge the daily collections at the bank continuously kept back portions of the money. He concealed his frauds from the head of his department by means of forged

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(*a*) *Local Government Act* 1890, ss. 347, 350, 540; and see *Newman* v. *Mayor of Maryborough*, 4 W.W. & A'B. (L.), 154.

(*b*) *Fuller* v. *Gannon*, 12 V.L.R., 529.

receipts in the name of a fictitious bank clerk. The weekly cheques of the officer for the whole amount which ought to have been lodged by the cashier were duly honoured, and the moneys were paid to the Treasury. The cheques resulted in a large overdraft of which the head of the department was entirely ignorant, and of which no notice was ever given to him by the bank. The bank brought an action against the Government to recover the amount of the overdraft. It was held that the Government was not liable. The Government only received the amount which had been actually collected, and the overdraft was held to be not merely without authority, but also outside the scope and object of such an account (*c*).

It has been held in Victoria that money lodged in a bank by the Master in Equity, in his official capacity, does not constitute a debt due by the bank to the Crown (*d*).

(*c*) *London and Chartered Bank* v. *M'Milllan*, 13 N.S.W. L.R., 88, affirmed on appeal (1892), A.C., 292; and see *Cooper* v. *Commercial Banking Co.*, 20 N.S.W. L.R., at p. 81.

(*d*) *Reg.* v. *Bank of Victoria*, 21 V.L.R., 32.

CHAPTER IV.

DEPOSIT ACCOUNTS.

SUMS of money lodged in a bank by a customer are called deposits. In point of law they are loans by the customer to the bank. Such deposits are of two kinds. There are the ordinary deposits which are made by customers and lodged to their credit on their current accounts, and which are operated on by means of cheques. With this branch of the subject we have already sufficiently dealt. But there is another class of deposits, namely, deposits or loans which are intended to remain in the bank for a time, but against which cheques are not meant to be drawn. Most London bankers allow interest on such deposits; and the Scotch banks have carried the practice of allowing interest on them to a great extent, the deposit system forming an important branch of their business. They pay interest on the deposit from the day it is lodged until the day it is drawn out, provided that it has been allowed to lie in the bank for a month, no interest being paid on a sum left for a shorter period. In this respect they have of late years been followed by some of the London banks.

Australian deposit accounts.

The following observations of a learned judge apply to similar deposits in Australian Banks :—" The system of lodging money on fixed deposit is very extensive in this country. Persons waiting for an investment for their money lodge it on deposit receipt rather than have it lying idle. . . . They lodge it knowing that the bank is under no legal liability to repay it until the expiration of the time fixed, and they regard it not as cash but as an investment. I do not know how the practice is in England. There appears to be some practice in England of lodging a sum on an interest account which the bank is bound to repay whenever demanded, but I do not know whether there is any practice of deposit receipts payable at a fixed future time as here" (*a*).

The system of taking deposits bearing a stated rate of interest for a fixed time does not prevail in England.

Deposit receipts of London banks.

In London the deposits held by the banks are mainly composed of large sums which are necessarily payable on demand. The practice of the London joint stock banks with reference to the allowance of interest on money left on deposit appears to be as follows:—Notice is given, or an application is made, by the customer stating that he desires to have interest on a particular sum. This sum is then withdrawn from the ordinary banking account, and an acknowledgment called a "deposit note" is given by the bank to the customer. In it are specified the terms on which interest will be paid. Most of the joint stock banks allow interest on deposits at the rate of 1 per cent. below the rate of discount at the Bank of England for the time being (*b*). The depositors are generally informed of the alterations in the rate of interest by advertisement or by letter, but it is

(*a*) *Per* Molesworth, J., in *Young* v. *Ormiston*, 11 V.L.R., at p. 287.

(*b*) *The Country Banker*, Letter XVIII.

usually stipulated that the depositors shall receive no interest unless the money is left undisturbed in the bank for not less than a certain specified time.

The manner in which these deposit accounts are dealt with may be understood from a published deposit note of the London and Westminster Bank, the material parts of which were as follows (c) :—

Received from J. D. five hundred and eighty pounds to the credit of his deposit account.

For the London and Westminster Bank,
A.T., *pro* Manager.

This deposit receipt is not transferable. The amount is repayable on demand, but will bear no interest unless it remains undisturbed for one month. The rate of interest is subject to alteration of which notice will be given by advertisement in the *Times* newspaper. When the money is withdrawn, or the interest paid, the depositor must sign the cheque on the back hereof, first affixing a penny stamp. If part only is withdrawn, a new draft will be given for the balance.

On the back of this deposit note was a form of cheque :—

To the London and Westminster Bank, Limited. Lambeth Branch.
188 .
Pay to self or bearer and interest.

The effect of requiring the depositor to draw a cheque for the amount of his deposit is to afford the banker the same protection when repaying the deposit that he enjoys when honouring the cheque of a customer upon his current account. It will be noticed that the deposit receipt is "not transferable." Yet the endorsed cheque, when signed by the depositor, renders it payable to bearer. By post-dating the cheque the depositor, apparently, could transfer the deposit receipt at any time during its currency, and the transferee might dis-

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(c) *Re Dillon*, 44 C.D., 76.

count it, or leave it for collection at another bank. All this, however, is inconsistent with the statement that the receipt is "not transferable." Such a cheque also operates as a receipt from the customer for both principal and interest.

If the deposit receipt was lost, the bank might require an explanation why it was not forthcoming before paying the amount, but it is conceived that the bank could not refuse to pay it when due (*d*).

Deposit receipts of English Country banks.

The present practice of the English country banks with respect to deposits is stated to be as follows:—"You (*i.e.*, the country banker) separate your deposits into two classes—into those which you have to pay at any moment on demand, and those which are not repayable without previous notice. The former you pass to the credit of parties on current account; the latter you place to their credit on deposit receipt. These receipts are subject to notice of withdrawal, ranging from a few days to a calendar month, according to the usage of different banks and localities" (*e*).

The form of a deposit note or accountable receipt is frequently as follows:—

"Received of A. B. one hundred and fifty pounds to account for on demand."

It is signed by the manager or other officer of the bank. These notes are given to customers when the banks receive money which is not to be placed on current account, but is to be kept separate, and to

(*d*) See *per* Cotton, L.J., in *Re Dillon*, 44 Ch. D., at p. 81, and *per* Lopes, L.J., at p. 84; cf., *Dunlop* v. *London Chartered Bank*, 4 A.J.R., 154.

(*e*) Rea's *Country Banker*, Letter XVII.

carry interest. Such a note is not a "security for money," nor is it a promissory note. It is simply an acknowledgment of debt (*f*).

In many banks parties may lodge money upon a deposit account who have no current account, and those who have current accounts may transfer any portion of their balance to a deposit account. Usually no interest is allowed on any deposit of less than £10. If deposits are withdrawn within one month no interest is allowed. In some banks no interest is allowed unless the money remains undisturbed for six months. It is frequently made a term of the deposit that it shall only be repayable after a certain notice of withdrawal has been given. The following is a form of receipt used for such deposits; it is taken from a recent case (*g*):—

East Grinstead Bank. Deposit Receipt. Dec. 24, 1890.
Received of Mr. A.T., the sum of £500.
For A.H. and E.H. (the private bankers),
A.B. (Signature of Cashier).

This deposit receipt bears interest at $3\frac{1}{2}$ per cent. per annum if left undisturbed for six months. It is repayable only after twenty-one days notice.

Australian practice.

The Australian practice with regard to deposits against which cheques are not intended to be drawn is different. Such deposits may be divided into two classes:—First, there are sums which are returnable to the depositor on demand. These are sometimes spoken of as deposits at call. No interest is paid on

Deposits at call.

(*f*) *Hopkins* v. *Abbott*, L.R., 19 Eq., 222; for other forms, see *In re Head*, (1893) 3 Ch., 426; *In re Head* No. 2, (1894) 2 Ch., 236; *In re Griffin*, (1899) 1 Ch., 408; *Way* v. *Bassett*, 5 Hare, 56; *Stapleton* v. *Stapleton*, 14 Sim., 187; *Gough* v. *Davies*, 4 Price, 200; 18 R.R., 697.

(*g*) *Re Head*, (1894) 2 Ch., 236.

them. The whole or part of such a deposit may be withdrawn at the pleasure of the customer. Receipts are issued for them which resemble the accountable receipts mentioned above, except that they do not bear interest. When the customer makes the deposit he signs a paid-in voucher, which is kept by the bank, and which generally contains a statement that the money is lodged on the terms mentioned in the receipt. This receipt and the voucher will be read together in order to ascertain the terms of the deposit (*h*). These deposits are usually made by persons who have no current account at the bank, but who wish to leave their money in a place of safety for a short time.

Fixed deposits.

Secondly, there are deposits which are left in the bank for fixed periods, and on which interest is allowed. These cannot be withdrawn at the will of the depositor, and the bank may, if it choose, retain them in its possession during the whole period for which they were originally lodged. Interest is granted on such sums if lodged for three, six, or twelve months, or for two or three years, at rates varying with the time for which the money is deposited, those lodged for long periods bearing a higher interest than those lodged for short terms. All such sums cease to bear interest on the expiration of the period for which they are deposited.

Fixed deposit receipts.

When a sum is lodged on fixed deposit, a deposit receipt is issued to the customer, and he signs a paid-in voucher, which is kept by the bank.

The following appears to be the practice, as deduced from a case recently decided in New South Wales, in

(*h*) For a form of such receipt and voucher, see *Re Federal Bank of Australia*, 23 S.A.L.R., 43.

which the relations of the bank to depositors who have placed money on fixed deposit were considered (*h*).

When the depositors paid the money into the bank they signed a pay-in slip or voucher, which was as follows :—

Sydney, 6th June, 1884.

Paid into the Bank of New South Wales the sum of £ as a fixed deposit receipt for months to bear interest at the rate of 6% per annum in terms and on the conditions specified in the deposit receipt issued to me this day.

J.H. and A.T.,
Executors of A.H.

The bank then issued to them a deposit receipt which was in the following form :—

Due 6th June, 1885.
Bank of New South Wales,
Sydney, June 6, 1884.

£

Received from J.H. and A.T., executors of A.H., deceased, the sum of £ as a fixed deposit for months to bear interest at the rate of 6% per annum for that period, from the date hereof.

For and on account of the Bank of New South Wales,
E.T., Accountant. A.B., Manager.

On the back of the deposit receipt was endorsed :—

J.H.
A.T. } Executors of A.H.

Not transferable.

This receipt should be returned to the bank before the deposit can be withdrawn or renewed. Interest will cease on expiry of the term for which the money is deposited (*i*).

(*h*) *Dixon* v. *Bank of N. S. Wales*, 17 N.S.W. L.R. (Eq.), 355.

(*i*) For other forms of paid-in voucher and fixed deposit receipt, see *The Colonial Bank* v. *M'Conkey*, 1 A.J.R., 154 ; and *R.* v. *Bank of Victoria*, 21 V.L.R., at p. 60 ; *Re Federal Bank of Australia*, 23 S.A.L.R., 43. For a form of Canadian deposit receipt, see *Richer* v. *Voyer*, L.R., 5 P.C., 461, 462.

The ordinary relation between banker and customer exists whether the deposits be on current account or on fixed deposit, with this difference, that in the case of a current account the money can be drawn out immediately by cheques, in such amounts as the depositor may choose; but, in the case of a fixed deposit, the bank cannot be called upon to pay it during the currency of the receipt. The repayment is deferred until the deposit matures, and it is then repayable to the order of the depositor upon production of the deposit receipt.

Various forms in use.

The forms used by the different banks are not all alike. Occasionally some of the terms of deposit are embodied in the paid-in voucher. It is then necessary to read the paid-in voucher and the receipt together in order to ascertain the terms of the deposit. Thus, where a voucher provided that the money was not to be withdrawn, except on giving up the receipt, but the receipt stipulated that the money was to be accounted for on demand, it was held that the two documents together constituted the contract between the customer and the bank, that the production of the receipt was not a condition precedent to the right to receive the money, and that the customer who had lost the receipt was nevertheless entitled to get back the amount of his deposit from the bank (*j*).

Condition as to evidence.

It has been held that a condition contained in the paid-in voucher to the effect that possession of a receipt by the bank shall, as against the depositor, be conclusive evidence, that he, or some one on his behalf, has received the amount therein expressed, will not protect

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(*j*) *Dunlop* v. *London Chartered Bank*, 4 A.J.R., 154; but see *Cooper* v. *Dunlop*, 4 Ex. D., 88.

the bank against gross negligence in paying, and thereby obtaining possession of the receipt. Thus, where a depositor lost his receipt and gave notice to the bank, and was then told that the money had been already paid to a person who presented the receipt, and said he was the depositor, it was held that the bank was not exonerated under the above-mentioned condition from its liability for the amount of the deposit by having possession of the receipt, inasmuch as the person who drew the money had signed a receipt in which he misspelt the real depositor's name, and that the bank was guilty of gross negligence in paying the amount to him under the circumstances (*k*).

Deposit receipts are not negotiable.

There does not seem to be any substantial difference between the legal qualities of the receipts for deposits at call and fixed deposit receipts. Both are simple acknowledgements of the bank that it holds the moneys for the use of the depositor upon the terms therein mentioned or referred to. They are stated on their face not to be transferable, and they are not like bills of exchange or promissory notes, capable of being transferred by endorsement or delivery so as to give an independent legal title to the holder. The depositor, by writing his name on a deposit receipt and delivering it to another person, confers no legal right on the person to whom he gives it similar to that acquired by an endorsee or holder for value of a bill of exchange. The holder, even if he obtained it *bonâ fide* and for value, could not sue the bank for refusing to cash it, for the bank has made no contract with him to pay it; nor could he maintain an action against the depositor for

(*k*) *Colonial Bank* v. *M'Conkey*, 1 A.J.R., 91; and see *Pearce* v. *Creswick*, 2 Hare, 286; 12 L.J., Ch., 251.

its dishonour by the bank (*l*). If the bank wishes to be secure, it ought not, as a rule, to pay the amount of a deposit receipt to anyone but the depositor or his authorised agent or nominee, or (in case of his death) his personal representative. It could not safely pay the amount to any one who produces the receipt endorsed, or purporting to be endorsed, by the depositor. If, for instance, it pays the deposit to a person who has stolen the receipt after endorsement by the depositor, or who has forged the endorsement, it will remain liable for the amount (*m*).

To whom receipts will be paid.

Nevertheless, banks are in the habit of paying the amounts of such receipts to other banks or to respectable persons whom they know, when the receipts are endorsed by the depositors. The endorsement of a receipt and its delivery probably constitute the holder, or endorsee, an agent of the depositor to receive the amount, and may operate as an order or request from the depositor to the bank to pay the endorsee the amount represented by the receipt, though this is not clear (*n*). That agency would be determined by the depositor's death.

Money on deposit is assignable.

But though deposit receipts are not negotiable like cheques or bills of exchange, the sums or debts which they represent are, it is conceived, assignable, at least in all those colonies which have adopted the provisions

(*l*) *Moore* v. *Ulster Bank*, I.R. 11 C.L., 512; *Re Federal Bank of Australia*, 23 S.A.L.R., 43.

(*m*) *Pearce* v. *Creswick*, 2 Hare, 286; 12 L.J., Ch., 251; and see *Colonial Bank* v. *M'Conkey*, 1 A.J.R., 91; *Dunlop* v. *London Chartered Bank*, 4 A.J.R., 154.

(*n*) *Moore* v. *Ulster Bank*, I.R., 11 C.L., 512; cf., *R.* v. *Atkinson*, Car. & M., 325; *R.* v. *Kay*, L.R. 1 C.C.R., 257; see, further, *Richer* v. *Voyer*, L.R. 5 P.C., 461, 475, 476.

of the English *Judicature Act* 1873, notwithstanding the statements which they contain that they are "not transferable." That Act made all debts assignable, and it is apprehended that bankers cannot in effect repeal it as to deposit receipts by printing the words "not transferable" upon them. The 25th section of the Act provides that an absolute assignment by writing under the hand of the assignor of any debt of which express notice in writing shall have been given to the debtor, shall be sufficient to transfer the legal right to the debt from the date of the notice. It has been held that under this section the present or future balance to the credit of a customer of any bank may be assigned, and the assignee may sue the bank for the amount of the balance. Notice of the assignment, though given to the bank after the death of the customer, will be effectual (*o*). Such assignment would, however, be subject to any lien or other right of the bank, which might exist when the notice was received. The assignee cannot obtain a better title than his assignor.

It has recently been held that the endorsement and delivery of a bank deposit receipt bearing the words "not transferable" with the intention to make a gift of it, operated as a valid equitable assignment of the amount on deposit at the bank (*p*).

Overdrafts secured by deposit receipts.

If, from any unforeseen emergency, a depositor greatly needs the repayment of the deposit before it is due, the

(*o*) *Walker* v. *The Bradford Bank*, 12 Q.B.B., 511 ; *In re Patrick*, (1891) 1 Ch., 82; and see *Re Griffin*, (1899) 1 Ch., 408; *Woodham* v. *Australian &c. Ass. Co.*, 3 Giff., 238 ; *Parsons* v. *Middleton*, 6 Hare, 261.

(*p*) *Re Griffin*, (1899) 1 Ch., 408.

bank, if requested and if satisfied of the *bona fides* of the application, will usually discount the deposit receipt for him at the ordinary rate of discount for bills of exchange, or the depositor may, in such a case, obtain a temporary advance upon the security of his deposit. For a bank will sometimes grant an overdraft to a customer if he holds a deposit receipt. When this is done the customer is often charged only 1 per cent. more for interest on the overdraft than he receives upon the deposit.

Receipts in name of husband and wife.

Money is sometimes lodged in a bank on deposit receipt in the joint names of a husband and wife. Where money was thus lodged, and there was evidence that the husband so deposited it with the object of enabling the survivor to take it, it was held that the joint deposits were intended for the wife who survived, and that she was entitled to them (*q*).

Deposit receipts as investments for trust funds.

The Court will authorise the investment of trust money on first mortgage of real estate, or in Government debentures or securities in Victoria, but will not order it to be placed on fixed deposit at a bank (*r*). If trustees merely place trust funds on fixed deposit in a bank for a reasonable time while waiting investment, they will not be liable for loss occasioned thereby. But if the means of suitable investment are ample, they will be responsible for any loss that may arise though their neglect to invest in proper securities (*s*).

The trustee companies formed under the Victorian

(*q*) *Talbot* v. *Cody*, I.R. 10, Eq., 138 ; cf., *Re Young*, 28 C.D., 705.

(*r*) *Re Cameron*, 11 V.L.R., 662.

(*s*) *Hutchings* v. *Snowden*, 23 V.L.R., 118.

Companies Act of 1890, are not authorised by that Act to invest trust funds on fixed deposit in a bank (*t*).

A power to invest trust money in "the debentures of any company" will not authorise an investment in deposit receipts, a deposit receipt not being a debenture (*u*).

Deposits by the Master in Equity.

Deposits made by the Master in Equity are not Crown debts. Where, in an administration suit, the Master in Equity, in his official capacity, placed some of the money, which was the subject of litigation, on fixed deposit in a bank, it was held by the majority of the Court that the deposit did not constitute a debt due from the bank to the Crown (*v*).

Donatio mortis causâ.

A deposit receipt may be the subject of what is called a *donatio mortis causâ*. A *donatio mortis causâ* is a gift of personal property made by the donor in immediate expectation of death, but not intended to take effect unless the donor dies and the donee survives him. Such a gift passes without probate or administration. It is not required by law to be made in the presence of witnesses. It is conditional on the donor's death, and is revocable if he recovers. It has frequently been held that a banker's deposit receipt may be given as a *donatio mortis causâ* (*w*).

(*t*) *Swan* v. *Perpetual Executors &c. Co.*, 23 V.L.R., 293; 19 A.L.T., 15; 3 A.L.R., 143; (1898) A.C., 763; see also *Matthews* v. *Trustees &c. Co.*, 24 V.L.R., 258; 20 A.L.T., 129; 4 A.L.R., 298.

(*u*) *Allen* v. *Mills*, 16 A.L.T., 84.

(*v*) *R.* v. *Bank of Victoria*, 21 V.L.R., 32.

(*w*) See, for instance, *Re Tully*, 4 W.W. & A'B. (I.E. & M.), 15; *Curran* v. *Cavenagh*, 7 V.L.R. (L.), 21; *Clarke* v. *Andrews*, 9 V.L.R. (E.), 18; *Tierney* v. *Halfpenny*, *ib.*, 152; *Re Dillon*, 44 Ch. D., 77; *Re Gannon*, 9 Q.L.J., 52.

Moneys that are lodged with the bank, either on fixed deposit, or at call, are entered in books which are kept for that purpose. A separate deposit account is not opened for each customer, but the amounts are recorded chronologically in the order in which they are received. When repaid to the depositors, such repayments are, of course, entered. If fixed deposits are not withdrawn, or renewed, at the expiration of the time for which they were lodged, they are entered in an account which is kept of overdue fixed deposits. The bank is obliged by law to keep separate accounts of the deposits which bear interest, and of those which do not; and therefore, when fixed deposits cease to bear interest, they are transferred from the account which is kept of interest-bearing deposits to another, consisting of overdue fixed deposits.

Deposit receipt books.

CHAPTER V.

On Cheques.

Origin of cheques.

Banking, it is said, did not exist in England till near the middle of the seventeenth century, about which time it was introduced by the London goldsmiths, who were the first London bankers. Their new trade or business soon gave rise to a novel form of mercantile paper. When a customer had paid in money to his account with a goldsmith, it was customary for him, when he wished to make a payment, to write a note to his banker, simply desiring him to pay the amount. The following specimen is taken from Mr. McLeod's valuable work on banking:—

16th Nov., 1689.

Mr. Jackson,—Pray pay to the bearer hereoff, Mr. Daniel Croker, five pounds, and place it to the accompt of

Your loving friend,

John Wynyarde.

To Mr. Roger Jackson,
At Sir Francis Child's, goldsmith.
Just within Temple Barr.

These notes were then, and, for many years afterwards, called "Cash Notes," and they speedily became negotiable. They are said to be the origin of the modern cheque (*a*), an instrument which is now a bill

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(*a*) *McLeod on Banking*, Vol. I., p. 208. Bills of exchange were known and used in England about the fourteenth century. *Story on Bills of Exchange*, 4th ed. (1860), Ch. I.

of exchange, drawn on a banker, payable on demand (*b*). It is therefore subject, in general, to the rules which regulate the rights and liabilities of parties to bills of exchange. But certain usages peculiar to cheques have gradually been adopted. Many of these have been embodied in legal decisions, and have now become a part of the commercial law (*c*). It is intended to draw attention to the most important of them, and also to point out certain other peculiarities, which are the result of special legislation.

Definition of "cheque."

Speaking generally, a cheque may be described as an unconditional written and signed order on a banker, directing the payment of the sum specified therein to the person named in it, bearer, or order (*d*).

Date.

It is not necessary that any particular form of words should be used in order to make the cheque a legal one (*e*), and the mere omission of the date from the order or cheque does not invalidate it (*f*), although it is in all cases advisable, for reasons to be explained

(*b*) *Bills of Exchange Act* 1882, s. 73.

(*c*) The rules of the common law, including the law merchant, except in so far as they are inconsistent with the express provisions of the *Bills of Exchange Act* 1882, still apply to cheques; *Bills of Exchange Act* 1882, s. 97 (2).

(*d*) *Bills of Exchange Act* 1882, ss. 3 (1), 73. This section, so far as it defines a cheque to be a bill of exchange, is declaratory. See *McLean* v. *Clydesdale Bank*, (1883) 9 App. Cas., 95, *per* Lord Blackburn; *Hopkinson* v. *Forster*, L.R. 19 Eq., 74.

(*e*) *Brooks* v. *Elkins*, 2 M. & W., 74; *Eddison* v. *Collingridge*, 9 C.B., 570.

(*f*) *Bills of Exchange Act* 1882, s. 3 (4), (*a*). See also *R.* v. *Gurnett*, 5 W.W. & A'B. (L.), 28. *Bills of Exchange Act* 1882, s. 12.

subsequently, that every cheque should be dated. It need not be the date on which the cheque is drawn, for it may be ante-dated or post-dated, or indeed may even bear date on a Sunday (*g*).

But when a cheque has been dated any unauthorised alteration of such date renders it useless except as against the person making the alteration and subsequent indorsers (*h*).

Unconditional order.

As mentioned above, a cheque in order to be valid must be unconditional; consequently, where a cheque is made payable on a contingency it is absolutely void (*i*). It must be an order for the payment of money only, and if it orders any act to be done in addition to the payment of money it is invalid (*j*). Thus, an order to pay money in the form of an ordinary cheque, with a proviso that a receipt-form attached should be filled up, is invalid (*k*); likewise, an order to pay money with a stipulation that it is to be paid out of a particular fund (*l*). On the other hand, the drawer of a cheque may specify the particular fund out of which

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(*g*) *Bills of Exchange Act* 1882, s. 13 (2). By s. 13 (1) of the same Act, when a cheque is dated, such date is, unless the contrary be proved, deemed to be the true date of the drawing of it.

(*h*) *Bills of Exchange Act* 1882, s. 64; see *Vance* v. *Lowther*, 1 Ex. D., 176.

(*i*) *Palmer* v. *Pratt*, 9 Moore, 358; 27 R.R., 583; *Carlos* v. *Fancourt*, 5 Term Rep., 482; 2 R.R., 647; *Ashcroft* v. *Denniston*, 6 N.Z.L.R., 432; *Baker* v. *Efford*, 4 A.J.R., 161.

(*j*) *Bills of Exchange Act* 1882, s. 3 (2). See also *Davies* v. *Wilkinson*, 10 Adol. & Ellis, 98; *Bolton* v. *Dugdale*, 4 B. & Ad., 619; 38 R.R., 326.

(*k*) *Bavins* v. *London and South-Western Bank*, 15 T.L.R., 226; approved on appeal, 16 T.L.R., 61.

(*l*) *Bills of Exchange Act* 1882, s. 3 (3).

the banker is to reimburse himself, or the particular account he wishes to be debited with the amount mentioned in the cheque (*m*).

Amount how determined.

It is not always an easy matter to determine the amount the drawer of a cheque intended should be paid on it, as for instance, where there is a variance between the amount as expressed in words and that set out in figures. In such a case the rule is that the amount as stated in words is considered to be that for which the cheque was drawn (*n*). Consequently, if the amount as expressed in words is the larger one, the banker must pay it. Should he refuse to do so, and, at the time of such refusal, the customer had a credit balance sufficient to meet the larger amount, the bank would probably be liable for dishonouring the customer's cheque.

It has been held that it is not obligatory on a banker to honour a cheque with the amount filled in in figures in the corner of the document, but not in words in the body (*nn*).

Amount must be definite.

The amount for which a cheque is drawn must be a definite one, otherwise there is no duty on the banker to cash it. Thus, where the amount was set out thus :—" Pay —— £65 and also all other sums which may be due," the cheque was useless (*o*).

(*m*) *Bills of Exchange Act* 1882, s. 3 (3).

(*n*) *Bills of Exchange Act* 1882, s. 9 (2) ; see also *Saunderson* v. *Piper*, 5 Bing., N.C., 425, in which it was held that parol evidence was inadmissible to show that the sum intended was that expressed in figures, and not that expressed in words. See further as to great importance of stating amount, *Commercial Bank* v. *Hull*, 10 V.L.R. (L.), 110.

(*nn*) *R.* v. *Waters*, N.Z.L.R. 5 C.A., 29.

(*o*) *Smith* v. *Nightingale*, 2 Starke, 375 ; 20 R.R., 694 ; see also *Ayrey*

Amount for which a cheque may be drawn.

There is now no minimum limit to the amount for which a cheque may be drawn. This was not always so, for, previous to the year 1876, a cheque for less than 20s. was in Victoria absolutely void, and it was an offence to utter such a draft, subjecting the offender to a penalty not exceeding £20, nor less than £5 (*p*). But in that year an Act was passed (No. 522), which made it lawful for any person to draw upon a bank that "*bonâ fide* holds money for his use" a draft for any sum under 20s. It seems from this that it was illegal to utter such a cheque when a man had no balance, but only an overdraft at his bank, although the bank might be likely to pay it (*q*).

To whom payable.

A cheque may be made payable to either order or bearer. In the latter case any person to whom it is delivered can cash it, and the banker must pay it. So also where it is drawn in favour of self or bearer. When payable to order, the person to whom it is to be paid must be named or otherwise indicated therein with reasonable certainty (*r*).

Cheques may be drawn in favour of two or more persons jointly; of either of two persons; of one or some of several persons; or of the holder of an office for the time being (*s*). When the payee is a fictitious

v. *Fearnsides*, 4 M. & W., 168; *Mortgage Ins. Corporation* v. *Commissioners of Inland Revenue*, 21 Q.B.D., 352. As to what is "a sum certain" within the meaning of the *Bills of Exchange Act* 1882, see s. 9 thereof.

(*p*) Secs. 17 and 18 of the *Instruments and Securities Statute* 1864.

(*q*) *Byles*, 14th ed., p. 19.

(*r*) *Bills of Exchange Act* 1882, s. 7 (1).

(*s*) *Bills of Exchange Act* 1882, s. 7 (2). See also *Yates* v. *Nash*, 8 C.B. N.S., 581; *Holmes* v. *Jaques*, L.R. 1 Q.B., 376.

or non-existing person, the cheque may be treated as payable to bearer (*t*). But a cheque need not be drawn in favour of an individual, *e.g.* a cheque in this form—"Pay ship China or bearer"—is good, and the holder may sue upon it (*u*). If a cheque payable to bearer is indorsed, the indorsee or any subsequent holder may sue the indorser of it (*v*). When a cheque payable to order is indorsed in blank it becomes payable to bearer; when payable to "——— or order" it is payable to the order of the drawer (*w*).

Cheques should be signed by the drawer or drawers of them (*x*). The signature need not be in any particular place, nor of necessity in the handwriting of the drawer (*y*), for it is sufficient if the drawer's signature has been written thereon by some other person by or under his authority (*z*). Moreover, the name in the signature need not be that of the person signing, *e.g.*, where a cheque is signed by a person in a trade or assumed name, he is liable thereon in the same Signature.

(*t*) *Bills of Exchange Act* 1882, s. 7 (3). See in this connection, *Clutton* v. *Attenborough*, (1897) A.C., 90 ; *Bank of England* v. *Vagliano Bros.*, (1891) A.C., 107.

(*u*) *Grant* v. *Vaughan*, 3 Burr., 1527.

(*v*) *Keene* v. *Beard*, 8 C.B. (N.S.), 372. See also *Bills of Exchange Act* 1882, s. 55 (2), (*a*).

(*w*) *Chamberlain* v. *Young*, (1893) 2 Q.B., 206.

(*x*) *Stoesiger* v. *S. E. Ry. Co.*, 3 Ell. & Bl., 549.

(*y*) *Bills of Exchange Act* 1882, s. 91 (1). The cheque of a corporation need not be sealed ; but it is quite sufficient if it is. Same Act, s. 91 (2) ; see also s. 22.

(*z*) *Bills of Exchange Act* 1882, s. 91 (1).

way as if he had signed his own name (*a*). 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 (*b*). When the drawer is unable to write, he should put his mark in the usual place for the signature (*c*). No person is liable as the drawer or indorser of a cheque who has not signed it as such (*d*). But when a person signing a cheque as drawer or indorser adds words to his own signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not liable thereon personally. On the other hand, the mere addition to his signature of words describing him as an agent, or in a representative capacity, does not exempt him from personal liability (*e*). He should show on the face of it that it had been drawn or indorsed by him on behalf of another (*f*).

When determining whether a signature on a bill is that of the principal or of the agent who wrote it, courts will adopt that construction which is most favourable to the validity of the document (*g*). In the case

(*a*) *Bills of Exchange Act* 1882, s. 20 (1).

(*b*) *Bills of Exchange Act* 1882, s. 23 (2) ; see also *Forster* v. *Mackreth*, L.R., 2 Ex., 163.

(*c*) *Serrell* v. *Derbyshire Ry. Co.*, 9 C.B., 827.

(*d*) *Bills of Exchange Act* 1882, s. 23.

(*e*) *Bills of Exchange Act* 1882, s. 26 (1) ; cf., *E. S. & A. Chartered Bank* v. *Gunn*, 10 S.C.R., 244 ; *Hoskins* v. *Thomson*, 14 N.S.W. L.R., 323 ; *Harriman* v. *Purchas*, 9 V.L.R. (L.), 234 ; but see *Bank of New Zealand* v. *Bacon*, N.Z. L.R. 2 S.C., 33 ; *Dickens* v. *Ingram*, 18 V.L.R., 675 ; *White* v. *Bank of Victoria*, 8 V.L.R. (M.), 8.

(*f*) *Dutton* v. *Marsh*, 6 Q.B., 361 ; *Alexander* v. *Sizer*, L.R. 4 Ex., 105.

(*g*) *Bills of Exchange Act* 1882, s. 26 (2).

of signature by procuration that fact is equivalent to notice that the agent has a limited authority to sign, and the principal is bound by such signature only in cases in which the agent in signing was acting within the limits of his authority (*h*). But the principal may, apart from the question of forgery, ratify the act of his agent done in excess of his authority (*i*).

Body of cheque: By whom filled in.

As regards the body of the cheque it need not be filled in by the drawer. Consequently, where a blank piece of stamped paper with a signature to it is delivered by the person signing it in order that it may be converted into a cheque, it may be filled up for any amount which the stamp will cover (*j*). But in order to make such a cheque enforceable against any person who became a party to it prior to its completion it must be filled up within a reasonable time (which is a question of fact), and strictly in accordance with the authority given (*k*).

Moreover, a holder in due course may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given (*l*). But where the signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, it is wholly inoperative (*m*). Even the forger cannot be sued on it,

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(*h*) *Bills of Exchange Act* 1882, s. 25.

(*i*) *Bills of Exchange Act* 1882, s. 24. See also *Reid* v. *Rigby &c. Co.*, (1894) 2 Q.B., 40.

(*j*) *Bills of Exchange Act* 1882, s. 20 (1).

(*k*) *Bills of Exchange Act* 1882, s. 20 (2).

(*l*) *Bills of Exchange Act* 1882, s. 20.

(*m*) *Bills of Exchange Act* 1882, s. 24.

although he renders himself liable on the implied contract, that he had the authority which he represented by his conduct he had, viz., to sign the cheque as he did (*n*); and, if he has been guilty of fraud, on an action for fraudulent misrepresentation (*o*).

Position of banker.

A banker, it has been said, is bound to know his customer's handwriting (*p*). Therefore, if he pay a forged cheque, he cannot debit his customer with it (*q*). Indeed, if a cheque were fraudulently increased in amount in so skilful a manner that no one in the ordinary course of business would observe it, the bank, if it paid the larger sum, could only debit the customer with the amount for which the cheque was originally drawn, and would itself have to bear the loss occasioned by the forgery (*r*).

But if a cheque were so carelessly drawn as to be easily altered to a larger sum, so that the banker could not distinguish or detect the alteration, the loss would fall on the drawer, as it would have been caused by his negligence. Thus, where a space was carelessly left which the holder filled up so as to increase the amount of the cheque, it was held that as the loss, which would otherwise have fallen on the bank, had

(*n*) *Randell* v. *Trimen*, 18 C.B., 786; *Kelner* v. *Baxter*, L.R., 2 C.P., 174.

(*o*) *West London Commercial Bank* v. *Kitson*, 13 Q.B.D., 360.

(*p*) See *Coles* v. *Bank of England*, 10 A. & E., 437; *Swan* v. *North British Australasian Co.*, 2 H. & C., 181; *Baxendale* v. *Bennett*, L.R., 3 Q.B.D., 525.

(*q*) *Baxendale* v. *Bennett*, 3 Q.B.D., at p. 533; *Ogilvie* v. *West Australian &c. Corporation*, (1896) A.C., 257.

(*r*) *Hall* v. *Fuller*, 5 B. & C., 750; 29 R.R., 383.

been brought about by the negligence of the customer, he must sustain it (*s*).

Negligence.

A customer would be guilty of negligence if he cancelled a cheque by tearing it in halves, and then threw them away. If they were picked up and were so skilfully joined together as to deceive the bank on which they were drawn, or any person into whose hands the cheques might have come, then the drawer would be liable upon it. He would have been guilty of negligence which proximately conduced to the fraud (*t*).

In the case of cheques payable to order bankers have been relieved by statute from liability, where they pay such cheques in good faith and in the ordinary course of business, although the indorsements thereon have been forged or made without authority. The loss occasioned by such forged or unauthorised indorsements is now borne by the holders or the drawers of the cheques (*u*).

(*s*) *Young* v. *Grote*, 4 Bing., 253 ; 29 R.R., 552 ; *Swan* v. *North British Australasian Co.*, 2 H. & C., 175 ; *Bank of Australasia* v. *Erwin*, 1 W.W. & A'B. (L.), 70.

(*t*) *Ingham* v. *Primrose*, 7 C.B., N.S., 82 ; and see *per* Bramwell, L.J., in *Baxendale* v. *Bennett*, 3 Q.B.D., at p. 528 ; but see *per* Brett, L.J., at p. 534.

(*u*) See *Bills of Exchange Act* 1882, s. 60. At to the protection of collecting banker in the case of crossed cheque, see *ibid*, s. 82, and Chapter VI., *post*. See further as to fraudulent alterations where customers' negligence is the immediate cause of the loss, *Scholfield* v. *Earl of Londsborough*, (1896) A.C., 514 ; *Merchants of The Staple* v. *Bank of England*, 21 Q.B.D., 161 ; *Bank of England* v. *Vagliano Bros.*, (1891) A.C., 107.

Cheques, &c. as subjects of a *donatio mortis causâ.*

It may not be inappropriate to make a few remarks here on cheques as the subjects of a *donatio mortis causâ.* A *donatio mortis causâ* it has already been stated may be shortly defined as a gift which is made by a person in expectation of immediate death, and which is only to take effect in the event of his death actually occurring, and is revocable during his life if he recover. A cheque payable to bearer cannot be the subject of a *donatio mortis causâ* unless it is presented for payment before the donor dies (*v*).

It seems, however, that a cheque payable to order, if indorsed over for value during the life of the donor, may be a valid *donatio mortis causâ* though not presented till after his death (*w*). But the gift of a bank pass-book is invalid as a *donatio mortis causâ* (*x*). A deposit receipt may be the subject of a *donatio mortis causâ* (*y*). So may a bank-note, a bill payable to bearer, or a bill payable to order (*z*).

Bets as consideration for a cheque.

Betting *per se* is not illegal. But by the 205th section of the *Instruments Act* 1890 so much of the 16 Car. II., c. 7, and 9 Anne, c. 14, sec. 1, as enacts that bills or notes shall be *void* by reason of gaming or wagering, is repealed, and it is provided that such securities shall be deemed to have been given for an

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(*v*) *Bromley* v. *Brunton*, L.R. 6 Eq., 275; 37 L.J., Ch., 902; *Hewitt* v. *Kaye*, L.R. 6 Eq., 198; 37 L.J., Ch., 633; *Edwards* v. *Graham*, 3 W.W. & A'B., Eq., 312; *Tate* v. *Hilbert*, 2 Ves. Jr., 111; 2 R.R., 175.

(*w*) *Rolls* v. *Pearce*, 5 Ch. D., 730; 46 L.J., Ch. D., 791.

(*x*) *Beak* v. *Beak*, L.R. 13 Eq., 489.

(*y*) *Re Tully*, 4 W.W. & A'B. (I.E. & M.), 15; *Cartledge* v. *Heales*, 24 V.L.R., 576. See *ante*, p. 76.

(*z*) Notes to *Ward* v. *Turner*, 1 Wh. & Tud. L.C.

illegal consideration. Such securities are valid and enforceable in the hands of a *bonâ fide* holder for value (*a*). But as between the immediate parties, they are treated as if tainted with illegality, and cannot be enforced. A cheque, therefore, given in payment of bets is void as between the drawer and payee, and the latter could not maintain an action on it against the former; nor can an indorsee for value with notice of the illegal consideration maintain an action (*b*). Similarly, a cheque given in payment of money lost at billiards is regarded as given for an illegal consideration (*c*). If the drawer of a cheque given in payment of bets or other money lost at gaming is obliged to pay the amount of it to a *bonâ fide* holder for value, he may, after the cheque has been cashed by his bankers, bring an action against the person to whom he paid it and recover back its amount from him (*d*).

But if A. and B. agree together that A. shall pay money to B., that B. shall lay out that money in making bets, say on the result of horse races, and that B. shall pay over the winnings, or a part of them, to A.; A. is entitled to recover his share of the winnings, if B. win money by those bets; and if he gets a cheque from B. for it, he may maintain an action on the cheque and recover its amount (*e*). If B., at the

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(*a*) *Fitch* v. *Jones*, 5 E. & B., 238; 24 L.J. (Q.B.), 293. See also *Bills of Exchange Act* 1882, ss. 29, 30 (2); cf., *Cohen* v. *Dingley*, 20 N.S.W. L.R., 36.

(*b*) See *Woolf* v. *Hamilton*, (1898) 2 Q.B., 337.

(*c*) *Parsons* v. *Alexander*, 5 E. & B., 263; 24 L.J. (Q.B.), 271.

(*d*) *Instruments Act* 1890, s. 206; *Lynn* v. *Bell*, I.R. 10 C.L., 487.

(*e*) *Beeston* v. *Beeston*, 1 Ex. D., 13; 45 L.J., Ex., 230.

request of A., made bets on horse races for A., and if he were to lose the bets and pay them, he might recover from A. the amount paid in discharge of the lost bets (*f*). Again, if A. lent B. money to pay bets which B. had lost, A. might recover from B. the amount so lent, and a cheque given for it would not be given for an illegal consideration (*g*).

(*f*) *Oldham* v. *Ramsden*, 44 L.J., C.P., 309.

(*g*) *Ex p. Pyke*, 8 Ch. D., 754. See further as to illegal considerations, *Byles on Bills*, 16th ed., p. 163.

CHAPTER VI.

Different Kinds of Cheques.

The object of this Chapter is to treat of the various kinds of cheques and the rules relating thereto.

Cheques payable to Bearer.—A cheque drawn payable to "A.B. or bearer" is negotiable and transferable by delivery. If it is indorsed, the indorsee, or person to whom it is indorsed may sue the indorser on it (*a*). But a cheque which is drawn payable to "A.B." is not a cheque payable to bearer, but to order, and therefore proceedings upon it can be taken successfully only by A.B. or in his name (*b*). The name inserted in a cheque payable to "A.B. or bearer" need not be that of any person. For instance, a cheque payable to "J.S. or bearer" (*c*), or "to Ship Fortune or bearer" (*d*), is valid and is payable to bearer.

Cheques payable to bearer.

(*a*) *McLean* v. *Clydesdale Banking Co.*, 9 Ap. Cas., 95 ; *Popjoy* v. *Fettling*, 8 A.L.T., 127 ; cf., *Hadley* v. *Henry*, 22 V.L.R., 230, at p. 234.

(*b*) *Cheetham* v. *Batter*, 5 B. & Ad., 837 ; *Dixon* v. *Chambers*, 1 C.M. & R., 841. See also *Bills of Exchange Act* 1882, s. 8 (4).

(*c*) *Hinton's Case*, 2 Show., 235.

(*d*) *Grant* v. *Vaughan*, 3 Burr., 1527.

When the payee is a fictitious or non-existing person, the cheque may be treated as payable to bearer (*e*), even if the drawer supposed him to be a real person (*f*). If a blank be left for the name of the payee in a cheque payable to bearer any *bonâ fide* holder may insert his own name (*g*).

Cheques payable to order.

Cheques payable to Order.—These include those which are expressed to be payable to order, or payable to a particular person and do not contain words which prohibit their transfer or show an intention that they should not be transferable (*h*). An instrument payable to "——— order," and the blank is not filled in, means payable to "my order" (*i*). Cheques drawn payable "to A. B. or order" become assignable by indorsement of "A.B.," and it is only when they are so indorsed that they become negotiable (*j*).

Bankers not responsible if the indorsement is forged.

This kind of cheque, which has long been common in England, was introduced into Victoria about 1877, through the operation of Act No. 522, sec. 6 of which is reproduced in sec. 61 of the *Instruments Act* 1890 (*k*). This section provides, in substance, that a banker

(*e*) *Bills of Exchange Act* 1882, ss. 7 (3) and 73.

(*f*) *Clutton* v. *Attenborough*, (1897) A.C., 90; see also *Bank of England* v. *Vagliano*, (1891) A.C., 107; *City Bank* v. *Rowan*, 14 N.S.W.L.R. (L.), 127.

(*g*) *Cruchley* v. *Clarance*, 2 M. & S., 90.

(*h*) *Bills of Exchange Act* 1882, ss. 8 and 73.

(*i*) See *Chamberlain* v. *Young*, (1893) 2 Q.B., 206. As to the conditions necessary to render a cheque not negotiable, see *National Bank* v. *Silke*, (1891) 1 Q.B., 435; *Bills of Exchange Act* 1882, ss. 8 (1), 76-82.

(*j*) See *Bills of Exchange Act* 1882, s. 31 (3), (4).

(*k*) Corresponding with s. 60 of the English *Bills of Exchange Act* 1882.

who pays a bill drawn on him payable to order on demand shall not be responsible for the genuineness of the payee's indorsement. If such a cheque *purports* to be indorsed by the payee, the banker on whom it is drawn is protected if he pay it; and he may debit the drawer with the amount of it.

The holder however is liable to refund if the indorsement is forged.

But the holder of the cheque who presents it for payment, and receives the amount, is responsible for the genuineness of the indorsement. If he claims under a forged indorsement he will be liable to refund to the drawer what he received on the cheque from the drawer's bank (*l*). The effect, therefore, of the statute is to place banks in the same situation with regard to these cheques as that in which they stand with respect to cheques payable to bearer. In neither case are they responsible for the title of the holder who obtains payment. This is manifestly fair; for though a banker is bound to know the signature of his customer, and ought not, therefore, to pay on his signature if forged, he cannot be expected to know the signatures of all the persons to whom the customer may please to make his cheques payable.

Advantages of cheques payable to order.

By making his cheques payable to order, the customer gains several advantages. First, if the cheque be lost before it reaches the payee, it cannot be paid without a forged indorsement, and the amount may be recovered from the person to whom it is paid, even though he gave a valuable consideration for it. The perpetration, too, of a forgery is a risk which a dishonest holder might be afraid to run. Further, the customer obtains through the indorsement an acknow-

(*l*) *Ogden* v. *Benas*, L.R. 9 C.P., 513; and see *Arnold* v. *Cheque Bank*, 1 C.P., 585.

ledgement from the payee of the receipt of the cheque and of its payment.

This section extends to indorsements by *procuration*, and the banker is protected if he pay upon them. And though the effect of an indorsement by procuration is to give notice to the person taking the cheque, that the agent has only a limited authority, the extent of which should be ascertained; yet by virtue of this section it is not incumbent on bankers to enquire whether an agent who indorses a cheque *per proc.*, has the requisite authority (*m*).

Title of holder.

The holder of an unindorsed cheque, drawn payable to the order of the payee, has no better title to it than the person from whom he got it. Accordingly, if before he can get it formally indorsed he receives notice that it was obtained by a fraud, he will be affected by that notice. For in such a case the law merchant only creates a title by *indorsement*. That title is valid if the instrument be taken for value and *bonâ fide* without notice of any fraud. But if the holder receives notice of the fraud before he becomes actual indorsee, his title is vitiated (*n*). A cheque drawn payable to drawer's order is payable to himself (*o*).

Cheques payable to bearer or order are "*payable on demand*" for the purpose of the *Stamps Act* or otherwise (*p*). The addition of the words "payable on de-

(*m*) *Charles* v. *Blackwell*, 2 C.P.D., 151; cf., also *Bissel* v. *Fox*, 53 L.T., 193.

(*n*) *Whistler* v. *Forster*, 14 C.B.N.S., 248.

(*o*) *Smith* v. *McClure*, 5 East., 476; 7 R.R., 750; and see *Chamberlain* v. *Young*, (1893) 2 Q.B., 206.

(*p*) See *Hare* v. *Copland*, 13 Ir. C.L.R., 426. See also *Bills of Exchange Act* 1882, ss. 10, 73.

mand" by the holder does not make a cheque invalid (*q*).

Crossed Cheques.—The practice of crossing cheques appears to have originated at the London clearing-house. The clerks of the different banks were accustomed to write across the cheques the names of the banks that deposited them there, in order that clerks of the clearing-house, when making up the accounts, might know by which bank each cheque had been lodged (*qq*). This practice was followed by customers, and after a time became general throughout England. It was adopted in the colonies; but did not, it seems, become the subject of legal regulation in Victoria until 1864. Up to that time the effect of crossing a cheque was slight. The crossing was regarded as a mere memorandum on the cheque cautioning the drawee against paying it to anyone but a banker. It formed no part of the cheque. It did not alter or affect the negotiability. But if the banker paid it to any person, not a banker, he did so at his peril; and if the payment was made to a wrongful holder, who had stolen or otherwise improperly obtained the cheque, it was regarded as evidence of negligence on the part of the banker who paid it, as he ought not to have cashed it for anyone but a banker, so that it might be readily ascertained for whose use the money had been paid (*r*).

Crossed cheques.

In 1864, *The Instruments and Securities Statute* was passed. It contained several sections relating to crossed cheques, and provided that a crossed cheque

Instruments and Securities Statute.

(*q*) *Aldous* v. *Cornwell*, 9 B. & S., 607.

(*qq*) *Bellamy* v. *Marjoribanks*, 7 Ex., 389.

(*r*) *Carlon* v. *Ireland*, 5 E. & B., 765.

should be paid to a banker only. Under this Act it was held that the crossing formed no material part of the cheque, and that it was not forgery to erase it. It did not affect the cheque's negotiability. It was, however, more than a mere caution to the banker. It amounted to a positive direction to him to pay the cheque to a banker only (*s*).

Act No. 522. In this state the law continued till April, 1876, when Act No. 522 was passed. By this statute it was provided that the crossing should be a material part of the cheque, and that it should be felony to obliterate the crossing with a fraudulent intent. The negotiability of the cheque, however, was not affected. The banker was protected, if he paid the cheque to the lawful holder, even though he did not pay it through a bank. Accordingly, the loser of a cheque could not maintain an action against a banker if he paid it to a person who had become a *bonâ fide* holder for value, even though the banker violated his duty by not paying it to the banker with whose name it had been crossed. The loser of the cheque had in such circumstances no claim to it. He had ceased to be the lawful holder, and the banker owed him no further duty in respect of it (*t*).

Present law. Eight months afterwards, namely, in December, 1876, the principal provisions relating to cheques which both the previous statutes contained were repealed, and the Act No. 562 was passed. It preserved existing rights and introduced a new species of cheque.

(*s*) *Gold Lake Co.* v. *Wood*, 6 W.W. & A'B. (L.), 170 ; *Simmonds* v. *Taylor*, 4 C.B., N.S., 463.

(*t*) *Smith* v. *Union Bank*, 1 Q.B.D., 31 ; and see *Bobbett* v. *Pinkett*, 1 Ex. D., 368.

The present law on the subject of crossed cheques is contained in the *Bills of Exchange Act* 1882 (*u*). Secs. 76 to 82 of this Act contain the provisions relating to the form of cheque which bears across its face the words "*not negotiable.*" A person who takes such a cheque can acquire no better title to it under any circumstances than the person from whom he got it (*v*). If, for instance, such a cheque was lost in the post, the finder could not give any title to a person who took it from him for a valuable consideration (*w*). Crossed cheques.

An uncrossed cheque may be crossed either generally or specially by the holder (*x*). Where a cheque is crossed generally, the holder may add the words "not negotiable." The banker on whom a cheque crossed generally is drawn cannot pay it to any person but a banker. Where a cheque is crossed generally the holder may cross it specially. Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself (*x*). Cheques crossed generally.

Where a cheque is crossed specially, the holder may add the words "not negotiable." A banker to whom a cheque is crossed specially may again cross it specially to another banker for collection. Where a cheque is crossed specially, the banker on whom it is drawn must not pay it to anyone but the banker to whom it is crossed, or his agent for collection; and if a cheque be Cheques crossed specially.

(*u*) Secs. 77-83 of the *Instrument Act* 1890 correspond with ss. 76-82 of the English *Bills of Exchange Act* 1882.

(*v*) *Bills of Exchange Act* 1882, s. 81.

(*w*) *Matthiessen* v. *London and County Bank*, 5 C.P.D., 7, 16.

(*x*) *Bills of Exchange Act* 1882, s. 77.

crossed specially to more than one banker, except, of course, when so crossed to an agent for collection, the bank on which it is drawn must refuse payment of it.

Liability of bankers.

A banker who duly pays a crossed cheque is now placed in the same position as if the true owner had been paid (*y*); so, too, is the drawer when the cheque has come to the payee's hands. Where a crossing has been obliterated or altered, the banker is exonerated from responsibility if he pay *bonâ fide*, and without negligence. A bank which collects a crossed cheque for a customer will not, if his title to it prove defective, incur any liability to the true owner merely on account of having collected it (*z*). A banker who pays a cheque contrary to the provisions of the Act will be responsible to the true owner for any loss he may incur through the banker's conduct in so paying it. Under the Victorian *Instruments and Securities Statute* 1864, the crossing was not a material part of the cheque (*a*); but by virtue of section 78 of the *Bills of Exchange Act* 1882 it is a material part. The drawer of a cheque sometimes strikes out the crossing and writes "pay cash" on it—a practice which, as Mr. Chalmers points out, is not sanctioned by this Act.

Where a foreign bank receives for collection from a stranger, who is the holder under a forged indorsement, a cheque crossed generally and drawn upon its London

(*y*) *Bills of Exchange Act* 1882, s. 80; see *Great Western Railway Co.* v. *London and County Banking Co.*, (1899) 2 Q.B., 172, as to the meaning of "customer" under s. 82 of the *Bills of Exchange Act* 1882.

(*z*) *Bills of Exchange Act* 1882, s. 82; and see *Matthiessen* v. *London and County Bank*, 5 C.P.D., 7.

(*a*) *Golden Lake &c. Co.* v. *Wood*, 6 W.W. & A'B. (L.), 170.

branch, the presentation of the cheque in England to the London branch, coupled with a credit to the amount of the cheque entered in the books of that branch in favour of the foreign bank, constitutes according to English law a wrongful conversion of the cheque to its own use (*b*). The stranger in such a case is not a customer within sec. 82 of the *Bills of Exchange Act* 1882. The bank, therefore, is not entitled to the protection afforded by that section, and as it cannot under such circumstances rely upon the protection afforded by foreign law, it is liable to the true owner for the amount of the cheque (*c*).

The protection afforded by section 82 of the *Bills of Exchange Act* 1882 extends to cases where the customer's account is overdrawn, and the effect of the transaction is to pay off the overdraft (*d*).

A cheque was drawn to the order of A., and crossed to the "Account of A." at the B. bank, where he kept an account. On receiving the cheque the bank placed the amount to A.'s account, and he drew against it. Subsequently, on the bank presenting the cheque, payment was refused by direction of the drawer. It was held that such crossing did not restrict the negotiability of the cheque to the bank, and that it as holders in due course for value was entitled to sue the drawer on the cheque (*e*).

Post-dated Cheques.—It is not uncommon for customers to post-date cheques.

(*b*) *La Cave & Co.* v. *Credit Lyonnais*, (1897) 1 Q.B., 148 ; following *Kleinwort* v. *Comptoir National d'Escompte de Paris*, (1894) 2 Q.B., 157.

(*c*) *Ibid.* See also *Matthews* v. *Brown*, 10 T.L.R., 386.

(*d*) *Clarke* v. *London and County Banking Co.*, (1897) 1 Q.B., 552.

(*e*) *National Bank* v. *Silke*, (1891) 1 Q.B., 435 (C.A.)

Post-dated cheque.

A post-dated cheque is in substance a bill of exchange for the number of days during which it has to run; and a banker is bound to observe the date, and, if he pay such a cheque before it is due, he is guilty of negligence, and liable to compensate the customer for any loss he may sustain (*f*). Although the drawer may incur a penalty, a post-dated cheque is not invalid (*g*).

Post-dating does not make a cheque irregular within sec. 29 (1) of the *Bills of Exchange Act* 1882, so as to charge the holder with equities of which he had no notice (*h*). The drawer of such a cheque is under no obligation to stop payment of it for the benefit of a third person. For instance he would not be obliged in the case of the insolvency of the payee to stop payment of it for the benefit of the trustee (*i*). In one case where a banker cashed a post-dated cheque (which had been lost) before the day of its date he was held liable to the loser for the amount (*k*). But the Supreme Court of Queensland has held that the true date of

(*f*) *Hinchcliffe* v. *Ballarat Banking Co.*, 1 V.R. (L.), 229; 1 A.J.R., 169; *Foster* v. *Mackreth*, L.R. 2, Ex., 163; 36 L.J., Ex., 94. As to stamping of a post-dated cheque, see *Gatty* v. *Fry*, 2 Ex. D., 265; affirmed in *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B., 715; and as to the stamping of a post-dated cheque in Victoria, see Act 1274, s. 7.

(*g*) *Emanuel* v. *Robarts*, 9 B. & S., 121; 17 L.T.N.S., 646; *Bull* v. *O'Sullivan*, L.R. 6, Q.B., 209; 40 L.J.Q.B., 141; see also *Bills of Exchange Act* 1882, s. 13 (2).

(*h*) *Hitchcock* v. *Edwards*, 60 L.T., 636; *Royal Bank of Scotland* v. *Tottenham*, (1894) 2 Q.B., 715 (C.A.); affirming *Gatty* v. *Fry*, and *Bull* v. *O'Sullivan*, *supra*.

(*i*) *Ex p. Richdale*, 19 Ch. D., 409 (C.A.)

(*k*) *Da Silva* v. *Fuller*, cited in 7 M. & W., 178.

a post-dated cheque is the day of its issue, and that a banker is not liable for cashing such a cheque before the day of its date (*l*).

A false pretence may be made by means of a post-dated cheque (*m*).

Ante-dated cheques.

Ante-dated Cheques (*n*).—Ante-dating a deed with the object of defrauding a third party is forgery (*o*), and it is very probable that the same principle would be held to apply to ante-dating bills and cheques with a like object (*p*).

Marked cheques.

Marked Cheques.—A custom has grown up in London amongst bankers of marking cheques as good for the purposes of clearance, by placing their initials on them. When a banker receives a cheque on another bank too late in the day to send it to the clearing-house, it is taken to the bank on which it is drawn "to be marked," that is to ascertain whether it will be paid next day. If it is determined to honour it, the drawee's clerk *marks* it by placing his initials upon it. If he refuses to do so, it is treated as dishonoured. It has been said that marking cheques in this way is equivalent to acceptance, and binds the banker to pay the cheques so marked (*q*). It is, however, conceived that

(*l*) *Magill* v. *Bank of North Queensland*, 6 Q.L.J., 262, mentioned in *Grant on Banking*, 5th ed., p. 14 (*n*).

(*m*) *R.* v. *Miller*, 7 N.S.W., Sup. Ct. R. (L.), 185; *R.* v. *Appel*, 3 A.J.R., 73.

(*n*) See *Bills of Exchange Act* 1882, s. 13 (2).

(*o*) *R.* v. *Ritson*, 1 C.C.R., 200.

(*p*) See Chalmers' *Bills of Exchange*, 4th ed., p. 34. As to bills ante-dated to defraud creditors, see *Jones* v. *Gordon*, 2 App. Ca., 616.

(*q*) *Byles on Bills*, 16th ed., pp. 23-24.

bankers only become bound to one another, and not to any other persons into whose hands such cheques might come (*r*). For an acceptance must now be signed (*s*).

In most Australian banks, cheques are handed to the ledger-keepers, who mark them for payment before they are presented to the paying tellers. The ledger keeper then debits the account of the customer with the amount of the cheque which he has marked. The prevailing opinion appears to be that the marking is a mere direction to the teller to pay, and that a cheque so marked, if taken out of the bank, would not bind it as an acceptance or make it liable to the holder; and it is apprehended that this view is correct. For unless a definite usage to the contrary can be proved, the only effect of a drawee bank initialling a cheque drawn upon it is to certify that it has funds of the drawer in its hands sufficient to pay the cheque (*u*).

Stale cheques.

Stale Cheques.—In England, bankers, it seems, are bound by usage to exercise caution in paying cheques which are presented a long time after they are drawn. Such cheques are called stale. It would appear that if a banker pay a stale cheque, he does so at his own risk, and that if he pay it to a wrongful holder he cannot charge the drawer with its amount. He is, it is

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(*r*) See *per* Cockburn, C.J., in *Goodwin* v. *Robarts*, L.R., 10, Ex. 337; *Pollard* v. *Bank of England*, L.R., 6 Q.B., 623; and *Bills of Exchange Act* 1882, s. 17 (2).

(*s*) *Bills of Exchange Act* 1882, s. 17 (21).

(*u*) *Gaden* v. *Newfoundland Savings Bank*, 1899 (A.C.) 281. "A bank, by accepting the deposit of a certified cheque and crediting the depositor with the amount thereof in her account, must be said, bound to make inquiries; and payment without inquiries or a reference to the drawer would be irregular, and out of the usual course of business (*v*).

The *Bills of Exchange Act* 1882 provides that a bill payable on demand is deemed to be overdue within the meaning of the section relating to the negotiation of overdue bills, when it appears on the face of it to have been in circulation for an unreasonable length of time. What amounts to an unreasonable length of time for this purpose is a question of fact (*w*). In determining whether the time is reasonable or not, the nature of the instrument, the facts of the particular case, and the usage and trade of bankers must all be considered (*x*). A cheque negotiated eight days after date was held not to be on the footing of an overdue bill (*y*), and the same was held with respect to a cheque given to

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deemed to have accepted it for the purpose of cashing it as the depositor's agent, and could not, in the absence of express agreement to that effect, be deemed to have acquired title to it in consideration of the credit entry, and thus to have gratuitously guaranteed its payment by the drawee bank." *Ibid.*

(*v*) See *Byles on Bills*, 13th ed., pp. 171, 223, 224. In practice a banker would apply to the drawer for instructions before paying a cheque more than a year old; *Crump on Banking*, p. 94.

(*w*) S. 3 (3). See *London and County Banking Co.* v. *Groome*, 8 Q.B.D., 288, where the previous decisions are all reviewed.

(*x*) *Boddington* v. *Schlenker*, 4 B. & Ad., 752.

(*y*) *London and County Bank* v. *Groome*, 3 Q.B.D., 288, distinguishing *Down* v. *Halling*, 4 B. & C., 330; and *Rothschild* v. *Corney*, 9 B. & C., 388, (six days); cf., *Serrel* v. *Derbyshire*, 9 C.B., 811; cf., as to dishonoured cheques *Ex p. Hughes*, 43 L.T.N.S., 577; and *Himmelman* v. *Hotaling*, 6 Amer. Rep., 600.

the plaintiff seventeen days after its date (*z*); but a cheque taken two months after date has been considered stale (*a*). A person who takes a stale cheque takes it at his peril (*b*).

In Australia, however, cheques seem to be regarded by many bankers as continuing authorities to pay to which a banker may conform without inquiry. They are rarely, it is believed, treated as stale, nor, as a rule, is payment of them refused on the ground that a long time has elapsed since they were drawn, unless the drawer's liability to pay has been discharged by the operation of the *Statute of Limitations* (*c*).

Lost cheques.

Lost Cheques.—Cheques are sometimes lost by the holders. At common law the owner of a lost cheque could not maintain an action upon it, even though he offered an indemnity (*d*). But now, under the 70th section of the *Bills of Exchange Act* 1882, the Court or a judge may order that the loss of such an instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court, or judge, or the prothonotary, against the claims of any other person upon the cheque (*e*).

(*z*) *Hayes* v. *Robertson*, 15 V.L.R., 480.

(*a*) *Serrel* v. *Derbyshire Ry. Co.*, 9 C.B., 811.

(*b*) *Bills of Exchange Act* 1882, ss. 36 (3), 73; see also *London and County Banking Co.* v. *Groome*, and *Hayes* v. *Robertson*, *supra*.

(*c*) cf., *O'Ferrall* v. *Bank of Australasia*, 9 V.L.R. (L.), 119; *Hutton* v. *Glass*, 5 W.W. & A'B. (L.), at p. 165.

(*d*) *Hansard* v. *Robinson*, 7 B. & C., 90.

(*e*) *Hoppe* v. *Single*, 2 Sup. Ct. R. (L.), 88; *Hargan* v. *Kennedy*, 5 Sup. Ct. R. (L.), 151, *in notis*; *Harkness* v. *Dixon*, 10 A.L.T., 137.

Sending cheques by post.

Cheques are frequently forwarded by post. It is said that if the debtor is directed by the creditor to remit money by post, and it is lost, the creditor must bear the loss, for he has chosen the mode of transmission (*f*).

But if the drawer forward a cheque, and it is abstracted from a letter or lost by a clerk or messenger while on its way to the payee, and it falls into the hands of a person who fraudulently obtains payment of it, the loss must fall on the drawer. It is as though the debtor had sent so much cash by an agent or messenger, and it had been stolen by the way and never reached the creditor's hands. But if the cheque is stolen or lost after the payee himself has duly received it, and if it is cashed before the payee has had time to give notice to the banker, or while he delays giving such notice, the loss must fall on the payee (*g*).

Blank cheques.

Blank cheques (*h*).—If a customer signed a blank cheque and lost it, and it was afterwards fraudulently filled in, he might, if he had been guilty of negligence, be liable upon it to a *bonâ fide* holder for value. But

(*f*) *Warwieke* v. *Noakes*, Peake, 67; *Hawkins* v. *Rutt*, *ibid*, 186; and cf., *Kington* v. *Kington*, 11 M. & W., 233; 12 L.J. Ex., 248; *Ex. p. Cote*, L.R., 9 Ch., 27; 43 L.J., B., 19; *Norman* v. *Ricketts*, 3 T.L.R., 182; *Pennington* v. *Crossley*, 77 L.T., 43.

(*g*) *Charles* v. *Blackwell*, 2 C.P.D., pp. 157-158. It is conceived, however, that no precautions taken by the payee could defeat the claims of a *bonâ fide* holder for value for a cheque that had been stolen or lost; *Colonial Bank* v. *Hunter*, 1 W. & W. (L.), 236. But the banks, it is considered, might refuse to pay it to the thief.

(*h*) See Ch. V., *ante*, with regard to forged, altered and blank cheques.

if a man signed a blank cheque with no payee, or date, or amount, and it was stolen, would he be liable or accountable for its amount, not merely to his banker, the drawee, but to a *bonâ fide* holder? It is apprehended that he would not. Supposing, for instance, that the customer placed such a cheque in the drawer of a writing table at his chambers, which was unlocked, and it was stolen and filled up by a servant or other person who had access to the room. In such a case a man would probably be considered negligent. Yet it is conceived that he would not be liable to a *bonâ fide* holder of the cheque; for his negligence would not be the proximate or effective cause of the fraud. He would not have voluntarily parted with the cheque: an intermediate cause, namely, the theft, would be necessary for the completion of the fraudulent transaction; and a man is only responsible for the immediate or proximate results of his negligence. Accordingly it was suggested by an eminent judge that if a banker paid, in the case supposed, the cheque which had been originally signed in blank, and afterwards stolen and filled up, he might not be entitled to debit the customer with it (*i*).

But if a customer, after signing a blank cheque, left it with a clerk to be filled in with the proper amount, and if the clerk dishonestly filled it in with a larger sum than was authorised, and misapplied the proceeds, the drawer, it is conceived would have to bear the loss. For he would have voluntarily parted with the blank

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(*i*) See *Baxendale* v. *Bennett*, 3 Q.B.D., *per* Bramwell, L.J., at p. 530; but see *per* Williams, J., in *Ingham* v. *Primrose*, 7 C.B., N.S., 85, where a contrary opinion was expressed. See also *Patent Safety Gun Cotton Co.* v. *Wilson*, 49 L.J.Q.B., 713.

cheque, and his conduct would have directly and immediately contributed to the perpetration of the fraud. In such a case criminal proceedings might be taken against the clerk; for filling up, with intent to defraud, a blank cheque for a larger sum than was authorised by the drawer is a forgery (*k*).

Where R. dated and signed a blank cheque, which by dishonest means came into the possession of his housekeeper, who fraudulently filled in the amount, and H. received the cheque at R.'s house from the housekeeper seventeen days after its date, and gave value for it, it was held that H. did not take the cheque under such circumstances as should have excited his suspicions, and therefore he was entitled to judgment upon it (*l*).

The manager of a local branch, who was one of two trustees, kept the banking account of the trust in his own branch. Having by some misrepresentation secured his co-trustee's signature to a blank cheque, he filled it up with an unauthorised sum of money, then cashed it in the branch himself, and appropriated the proceeds. It was held that the bank were not entitled to debit the trust account with the amount of the cheque (*m*).

(*k*) *R.* v. *Wilson*, 1 Den. C.C., 284; 17 L.J.M.C., 82. As to the duty of an acceptor of a bill of exchange to subsequent holders, with respect to blanks capable of being fraudulently filled in, see *Scholfield* v. *Landesborough*, (1896) A.C., 514.

(*l*) *Hayes* v. *Robertson*, 15 V.L.R., 480.

(*m*) *McMahon* v. *Brewer*, 18 N.S.W. L.R. (E.), 88. In *Lamson* v. *Beard*, reported in vol. 31 of the *Chicago Legal News*, p. 351 (1899), the Circuit Court of the United States decided that the president of

Cashed cheques.

Cashed Cheques.—A cheque, after it has been paid, is the property of the drawer and not of the bank (*n*). But the banker is entitled to keep it as a voucher till his account with the customer is settled. After that the drawer is entitled to it as a voucher between him and the payee (*o*). It is believed that in England an account is considered as settled when a customer has received his pass-book duly written up, and has kept it for a reasonable time without objection. His silence is regarded as an admission that the entries are correct. No other settlement takes place in the ordinary course of business (*p*). The drawer has a right to have a cheque that has been duly cashed delivered up to him. The bank, after paying it, holds it as his agent (*q*). Accordingly, it appears to be the practice of English bankers periodically to return cashed cheques to the customers who drew them. Some, however, do not give them up until the customer signs a receipt for them acknowledging that they are correct.

The practice of returning cashed cheques to the parties who drew them has not, it is thought, as a rule, been adopted by many of the colonial bankers, who generally refuse to deliver them up except on getting a receipt or duplicate cheques from the customer.

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a bank drawing drafts upon the funds of the bank to discharge his individual obligations, placed the parties receiving the drafts upon inquiry as to his authority.

(*n*) *R.* v. *Watts*, 19 L.J., M.C., 192.

(*o*) *Charles* v. *Blackwell*, 2 C.P.D., at p. 162, *per* Cockburn, C.J.

(*p*) *Walker on Banking*, 121, 122.

(*q*) *R.* v. *Watts*, 19 L.J., M.C., 192; 4 Cox, C.C., 336.

On the ground that a cheque, when paid, belongs to the customer, notice to produce a cheque, although it has not been returned from the banker, is held sufficient to warrant the admission of secondary evidence of its contents against the drawer (*r*), and it is not necessary to call the banker's clerk to produce it (*s*).

Cancelled cheques.

Cancelled Cheques.—The banker's consent to pay a cancelled cheque which is inferred from the cancellation of it is not binding on him as against the holder and may be withdrawn (*t*). Frauds are sometimes perpetrated by means of cancelled cheques, as for example, in the following case:—The drawer of a cheque, after it had been paid and returned to him cancelled darkened the signature, so as to give it the appearance of a forgery. He then took it to the bank, and represented it to be a forgery, and induced them to prosecute the supposed forger. It was held that the alteration of his own cheque by the drawer, although a cheat on the bank, was not a forgery. Accordingly, a customer who alters his own cheque fraudulently is not a forger, or guilty of a felony (*u*).

If the drawer cancelled a cheque by tearing it in pieces, and the pieces were picked up and so skilfully joined together as to conceal the cancellation, the bank could probably charge the customer with the amount

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(*r*) *R.* v. *Watts*, 19 L.J., M.C., 195, *per* Wilde, J.; *Partridge* v. *Coates*, 1 C. & P., 534.

(*s*) *Burton* v. *Payne*, 2 C. & P., 520.

(*t*) *Prince* v. *Oriental Bank*, 3 Ap. Ca., 325; *Warwick* v. *Rogers*, 5 M. & G., 340; *Teftley* v. *Mills*, 4 T.R., 175.

(*u*) *Brittain* v. *Bank of London*, 8 L.T.N.S., 382.

of the cheque (*v*). But if the pieces were so clumsily pasted together and the cheque so soiled as to attract attention, the banker, if he paid it, could not charge his customer with its amount (*w*).

(*v*) *Ingham* v. *Primrose*, 7 C.B.N.S., 82.

(*w*) *Scholey* v. *Ramsbottom*, 2 Camp., 485.

CHAPTER VII.

PRESENTMENT AND PAYMENT.

MOST of the law relating to the presenting of cheques comes under one of two headings, viz., the *time* within which cheques must be presented for payment, and the *place* at which such presentment must be made.

Time within which Cheques must be Presented for Payment.—All cheques should be presented for payment within a reasonable time after they have been issued in order to render the drawer liable (*a*). A cheque is issued on its first delivery, complete in form, to a person who takes it as holder (*b*). Speaking generally, the point about which difficulty arises is in determining what is a reasonable time. In deciding this, the nature of the instrument, the usage of trade and bankers, and the facts of the particular case must all be taken into consideration (*c*). Whether or not a

(*a*) *Bills of Exchange Act* 1882, s. 45 (2); *Hutton* v. *Glass*, 5 W.W. & A'B. (L.), 163.

(*b*) *Bills of Exchange Act* 1882, s. 2. The "holder" of a cheque is the payee or indorsee of it who is in possession of it or the bearer thereof. *Ibid.*

(*c*) *Bills of Exchange Act* 1882, s. 74 (2); *London and County Banking Co.* v. *Groome*, 8 Q.B.D., 288; *Hayes* v. *Robertson*, 15 V.L.R., 480.

cheque has been presented within a reasonable time of its issue under section 74 of the *Bills of Exchange Act* 1882, is a question of fact and not a question of law (*cc*).

If the person who receives a plain or uncrossed cheque, and the bank on which it is drawn, are located in the same place, the holder, in order to enable him to fix the drawer with any loss arising from the insolvency of the bank, should present it for payment not later than the day following that on which he receives it, whether the presentment is made by himself or through his bankers (*d*). This same rule applied even though the bank subsequently paid 20s. in the £.

The Bills of Exchange Act 1882 (*e*) now provides that where a cheque is not presented within a reasonable time of its issue, and the drawer had the right at the time "of such presentment" (*f*), as between him and the banker to have the cheque paid, and suffers actual damage through the delay in presentment, he is discharged to the extent of such damage. That is to say, he is discharged to the extent to which he is a creditor of the banker to a larger amount than he would have been had the cheque been paid (*g*). This section further affords the holder of the cheque a

(*cc*) *Wheeler* v. *Young*, 13 T.L.R., 468.

(*d*) *Alexander* v. *Burchfield*, 7 M. & G., 1061.

(*e*) Sec. 74 (1).

(*f*) The Victorian and Tasmanian Acts contain instead of the quoted words the following—" at which the presentment ought to have been made."

(*g*) Sec. 74 (1).

remedy against the banker (*h*). So that it would now appear that if the drawer had sufficient funds to meet the cheque if presented within a reasonable time of its issue, the omission to so present it absolutely discharges him on failure of the bank, but the holder may now prove against the bank to the amount of the cheque. If the cheque be crossed by the drawer before he gives it to the holder, it seems that the latter should pay it to his bank for collection not later than the day after he receives it, and the bank has another day for presenting it. In the case of an uncrossed cheque the drawer, therefore, it would appear, is answerable for the solvency of the bank for one day; and in the case of a crossed cheque, for two days (*i*).

If the payee presents a cheque within the banking hours on the day after he receives it, and finds that the bankers have become insolvent between his receipt of the cheque and his presentment of it, the payee may recover from the drawer (*j*). When the holder has received a cheque, which is dishonoured on presentment, from the payee or a previous holder, he must, in order to succeed in an action against the person from whom he received it, present it within banking hours on the day following that on which he received it (if ordinary means to so present it exist) (*k*). But if the person who receives the cheque and the bank on which it is drawn reside in different places, the cheque should be forwarded for presentment to his banker or other

(*h*) Sec. 74 (3).

(*i*) See *per* Tindall, C.J., in *Alexander* v. *Burchfield*, *supra*; *Chalmers on Bills of Exchange*, pp. 207, 208; *McLeod on Banking*, vol 2, p. 506. See also *Stringfield* v. *Lanezzari*, 16 L.T., 361.

(*j*) *Boddington* v. *Schlencker*, 4 B. & Ad., 752; 38 R.R., 360.

(*k*) *Moule* v. *Brown*, 4 Bing., N.C., 266.

agent not later than by the next day's post; and the agent should present it not later than the day after it is received (*l*). Where a holder neglected for nearly a month to present a cheque drawn in his favour by his debtor's agent, and it was found as a fact that there was a reasonable probability that it would have been paid if duly presented, it was held that the debtor was discharged by the negligence of his creditor, the holder (*m*).

Drawer may be liable for six years.

If no inconvenience or loss results, there is nothing unreasonable in the presentment of a cheque at any time within six years (*n*). For there is no prescribed time within which the holder is bound to present it. But if loss is occasioned to the drawer by the delay, if he has sustained actual prejudice, if his banker, for instance, becomes insolvent before the cheque is presented, he is discharged from all liability upon it, and the loss must fall on the holder (*o*).

When presentment necessary to charge indorser.

A banker's cheque, being, as we said before, a negotiable instrument, passes by indorsement, and an indorser may be sued thereon (*p*). But perhaps it may be asked, within what time must a cheque be presented in order to charge an indorser? Or, what delay, in presentment, will discharge him from his liability?

(*l*) *Hare* v. *Henty*, 10 C.B., N.S., 65; *Prideaux* v. *Criddle*, L.R., 4 Q.B., 455; *Heywood* v. *Pickering*, L.R., 9 Q.B., 428.

(*m*) *Hopkins* v. *Ware*, L.R. 4, Ex., 268.

(*n*) See previous Chapter, "Stale Cheques"; see also *London and County Banking Co.* v. *Groome*, 8 Q.B.D., 288; cf., *Hayes* v. *Robertson*, 15 V.L.R., 480.

(*o*) *Laws* v. *Rand*, 3 C.B. (N.S.), 442; see also *Bills of Exchange Act* 1882, s. 74.

(*p*) *Keene* v. *Beard*, 8 C.B., N.S., 372; see *Bills of Exchange Act* 1882, s. 55 (2); *McLean* v. *Clydesdale Bank*, 9 Ap. Cas., 95.

The rules applicable to the drawer or indorser of a bill would appear to apply to the indorser of a cheque (*q*); and it would seem that an indorser would be discharged by the omission to present within a reasonable time after indorsement, as estimated according to the rules laid down in a preceding page, even though no actual damage arose from the delay. The same conclusion seems to have been arrived at by some of the American courts (*r*). In a Victorian case, where a person indorsed a cheque with the intention that the maker should represent him as liable for its payment, and handed it back to the maker who paid it to a third person, it was held that in order to bind the indorser, it was not necessary that the cheque should be presented at the earliest practicable opportunity, but that it was sufficient if the cheque was presented within a reasonable time (*s*).

Delay in presenting.

Delay in making presentment is excused when the delay has been caused by circumstances beyond the control of the holder, and which do not arise from his default, misconduct or negligence (*t*). But when the cause of delay ceases to operate, presentment must be made with reasonable diligence (*u*). The drawer and payee may agree to extend the time for presentment. Thus, it has been held that a cheque given after banking hours on the 25th February upon an understanding

(*q*) See *Bills of Exchange Act* 1882, ss. 45, 73; *Chalmers on Bills of Exchange*, p. 245.

(*r*) *Morrison* v. *Bailey*, cited in 1 Hare & Wallace, Amer. Leading Cases, 5th ed., 484.

(*s*) *Watts* v. *Spain*, 14 A.L.T., 260.

(*t*) *Bills of Exchange Act* 1882, s. 46 (1).

(*u*) *Ibid*, s. 46 (1).

that it should not be presented for a few days, was presented in time on the 11th March (*v*).

It should be noticed that a drawer or indorser who is discharged from his liability on a bill, is also discharged from his liability on the consideration therefor (*w*).

Place of presentment.

Presentment must be made generally at the banking house of the banker on whom the cheque is drawn (*x*). Presentment now is made in by far the greatest number of cases, through the Clearing House. Presentment at the Clearing House is a sufficient presentment (*y*); so also is sending a cheque through the post (*z*).

Where it was proved that a local usage existed amongst branch banks to present cheques to each other for payment at certain hours known as "the exchange," it was held that when cheques were presented for payment they might be so presented either according to

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(*v*) *Carew* v. *Duckworth*, L.R. 4, Ex., 313; *Boddington* v. *Schlencker*, 4 B. & Ad., 752; 38 R.R., 360. See Chapter VI., *ante*, as to stale cheques.

(*w*) *Peacock* v. *Pursell*, 32 L.J.C.P., 266.

(*x*) *Bills of Exchange Act* 1882, s. 45 (4). As to cheques drawn on branch bank, see *Woodland* v. *Fear*, 7 E. & B., 517; *Prince* v. *Oriental Banking Corporation*, 3 Ap. Cas., 325; *City Bank* v. *Australian Joint Stock Bank*, 9 N.S.W. S.C.R. (L.), 259; *Turner* v. *McCabe*, 8 N.S.W. L.R. (L.), 269.

(*y*) *Reynolds* v. *Chettle*, 2 Camp., 596. As to cheques payable at two places, see *Beeching* v. *Gower*, Holt, 313.

(*z*) *Bills of Exchange Act* 1882, s. 45 (8); *Heywood* v. *Pickering*, L.R. 9 Q.B., 428.

the local usage or in the ordinary way recognised by law (*zz*).

Payment: Effect of death of customer on.

A bank should not pay the cheques of a customer after it has notice either of his death or his insolvency. For death or insolvency terminates the relationship of banker and customer (*a*). The holder of a cheque can on the death of the drawer recover the amount from his executors (*b*).

The *Bills of Exchange Act* 1882 now expressly provides that the duty and authority of a banker to pay a cheque is determined by notice of his customer's death (*bb*).

Cashing cheques over the counter.

Payment of a cheque once made is irrevocable. It cannot be retracted by the bank. As soon as a cheque is handed over to the teller and the money produced by the latter and laid on the counter, the money becomes the property of the person who presented the cheque. The bank has no right to demand back the money if it discover that the drawer has no assets—even though the demand is made before the party who cashed the cheque has finished counting the cash he received (*c*).

(*zz*) *Bird* v. *National Bank of New Zealand*, 3 N.Z. J.R., N.S., 23.

(*a*) See *White* v. *London and Chartered Bank*, 3 V.L.R., Eq., 168; *Newman* v. *Bank of New South Wales*, 12 N.S.W. S.C.R., 287; *Rogerson* v. *Ladbroke*, 1 Bing., 93; 7 Moore, 412; *Baker* v. *Lipton*, 15 T.L.R., 435.

(*b*) *Sinnamon* v. *Hargrave*, 4 Q.L.J., 16.

(*bb*) Sec. 75 (2).

(*c*) *Chambers* v. *Miller*, 13 C.B., N.S., 125; *Pollard* v. *Bank of England*, L.R. 6 Q.B., 623.

Payment in counterfeit coin.

The person cashing a cheque should be careful to see that the coin received by him is not counterfeit; for where the banker innocently pays in counterfeit coin, unless the payee at once make objection to such coin he must bear the loss (*d*). In this connection it may not be out of place to note that sovereigns and half-sovereigns struck at the Sydney Mint are good and lawful money in Victoria since the 14th day of July, 1857 (*e*).

Payment by forged notes.

But if payment be made in forged notes the position is different. In that case the payment is a nullity (*f*), the payee may treat the debt due from the drawer as unpaid and recover it from him, and the drawer, it would appear, may in his turn recover from the banker (*g*). The bearer, however, appears to be in a different position, for as there is no contractual relation between him and the banker he could not succeed in an action except in the somewhat exceptional case of the banker's accepting the cheque (*h*).

Negotiable instruments as payment.

Customers frequently take bank notes and sometimes bills of exchange or other negotiable instruments in payment of cheques. In such cases, if the bankers are parties to the negotiable instruments, and such

(*d*) *Grant on Banking*, 5th ed., p. 40. "If the banker, upon objection being made at the right time, should insist that the coin is good, and refuse to change it for other coins, the payee ought to request him to put some private mark upon it, and perhaps to place it in the hands of some third person, till it could be assayed, or other decisive means taken to ascertain its real value."

(*e*) *Banks and Currency Act* 1890 (No. 1164), s. 29.

(*f*) *Per* Littledale, J., in *Camidge* v. *Allenby*, 6 B. & C., 385; 30 R.R., 358.

(*g*) *Grant on Banking*, 5th ed., pp. 41, 42.

(*h*) *Ibid.* *Bellamy* v. *Marjoribanks*, 7 Ex., 389, at p. 404.

instruments are subsequently dishonoured, the customer, if he has taken the proper steps with regard to presentment and notice of dishonour, will have a right of action against the banker. But if the customer has not taken such steps, or has been guilty of negligence with reference to them, the banker cannot be held liable (*i*).

When the bankers are not parties to a negotiable instrument payable to bearer, and do not indorse it, no action will lie for its dishonour, for they are in such cases "*transferors by delivery*" (*j*). But unless the customer has been guilty of negligence, the banker must pay the amount of his cheque (*k*). When a "*transferor by delivery*" negotiates a bill he warrants to the person to whom he hands it, if such person be a holder for value, not only that it is what it purports to be (*l*), but that he has a right to transfer it, and that at the time of such transfer he is not aware of any fact which renders it valueless (*m*).

The receipt by the payee of such a negotiable instrument in payment of a cheque discharges the debt of the drawer (*n*). This is not so, however, if the

(*i*) *Bridges* v. *Berry*, 3 Taunt., 130; 12 R.R., 618; and see *Wegg* v. *Prosser*, (1894) 2 Q.B., at p. 106; *Lichfield Union* v. *Greene*, 26 L.J., Ex., 140.

(*j*) *Bills of Exchange Act* 1882, s. 58 (1), (2).

(*k*) *Byles on Bills*, 15th ed., on Transfer; *Camidge* v. *Allenby*, 6 B. & C., 385; 30 R.R., 358; *Lichfield Union* v. *Green*, 26 L.J., Ex., 140. See also *per* Holt, C.J., in *Ward* v. *Evans*, 2 Ld. Raym., 928.

(*l*) *Bills of Exchange Act* 1882, s. 58 (3); and see *Gompertz* v. *Bartlett*, 23 L.J.Q.B., 65; *Pooley* v. *Brown*, 31 L.J.C.P., 134; *Leeds Bank* v. *Walker*, 11 Q.B.D., 84.

(*m*) *Smith* v. *Mercer*, L.R. 3 Ex., 51; *Camidge* v. *Allenby*, *supra*.

(*n*) *Vernon* v. *Bouverie*, 2 Show., 296; *Smith* v. *Ferrand*, 7 B. & C., 19; cf., *Davis* v. *Reilly*, (1898) 1 Q.B., 1.

banker is directed by the customer's cheque to pay only in such negotiable instruments, and such instruments are subsequently dishonoured (*o*).

Cheques as payment.

A cheque operates as payment, and extinguishes the debt, subject, however, to the condition that if it be dishonoured, the original debt revives (*p*). But in order to operate as payment, it must be unconditional. It should not, therefore, appear on its face that it is for the balance of an account, and a party to whom such a cheque is sent may, before returning it, commence an action against the drawer for the debt (*q*).

Payment of a crossed cheque is payment of a debt which discharges a purchaser as soon as the cheque is cashed (*r*).

Where a cheque has been sent and a receipt returned, it seems that both the cheque and the receipt are in

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(*o*) *Marsh* v. *Peddar*, 4 Camp., 257.

(*p*) *Byles on Bills*, 15th ed., p. 24; *Charles* v. *Blackwell*, 2 C.P.D., at pp. 158, 159; *Cohen* v. *Hall*, 3 Q.B.D., 371; *Everett* v. *Collins*, 2 Camp., 515; 11 R.R., 785; *Hadley* v. *Hadley*, (1898) 2 Ch., 680. See also *Chalmers on Bills of Exchange*, 5th ed., p. 73; cf., *Ward* v. *Evans*, 2 Ld. Raym., 928, wherein Holt, C.J., said:—"Taking a note for goods sold is a payment, because it was part of the original contract, but paper is no payment, where there is a precedent debt; for when such a note is given in payment it is always intended to be taken under this condition, to be payment, if the money be paid thereon in convenient time." If a purchaser of goods gives a cheque for the price when he has no funds at the bank to meet it, this amounts to a material misrepresentation which avoids the sale and entitles the seller to rescind the contract; *Loughnan* v. *Barry*, I.R. 6 C.L., 457.

(*q*) *Hough* v. *May*, 4 A. & E., 954.

(*r*) *Bridges* v. *Garrett*, L.R. 5 C.P., 451; *Pipe* v. *Westacott*, (1894) 1 Q.B., 272.

any case admissible as evidence of payment (*s*). Indeed, it has been held that putting in a cheque shown to have been in circulation is *primâ facie* proof of payment (*t*).

The 3rd section of the Victorian *Bankers Books Evidence Act* 1878 (now the *Evidence Act* 1890, sec. 34) provides that the production of a cheque signed by the drawer, whose account has been debited with the amount, together with the debit entry in the bank book, verified by a manager's affidavit, or proved by other evidence, shall be *primâ facie* evidence of payment by the bank to or for the use of the drawer (*u*).

A creditor is of course not compelled to accept a cheque in payment of his debt. Even if a custom could be proved, obliging, say, a vendor at an auction to accept cheques in payment of a deposit, no such custom could bind him to accept a cheque from a pauper; and further, if the conditions of sale specified that the deposit was to be paid in cash, the vendor in such a case would not be bound to wait till next day for it (*v*).

(*s*) *Carmarthen &c. Ry. Co.* v. *Manchester &c. Ry. Co.*, L.R. 8 C.P., 685.

(*t*) *Thompson* v. *Pitman*, 1 F. & F., 339, *per* Willes, J.; Mr. Justice Byles, however, seems to think that the production of a cheque which has been paid by the bank is not evidence of payment to the payee, unless proof can be given that it passed through his hands.

(*u*) It has been held that a promissory note which is insufficiently stamped cannot be used as evidence of the receipt of the amount of the note; *Ashling* v. *Boon*, (1891) 1 Ch., 568; although it may be used for the purpose of refreshing a witness's memory; *Burchall* v. *Bullough*, (1896) 1 Q.B., 325.

(*v*) *Johnston* v. *Boyes*, (1899) 2 Ch., 73.

Payment by agent's cheque.

Payment is sometimes made by an agent's cheque. When an agent's cheque is taken in payment of his principal's debt, it should be presented promptly, if the holder desires to preserve the liability of the principal—for the latter may be discharged, if the holder is guilty of laches, and defers presentment for an unreasonable time. Thus, where an agent's cheque was taken in payment on the 11th of May, and not presented till the 9th June, when it was dishonoured, his principal was held to be discharged, as it was shown that there was a reasonable probability that it would have been paid had it been presented before the 4th June (*w*).

Stopping cheques.

Not unfrequently customers stop payment of cheques which they have drawn, and when a banker receives orders from the customer not to pay cheques he should obey.

It is now provided, indeed, by the *Bills of Exchange Act* 1882 that the duty and authority of a banker to pay a cheque drawn on him by his customer, are determined by countermand of payment (*x*).

It is conceived as between drawer and payee, the drawer can stop a cheque whenever he can refuse payment of the sum for which it was drawn. For instance, if there was a total failure of the consideration for which the cheque was given, he might stop its payment. Thus, if a cheque was given pursuant to a contract, which was afterwards rescinded, payment might be stopped (*y*).

(*w*) *Hopkins* v. *Ware*, L.R. 4, Ex., 268.

(*x*) Sec. 75 (1).

(*y*) *Mills* v. *Oddy*, 2 C.M. & R., 103; 6 C. & P., 728; 40 R.R., If a person is served with a garnishee order after he has issued a cheque in payment of a debt attached by the order, he is, it seems, at liberty to stop the cheque, if he likes. But he is not bound to take that step (*z*). Garnishee.

Nor is the drawer of a post-dated cheque bound to stop its payment before its date for the benefit of a third person. For instance, if before the date of payment he receives notice of an adjudication of insolvency, made against the payee upon an act of insolvency committed by him before delivery, he is not bound to stop the cheque for the benefit of the insolvent's creditors. Indeed, if he were to do so he would in all probability expose himself to the risk of an action by some *bonâ fide* holder for value of the cheque (*a*).

By the stoppage of the cheque the parties are placed in the same position as if it had never been given. The debt revives and becomes subject to the order (*b*).

But it seems that the payee or holder of a cheque has no power to stop it. Thus, where the payee lost a cheque, and gave notice to the bank requesting them not to pay it, the bank was justified, it was held, notwithstanding the notice, in paying the amount of the cheque to the credit of one of their customers who had lodged it for collection (*c*). Holder cannot stop a cheque.

847; cf., *Humphrey* v. *Rutter*, 10 N.S.W. S.C.R. (L.), 74; and *Hunter* v. *M'Donald*, 7 N.S.W. S.C.R. (L.), 36.

(*z*) See *Elwell* v. *Jackson*, 1 Cababe & Ellis, 362.

(*a*) *Ex p. Richdale, in re Palmer*, 19 Ch. D., 409.

(*b*) *Cohen* v. *Hall*, 3 Q.B.D., 371.

(*c*) *Colonial Bank* v. *Hunter*, 1 W. & W. (L.), 236; see *Byles on Bills*, 16th ed., p. 223.

Payment of cheque—what amounts to.

Very often questions arise as to whether a certain transaction amounts to payment of a cheque. Thus, where a bill of exchange was drawn by A. upon and accepted by B. At maturity it was dishonoured, and the indorsee—a bank—debited it to the account of A., whose account at the bank was then only in credit to the extent of 16s. 6d. Neither A. nor B. paid the bill. It was held that the debiting of the account at the bank did not amount to payment, and that the acceptor was not discharged (*d*). The mere fact that a banker accepts as a deposit a certified cheque, and credits the depositor with the amount thereof in his account, does not amount to a guarantee by such banker that the cheque will be paid by the drawee bank (*e*).

It should be remembered that no banker is compelled to pay a cheque on a bank holiday; where a cheque falls due or is payable on a bank holiday the banker is not compelled to pay it until the following day. If it is paid on the following day such payment is equivalent to payment on the bank holiday (*f*).

(*d*) *The London Chartered Bank* v. *Hickey*, 2 A.J.R., 83.

(*e*) *Gaden* v. *The Newfoundland Savings Bank*, (1899) A.C., 281.

(*f*) *Banks and Currency Act* 1890 (No. 1164), s. 19.

CHAPTER VIII.

The Dishonour of Cheques.

THE bank's contract with its customer, as already explained, is to pay the cheques of the latter so long as it has funds of the customer in its possession applicable to that purpose, or within a reasonable time after it receives them; and if the relation of banker and customer does not exist, the plaintiff, although a creditor of the bank, has no right to draw cheques upon the bank.

Dishonouring cheques.

But, as has already been pointed out in a previous chapter, a cheque must be complete in all its essentials, otherwise the banker is not liable for dishonouring it. Thus, where a cheque was incomplete in the statement of the sum of money in the body, and was dishonoured in consequence, an action against the banker for such dishonour failed (*a*).

Cheque must be complete.

Furthermore, the banker must have in his possession funds of the customer applicable to the payment of cheques, and on which the customer can operate. Thus in an action against a banker for dishonouring a customer's cheque, a plea by the banker that he had not received from the customer any money applicable to

Funds must be available.

(*a*) *Commercial Bank of Australia* v. *Hulls*, 10 V.L.R. (L.), 110; 6 A.L.T., 9. Marginal figures are not an essential part of a cheque; see *Garrard* v. *Lewis*, 10 Q.B.D., 30.

the payment of the cheque within six years before presentment or before action, was held a good answer to the action (*b*).

Where there was an agreement that some bills should stand as security for others which were discounted by the bank, the bank was held not liable for dishonouring a cheque while holding the former bills, although they were paid before the presentment of the cheque (*c*). Furthermore, if all the available funds of the drawer have been exhausted by the payment of bills of exchange accepted by him and payable at the bank, the banker is justified in dishonouring the drawer's cheque (*d*).

Banker not liable for dishonouring cheques unless funds paid in a reasonable time before presentment.

Moreover, the customer's money must have been in the hands of the bank a reasonable time before the presentment of the cheque, so as to enable the clerks to become aware of the deposit, otherwise the bank will not be liable for its refusal to pay the cheque.

What is a reasonable time.

What is a reasonable time is a question that will, in each case, be left to the determination of the jury (*e*). On this point the following test has been suggested by an eminent judge :—" The principle stated in

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(*b*) *O'Ferrall* v. *Bank of Australasia*, 9 V.L.R. (L.), 119 ; 5 A.L.T., 20.

(*c*) *M'Cooey* v. *Bank of New South Wales*, 5 A.J.R., 23.

(*d*) *Kymer* v. *Laurie*, 18 L.J.Q.B., 218 ; *Agra and Masterman's Bank* v. *Hoffman*, 34 L.J., Ch., 285 ; cf., *Robey* v. *Oriental Bank*, 2 N.S.W. S.C.R., N.S. (L.), 57.

(*e*) *MacDermott* v. *Bank of Australasia*, 4 A.J.R., 37 ; *Troedel* v. *Colonial Bank*, 1 A.J.R., 99 ; *Whitaker* v. *Bank of England*, 1 C.M. & R., 744 ; *Parr's Bank (Ltd.)* v. *Ashby*, 14 T.L.R., 563 ; *Bosley* v. *Bank of Australasia*, 1 N.S.W. L.R., 280 ; *Bransby* v. *East London Bank*, 14 L.T., 473 ; *Wheeler* v. *Young*, 13 T.L.R., 468.

Marzetti v. *Williams*, as to a reasonable time, allows a latitude to the banker which, it seems to me, would scarcely be allowed at the present day. One would almost infer from that case that the clerk to whom a cheque is presented need not inquire till the end of the day whether there are sufficient funds in the bank to meet the cheque. But it would seem to me that a reasonable time would be just sufficient time to examine the receiving teller's *ledger*, and to see whether sufficient funds to satisfy the cheque had been paid in" (*f*).

As these observations relate to a matter of some practical importance to bankers, a few remarks upon them may be excused. The word "ledger" in italics is probably a misprint, as a receiving teller has no time to keep a ledger, though he can keep a waste book in which he enters the name of a depositor, the amount of his deposit and the particulars—whether notes, cash, or cheques—of which it consists, but he would not take down the names of the persons who drew the cheques. Now suppose A., a customer, has a credit balance of £400. At 10 a.m. he pays in £200 to his credit. At 11 o'clock B., another customer, lodges for collection a cheque for £300 drawn by A. At 11.10, C., a stranger, presents for payment another cheque of A.'s for £500. If the ledger-keeper then examines the receiving teller's book, he will see that sufficient funds have been paid in to meet the cheque presented by C.; but he will not be able to discover that B. has previously presented a cheque for £300, which, *according to the practice of bankers*, would be deducted from A.'s balance

(*f*) *Eddy* v. *Bank of New South Wales*, Knox's Rep. at p. 302, *per* Martin, C.J.; but see *Macdermott* v. *Bank of Australasia*, 4 A.J.R., 37.

before any portion of it would be applied in payment of the cheque in C.'s favour, and which, if deducted, would not leave enough to pay the cheque presented by C. Accordingly, by looking at the receiving teller's books, the ledger-keeper could draw no safe inference as to the state of A.'s account; he could ascertain the amount then lodged, but he could not tell the amount already drawn against that account by cheques paid in for collection by other customers; and he would have to wait until all the accounts were made up in the ordinary course before he could know the effect of such transactions upon A.'s balance. It is submitted, therefore, with all deference to the learned judge, that the time allowed ought to be sufficient for entering in the ledgers all cheques, &c., received by the tellers.

If banker keep a private box at a post-office delivering there is delivery to the bank.

If by arrangement with a bank a postmaster keeps its letters in a private box till sent for by the bank, a delivery to the post-office of a letter is a delivery of it to the bank, and the latter cannot set up a defence of not sufficient funds if a letter containing a remittance is lying at the post-office when the cheque is dishonoured. For if a bank by such an arrangement interferes with the due course of post, and delays the receipt of a customer's letter by not sending for it so as to receive it by the same time that the post-office would deliver it, the bank would, it seems, be liable for the consequences. If a customer send a cheque and a remittance to meet it by the same post to the same place, he ought not to complain if the cheque is presented and dishonoured before the remittance has been a reasonable time in the hands of the bank (g).

(g) *Eddy* v. *Bank of New South Wales*, Knox's Rep. (N.S.W.), 299.

No case, it is believed, has as yet arisen respecting the duty of a bank before dishonouring a cheque for want of funds to send for letters in a town where there is no post delivery.

Bank is not to pay cheques at all hazards.

But a bank is not to pay a customer's cheques at all hazards, even where it has funds available for the purpose. It should not, for instance, do so if it has notice of an act of insolvency committed by him (*h*), or if, before drawing the cheques, he has assigned over all his money in the hands of the bank, and the assignees have, before presentment of the cheques, given notice of the assignment and demanded the money (*i*). And where a banker is served with a garnishee order *nisi* which attaches all moneys belonging to the customer and held by him as a banker, he is under no legal obligation to honour cheques drawn by the customer against the balance in his hands over and above the amount of the judgment debt, and consequently has a good defence to an action for dishonouring such cheques (*k*).

Customer's funds garnisheed.

When duty of banker to refuse to pay.

A banker ought to refuse to pay a cheque which he knows to be drawn for the purpose of committing a breach of trust (*l*).

It is also his duty to refuse to pay when there has

(*h*) *Ex p. Sharpe*, 8 Jur., 1012.

(*i*) *Newman* v. *Bank of New South Wales*, 12 N.S.W. S.C.R. (L.), 289; and see *Bills of Exchange Act* 1882, s. 75, as to revocation of banker's authority to pay a *cheque*.

(*k*) *Rogers* v. *Whiteley*, (1892) A.C., 118.

(*l*) *Gray* v. *Johnston*, L.R. 3 H.L., 1; *Lawson* v. *Commercial Bank of South Australia*, 22 S.A.L.R., 56; cf., *Thomson* v. *Clydesdale Bank*, (1893) A.C., 282.

been a countermand of payment (*m*). So also where he has received notice of the customer's death (*n*). On the other hand, payment of a cheque after the death of the drawer, but before notice of it has been received by the bank, is a good payment (*o*). But the fact that one partner of a firm having an account at a bank dies, does not preclude the surviving partners from operating upon the partnership account (*p*).

Where a banker has notice that a customer has become insolvent, or has assigned all his money in the hands of the bank, it should not pay a cheque presented after the receipt of such notice (*q*).

Holder of dishonoured cheque.

The payee or holder of a cheque cannot maintain an action upon it against the bankers on whom it is drawn, if they wrongfully dishonour it. There is no privity of contract between him and them (*r*); for a cheque does not amount to an equitable assignment by the drawer of his money in the hands of his bankers (*s*). It is simply a bill of exchange payable at the bank. But if the bankers agree with the payee to hand him

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(*m*) *Bills of Exchange Act* 1882, s. 75; *Cohen* v. *Hale*, 3 Q.B.D., 371; *McLean* v. *Clydesdale Bank*, 9 A.C., 95.

(*n*) *Bills of Exchange Act* 1882, s. 75; see also *Baker* v. *Lipton*, 15 T.L.R., 435.

(*o*) *Tate* v. *Hilbert*, 2 Ves. Jr., 118; 2 R.R., 175.

(*p*) *Backhouse* v. *Charlton*, 8 Ch. D., 444.

(*q*) *Newman* v. *Bank of New South Wales*, 12 S.C.R., 289; *Ex p. Sharpe*, 8 Jur., 1012.

(*r*) *Schroeder* v. *Central Bank of London*, 34 L.T., N.S., 735; cf., *Colonial Bank* v. *Hunter*, 1 W. & W. (L.), 236; *Union Bank* v. *Mercantile Bank of Sydney*, 9 N.S.W. L.R. (L.), 560.

(*s*) *Hopkinson* v. *Foster*, L.R. 19, Eq., 74; *Bills of Exchange Act* 1882, s. 53 (1).

over the money, or to hold it for his use, an action for money had and received would lie against them at the suit of the payee if they refused to pay him the money (*t*).

Customer may recover damages.

If the bank dishonour its customer's cheque when it has money in its possession belonging to him applicable to the payment thereof, it is liable to an action in which the customer will be entitled to recover at least nominal damages for the breach of contract, and if he is engaged in commercial pursuits he may obtain substantial compensation without proof of special damage (*u*). The jury should, in such a case, give "such temperate damages as they may judge to be a reasonable compensation for the injury the plaintiff must have sustained from the dishonour of his cheque" (*v*). A customer may obviously sustain serious prejudice from such conduct on the part of the bank. For it is an injury to his commercial character to have his draft dishonoured, especially if it be for a small sum, which would show that the bank had very little confidence in him. But customers have, as a rule, small reason to complain of the compensation they receive for the dishonour of a cheque. For juries are in the habit of awarding against banks very liberal damages in such circumstances,

(*t*) *Grant* v. *Austen*, 3 Price, 58; 17 R.R., 540; *Griffin* v. *Weatherby*, L.R. 3 Q.B., 753.

(*u*) *Marzetti* v. *Williams*, 1 B. & Ad., 415; 35 R.R., 329. Such an action is one of contract; *Thomson* v. *Equitable Co-Operative Society*, 14 V.L.R., 255; 10 A.L.T., 2.

(*v*) See *Byles*, 15th ed., p. 20. As to the measure of damages against parties to dishonoured bills, see s. 57 of the *Bills of Exchange Act* 1882. It will be noted that the interest, *if any*, recoverable is calculated, in the case of bills payable on demand, from the time of presentment for payment.

and the courts seem to be very unwilling to interfere with these verdicts when asked to do so, on the ground that the damages are excessive, even when no special damage has been proved (*w*).

Measure of damages.

The harm done by the dishonour of a cheque consists in a slur or imputation upon the plaintiff's credit in the commercial world ; and the measure of damages seems similar, if not identical with, that which is adopted in the case of a libel or slander upon a person in reference to his trade, to which in its nature and effect it bears a close resemblance (*x*). From this it appears to follow that if the plaintiff has no commercial character he can only recover nominal damages. Accordingly it was held in Victoria that a farmer, not being a trader or merchant, can only recover a nominal sum unless he can prove some special and substantial injury for which the bank can properly be held responsible (*y*). In a subsequent case the Supreme Court of Victoria held that a stock and sharebroker, though not a trader, was entitled to recover £2900 which had been awarded him by a jury for the breach of an express contract to honour his cheques which had caused injury to him as a speculator on his own account, and to his business and credit as a stock and sharebroker (*z*). On the other hand the Supreme Court in Queensland decided that any person who transacts his pecuniary affairs by means of cheques on a

(*w*) *Jonnes* v. *National Bank*, 1 A.J.R., 170 ; *Bengson* v. *Bank of Victoria*, N.C., 13; *Hinchcliffe* v. *Ballarat Banking Co.*, 1 A.J.R., 169; 1 V.R. (L.), 229 ; *Robey* v. *Oriental Bank*, 2 N.S.W. S.C.R., N.S. (L.), 56.

(*x*) See *per* Williams, J., in *Rollin* v. *Stewart*, 14 C.B., 595.

(*y*) *Bank of New South Wales* v. *Milvain*, 10 V.L.R. (L.), 3.

(*z*) *Dean* v. *Melbourne Stock &c. Corporation*, 16 V.L.R., 403.

bank can without proof of special damage recover substantial damages for the dishonour of a cheque (*a*).

If a business man, by incautiously or improperly giving cheques upon his bank when there were no funds available to pay them, has diminished the value of his mercantile character, the jury, in estimating the amount of their verdict, should take that circumstance into consideration in reduction of his claim, but such conduct will not affect the amount of special damage he may be entitled to recover (*b*).

When a customer claims special damages for the dishonour of his cheque, he will not be entitled to recover them unless they are shown to be the reasonable and natural consequence of the banker's breach of contract. Thus, where a plaintiff claimed the value of a partnership which he said he had lost through the dishonour of his cheque, it was held he could not recover it, as such damage is not the usual or natural result of the dishonour of a cheque (*c*).

But unless the relation of banker and customer exists, the plaintiff, although a creditor of the bank, has no right to draw cheques upon it, and therefore cannot recover damages if he draw a cheque which is dishonoured by the bank (*d*).

See *Larios* v. *Bonany y Gurety*, L..R. 5 P.C., 346, 357. As to the only difference between express and implied contracts, see *post* p. 140.

(*a*) *Magill* v. *Bank of North Queensland*, 6 Q.L.J., 262.

(*b*) *Doria* v. *Bank of Victoria*, 5 V.L.R. (L.), 394, where plaintiff was a schoolmaster and proved special damage.

(*c*) *Dyson* v. *Union Bank of Australia*, 8 V.L.R. (L.), 106.

(*d*) *Stewart* v. *Bank of Australasia*, 9 V.L.R. (L.), 240 ; 5 A.L.T., 77 ; *Robinson* v. *Oriental Bank*, 3 V.R. (L.), 177 ; 3 A.J.R., 74.

CHAPTER IX.

BILLS ACCEPTED PAYABLE AT A BANK.

MERCANTILE men are in the habit of accepting their bills payable at a bank, and it is proposed to discuss in this chapter the principal duties and liabilities which arise with regard to such bills.

Definition and requisites of acceptance.

The acceptance of a bill of exchange is the signification by the drawee of his assent to the order of the drawer. It must be written on the bill, and it must be signed by the drawee. The mere signature of the drawee is sufficient (*a*).

An acceptance is either a general or a qualified acceptance. 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 (*b*). Formerly when a bill was accepted payable at a particular place it was much disputed whether such an acceptance was a general or a qualified acceptance, and whether it was necessary to present the bill at the place mentioned in the acceptance in order to charge the acceptor. At last the Legislature

(*a*) *Bills of Exchange Act*, s. 17.

(*b*) *Bills of Exchange Act*, s. 19.

intervened, and it was enacted that an acceptance payable at a particular place was to be deemed a general acceptance, unless expressed to be payable there only and not elsewhere—and this enactment is now embodied in the *Bills of Exchange Act* (*c*). Accordingly a bill drawn generally on a party may be accepted payable at a particular bank, or payable at a particular bank and not elsewhere. If the drawee adopts the first of these forms and accepts the bill payable at a bank, he undertakes to pay the bill at maturity when presented for payment either to himself or at the bank. Presentment, therefore, at the bank is not necessary in order to charge the acceptor (*d*). But it is necessary in order to charge the drawer (*e*) or an indorser (*f*).

Qualified acceptance of a bill payable at a bank.

If the acceptor in his acceptance states that he accepts the bill payable at a banker's only, and not elsewhere, such acceptance is a qualified acceptance of the bill. The acceptor then contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise (*g*). He is not, however, discharged from his liability to pay it, if the holder omits to present the bill for payment on the day that it becomes due (*h*).

(*c*) *Bills of Exchange Act*, s. 19.

(*d*) *Halstead* v. *Skelton*, 5 Q.B., 86 ; 13 L.J., Ex., 177.

(*e*) *Gibb* v. *Mather*, 8 Bing. 214 ; 34 R.R., 688.

(*f*) *Saul* v. *Jones*, 28 L.J., Q.B., 37 ; 1 E. & E., 59 ; *City Bank* v. *Australian Joint Stock Bank*, 9 S.C.R. 259.

(*g*) *Per* Tindal, C.J., in *Halstead* v. *Skelton*, 5 Q.B., 86 ; 13 L.J., Ex., 177.

(*h*) *Bills of Exchange Act*, s. 52 (2).

The holder may decline to receive such an acceptance. He may insist upon the drawer accepting the bill generally; and if the latter refuse to do so the holder may treat it as dishonoured and resort to the drawer and indorsers as for non-acceptance (*i*).

Notice of qualified acceptance.

Where a qualified acceptance is taken without the consent of the drawer or a prior indorser, he is discharged from his liability on the bill. Accordingly the holder should give immediate notice of it to the drawer and indorsers, and if they do not within a reasonable time express their dissent to the holder, they will be deemed to have assented to the qualified acceptance (*k*). Such an acceptance binds the acceptor and all persons who indorse subsequently to it.

Effect of the acceptance.

A customer by accepting a bill payable at his bank gives it authority to apply his money in its hands to the payment of that bill. If he wish to do away with that authority, he ought to give the bank notice not to honour the bill (*l*). Indeed, he perhaps gives more than a mere authority. For it has been held that such an acceptance is tantamount to an order or direction to the banker to pay the bill to anyone who can give him a discharge for it; that if he refused to pay it, he would be liable to an action at law at the suit of his customer; and that the questions for the jury in such a case are the same as in the case of a wrongful refusal to honour a customer's cheque. Accordingly, in an action against a bank where a jury awarded £500 to a plaintiff as compensation for the

(*i*) *Bills of Exchange Act*, s. 44 (1).

(*k*) *Bills of Exchange Act*, s. 44 (2).

(*l*) *Keymer* v. *Laurie*, 18 L.J., Q.B., 218.

damage done to his mercantile credit by the dishonour of a bill which he had accepted payable at the bank, the Court refused to disturb the verdict (*m*). No such action has been successfully maintained in England, and it is doubtful whether this is a correct statement of the law (*n*).

Is a bank liable for dishonouring overdue bills?

But assuming it to be correct, several important questions would arise in the event of such an acceptance being presented for payment when overdue. Ought the bank to pay it then without inquiry? Or, ought they first to communicate with the customer and obtain his authority to pay such overdue acceptance? Or, if presented for payment, and then dishonoured for want of funds, ought the bank to pay it, if it is afterwards presented when they have funds to meet it? No case, it is believed, has arisen in England, where these or similar questions have been decided, or even discussed. But in the case of *Wine* v. *Bank of New South Wales,* which was decided in the Supreme Court of Victoria (*o*), it was held that a bank is bound to pay the overdue acceptance of its customer on presentation, on the ground apparently that the authority to pay it which he gave to the bank by accepting it payable there, remains in force until it is revoked. This decision took many of the bankers by surprise. They had always thought that such overdue acceptances ought not to be paid without first communicating with the acceptor, and obtaining his instructions whether the bill was to

(*m*) *Troedel* v. *Colonial Bank,* 1 A.J.R., 99; and see *McDermott* v. *Bank of Australasia,* 4 A.J.R., 37; *Whitaker* v. *Bank of England,* 1 C.M. & R., 744; 40 R.R., 713; *Burke* v. *Colonial Bank,* O.B. & F. (F.C.), 146.

(*n*) See *post* p. 140.

(*o*) *Wine* v. *Bank of New South Wales,* 4 A.J.R., 78.

be paid or not, and had acted on that opinion. They accordingly prepared a joint case which was submitted for the opinion of counsel in Melbourne and in Sydney. The members of the Sydney bar, before whom the case was laid, and also an eminent judge who had retired from the bench (*p*), were all of opinion that *Wine* v. *Bank of New South Wales* was wrongly decided. The Victorian barristers, who were consulted, were unanimously of opinion that it was rightly decided (*q*).

Arguments for the liability.

Those who thought that a bank was bound to pay on presentation the overdue bills of a customer, accepted payable at the bank, contended that by accepting a bill in that form the customer gives an authority to his banker to pay it; that such authority continues until it is revoked; that the duty of the banker is co-extensive with his authority; that if he did not pay the bill, though overdue, an action would lie against him for breach of his duty; and that if the customer suffered any loss from the payment of the bill when overdue, it was his own fault for not countermanding the authority he had given, or communicating to his banker the nature of any arrangement with the holder by virtue of which the presentment of the bill for payment might have been postponed; but that the lapse of a long time, say six months or so, or other unusual circumstance, might render it prudent for the bank to refer when practicable to its customer before paying such an overdue bill.

Arguments against the liability.

Those who were of the contrary opinion maintained that from the commencement of banking business in

(*p*) The late Sir Alfred Stephen.

(*q*) One of them was the late Chief Justice Higinbotham.

Australia and New Zealand it had been the custom of bankers to refuse payment of such bills without renewed instructions from the customer ; that no usuage to the contrary had been known ; that the established practice must form the contract between banker and customer; that the words " payable at the bank " give not a continuing authority to pay at any time after due date, but only a limited authority to pay at such due date and then only ; that if a bill be presented for payment after due date, the reasonable inference is that the delay is the result of a prior arrangement between the parties which the bank might assist in violating if it then paid ; that in the interests of its customer it is bound to communicate with him ; that if it did not, it might be answerable to him in damages for any loss occasioned by paying the bill when overdue ; that if the authority given by such a mode of acceptance, was a continuing authority with which it was a banker's duty to comply, mere lapse of time would not excuse or justify a refusal to pay such an overdue bill on presentation ; and that by referring under any circumstances to his customer, he would disregard both his authority and his duty, and become liable to an action.

In this conflict of opinion, the question cannot be considered as determined until it has been settled by a Court of final appeal. In the meantime, the practice of the banks is not uniform. Some act upon the opinions obtained in Sydney, others upon the views held by the Supreme Court in Victoria.

Such was the state of opinion and practice when the first edition of this book was printed.

It may, however, be questioned whether a bank is

Is a banker bound to pay bills accepted payable at his bank?

bound to honour the bills of a customer which he accepts payable at the bank in the same manner and to the same extent that it is bound to honour his cheques. Before stating the grounds for expressing this doubt it will be convenient to explain the difference between express and implied agreements. "The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties. But wherever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence" (*r*).

Express and implied contracts.

Grounds for doubting the obligation of a bank to pay such bills.

In a recent case in the House of Lords it was emphatically stated that the ordinary relation of banker and customer does not impose upon the banker the duty of honouring his customer's acceptances made payable at the bank, and that such an obligation could only result from a contract express or implied to honour them.

Lord Macnaghten said (*s*):—"The following points

(*r*) *Marzetti* v. *Williams*, 1 B. & A., at p. 423; 35 R.R., at p. 335, *per* Lord Tenterden, C.J.

(*s*) *Bank of England* v. *Vagliano*, (1891) A.C., at p. 157. Mr. Chalmers, in the fifth edition of his work on Bills of Exchange (p. 252), expresses the following opinion :—"Where a customer accepts a bill payable at his banker's, it is an authority to the banker to pay it; but the banker is not bound to do so in the absence of special arrangement." It is true that elsewhere (p. 182), he expresses a different opinion, but the latter appears to be an oversight, and is the repetition of a statement made in preceding editions which he probably forgot or omitted to correct when revising his book for the last edition.

are, I think, established. (1.) The relation of banker and customer does not of itself, and apart from other circumstances, impose upon a banker the duty of paying his customer's acceptances. . . (2.) If a banker undertakes the duty of paying his customer's acceptances, the arrangement is the result of some special agreement, express or implied."

He said that if authority was wanting for the first proposition it would be found in a case which, ever since its date (1851), has been accepted as determining the obligations incumbent upon bankers who agree to retire acceptances on account of their customers (*t*), and in which it was said by the Court that "if bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker." With respect to this observation he pointed out that it "implies that bankers may refuse to pay their customers' acceptances, and that such refusal is not inconsistent with the relation of banker and customer, or a breach of the banker's duty to the customer." If this opinion be correct, then no customer is entitled to recover damages against a bank for refusing to pay the bills which he domiciles at the bank unless he can prove that it agreed to pay them when due or when overdue. Such an agreement might be a written one or it might be inferred or implied from the previous transactions or course of dealing between the parties.

If the above opinion is right, it also follows that

(*t*) *Robarts* v. *Tucker*, 16 Q.B., 560.

Wine v. *The Bank of New South Wales* was wrongly decided. For previous to that case it was not the practice of any bank to pay an overdue bill without first obtaining the direction or order of the customer to do so, and such a circumstances or course of dealing is obviously inconsistent with the existence of any implied contract by the bank to pay it on presentation.

Forged acceptances.

A bill may be sometimes presented for payment at a bank bearing the forged acceptance of the customer. A banker of course could not debit the customer with the amount of such a bill if he paid it to the holder (*u*). If he pays it his only chance of avoiding loss is to get the money back immediately from the holder to whom he paid it, which seldom can be done. For when a bill becomes due and is presented for payment, the holder is entitled to know at once whether the bill will be paid or not, and when money is once paid and received on a bill of exchange in good faith under a mistake, not instantly discovered, it cannot be recovered back (*v*).

If the forgery of an acceptance or an indorsement is discovered and notice of it given on the very day when the payment is made and the bill is due, so as to enable the holder to send notice of dishonour to the prior parties within the time allowed by law, the bank might recover the money from the holder (*w*). But if the banker only discovers the forgery at a later date, and then gives the holder notice of the fact, he cannot re-

(*u*) *Smith* v. *Mercer*, 6 Taunt., 76 ; 16 R.R., 576.

(*v*) *London and River Plate Bank* v. *Bank of Liverpool*, (1896) 1 Q.B., 7.

(*w*) *Wilkinson* v. *Johnson*, 3 B. & C., 428 ; 27 R.R., 393. See however *London and River Plate Bank* v. *Bank of Liverpool*, (1895) 1 Q.B., at p. 11.

cover back the amount from the person to whom it was paid. For the holder has lost his remedy against his indorser, as a notice of dishonour, if given then, would be too late (*x*).

Bill with forged indorsement.

When a bill is accepted payable at a bank, and is presented, having on it the forged indorsement of the payee, the bank cannot debit the customer with the amount of the bill, if they pay it to a holder whose title depends on the forgery (*y*), except when the bank has been misled by the customer and induced by his negligence or conduct to make the payment (*z*). For in the case of bills accepted payable at a bank, the responsibility is greater than in the case of cheques payable to order. When paying the latter the banker is relieved by statute from inquiring into the genuineness of the indorsement, and when he has paid a genuine cheque bearing the forged indorsement of the payee he is at liberty to debit his customer with the amount of the cheque (*a*). But in the case of a bill the banker undertakes the responsibility of deciding upon the genuineness of the indorsements which it bears, and if he makes a mistake the bank must sustain the loss. For he cannot charge his customer with the amount of a bill when the indorsement of the payee has been forged, and the holder claims under it (*b*).

(*x*) *Cocks* v. *Masterman*, 6 B. & C., 902; 33 R.R., 365; *Smith* v. *Mercer*, 6 Taunt., 76; 16 R.R., 576; and see *Leeds Bank* v. *Walker*, 11 Q.B.D., 84, 89.

(*y*) *Wilkinson* v. *Johnson*, 3 B. & C., 428; 27 R.R., 393.

(*z*) *Bank of England* v. *Vagliano*, (1891) A.C., 107.

(*a*) *Bills of Exchange Act*, s. 60.

(*b*) *Robarts* v. *Tucker*, 16 Q.B., 560; 20 L.J., Q.B., 270; cf., *Arnold* v. *Cheque Bank*, 1 C.P.D., 578; *Bank of England* v. *Vagliano*, (1891) A.C., 107.

Of course, if there were circumstances amounting to a direction from the acceptor to the banker to pay without regard to the genuineness of the indorsement, or if the customer did anything equivalent to an admission of its genuineness which induced the bank to alter their position, he might be precluded or estopped from treating the indorsement as a forgery, and the loss would then fall on him (*c*).

Inquiries as to genuineness of indorsements.

In *Robarts* v. *Tucker* (*d*), Maule, J., stated that, in his opinion, if a banker is called upon to pay an acceptance of his customer's, bearing several indorsements, he is entitled to a reasonable time to inquire into their genuineness and the title of the presenter. This observation, however, has been dissented from (*e*). If it were the duty or the practice of bankers to refuse or delay payment of bills until they could ascertain the genuineness of every indorsement, it would continually happen that the bills, especially if they were foreign ones, would not be paid at the proper time and place, and *bonâ fide* holders might treat them as dishonoured (*f*). Indeed, if a banker is entitled to a reasonable time to make such enquiries, the right is of little use to him. For commercially speaking it is absolutely impracticable for him to investigate the validity of the indorsements on the bills domiciled at his bank (*g*).

(*c*) *Robarts* v. *Tucker*, *supra*; and cf. *Société Generale* v. *Metropolitan Bank*, 27 L.T., N.S., 849.

(*d*) 16 Q.B., 575.

(*e*) By Lord Bramwell in *Bank of England* v. *Vagliano*, (1891) A.C., at p. 141.

(*f*) *Ibid*, *per* Lord Selborne, at p. 124.

(*g*) *Ibid*, *per* Lord Herschell, at p. 155.

Bills fraudulently altered in amount.

It has already been stated that if a cheque be so carelessly drawn as to be easily altered to a larger sum, so that the bank when they pay it cannot distinguish the fraudulent alteration, the loss must fall on the drawer, as it is the result of his own negligence. For, where the relation of banker and customer exists, if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again (*h*). The duty of the customer to take proper precautions when drawing his cheques arises directly from an implied contract between him and the bank that his cheques shall not be in such a form as to give the means of enlarging their amount without this being readily detected (*i*). The question has been raised whether this principle extends to the drawers, indorsers, and acceptors of bills of exchange and to bills domiciled at a bank. In one case it was held in New South Wales that the acceptor of a bill which had been altered to an increased sum after acceptance without his authority cannot be made liable on the bill as altered, merely by reason of his carelessness having facilitated the fraud (*j*). In Victoria, however, the acceptor has been held liable where his negligence conduced to a fraudulent alteration of the amount of a bill (*k*). In that case, Williams, J., in general terms stated the law to be as follows:—"Where the acceptor, by his neglect, facilitates fraud on other innocent per-

(*h*) See *ante*, p. 86, and notes to *Duchess of Kingston's Case*, 2 Sm. L.C., 10th ed., p. 835 *et seq.* *Young* v. *Grote*, 4 Bing., 253; 29 R.R., 552.

(*i*) *Scholfield* v. *Earl of Londesborough*, (1896) A.C., at p. 548.

(*j*) *Lea* v. *Graham*, 1 Sup. Ct. R., L., 288.

(*k*) *Bank of Australasia* v. *Erwin*, 1 W.W. & A'B. (L.), 70; *Levinger* v. *Fitzgerald*, 4 A.J.R., 138.

sons guilty of no neglect, it is he and not they who must abide the consequences of the fraud." This, though true of many kinds of negligence, does not apply to carelessness in drawing a bill. For it has been recently determined by the House of Lords that the acceptor of a bill of exchange is not under any duty to take precautions against fraudulent alterations in the bill after acceptance (*l*). The indorser of a bill is not liable for loss caused by a fraudulent alteration made after the indorsement (*m*). In these cases the relation of banker and customer did not exist between the plaintiff and defendant. In New Zealand it has been held that (except in the case of banker and customer), there is no duty on the part of the drawer to use such care in drawing a bill as will prevent the fraudulent alteration of the instrument (*n*).

Banker is bound to pay a bill when he receives his customer's money for that purpose.

If a customer pay into a bank a sum of money for the express purpose of taking up his acceptance payable there, the bank is bound to apply it to that purpose only. It could not apply it to the reduction of an overdraft which it had granted to the customer (*o*); and if the bill was dishonoured, the customer might sue the bank for damages (*p*). In short, where money is paid into and received by a bank to be applied in retiring such a bill, the bank must either apply it in accordance

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(*l*) *Scholfield* v. *Earl of Londesborough*, (1896) A.C., 514.

(*m*) *Société Générale* v. *Metropolitan Bank*, 27 L.T., N.S., 849; approved in *Scholfield* v. *Earl of Londesborough*, (1896) A.C., at pp. 532, 540, 548.

(*n*) *Colonial Bank* v. *Bennet*, 9 N.Z.L.R., 487.

(*o*) *Hill* v. *Smith*, 12 M. & W., 618; 13 L.J., Ex. 243.

(*p*) *Bell* v. *Corey*, 9 C.B., 887; 23 L.J.C.P., 105; cf., *Bank of New Zealand* v. *Fleming*, 18 N.Z.L.R., 1.

with the instructions, or return it to the customer (*q*). But the drawer or holder of such a bill has no remedy either at law or in equity against the bank if they dishonour the bill and apply the money so paid in to the satisfaction of the customer's debts to them (*r*).

Part payment of note payable at the bank.

It seems that a banker not having sufficient funds of a customer to pay in full a promissory note of such customer domiciled at the bank, is justified in applying the money of the customer in his hands in part payment of the note, and crediting the payee with that amount, where both the maker and the payee are customers of the bank, and the payee has an overdraft (*s*). This, however, may be questioned (*t*).

Presentment for payment.

A bill accepted payable at a bank may be presented to the banker either at the bank or through the clearing-house, in a place where there is one (*u*).

The rules relating to the presentment of bills for payment will be found in the *Bills of Exchange Act*, secs. 45 and 46, printed in the Appendix.

A custom of treating as equivalent to payment a notification of one banker to another after office hours, that a note is good and will be paid next day on presentment, has been held invalid (*v*).

(*q*) *Huenerbein* v. *Federal Bank*, 13 N.S.W. L.R., 244.

(*r*) *Moore* v. *Bushell*, 27 L.J., Ex., 3 ; *Hill* v. *Royds*, L.R. 8, Eq., 290.

(*s*) *Mulloy* v. *Mulloy*, 3 V.R., Eq., 33.

(*t*) See *Grant on Banking*, 5th ed., pp. 44, 45.

(*u*) *Reynolds* v. *Chettle*, 2 Camp., 596 ; *Robson* v. *Bennett*, 2 Taunt., 388; 11 R.R., 614 ; *Bird* v. *National Bank of New Zealand*, 2 N.Z.J.R., N.S. (S.C.), 96.

(*v*) *Tobin* v. *City Bank*, 1 Sup. Ct. R., N.S., L., 267.

Bills payable at a branch.

If a customer lodge with his bank for collection a bill which has been accepted payable at one of its branches, the bank must present the bill at that branch, even though it knows well that the acceptor has no funds there. If not so presented, the other parties would be discharged from their liability, and the bank would then become responsible to the customer for any loss he might incur through non-presentment (*w*).

Bills falling due on holidays.

Bills which fall due on a bank holiday are, in Victoria and other Australian colonies, payable on the succeeding business day; and, in case of non-payment on such day, they may be then noted and protested. A similar rule applies to sending notice of dishonour (*x*). No one is compellable to make a payment, or to do any act on a bank holiday, which he would not be compellable to do on a Sunday (*y*). A bill drawn or accepted on Sunday, is not illegal (*z*), and as the law merchant respects the religion of different people, an indorsee of the Hebrew religion was held not guilty of *laches* where he neglected to give notice of dishonour on the regular day, as it was a festival on which he was forbidden to attend to secular business (*a*).

(*w*) *City Bank* v. *Australian Joint-Stock Bank*, 9 Sup. C.R., L., 259.

(*x*) *Henderson* v. *Horne*, 18 V.L.R., 236; 13 A.L.T., 292; *Banks and Currency Act*, ss. 17, 18.

(*y*) *Banks and Currency Act* 1890, s. 19. See further *Bills of Exchange Act* 1882, s. 14, in the Appendix, where the law about holidays in the various colonies will be found.

(*z*) *Bills of Exchange Act* 1882, s. 13 (2); *Walsh* v. *Hosking*, 4 W.W. & A'B. (L.), 35. As to cancellation, see *Bills of Exchange Act*, s. 63.

(*a*) *Lindo* v. *Unsworth*, 2 Camp., 602, *per* Lord Ellenborough; 12 R.R., 750.

When a bill accepted payable at a bank is presented for payment, and is left there in order that the bank may determine whether they will pay it or not, they incur a certain obligation to the holder or true owner of the bill. It is usual, for instance, to cancel bills intended to be paid by drawing lines across and along the name of a party for whom the payment is intended to be made. Such cancellation, if made by mistake, does not affect the liability of the parties whose signatures are cancelled (*b*). When a cancellation is made in error, the mistake should be indicated by writing on the bill that it has been cancelled in error. So when a bill is left at the bank for them to consider whether they will pay it, they are bound to take due care of it. If they resolve not to pay it, they must return it uncancelled, unless it has been cancelled in error, and in that case they should by writing indicate on the bill that it has been so cancelled. If a banker omits to return a bill, he does not thereby contract a liability to pay the amount of it. But if he cancels, or defaces, or retains it wrongfully, he becomes liable to the holder in damages for his breach of duty (*c*). Duty to holder.

(*b*) *Warwick* v. *Rogers*, 5 M. & G., 352.

(*c*) *Warwick* v. *Rogers*, 5 M. & G., 340; 12 L.J., C.P., 113; and see *Prince* v. *Oriental Bank*, 3 Ap. Cas., 325; *Raper* v. *Birkbeck*, 15 East, 17; 13 R.R., 354.

CHAPTER X.

OVERDRAFTS.

OVERDRAFTS are loans from a bank to its customers. It was indeed stated in one or two cases that there was a distinction between an overdraft and a loan (*a*), but these *dicta* have been overruled in a recent case in the House of Lords (*b*). In all banking accounts the bankers, so long as the balance of the account is in favour of the customer, are bound to pay his cheques properly drawn. But in the absence of any special agreement they are under no obligation to honour cheques that exceed the amount of the balance, or in other words to allow the customer to overdraw. When they do allow an overdraft the legal effect is that they lend the amount of it to the customer, they can charge the amount against him in his account, and can make available any securities which, either from the general custom of bankers or from a special bargain, they have to secure their account (*c*). As regards the customer, an overdraft is a mode of borrowing, and is most

(*a*) *Re Cefn Cilcen Co.*, L.R. 7, Eq., 88; *Waterloo* v. *Sharp*, L.R. 8, Eq., 501.

(*b*) *Brooks* v. *Blackburn B.S.*, 9 Ap. Cas., at p. 865.

(*c*) *Brooks* v. *Blackburn Soc.*, 9 Ap. Cas., 864.

frequently resorted to for the purpose of obtaining temporary accommodation rather than a permanent loan.

Practice of the London banks.

In London, advances are generally made by loans, as they are called, and not by overdraft. By loans are meant specific advances for certain periods with or without security as may be agreed on. No customer is allowed to overdraw his current account. Where a customer obtains a loan the bank opens two accounts with him—one an ordinary current account, the other a loan account (*d*). The loan account is debited with the sum granted to the customer, and the amount of the loan is then placed to his credit in his current account. Interest is charged on the whole sum lent, even though it may not be drawn out of the current account, and when it is repaid the loan account is credited with the re-payment.

Australian practice.

The Australian practice differs from that of the London bankers, and is practically the same as that of the Scotch banks and the English country bankers. An advance to a customer is made by allowing him to overdraw his account, and he is charged interest only on the variable balance owing from day to day (*e*). The advantage to the customer of an overdraft is that he only pays interest on the money which he actually uses, and not upon the whole amount which the bank may have

(*d*) Gilbart's *Principles and Practice of Banking*, pp. 174, 399; and see *Misa* v. *Currie*, 1 Ap. Cas., 554; *Laurie* v. *Scholefield*, L.R. 4 C.P., 622; *In re The European Bank*, L.R. 8 Ch., 41; *Mutton* v. *Peat*, (1899) 2 Ch., at p. 556; *Bank of Australasia* v. *Cotchett*, 4 V.L.R. (L.), 226.

(*e*) See as to such overdrafts, Rae's *Country Banker*, Chapters VI. and VIII.

agreed to advance to him. Moreover, every payment lodged to his credit reduces the amount of the indebtedness upon which interest is payable.

Various arrangements are made about allowing overdrafts so as to suit the different requirements of customers. A special contract is sometimes entered into to allow an overdraft for a named amount and a definite time. Where an agreement is entered into by a bank to allow an overdraft the bank is bound to honour the customer's cheques pursuant to the terms of the agreement, and if it refused to do so an action might be maintained and heavy damages recovered for dishonouring them (*f*). In one case a banker agreed to allow an overdraft, and in the letter which he wrote to the customer embodying the agreement, he by mistake informed the customer that he might overdraw to a larger amount than had been requested, it was held that the bank was bound by the letter, which was never withdrawn by the bank, and that the customer was entitled to overdraw to the extent mentioned in it (*g*).

It often happens that a bank simply gives permission to a customer to overdraw provided he does not exceed a certain limit. Bankers, it is believed, consider that they can withdraw such a permission at any time, and insist upon a prompt and immediate payment of the amount then due. It may be that an overdraft so allowed does not prevent the bank from giving notice that it is no longer to continue, and that the money overdrawn must be paid. It is submitted, however, that the bank is bound to honour all cheques or drafts

(*f*) *Doria* v. *Bank of Victoria*, 5 V.L.R. (L.), 393.

(*g*) *Doria* v. *Bank of Victoria*, 5 V.L.R. (L.), 393.

within the agreed limit which have been drawn and put in circulation by the customer before such notice is given to him (*h*).

The law will often imply an agreement concerning the terms on which an overdraft is granted. Implied agreements as to overdrafts.

When a banker and a customer have carried on a banking account for a length of time on a certain system, it may be inferred that there was an agreement to keep the account on that footing or until notice to determine it was given. Thus, where bankers were in the habit of taking up a customer's bills on the security of consignments, and allowing him to draw on his current account without debiting it with those advances, it was held that they could not terminate that arrangement without notice, nor charge the account with the advances, and then treat it as overdrawn and dishonour the customer's cheques (*i*).

There cannot be right to compound interest in mercantile accounts current, unless there is either a custom or an express or implied contract to pay it (*j*). Compound interest on overdrafts.

It is by usage incidental to the relation of banker and customer. Accordingly, bankers are in the habit of making half-yearly rests, and turning interest into principal. Interest is calculated daily on the debit balance of the account, and is debited to it at the end of each half-year. The customer's pass-book is sub-

(*h*) *Rouse* v. *Bradford Banking Co.*, (1894) A.C., at p. 596.

(*i*) *Cumming* v. *Shand*, 5 H. & N., 95; 29 L.J., Ex., 129.

(*j*) *Ferguson* v. *Fyffe*, 8 C. & F., 121; and *per* James, L.J., in *Williamson* v. *Williamson*, L.R. 7, Eq., 546; *Clancarty* v. *Latouche*, 1 Ball. & B., 420; *Stewart* v. *Stewart*, 27 L.R., Ir., 351; *Lenane* v. *Bank of New South Wales*, 2 N.S.W. L.R., 285; *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B., 460.

sequently written up and balanced for the half-year, and the amount due for interest up to the end of that half-year is entered in it. This practice is valid, and the customer is bound by it (*k*). Three-monthly rests have been disallowed, but that was when there were laws against usury (*l*).

Where bankers had been in the habit for a number of years of making annual rests and charging a customer compound interest on the balances, it was held that the customer had acquiesced in and assented to that system of keeping the accounts; and a contract to pay compound interest so long as the relation of banker and customer continues was inferred from such a course of dealing between the parties (*m*).

Not chargeable on sums secured by mortgage.

But if a banker takes a mortgage for a fixed sum owing to him from a customer, the relation of banker and customer ceases as to that sum. In reference to it, their mutual rights and obligations are those of mortgagees and mortgagors, and the banker is not entitled to charge compound interest upon it unless authorised to do so by the terms of the mortgage (*n*).

A mortgage to a bank to secure advances "at usual banker's charges" entitles the bank to charge interest on an overdrawn account taken with rests (*o*).

(*k*) *Ferguson* v. *Fyffe*, 8 C. & F., 121; cf., *Daniell* v. *Sinclair*, 6 A.C., 181.

(*l*) *Clancarty* v. *Latouche*, 1 Ball. & B., 420, decided in 1810.

(*m*) *Mosse* v. *Salt*, 32 L.J., Ch., 756; 32 Beav., 269.

(*n*) *Mosse* v. *Salt*, 32 L.J., Ch., 756; 32 Beav., 269; *White* v. *L. and C. Bank*, 3 V.L.R., Eq., 33, 168; affirmed 5 App. Cas., 413; *Broughton* v. *Rodd*, 6 S.C.R. (Eq.), 102; *Sinclair* v. *Daniell*, O. B. & F., 1; affirmed 6 Ap. Cas., 181.

(*o*) *McLeod* v. *National Bank of New Zealand*, 6 N.Z.L.R., 3.

Death of customer.

Compound interest is chargeable on overdrafts only so long as the relation of banker and customer exists. Death terminates that relation, and accordingly on the death of the customer compound interest in the absence of an express agreement ceases to be payable.

Simple interest.

From that time, however, simple interest may be charged until the overdraft is paid off. The question does not appear to have been expressly decided in England. Sir J. Romilly, however, thought that it was not chargeable. His reasoning is as follows:— "I look at it (*i.e.* the question before him) in the same light as if a customer keeping an account with his banker died. All that the banker could claim against his estate would be the balance due at his death. It would be a mere simple contract debt not carrying interest at all. The arrangement between the customer and the bank terminates at his death, and in the absence of any contract varying it all interest would cease at that period. . . . . It is argued that a banker's account is not closed until it is paid, and this undoubtedly is true in one sense of the term, but its character may be essentially altered. When a merchant who keeps an account current with a banker dies, it ceases to be a common mercantile account current, and becomes a simple contract debt due from his estate, on which, in the absence of any binding contract, no interest could be charged" (*p*).

In a more recent case a bank did charge it, and apparently without objection. The customer died, and from that time, though compound interest was disallowed, yet the bank's right to simple interest was not con-

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(*p*) *Croskill* v. *Bower*, 32 L.J., Ch., 543, 544; 32 Beav., 86; *Graves* v. *Davies*, 17 Ir. Ch. R., 227; *Bates* v. *Robins*, 32 Beav., 73.

tested by the representatives of the customer, whose estate was being administered by the Court of Chancery. The point was, however, incidentally referred to, for Lord Justice James is reported to have said:—"With regard to interest accruing after the testator's death, I should take some time before assenting to the proposition that the account did not bear simple interest, *but I have not to decide this point*" (q). The remarks of the English judges in that case leave the matter in a state of uncertainty. The question was distinctly raised in South Australia in a suit brought by a bank against the executors of a deceased customer: and it was there held by a majority of the Supreme Court, in opposition to the *obiter dicta* of Sir J. Romilly, that a customer's overdraft did not cease to bear interest on his death; and that a bank was entitled to charge it until the overdraft was paid off. The main ground for this conclusion was that by the custom of bankers in Australia, interest is chargeable on all overdrafts without any special agreement to pay it; and that consequently a person by overdrawing, enters into an implied agreement binding on his executors to pay interest according to that custom, until the overdraft is paid off, either by himself or his personal representatives (r). On the part of the executors it was contended that the implied contract can only be to pay interest so long as the relation of banker and customer continues, and that such relationship is dissolved on

(q) *Williamson* v. *Williamson*, L.R. 7, Eq., at p. 546; and see the remarks of Lord Selbourne in *Barfield* v. *Loughborough*, L.R. 8, Ch., at p. 7; *Provincial Bank of Ireland* v. *O'Reilly*, 26 L.R., Ir., 313; *Graves* v. *Davies*, 17 Ir. Ch. R., 227; *The Public Trustee* v. *Bank of New Zealand*, 6 N.Z.L.R., 680.

(r) *South Australian Banking Co.* v. *Horner*, 2 S.A.L.R., 109.

the death of the latter; but this view was rejected by the majority of the Court, whose reasoning it may be thought would prove that compound interest would also be chargeable. For it is quite as much the custom of bankers to charge compound interest as to charge simple interest; and if a custom to charge simple interest creates an implied contract to pay it which is binding on executors, why should not a custom to pay compound interest create a similar contract to pay it equally binding on executors? When the question recently arose in Ireland, a majority of the Court there held that a bank is entitled to charge simple interest upon the amount of an overdraft due at the time of a customer's death until the debt is paid or settled by his personal representatives (*s*).

The balance of authority seems to be at present in favour of the bank's right to simple interest, but this view has not commended itself to text writers of repute (*t*).

Appropriation of payments on account.

The ordinary rule of appropriation of payments where both principal and interest are due upon an account is that sums paid on account must be applied first in discharge of the interest, and secondly in reduction of the principal. This, however, does not apply in the case of bank overdrafts. For, according to the ordinary practice of bankers the interest due is from time to time added to the principal, and becomes itself part of the principal (*u*).

(*s*) *The Provincial Bank* v. *O'Reilly*, 26 L.R., Ir., 313; where all the cases are reviewed in the elaborate judgment of Gibson, J.

(*t*) See *Walker on Banking*, p. 35; *Grant on Banking*, 5th ed., pp. 198, 199; *Coote on Mortgages*, 4th ed., pp. 869, 870.

(*u*) *Parr's Banking Co.* v. *Yates*, (1898) 2 Q.B., 460.

If a man is in credit at one branch of a bank and overdrawn at another, the bank may charge interest on the overdraft without deducting the credit balance at the other branch (*v*).

If money is paid in by a customer to take up a particular bill or to meet a particular cheque, the bank cannot apply the money so paid in to reduce the customer's overdraft (*w*).

But money paid in by a customer in the ordinary course of his business, even though it may belong to his clients, may be so applied—*e.g.* money so paid in by an auctioneer or a sharebroker which belongs to his clients (*x*).

Insolvency of customer.

On the insolvency of a customer, the relation of banker and customer is determined (*y*). A banker is not allowed to prove against the customer's estate for any interest that may accrue in respect of an overdraft, after the date of the insolvency (*z*). This rule extends to other creditors (*a*).

Promissory note.

If a customer becomes insolvent during the currency of a promissory note given by him to the bank along

(*v*) *National Bank* v. *Grace*, 8 N.Z.L.R., 706.

(*w*) *De Bernales* v. *Fuller*, 14 East, 590; 13 R.R., p. 321 (note); *Warwick* v. *Rogers*, 5 M. & G., 340; 12 L.J.C.P., 113; *Huenerbein* v. *Federal Bank*, 13 N.S.W. L.R., 244; *Chamberlain* v. *E. S. & A. C. Bank*, 4 V.L.R. (L.), 45.

(*x*) *Martin* v. *Roche*, 53 L.T., 946; *Thompson* v. *Clydesdale Bank*, (1893) A.C., 282. See also *post* pp. 186, 187.

(*y*) *White* v. *London Chartered Bank*, 3 V.L.R., Eq., 168; 4 App. Cas., 413.

(*z*) *Ex p. Lubbock*, 32 L.J., Bank., 58.

(*a*) *Re Savin*, L.R. 7, Ch., 760.

with a mortgage to secure an overdraft, without any express stipulation concerning interest, simple interest at the legal rate of eight per cent. is, it seems, chargeable on the amount of the note from the date of its maturity, but not the customary interest charged by banks on advances to their customers (*b*).

Insolvency of banker.

It has been decided that on the insolvency of a banker his assignees may recover interest accruing after the insolvency on the overdrawn account of a customer (*c*).

(*b*) *White* v. *London Chartered Bank*, 3 V.L.R., Eq., 168; 4 Ap. Cas., 413.

(*c*) *Pott* v. *Beavan*, 7 M. & G., 604; 13 L.J.C.P., 187.

CHAPTER XI.

GUARANTEES TO SECURE OVERDRAFTS AND OTHER ADVANCES.

WHEN a customer requires an overdraft it is often granted to him upon the express condition that the advance which the bank consents to make shall be secured by the guarantee of some one or more responsible sureties. It may therefore be useful to explain a few points of frequent occurrence which it is important to bear in mind when dealing with such guarantees. But to review the numerous decisions relating to sureties would be to wander too far from the main subject of this book.

Guarantees.

Guarantees are of various kinds and forms. Sometimes they are guarantees for the payment of a specific sum, such as the amount of a bill of exchange. Sometimes they are guarantees for only a portion of the debt, or they may be continuing guarantees for a definite or indefinite time, and for a definite or indefinite amount. They vary with the circumstances of each particular case. Accordingly it is not proposed to examine or discuss any of the guarantees that have been interpreted or construed by the Courts of law.

How construed.

It is sufficient to point out that it has been decided, in the first place, that a Court generally construes a guarantee against the guarantor, and always leans against any construction which would make the guarantee illusory; and secondly that in construing a guarantee the Court can look at the surrounding circumstances in order to find out the real meaning of the parties, which may not be very accurately expressed in their contract (*a*).

Guarantee must be in writing and signed by the guarantor

By the *Statute of Frauds* (*b*), which was passed in the reign of Charles II., and which is in force in Victoria (*c*) and the other Australian colonies, it is enacted that no action shall be brought upon a contract to answer for the debt of another unless the agreement or a note of it be in writing and be signed by the party to be charged or his agent. From this it would appear that the whole of the guarantee, that is to say both the consideration and the promise, must be in writing. But this is not so. For, by another Act (*d*) which is also in force in Victoria (*e*) and other colonies, it is provided that no guarantee shall be invalid merely because the consideration for it does not appear in the written agreement. A consideration for such an agreement of course is necessary in order to make it binding on the guarantor, but it may be proved by parol evidence, and need not be in writing (*f*). All the other

(*a*) *Jones* v. *Mason*, 13 N.S.W. L.R., 157 ; *German* v. *Norton*, 8 N.S.W. L.R., 479 ; and see notes to *Birkmyr* v. *Darnell*, 1 Sm. L.C., 10th ed., pp. 294, 295.

(*b*) 29 Car. II., c. 3, s. 4.

(*c*) *Instruments Act* 1890, s. 208.

(*d*) 19 & 20 Vict., c. 97, s. 3.

(*e*) *Instruments Act* 1890, s. 129.

(*f*) Notes to *Birkmyr* v. *Darnell*, 1 Sm. L.C., 10th ed., 292 ; *Leake on Contracts*, 3rd ed., p. 231.

terms of the contract must be in writing, and they cannot be varied or added to by parol evidence (*g*).

The contract may be signed either by the guarantor or by his agent. It is not necessary that the agent should be appointed in writing. He may be appointed without it (*h*).

In taking guarantees or other securities from companies, care should be taken to see that the documents are properly signed. If it is clearly stated that the manager or directors sign the document for or on account of the company of which they are the representatives, they will effectually bind the company. But if they do not expressly state that they are acting for or on behalf of the company, but merely call or describe themselves as its directors, the company will not be bound, but they will themselves be individually liable on the contract (*i*).

Name of party guaranteed.

But though the guarantee may be sufficiently signed it will not be binding unless both contracting parties are named or described in it. Consequently a guarantee which does not contain the name of the bank to which it is given cannot be enforced though duly signed by the guarantor (*j*). It is not necessary that the guarantee should be signed by the bank.

(*g*) *Colonial Bank of New Zealand* v. *Lewis*, N.Z.L.R. 5 S.C., 465; *Mercantile Bank of Sydney* v. *Taylor*, (1893) A.C., 317; *Albert Building Society* v. *Pratt*, 19 V.L.R., 195.

(*h*) *Coles* v. *Trecothick*, 9 Vesey, at p. 243; 7 R.R., at p. 172.

(*i*) *White* v. *Bank of Victoria*, 8 V.L.R. (M.), 8. And see the cases cited *ante*, p. 84, notes (*e*) and (*f*).

(*j*) Notes to *Birkmyr* v. *Darnell*, 1 Sm. L.C., 10th ed., pp. 297, 298.

Alterations made in a guarantee after it has been signed will be binding if assented to by the parties to the contract, provided such alterations do not create a different or substituted contract (*k*).

Alterations after signature.

Where a guarantee had been entered into on a written or printed form containing a clause with unfilled blanks which was irrelevant and inoperative, it was held that the creditor to whom the guarantee had been given might strike out the clause without avoiding or annulling the contract. But if the alteration changed the operation of the instrument, the guarantee would be rendered void by it (*l*).

The creditor is under no obligation to inform the intending surety, without inquiry on his part, of matters affecting the credit of the debtor, or of other circumstances unconnected with the transaction, which may render the position of the surety more hazardous (*m*).

Disclosure of facts.

If, however, one of the contracting parties has made a statement which he believes to be true, but which he afterwards discovers in the course of the negotiation to be false, he is bound to correct his erroneous statement; and very little said which ought not to have been said, and very little omitted which ought to have been communicated, may be sufficient to avoid the contract (*n*).

(*k*) Notes to *Birkmyr* v. *Darnell*, 1 Sm. L.C., 10th ed., p. 299.

(*l*) *Colonial Bank* v. *Moodie*, 6 V.L.R. (L.), 354. As to an ambiguity arising from blanks in a guarantee, see *New Zealand Loan and Mercantile Agency Co.* v. *Paterson*, N.Z.L.R. 1 C.A., 327.

(*m*) *Fitzgerald* v. *Jacomb*, 4 A.J.R., 189; *Edwards* v. *Lennon*, 6 S.C.R., Eq., 18; and see *Hamilton* v. *Watson*, 12 Cl. & Fin., 118.

(*n*) *Davies* v. *London &c. Insurance Co.*, 8 Ch. D., 469.

Joint and several guarantees.

Two or more sureties often sign a joint and several guarantee to secure the account or debt of a customer. If a surety sign such a guarantee upon condition that he is not to be bound by it unless the other surety or sureties also execute it, he will not be liable under it unless that condition be fulfilled (*o*). In the absence of special arrangements, it is the person by whom the security is taken and the contract prepared who should see that it is executed by the necessary parties (*p*).

The death of a co-surety does not release the survivors (*q*).

After a joint and several guarantee had been signed by the guarantors, the name of one of them was erased, but without the consent of some of the others. It was held that the whole guarantee was gone, and that it could not be enforced even against a guarantor who had assented to the erasure (*r*).

Continuing guarantees.

Questions sometimes arise as to whether a guarantee is intended to apply only to debts existing at the time it was given or whether it was intended to cover advances to be made from time to time. Those guarantees which are intended to be securities for a fluctuating balance that may vary from time to time are known as continuing guarantees. The Court is at liberty to take into consideration the situation of the parties, and

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(*o*) *The City Bank* v. *Reynolds*, 9 N.S.W. L.R., 472; *Bonser* v. *Cox*, 4 Beav., 379; *Evans* v. *Bremridge*, 8 DeG. M. & G., 102.

(*p*) *Fitzgerald* v. *M'Cowan*, (1898) 2 I.R., 1.

(*q*) *Beckett* v. *Addyman*, 9 Q.B.D., 783.

(*r*) *Australian Joint Stock Bank* v. *Bailey*, 18 N.S.W. L.R., 103; cf., *Bank of Hindostan &c.* v. *Smith*, 36 L.J., C.P., 241.

may interpret doubtful phrases with reference to it. Accordingly, words which apparently apply merely to a pre-existing debt may be extended to moneys which may become due from time to time upon the account secured (*s*).

Revocation.

Continuing guarantees remain in force until they are revoked by the guarantor, and unless they contain provisions to the contrary, they may be revoked at any time as to future, but not as to past advances, on notice given by the guarantor (*t*). The surety may then, it seems, call upon the creditor to sue the principal debtor, and if the creditor refuses to do so, he may bring an action against the debtor to compel him to pay the debt (*u*), or the surety may pay it himself and then sue the principal debtor for the amount (*v*).

A continuing guarantee for the transactions of a firm is, in the absence of an agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm (*w*).

Death of guarantor.

On the death of a guarantor, a continuing guarantee, in the absence of express provision, is revoked as to all advances made after notice of his death has been

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(*s*) *Laurie* v. *Schofield*, L.R. 4 C.P., 622; and see *Morrell* v. *Cavan*, 1 Ch. D., 151; *Leake on Contracts*, 3rd ed., p. 181.

(*t*) *Offord* v. *Davies*, 12 C.B., N.S., 748; 31 L.J., C.P., 319; *Coulthart* v. *Clementson*, 5 Q.B.D., 42; *Burgess* v. *Eve*, L.R. 13 Eq., 450; notes to *Rees* v. *Berrington*, 2 Wh. & Tud., 7th ed., 576; and see *Guinness* v. *Box*, 5 V.L.R. (L.), 381; *Saddington* v. *Byrne*, 4 S.C.R., 27; *Harris* v. *Fawcett*, L.R. 8, Ch., 866.

(*u*) *Matthews* v. *Saurin*, 31 L.R., Ir., 181.

(*v*) *Green* v. *Wynn*, L.R., 4 Ch., 204.

(*w*) *Partnership Act* 1891, s. 22.

given to the bank. For notice of that event and of the existence of a will is notice of the existence of trusts, which may be incompatible with the continuance of the guarantee. But if by the testator's will the executor has the option of continuing the guarantee, a guaranteed bank, if it received no notice of revocation from the executor, might, perhaps, assume as against the estate, that the guarantee is not determined (*x*).

Modes of releasing a surety:

There are various modes in which a surety may be be released from his obligation, and it seems desirable to call attention to some of them. For it has frequently happened that a banker, from ignorance of them or from neglect of some simple precaution, has released a surety when he never intended or contemplated such a result. It is accordingly proposed to explain shortly the following modes in which a bank may discharge a surety from his liability, (1) by altering the contract between the bank and the debtor; (2) by giving time to the debtor; (3) by releasing the debtor; (4) by releasing a co-surety; (5) by receiving payment of the debt; (6) by giving up securities to which the surety would be entitled on payment of the debt; and (7) by destroying his right to contribution from other sureties.

(1) Alteration of the terms on which an advance is made.

Any material variation of the contract between a bank and its customer without the knowledge and consent of the surety will release the surety. Thus, if the banker advances money upon a shorter credit than has been stipulated for, the surety will be released. Where a surety agreed to guarantee the payment of a draft at

(*x*) *Coulthart* v. *Clementson*, 5 Q.B.D., 42; *Lloyds* v. *Harper*, 16 Ch. D., 290; *Re Silvester*, (1895) 1Ch., 573; *Dodd* v. *Whelan*, (1897) 1 Ir. R., 575.

three months date, and the banker, instead of giving the draft, immediately advanced the whole of the money to the customer, it was held that this was a material departure from the engagement to which the surety was a party, and that he was released from his liability (*y*).

Overdraft exceeding amount of guarantee.

Where a surety guarantees the repayment of advances to the extent of a named and stipulated sum, the surety will not, in the absence of any agreement to the contrary, be released from his guarantee if the bank allows an overdraft for a larger amount than the sum named in the guarantee (*z*).

(2) Giving time to the debtor.

If the debt guaranteed is payable at a specified time the surety will be discharged if further time be given to the principal debtor without the consent of the surety. For the original contract is varied, and the bank has no right to alter it by giving further time to the debtor without the surety's consent, even when the extension of time seems beneficial to the surety; for "the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is, or is not, for his benefit. The creditor has no right—it is against the faith of his contract—to give time to

(*y*) *Bonser* v. *Cox*, 6 Beav., 110; 13 L.J., Ch., 260; *Combe* v. *Wolf*, 8 Bing., 156; 34 R.R., 659; and see *Ward* v. *Natonial Bank of New Zealand*, N.Z.L.R., 4 C.A., 35; cf., *Polak* v. *Everett*, 1 Q.B.D., 669; *Holme* v. *Brunskill*, 3 Q.B.D., 495; *New Zealand &c. Co.* v. *Smith*, 15 A.L.T., 92; *Bank of South Australia* v. *Benjamin*, 14 A.L.T., 159; *Royal Bank* v. *Hipwood*, 4 Q.L.J., 108.

(*z*) *Commercial Bank* v. *Moylan*, 1 A.J.R., 123; *National Bank* v. *Plummer*, 6 W.W. & A'B. (L.), 165; *Bank of New Zealand* v. *Wilson*, N.Z.L.R. 5 S.C., 215; and see *Rouse* v. *Bradford Banking Co.*, (1894) A.C., 586.

the principal, even though manifestly for the benefit of the surety, without the consent of the surety" (*a*).

But in order that the giving of time to the debtor may have the effect of releasing the surety there must be a positive binding contract to give time, made between the bank and the debtor, which the debtor can enforce (*b*). Accordingly, if the promise to give time is made by the bank without receiving a valuable consideration for it, a surety is not released (*c*).

Reservation of rights against the surety.

To this rule there is an exception. If the creditor, on making the agreement with the principal debtor, expressly reserves his rights against the surety, the latter remains liable. For by a well-established rule of law for which only technical reasons can be given, this reservation is held to preserve to the surety his right of suing the principal debtor (*d*). In such a case the surety, whether sued by the bank or not, may pay off the debt which he has guaranteed, and may then proceed against the person for whom he was surety.

(*a*) *Samuell* v. *Howarth*, 3 Mer., at p. 279; 17 R.R., at p. 86; *Polak* v. *Emerett*, 1 Q.B.D., at p. 674; *Queensland Investment &c. Co.* v. *Hart*, 6 Q.L.J., 186; and see *Oakeley* v. *Pashellar*, 4 Cl. & Fin., at p. 433; 42 R.R., at p. 18; *Overend, Gurney & Co.* v. *Oriental &c. Corporation*, L.R. 7 H.L., 348; *Rouse* v. *Bradford Banking Co.*, (1894) A.C., 586; and see *Howell* v. *Jones*, 1 C.M. & R., 97; *Dodgshun* v. *Moss*, 4 A.J.R., 118; *Bing & Co.* v. *Hislop*, N.Z. L.R 2 S.C., 311; *Munster and Leinster Bank* v. *France*, 24 L.R., Ir., 82.

(*b*) *Samuell* v. *Howarth*, 3 Mer., at p. 278; 17 R.R., at p. 86; *Clarke* v. *Birley*, 41 Ch. D., 422.

(*c*) *McKenzie v. West*, 16 V.L.R., 588; 12 A.L.T., 63.

(*d*) *Price* v. *Ellis*, 4 El. & Bl., 760; *Holme* v. *Brunskill*, 3 Q.B.D., 495, 505; *Owen* v. *Homan*, 4 H.L.C., 997; *Muir* v. *Crawford*, L.R., 2 Sc. Ap. Cas., 456; notes to *Rees* v. *Berrington*, 2 Wh. & Tud., 7th ed., 592.

But a binding agreement with a stranger to give time to the principal debtor, will not discharge the surety (*e*).

If there be two separate debts or instalments secured by the same guarantee, the giving of time for the payment of one will not release the surety from his liability as to the other (*f*).

But taking a further or additional security from the debtor without giving further time to pay will not release the surety (*g*).

(3) Release of principal debtor.

If a bank release the principal debtor, its remedy against the surety is gone. Where such a release is given no right against the surety can be reserved. The debt is extinguished, and no right of recourse to him remains when the debt is released (*h*). Language importing an absolute release may, however, be construed as a covenant not to sue the debtor where that intention clearly appears. Such a covenant is only a partial discharge, and it is a rule of law that, if such a covenant is qualified by a reservation of the creditor's remedies against the surety the latter will not be discharged from his liability. He will retain

(*e*) *Frazer* v. *Jordan*, 8 E. & B., 303 ; *Clarke* v. *Birley*, 41 Ch. D., 422.

(*f*) *Croydon Gas Co.* v. *Dickinson*, 2 C.P.D., 46.

(*g*) *Overend, Gurney & Co.* v. *Oriental Financial Corporation*, L.R., 7 Ch., 142; L.R., 7 H.L., 348; and see *Matton* v. *Lipscombe*, 16 N.S.W. L.R., Eq., 142 ; *Swan* v. *National Bank*, 4 A.J.R., 42, 43 ; *Dodgson* v. *Moss*, 4 A.J.R., 118 ; *Ward* v. *National Bank of New Zealand*, 4 C.A., 35 ; *Bank of Australasia* v. *MacDonald*, O. B. & F. (C.A.), 131 ; notes to *Rees* v. *Berrington*, 2 Wh. and Tud., 7th ed., 598.

(*h*) *Commercial Bank of Tasmania* v. *Jones*, (1893) A.C., 313 ; *Re Mount Costigan Mining Co.*, 17 N.S.W. L.R., Eq., 80.

all his remedies against the principal debtor (*i*). He may call upon the debtor to pay the debt, and if the debtor fail to do so, the surety may pay it himself, and may recover the amount so paid from the debtor (*j*).

Release by operation of law.

But where the debtor is released by operation of law, as by proceedings under the Insolvency Acts, whether by a sequestration, a liquidation by arrangement, or a composition, the surety remains liable (*k*). But he will be entitled to be credited with any dividends paid by the estate of the principal debtor, unless by the terms of his contract he has excluded or abandoned his right to them (*l*).

(4) Release of co-surety.

Where there are two or more sureties who jointly and severally guarantee an advance, and the bank releases one of them from his liability, the others will be released from their liability (*m*). But the co-sureties

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(*i*) *Price* v. *Barker*, 4 El. & Bl., 760 ; 24 L.J.Q.B., 130.

(*j*) *Green* v. *Wynn*, L.R. 4 Ch., 204, *per* Lord Hatherley ; and see *Mathews* v. *Saurin*, 31 L.R., Ir., 181, as to the surety's right to compel the debtor to pay the creditor. As to the surety's other rights see notes to *Lampleigh* v. *Brathwait*, 1 Sm. L.C., 10th ed., p. 149 ; and to *Rees* v. *Berrington*, 2 White & Tud. L.C., 7th ed., 540.

(*k*) *Ellis* v. *Wilmot*, L.R., 10 Ex., 10 ; *Ex p. Jacobs*, L.R. 10 Ch., 211 ; and see *Union Bank* v. *Rogan*, 13 N.S.W. L.R., 285.

(*l*) *Midland Banking Co.* v. *Chambers*, L.R. 4 Ch., 398 ; *Ellis* v. *Emmanuel*, 1 Ex. D., 157, where the cases are reviewed ; *Ford* v. *London Chartered Bank*, 5 V.L.R., Eq., 328 ; *Ex p. Provincial Bank*, 17 Ch. D., 98 ; *Re Sass, Ex p. Provincial Bank*, (1896) 2 Q.B., 12 ; *Hobson* v. *Bass*, L.R. 6 Ch., 792 ; *In re Gillespie*, 19 L.R., Ir., 198 ; notes to *Dering* v. *Earl of Winchelsea*, 2 Wh. & Tud. L.C., 7th ed., 564.

(*m*) *Mercantile Bank of Sydney* v. *Taylor*, (1893) A.C., 317, affirmng s.c., 12 N.S.W. L.R., 252 ; and see *Australian Joint Stock Ban* v. *Bailey*, 18 N.S.W. L.R., 103 ; *South Australian &c. Co.* v. *M'Innes*, 6 Q.L.J., 289 ; *Robison and others* v. *Sloss*, 14 A.L.T., 145.

would not be released if there was a proviso reserving the right of the creditor to enforce payment against the principal debtor and the other sureties (*n*).

(5) Payment by the debtor of the debt guaranteed.

It is, perhaps, needless to say that the liability of the guarantor is extinguished when the customer repays to the bank the loan or overdraft which has been guaranteed. But, occasionally, through forgetting the rule for the appropriation of payments, viz., that an ordinary payment on account is considered to be a discharge of the oldest portion of the debt in respect of which it is paid—it is unexpectedly found that the debt secured by the guarantee has been discharged, and that the surety has, consequently, been released from all liability for it. In one case the account of a firm of partners was guaranteed. One of the partners retired, and a new firm was created. No new account was opened by the bank with the new firm, which, after a time, became insolvent. Before its insolvency the new firm had paid to the credit of the account sums which far exceeded the overdraft due to the bank when the old partner retired, and the new firm was established. It was held that the balance then due to the bank had been liquidated by the subsequent payments of the new firm, and that a guarantor of the account of the old firm was not liable for its overdraft, which, according to the rule for the appropriation of payments, was regarded as fully paid (*o*).

(*n*) *Thompson* v. *Lack*, 3 C.B., 540.

(*o*) *Colonial Bank of New Zealand* v. *Smith*, 6 N.Z.L.R., 659; *Pemberton* v. *Oakes*, 4 Russ., 154; and see *Kinnaird* v. *Webster*, 10 Ch. D., 139.

Probably the best way to avoid the application of this rule in similar cases is to close the old account when the guarantee comes to an end, and to open a new and distinct account into which all subsequent transactions should be carried. This mode of dealing with guaranteed accounts has received judicial sanction. On the death of a surety who had given a continuing guarantee, terminable at his death, for an overdraft, a bank closed the old account and opened a new account with the customer. In the new account they did not debit the customer with the amount of the overdraft which existed at the date of the guarantor's death, and it was held that the bank was justified in doing so, and could recover the amount of that overdraft from the executors of the guarantor (*p*).

The mere transfer of money from a secured account to the overdrawn current account of a customer will not operate as a payment of the account to which it is credited, and will not release a surety who is liable for the overdraft (*q*).

Surety's right to securities and to contribution.

A surety who pays the bank the whole amount of the secured debt is entitled to an assignment from the bank of all the securities which it holds for the debt; and a surety who has paid more than his fair share of the debt is entitled to contribution from the other sureties, whether they guaranteed the debt by the same or by different instruments.

(*p*) *In re Sherry, The London and County Banking Co.* v. *Terry*, 25 Ch. D., 692.

(*q*) *Bank of Australasia* v. *Cotchett*, 4 V.L.R. (L.), 226. As to such transfers, see further *Horton* v. *Bank of New Zealand*, 7 N.Z. L.R., 582.

(6) Surety discharged if securities lost.

A surety who pays off the debt of the principal debtor, being entitled to have an assignment to him from the bank of all securities for the debt held by the bank, whether taken before or after the contract of suretyship was made (*r*), it follows that, if the bank gives up or loses securities to which the surety would be then entitled, or causes a loss by mismanaging a sale of them, or by neglecting to value them when proving the debt of the bank on the insolvency of the customer, or by any other negligent act or omission in dealing with them, he is discharged to the extent of such securities or such loss (*s*).

Negligence of creditor.

But mere forbearance, or even supineness, on the part of a bank as creditors has not the effect of releasing a surety (*t*). If the surety considers the

(*r*) *Instruments Act* 1890, s. 131, which is identical with 19 & 20 Vict., c. 97, s. 5; *Ewart* v. *Latta*, 4 Macq. H.L.C., 983; *Taylor* v. *Bank of New South Wales*, 11 App. Cas., 596. See also *Hardy* v. *Johnston*, 6 V.L.R. (L.), 190; *Everingham* v. *Waddell*, 7 V.L.R. (L.), 180; *Swan* v. *National Bank*, 4 A.J.R., 42; *Embling* v. *M'Ewan*, 3 V.R. (L.), 52; *Bank of Victoria* v. *Smith*, 20 V.L.R., 450; 16 A.L.T., 92; *Jones* v. *Hill*, 14 N.S.W. L.R., Eq., 172, 303; *Monk* v. *Smith*, 14 N.S.W. L.R., Eq., 311; *Ward* v. *National Bank of New Zealand*, 8 N.Z.L.R., 10; notes to *Lampleigh* v. *Brathwait*, 1 Sm. L.C., 10th ed., p. 153.

(*s*) *Australian Joint Stock Bank* v. *Hetherington*, 14 N.S.W. L.R., 503; *Wulff* v. *Jay*, L.R. 7 Q.B., 756; *Mutual Loan Fund Association* v. *Ludlow*, 5 C.B., N.S., 449; *Rainbow* v. *Juggins*, 5 Q.B.D., 422; *Watson* v. *Alcock*, 4 DeG. M. & G., 242; *Strange* v. *Fooks*, 4 Giff., 408; *Peacock* v. *Pursell*, 32 L.J.C.P., 266; *Forsyth* v. *M'Leod*, Macass., 293; *Matton* v. *Lipscomb*, 16 N.S.W. L.R. (Eq.), 142; *Healey* v. *Cornish*, 3 S.C.R. (Eq.), 28; *Bank of Victoria* v. *Smith*, 20 V.L.R., 450; notes to *Dering* v. *Winchelsea*, 2 Wh. & Tud. L.C., 7th ed., 554-563.

(*t*) *National Bank* v. *Plummer*, 6 W.W. & A'B. (L.), 165; cf., *Trust and Agency Co.* v. *Greene*, 1 V.R. (L.), 171; *Black* v. *Ottoman Bank*, 15 Moore, P.C., 472; notes to *Rees* v. *Berrington*, 2 Wh. & Tud. L.C., 7th ed., 599.

creditor to be too inactive or dilatory in realising his securties, his proper course is very clearly defined. He may pay off the creditor, obtain an assignment from him of the securities, and enforce any securities which the creditor has omitted to realise. But a creditor may agree to put in force the securities which he holds, and the efficacy of such an agreement has been fully recognised. Thus a surety was held to have been released because the creditor did not sue for his debt in compliance with a stipulation made between him and the surety; but in the absence of such a stipulation, it is not necessary for him to do so (*u*).

(7) When right to contribution is taken away.

Where one of two or more sureties is compelled to pay the debt which they have guaranteed he is entitled to contribution from the others in proportion to the amount for which each is a surety. This doctrine is not founded on contract, but depends upon general principles of equity (*v*). Accordingly, if several sureties are bound by separate instruments and distinct contracts to secure the same debt, they are all liable to contribute; and should the creditor, by releasing one of such sureties, deprive the others of their right to contribution, they will be released, if not absolutely,

(*u*) *Lawrence* v. *Walmsley*, 31 L.J.C.P., 143; 12 C.B., N.S., 799; *Strong* v. *Foster*, 17 C.B., 201; *Watson* v. *Alcock*, 4 De G. M. & G., 242; *M'Mahon* v. *Young*, 2 V.L.R. (L.), 57; *Imperial Bank* v. *London &c. Docks*, 5 C.D., 195.

(*v*) *Dering* v. *Winchelsea*, 1 R.R., 41; 2 Wh. & Tud. L.C., 7th ed., p. 535; and see *Toohey* v. *M'Culla*, 10 N.S.W. L.R., Eq., 264; *Monk* v. *Smith*, 14 N.S.W. L.R. (Eq.), 311; *Godfrey* v. *Henelly*, 19 V.L.R., 70; *Ellesmere Brewing Co.* v. *Cooper*, (1896) 1 Q.B., 75; *Re Parker*, (1894) 3 Ch., 400; notes to *Lampleigh* v. *Brathwait*, 1 Sm. L.C., 10th ed., 151.

at all events to the extent of the contribution which has been lost (*w*).

Promissory notes as guarantees.

Banks sometimes take a note signed by the customer and indorsed by one or more friends as sureties for him, in order to secure his indebtedness to the bank (*x*). *Primâ facie* a note is given for an advance then made, or a specific balance then due, and the burden of proof is on the person who seeks to establish that it was intended to be a security for a fluctuating balance. It is entirely a question of evidence (*y*). For this reason, and because no contemporaneous oral agreement can modify or control the contract embodied in a bill or note (*z*), it is desirable to have the arrangement reduced into writing. This may be done by a separate document, or it may be indorsed on the back of the note (*a*). In such cases the bank should not give additional time to the principal debtor for the payment of the note, for, by so doing, it would release any party who was a surety in reality (*b*).

(*w*) *Ward* v. *National Bank of New Zealand*, 8 App. Cas., 755; N.Z. L.R., 1 C.A., 51.

(*x*) See, for instance, *Bank of Victoria* v. *Brown*, 1 V.L.R. (L.), 47.

(*y*) *Re Boys*, L.R., 10 Eq., 467.

(*z*) *Hinton* v. *Setchell*, 8 S.C.R., 152; *Cornish* v. *Bank of N. S. Wales*, Mac., 181; *Heslop* v. *Phillips*, 24 V.L.R., 498; *New London Credit Syndicate* v. *Neale*, (1898) 2 Q.B., 487; but see *Bank of South Australia* v. *Williams*, 19 V.L.R., 514; 15 A.L.T., 106.

(*a*) See *Lipscomb* v. *Matton*, 15 N.S.W. L.R., 362; *Chomeley* v. *Darley*, 14 M. & W., 344; *Davies* v. *Stainbank*, 6 De G. M. & G., 679; *Greenough* v. *M'Lelland*, 2 El. & El., 424; *Strong* v. *Foster*, 17 C.B., 201.

(*b*) *Mackenzie* v. *West*, 16 V.L.R., 588; 12 A.L.T., 63; *Davies* v. *Stainbank*, 6 De G.M. & G., 679.

CHAPTER XII.

CASH CREDITS.

THE following description of a cash credit is derived from "a work of considerable repute amongst bankers" (*a*) :—

Cash credits described.

"A cash credit is an undertaking on the part of the bank to advance to an individual such sums of money as he may from time to time require, not exceeding in the whole a certain definite amount, the individual to whom credit is given entering into a bond with sureties, generally two in number, for the repayment on demand of the sums actually advanced. . . . A cash credit is in fact the same thing as an overdrawn account, except that in a current account the party generally overdraws on his own individual security, and in the cash credit he finds two sureties who are responsible for him."

This account is fully supported by the hightest legal authority (*b*). The bank permits the customer to draw

(*a*) *The Principles and Practice of Banking*, by Gilbart. See *Dawson* v. *Bank of New Zealand*, 5 N.S.W.R., *per* Faucett, J., at p. 162.

(*b*) See the judgment of Lord Brougham, in *Swan* v. *The Bank of Scotland*, 10 Bleigh N.S., 627 ; s.c., under the name of *Swan* v. *Blair*, 3 Cl. & Fin., 6, 10; 39 R.R., 78 ; where the substance of the common on it for the whole amount of the credit, or for such part as his daily transactions may require. To the credit of this account he pays in such sums as he may receive in the course of his business, and which he may not have occasion to use, so as to reduce the amount to his debit. But these credits are not allowed to degenerate into dead loans. They must be frequently operated on by paying in and drawing out, otherwise they will be discontinued. The sureties have a right to know the state of the customer's account and all operations upon it, and to stop it at any time on giving notice to the bank, but they are liable for the amount then due.

To whom granted.

Such credits are extensively granted to people commencing business, and to contractors and others. In Scotland they are used not only by traders, but by persons in any other occupation or profession, requiring supplies of capital to a moderate amount, such as agents and lawyers, sometimes even by private persons living on their means. They have been largely adopted in most, if not all, of the colonies, and their use seems to be extending. London bankers, for reasons peculiar to their own business, generally refuse to grant them. In London the banks are liable to sudden and large demands upon them by their customers. They therefore find it expedient to invest their funds chiefly in securities that can be promptly realised, and this quality of easy realisation does not belong either to overdrafts or cash credits.

Obligations of bank.

According to a recent decision a bank by granting a cash credit to a customer upon the usual terms incurs

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form of a cash credit bond will be found. Each bank has its own forms. See the description of cash credits in Adam Smith's *Wealth of Nations*, Bk. II., chap. 2, and in Hume's *Essays* : *Essay on the Balance of Trade*.

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an obligation to honour the drafts of the customer up to the amount agreed on. It cannot get rid of that obligation without giving notice to the customer. The transaction is equivalent to an agreement by the bank to allow credit to the customer to the amount named, and an action may be maintained for a breach of that agreement (*c*). But though the bank has not the power, at its mere will and pleasure, to terminate the agreement without taking any steps to inform the customer of its intention to do so, it may put an end to the cash credit by giving sufficent notice to the customer, and what amounts to due notice is question not of law for a judge, but of fact for a jury (*d*).

A bank agreed to issue a cash credit to its customer for two years, but the bond to secure it was not limited in its terms to advances made during that time, and it was held, notwithstanding the form of the bond, that the sureties were not answerable for any advances made after the expiration of two years (*e*).

Liabilities of sureties.

Where sureties agreed to be responsible for all advances made on a cash credit account and to pay upon demand in writing all money advanced according to an account current made up and signed by the manager of the bank, it was held that the making-up and signing the account was not a condition precedent to the bank's right to sue for the advances (*f*).

Where a bank exonerated a surety from his respon-

(*c*) *Dawson* v. *Bank of New Zealand* (No. 1), 5 N.S.W.R., 154; and see *Bank of Australasia* v. *Palmer*, (1897) Ap. Cas., 540, 545, 546.

(*d*) *Dawson* v. *Bank of New Zealand* (No. 2), 5 N.S.W.R., 386.

(*e*) *Joint Stock Banking Co.* v. *Mortimer*, 6 Sup. Ct. R., L., 248.

(*f*) *Commercial Banking Co.* v. *Bennett*, 6 Sup. Ct. R., L., 347.

sibility in respect of an account upon his delivering to them other securities for it, the court held him to be released from his suretyship though there was no discharge under seal. But if the surety knew the securities to be worthless when he delivered them he would not be discharged (*g*).

The liability of a surety on a cash credit bond will not, in the absence of any agreement to the contrary, be discharged, if, immediately after the execution of the obligation, the cash credit is employed to pay off an old debt previously due from the customer to the bank (*h*).

Additional securities.

The sureties of a cash credit bond occasionally obtain from the person to whom the credit is granted counter securities for the payment of his overdraft (*i*). A bank may, also, at times insist upon obtaining security from the person to whom it grants such a credit, in addition to the usual bond (*k*).

Most of what is said in the last chapter as to guarantees is equally applicable to cash credit bonds, which in effect are only a special kind of guarantee.

(*g*) *Commercial Banking Co.* v. *Bennett*, 9 Sup. Ct. R., L., 238.

(*h*) *Hamilton* v. *Watson*, 12 C. & F., 109 ; cf., *Bank of Australasia* v. *Wilson*, N.Z. L.R. 3 C.A., 130.

(*i*) See *Lyons* v. *Bank of New South Wales*, 3 N.S.W. L.R., 385.

(*k*) See *Barton* v. *Bank of N. S. Wales*, 15 App. Cas., 379.

CHAPTER XIII.

The General Lien of Bankers.

Banker's general lien is part of the law merchant.

It is well-known that by virtue of the law merchant, bankers have a general lien on all securities deposited with them as bankers by a customer for any balance that may be due from him.

The general lien of bankers is so frequently referred to as an illustration of the operation of the law merchant, that it may not be inappropriate to offer here a few observations explanatory of the nature of that law, especially as it is, in many instances, applicable to banking operations.

The law merchant.

The *lex mercatoria,* or law merchant, forms a part of the common law. It is founded on usage or custom (*a*): Accordingly, it is not a fixed or stereotyped body of law. It is capable of being expanded or enlarged by the addition of new customs, so as to meet the wants and requirements of trade in the varying circumstances of commerce. It consists of the usages of bankers, merchants, and traders, ratified by the decisions of courts of law. Upon satisfactory proof of a general

The law merchant consists of mercantile usages ratified by law.

(*a*) The words "usage" and "custom" seem to be synonymous. See the judgment of Cockburn, C.J., in *Goodwin* v. *Robarts,* L.R., 10 Ex., 337, *passim.*

custom the courts adopt it as settled law. What precise amount of proof is required to establish the existence of such a custom is not quite clear. It may be still in growth; and may require evidence for its support in each case (*b*). But there is no doubt that it may be so frequently proved in the Courts that they will take judicial notice of it, and it then becomes a part of the law merchant. It would be a useless expense to require parties to prove by a large number of witnesses a custom which had been proved over and over again (*c*). By this process, what was once merely a usage, unsanctioned by legal decision, may be engrafted on or incorporated into the common law. When it has thus been judicially ascertained and established, it becomes a portion of the law merchant, which courts of justice are bound to know and recognise (*d*).

New usages.

In order to constitute part of the law merchant, a usage must be universal or general in some department of trade or commerce. But the length of time during which it has existed is chiefly material in determining how far it has generally prevailed. A recent usage, therefore, when once shown to be universal, is not the less entitled to prevail because it may not have formed a part of the law previously recognised and adopted by the Courts (*e*). But a new usage, to obtain legal recog-

(*b*) *Juggomohun Ghose* v. *Manickchund*, 7 Moore, Ind. Ap., 263.

(*c*) *Ex p. Powell*, 1 Ch. D., 506, 507; and see *Ex p. Hattersley*, 8 Ch. D., 601, as to the "three years' system" of hiring pianos; *Crawcour* v. *Salter*, 18 C.D., at p. 50.

(*d*) See *per* Cockburn, C.J., in *Goodwin* v. *Robarts*, L.R., 10 Ex., 337, affirmed 1 Ap. Cas., 476; *Brandao* v. *Barnett*, 12 C. & F., 787; *Rumball* v. *Metropolitan Bank*, 2 Q.B.D., 194.

(*e*) *Goodwin* v. *Robarts*, *supra*; *Bechuana Land Co.* v. *London* nition, must not be contrary to positive law. It cannot, therefore, be set up against one already settled and adopted by the Courts. If an attempt were made to prove such a usage at a trial, the judge, it seems, ought not to receive evidence of it (*f*).

Customs must be reasonable.

A custom to be binding must be not merely universal or general, but also reasonable; and it is not reasonable if it be such as honest and right-minded men would deem unrighteous or unfair (*g*). No continuance could make such a custom a good custom. The question of unreasonableness is for the court, and evidence of an unreasonable custom ought not, it is apprehended, to be submitted to a jury (*h*).

But until a usage has been embodied in a legal decision, its existence, nature, and extent are questions of fact which must be established by evidence (*i*).

Local usages.

In addition to the universal usages already referred to, there are local usages which are not strictly speaking portions of the general law merchant, but to which the Courts of law will give effect. But they must be reasonable and consistent with the established law. For to give effect to a usage which involved a defiance of reason or a disregard of law would be contrary to fundamental principles. Local usages are not unknown

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Trading Bank, (1898) 2 Q.B., 658; cf., *Chamberlain* v. *English, Scottish and Australian Bank,* 4 V.L.R. (L.), 45.

(*f*) *Goodwin* v. *Robarts, supra,* at p. 357.

(*g*) *Paxton* v. *Courtney,* 2 F. & F., 131.

(*h*) *Gibson* v. *Crick,* 1 H. & C., 142; 31 L.J., Ex., 304; *Bank of N. S. Wales* v. *King,* 2 A.J.R., 83.

(*i*) *Goodwin v. Robarts, supra,* and see *per* Mellish, L.J., *Ex. p. Powell,* 1 Ch. D., 501.

amongst bankers. When a local usage exists, the customer impliedly contracts that the bank may deal with him according to it. Thus it is the custom of the London banks not to pay post-dated cheques. When a post-dated cheque is presented before its due date, it is marked post-dated by the bank, and it will not be paid afterwards at maturity. An action for dishonouring it when due could not be maintained (*k*).

But evidence would not be received of a local usage in London entitling a banker, as the holder of a foreign bill that had been dishonoured, to the option of demanding either the amount of the re-exchange or the price given for the bill. For by the law merchant it is settled that the obligation of the indorser is to pay the re-exchange and expenses, and such a custom would be at variance with it (*l*).

Local usage is not binding elsewhere.

Persons ignorant of a local usage will not generally be bound by it. Thus it was held that Sydney merchants could not be bound by a Liverpool custom of which they were ignorant, and under which a Liverpool shipper claimed a lien on goods consigned to Sydney (*m*). And a local custom in Bombay making mate's receipts to represent the goods indicated by them, and rendering those documents negotiable there, would not bind the goods in Liverpool (*n*). But a

(*k*) *Emanuel* v. *Robarts*, 17 L.T., N.S., 646; 9 B. & S., 121; and see *Bird* v. *National Bank of New Zealand*, 2 N.Z. J.R., N.S., 96.

(*l*) *Suse* v. *Pompe*, 30 L.J., C.P., 75; 8 C.B., N.S., 538; but see *Williams* v. *Ayers*, 3 App. Cas., p. 144.

(*m*) *Kirchener* v. *Venus*, 12 M.P.C.C., 361; and see *per* Kelly, C.B., in *Buckle* v. *Knoop*, L.R., 2 Ex., 125; *Robinson* v. *Mollet*, L.R. 7 H.L., 802.

(*n*) *Hathesing* v. *Laing*, L.R., 17 Eq., 92.

person who employs an agent to act for him in a particular place may by so doing give him authority to act in accordance with the customs there established (*o*).

Banker's lien.

Such, then, being the general nature of the law merchant, it has been held by the Privy Council that, under it, Australian bankers are, by the universal custom of bankers sanctioned by legal decisions, entitled to a general lien over the securities deposited with them as bankers by their customers, unless there be an express contract or other circumstances that show an implied contract inconsistent with the lien (*p*).

It is proposed to consider shortly, (1) what securities may be the subject of a banker's lien, and (2) the circumstances which may be deemed inconsistent with such a lien.

(1) Securities subject to lien.

The extent of this lien has occasionally given rise to discussion. For there appears to be some doubt about the meaning of the word "securities," and about the matters which it includes.

Title deeds.

It has been asserted that, when used in this connection, it does not include a conveyance of land (*q*). The point has recently been fully investigated, and it was held that bankers are entitled to a lien over their customers' title deeds which are deposited with them in the ordinary course of business (*r*).

(*o*) *Bayliffe* v. *Butterworth*, 1 Ex., 425, *per* Alderson, B.; notes to *Wigglesworth* v. *Dallison*, 1 Sm. L.C., 10th ed., 548.

(*p*) *London Chartered Bank* v. *White*, 4 App. Cas., 413; following *Brandao* v. *Barnett*, 12 Cl. & F., 787; and, affirming the judgment in the Court below, 3 V.L., Eq., 168.

(*q*) *Wylde* v. *Radford*, 33 L.J., Ch., 53.

(*r*) *Dale* v. *Bank of New South Wales*, 2 V.L.R. (L.), 27; *R.* v.

Accordingly, it is conceived that even those banks which, by their charters or statutes of incorporation, are prohibited from making advances on the security of land, may acquire valid liens over title deeds deposited with them by their customers to secure loans and fluctuating overdrafts (*s*).

A bank would have a lien on title deeds for money advanced to an executor who has power to charge real estate (*t*).

A bank may also have a lien upon the bills of exchange belonging to its customer which have not been discounted by it (*u*). Of course if the banker knows that the customer has no right to use the negotiable securities which he deposits, the banker will have no lien upon them (*v*). Bills and notes.

Where a bank has a lien upon a bill, arising either from contract or by implication of law, it is a holder for value to the extent to which it has a lien (*w*). For instance, if the holder of a bill for £100 indorses and

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Williams, Ir. Rep., 3 Eq., 346 ; *Re Trethowan*, 5 Ch. D., at p. 565 ; *Re General Provident Ass. Co.*, L.R., 14 Eq., 507 ; *Farhall* v. *Farhall*, L.R., 7 Eq., 286.

(*s*) But see *National Bank* v. *Cherry*, 2 S.A.L.R., 212 ; L.R., 3 P.C., 299 ; *Hodgkinson* v. *Wyatt*, 4 Q.B., 749.

(*t*) *Farhall* v. *Farhall*, L.R., 7 Eq., 286.

(*u*) *Davis* v. *Bowsher*, 5 T.R., 488 ; 2 R.R., 650 ; *Commercial Bank* v. *Lawrence*, 1 A.J.R., 119 ; cf., *Ex p. Carlisle Banking Co.*, 5 Ch. D., 882.

(*v*) *Ex p. Kingston*, L.R. 6 Ch., 632 ; *Earl of Sheffield* v. *London Joint Stock Bank*, 13 Ap. Cas., 333.

(*w*) *Bills of Exchange Act*, s. 27 (3).

deposits it with his banker as a security for £50, the bank is a holder for value to the extent of £50, and can recover that amount from the indorser (*x*).

Lien on bills for collection.

A banker, it is conceived, has a lien on all bills and cheques deposited with him by customers for collection, and may sue upon them (*y*).

Lien on securities fraudulently deposited by an agent.

A bank may also have a lien over negotiable paper, such as scrip, or bonds payable to bearer, when deposited with it by an agent to secure his own account, though this may be done in fraud of his principal to whom the securities really belong. For if the owner of a security purporting on its face to be transferable by delivery chooses to leave it in the hands of an agent who dishonestly hands it over to a *bonâ fide* holder for value, the true owner must be taken to have brought about his own loss by reposing his confidence in an untrustworthy person, and must therefore bear it (*z*).

A bank may also have a lien upon the securities of an executor, where it has advanced him money for executorial purposes (*a*); or upon securities deposited by a broker, if in the ordinary course of his business

(*x*) *Attenborough* v. *Clarke*, 27 L.J. (Ex.), 139; and see *Re European Bank*, L.R. 8 Ch., 41; *Ex p. Newton*, 16 Ch. D., 330.

(*y*) *Misa* v. *Currie*, 1 App. Cas., 554, *per* Lord Hatherley, and at pp. 565 and 573; *Bank of Australasia* v. *Walters*, 2 W.W. & A'B. (L.), 89; *Colonial Bank* v. *M'Donald*, 5 V.L.R. (L.), 214; but see *Ford* v. *London Chartered Bank*, 5 V.L.R., Eq., 328, where previous decisions do not appear to have been fully cited.

(*z*) *Jones* v. *Peppercorn*, Joh., 430; 28 L.J., Ch., 158; and see *Rumball* v. *Metropolitan Bank*, 2 Q.B.D., 194; *Hone* v. *Boyle*, 27 L.R., Ir., 137.

(*a*) *Thorley* v. *Child*, 16 C.D., 151.

he has authority to pledge them (*b*). But it would be different in cases in which the bank must know that the securities did not belong to the depositor, but to his customers, and that he had no authority to pledge them (*c*).

A bank would have a lien on securities deposited by a building society not authorised to borrow, for so much of an overdraft as was applied in the necessary and lawful payments of the society (*d*).

Lien on bank's own shares.

Where a bank was, by its instrument of incorporation, entitled to a lien upon its shares for all debts due to it by the shareholders, and was not bound to register trusts, it was decided by the Courts in England and New South Wales that the bank was entitled to a lien over shares held in trust under a marriage settlement for debts due by the trustee personally (*e*). But if it were shown that the bank had notice of the trusts before it made the advances to the trustee, the interest of the beneficiaries would, it seems, prevail, and the bank would not be allowed to exercise its lien (*f*). Where, upon the death of a shareholder, his property

(*b*) *London Joint Stock Bank* v. *Simmons*, (1892) A.C., 201; *Bentinck* v. *London Joint Stock Bank*, (1893) 2 Ch., 121.

(*c*) *Earl of Sheffield* v. *London Joint Stock Bank*, 13 A.C., 333; *Williams* v. *Colonial Bank*, 38 Ch. D., 388; *Goodall* v. *Australian Freehold Banking Corporation*, 16 V.L.R., 29; 11 A.L.T., 183.

(*d*) *Blackburne &c. Society* v. *Cunliffe*, 9 A.C., 857, affirming S.C., 22 Ch. D., 61.

(*e*) *New London and Brazilian Bank* v. *Bucklehurst*, 21 Ch. D., 302; *Budge* v. *Bank of N. S. Wales*, 11 N.S.W. L.R., 385.

(*f*) *Budge* v. *Bank of N.S. Wales*, 11 N.S.W. L.R., 385; *Browne* v. *Same*, 11 N.S.W. L.R., 392; *Bradford Banking Co.* v. *Briggs*, 12 App. Cas., 29.

devolved upon an administrator into whose name the shares were transferred, it was held in Victoria that a bank which, by its articles of association, was entitled to a similar lien, was, nevertheless, liable to an action for refusing to transfer the shares when sold by the administrator, who was indebted to it, inasmuch as under such circumstances it could have no lien upon them for the administrator's private indebtedness (*g*).

(2) Circumstances inconsistent with the general lien.

The banker's right to a general lien is not the result of any express contract, but is established by usage and sanctioned by law. If therefore the right to a lien over securities is created by a written contract, the express stipulation excludes the general lien, and limits the rights of the parties by the express agreement which they have made (*h*). But the general lien will not be excluded by a special contract unless the special contract be inconsistent with it (*i*).

No lien on security deposited for a special purpose.

Amongst the circumstances which may negative the existence of a lien for the customer's general balance is the deposit of the security for a special purpose clearly indicated at the time it is made. Accordingly, if the securities be deposited with the bank in respect of certain specific advances, and not on the general account, the bank has no lien on the securities for the general balance due by the customer (*k*).

(*g*) *M'Laughlin* v. *Bank of Victoria*, 20 V.L.R., 433; 16 A.L.T., 54.

(*h*) See *In re Leith's Estate*, L.R. 1 P.C., 296; cf., *Kirchner* v. *Venus*, 12 Moore's P.C., N.S., 158.

(*i*) *In re European Bank*, L.R. 8 Ch., 41; cf., *Jones* v. *Peppercorne*, Joh., 430; *Symons* v. *Mulkern*, 46 L.T., 763; *Re City of Melbourne Bank*, 4 A.L.R., 292.

(*k*) *London Chartered Bank* v. *White*, 4 A.C., 413; *Wolstenholme* v. *Sheffield Union Banking Co.*, 54 L.T., 746.

Where Government securities were deposited by a customer as the agent of a foreign merchant with a banker in order that he might obtain payment of the interest due upon them for the principal, it was held that the bank had no lien upon them for the agent's general balance, as such a special circumstance was not consistent with the existence of a general lien (*l*).

In general, no lien on trust shares or deeds.

If shares held in trust, or if a deed be deposited with a banker as a security, in violation of a trust, he will not obtain a lien upon it, even though he has no notice of the trust. The prior equity of the *cestui que trust* must prevail, and the trustee cannot confer an interest in that which does not belong to him (*m*). But the bankers might have a claim if the *cestui que trust* had been guilty of negligence; what amount of negligence would be sufficient to deprive a *cestui que trust* of his priority is not quite clear (*n*).

No lien on chattels deposited for safety.

A bank has no lien for the balance of an account upon boxes containing plate or securities, which have been deposited with it for safe custody (*o*).

Nor on securities left by accident.

Nor has it a lien on securities left at the bank accidentally on which it has refused to make advances

(*l*) *Brandao* v. *Barnett*, 12 Cl. & Fin., 787.

(*m*) *Colonial Bank* v. *Cody*, 15 Ap. Cas., 267; *Manningford* v. *Toleman*, 14 L.J., Ch., 160; *Baillie* v. *M'Kewan*, 35 Beav., 177; cf., *Shropshire Union Ry. and Canal Co.* v. *The Queen*, L.R. 7 H.L., 496.

(*n*) *Stackhouse* v. *Jersey*, 30 L.J., Ch., 421.

(*o*) *Hamilton* v. *Bank of New South Wales*, 15 N.S.W. L.R., 109; *Dale* v. *Bank of New South Wales*, 2 V.L.R. (L.), 27; *Leese* v. *Martin*, L.R. 17 Eq., 224.

(*p*), nor on a partner's separate account, for the balance due from the firm (*q*).

No lien on credit balance for bills not due.

A banker has no lien on his customer's cash balance on a current account in respect of bills discounted but not yet due, even though some of the parties to them may be in insolvent circumstances (*r*). For a person cannot retain a sum of money which is actually due against a sum of money which is only to become due at a future time (*s*), unless it is specially agreed that he shall be at liberty to do so (*t*).

Agreements for liens.

Bankers sometimes insist that the terms upon which they are to have a lien shall be reduced into writing, and require what is often called a letter of lien. Of course, the effect of each of such documents must depend upon its own terms.

A written agreement that if a bank discount a customer's bills and allow him an overdraft, they shall be entitled to a lien upon his securities, confers only the ordinary banker's lien (*u*). And a security given by a customer for the amount "which shall or may be found due on the balance" of his account covers only the then existing balance, and does not operate as a

(*p*) *Lucas* v. *Dorrein*, 7 Taunt., 279.

(*q*) *Watts* v. *Christie*, 11 Beav., 546 ; *City Bank Case*, 3 De G. F. & J., 629 ; 30 L.J., B., 20.

(*r*) *Bower* v. *Foreign &c. Gas Co., ex p. Metropolitan Bank*, 22 W.R., 740 ; *Robey* v. *Oriental Bank*, 2 Sup. Ct. R., N.S., 57.

(*s*) *Jeffreys* v. *Agra & Masterman's Bank*, L.R. 2, Eq., 674, at p. 680.

(*t*) *Chartered Bank of India* v. *Evans*, 21 L.T., N.S., 407 ; *M'Cooey* v. *Bank of N. S. Wales*, 5 A.J.R., 23.

(*u*) *White* v. *London Chartered Bank*, 3 V.L.R., Eq., 33.

continuing security (*v*). Where a customer deposited a policy of life insurance with his bankers, accompanied by a memorandum of charge to secure advances not exceeding a specified amount, it was held that the banker's general lien was displaced and that the charge was limited to the amount specified (*w*).

(*v*) *Re Meadows*, 26 Beav., 588 ; 28 L.J., Ch., 891. See further *Re City of Melbourne Bank*, 4 A.L.R., 292 ; *Re Dominion Bank*, 24 V.L.R., 532.

(*w*) *In re Bowes*, 33 Ch. D., 586.

CHAPTER XIV.

*BANK CHARTERS.

Bank charters in Victoria.

BANKS in Victoria carry on business under Royal Charters, special Acts of Parliament, or the *Companies Statute* 1890; each has its powers, expressly or impliedly defined by its charter, Act, or memorandum of association; every such charter, Act, or memorandum is of the nature of a contract, made by the Crown or Legislature with the bank, on behalf of everyone interested, in anything to be done under it (*a*); and as such Act or memorandum may be regarded as a statutory charter, the word "charter" will, for brevity's sake, and where not inconsistent with the context, be used throughout this chapter as including charter, Act, and memorandum.

The bank's powers to contract and enforce contracts and to take, hold and realise upon securities, are those

(*a*) *Blakemore* v. *Glamorganshire Canal Co.*, 1 My. & K., 162; 36 R.R., 289.

* This chapter and the next were originally written and published long before the passing of the *Banks and Currency Act* 1890 and the *Reconstructed Companies Act* 1893, under which latter Act most of the banks constituted by Royal Charter or special Acts of Parliament were reconstructed and became incorporated under the *Companies Act* 1890, or the English Companies Acts. The operation of section 24 of the *Banks and Currency Act*, and the fact that so many of the banks are no longer under Royal Charter or special Acts, make many matters discussed in these chapters of comparatively small practical importance except as to securities taken, contracts entered into, and acts done before the passing of those Acts, but as the Acts are not retrospective, it was thought advisable to retain the chapters in a modified form.

expressly or impliedly conferred by its charter; it is, therefore, important to ascertain the rules of construction to be applied to charters, and some general principles determining what acts are or are not *ultra vires* of the charter; also, what are the operation of and consequences incident to an act *ultra vires.*

Nature and operation of a charter.

Till recently there were conflicting opinions as to the nature and operation of a charter, some contending that the corporation, as a creature of the charter, had only those powers and rights which the charter expressly, or by *necessary* implication, conferred (*b*); others contending that the charter having created a person, that person was clothed with all the common law powers and rights which a private person has and enjoys; subject only to any limitations imposed by the charter, and this contention is countenanced by many of the old authorities. Hence it is we find some charters have only enabling and permissive clauses, as though nothing could be done that was not expressly authorised; whereas others have, in addition, prohibitory clauses, as though express limitation of the general powers were necessary. Recent decisions, however, have decided that neither of the above views is correct, and that the true one lies between them.

True rule of construction.

According to these decisions, to ascertain the powers and rights of any particular corporation, regard must be had to the business or purpose for which it was incorporated, as declared by its charter; and then it may be assumed to be empowered and privileged to do all acts and enjoy all rights necessarily, properly, or

(*b*) *Blakemore* v. *Glamorganshire Canal Co.*, 1 My. & K., 162; 36 R.R., 289. See also *Lindley on Company Law*, 5th ed., p. 164; and *Re Metropolitan Permanent Building Society*, 7 V.L.R. (Eq.), 86.

reasonably within the scope of such business or purpose, or which are customarily exercised and enjoyed by private individuals carrying on or seeking to accomplish a similar business or purpose; the expressed general powers and privileges, carrying with them all subsidiary and auxiliary powers and privileges not expressly, or by necessary implication, prohibited by the charter; but it must not be assumed to have any other powers or privileges (*c*).

Acts *ultra vires*, *extra vires*, and informal acts *intra vires*.

Acts *ultra vires* are divisible into (1) acts *ultra vires* of the corporation, *i.e.*, acts altogether outside the business or purpose for which the corporation was formed, and not necessary to the enjoyment of the powers and privileges expressly conferred, which class of acts, for the sake of distinction, we shall designate acts *ultra vires*; (2) acts within the business or purpose of the corporation, and cognate to acts expressly authorised by the charter, but which exceed limits imposed by the charter, or otherwise violate some express or implied restriction of the charter, these we will distinguish as acts *extra vires*; (3) acts *ultra vires* of the directors, *i.e.*, acts of the directors which, though not violating the charter, would not bind dissentient members; and (4) acts *intra vires* of the directors, but done in an informal manner. As it is not intended to discuss at length the doctrine of *ultra vires*, but merely to apprise bankers of certain of its principles, to be observed in entering into contracts, and more especially in taking securities, attention will be principally given to acts *extra vires*.

(*c*) *Taylor* v. *Chichester and Midland Railway Co.*, L.R. 2 Ex., 356, 384; L.R. 4 H.L., 628; *Attorney-General* v. *Great Eastern Railway Co.*, L.R. 5 Ap. Cas., 478; *Brice on Ultra Vires*, 3rd ed., Ch. 9.

Restraint on dealings with land.

Nearly all bank charters and bank Acts impose express or implied restraint upon the bank, in acquiring, holding, or dealing with land. This restraint seems objectionable as a matter of public policy, and irksome both to banker and customer. And this view appears to have been taken by the Victorian Legislature, which by section 242 of the *Banks and Currency Act* 1890, passed since the first edition of this work was published, enacted that "any incorporated banking company may, notwithstanding anything to the contrary contained in any Act in force in Victoria relating to such bank, advance money on the security of lands, houses, ships or pledges of merchandise."

Law of *ultra vires* applied to bank charters.

The points which in every-day bank business most frequently arose before the passing of the *Banks and Currency Act* 1890 were the extent to which; the circumstances under which; and the form in which, a bank is permitted by its charter to take security over real property, to secure present and future advances, an account current, or indebtedness partly pre-existing and partly incurred at date of security. In some charters there are no prohibitory clauses, but in a majority there are, and the restraint above referred to is usually imposed by a prohibitory clause declaring "it shall not be lawful for the corporation to advance or lend upon the security of lands or houses," coupled with a modifying and enabling clause, by which it is provided that notwithstanding any statute or law to the contrary, or the said prohibitory clause, it shall be lawful for the corporation "to take and to hold, until the same can be advantageously disposed of, for the purpose of reimbursement only, and not for profit, any land, houses, and other real estate which may be taken by it, in satisfaction,

Usual form of restraint.

liquidation or discharge, of any debt due to the corporation, or in security for any debt, or liability *bonâ fide incurred, or come under, previously to and not in anticipation or expectation of such security,*" and to sell, dispose of, convey, assign, or assure the same as occasion may require.

What included in "lands and houses."

The first question is, What do the words "lands or houses" cover? In some charters "leaseholds" are mentioned as well as lands, and it becomes a question whether the words "lands or houses" include leaseholds in those charters where leaseholds are not mentioned. If charters were drawn on uniform principles, the mention of leaseholds, in addition to lands, in one charter, would show that the word "lands," in charters of a similar nature, was not intended to include them; but we shall look in vain for any uniform principle of drafting in charters. The definition of the word in any text-book of authority is confined to freeholds, and doubtless in a restrictive clause such as that under consideration the word would receive its most limited meaning. As to the word "houses," an examination of the charters in which it occurs, shows it was not used to indicate a different estate in realty to that indicated by "land"; but probably to prevent a possible quibble, as to the money being lent upon the security of the buildings, and not of the land on which they stood. It therefore appears that leasehold property, if not mentioned, *eo nomine,* in the prohibitory clause, can be taken as security for any kind of indebtedness, pre-existing, present or future.

Leaseholds.

Crown leases.

The peculiar nature of those Crown leaseholds which, in certain events, mature into freeholds, raises a doubt as to whether they are or are not within the meaning of the word "land." The tenure is one not known in

England, and therefore is not contemplated by the charters which have been used as models for those in force in this colony; it apparently had its origin in a political land scheme, by which it was intended to sell the fee simple of Crown lands to a certain class of the community, on a system of time payments, conditions being imposed to restrict the indulgence to that particular class; and the contrivance of a lease adapted to, amongst other things, negative any claim to the fee simple, until every condition upon which the indulgence was granted has been fulfilled to the satisfaction of the Crown. The lessee could, however, at any time entitle himself to the fee by a money payment. There is, therefore, no doubt that he was a *quasi* purchaser, and the tenure a *quasi* freehold. On the other hand, the Crown has carefully preserved and insisted upon the relative positions of lessor and lessee, as between it and the tenant, pending the latter's right to claim the grant in fee; moreover, such tenures do not, *per se*, or by mere effluxion of time, become freeholds; certain acts have to be done by the tenant, and certain other by the Crown, to effect the conversion. There is no contract of purchase which the Crown could specifically enforce, and no interest under the contract which under the old law would descend to the heir. There is, therefore, a period during which such tenures are simply leasehold.

On the whole, it appears that whilst they remain leaseholds, and until there has been some judicial decision to the contrary, these Crown leases can be deemed outside the prohibition. In many cases, where security has been taken over such leases for a present advance, such advance will, by the time the leasehold has matured into freehold, have itself matured into a pre-existing due debt, for which a fresh security over the new-born freeholds can be substituted; and if, as is usually the case, the moneys constituting the debt were originally advanced upon other security beside the leaseholds, they very probably will not have been advanced in anticipation, or expectation, of the substituted security.

A bank, restrained by a prohibitory clause, such as above mentioned, although it can only take a freehold estate in land as security for a pre-existing debt, can make that security cover after-accruing interest, and the other charges usually incident to bank debts, computed, charged and dealt with in the customary manner of the bank, also moneys reasonably expended in preserving and perfecting the security.

Equitable mortgages.

An important and difficult question has been raised, namely, whether *equitable mortgages* of land, for present or future advances, or a floating-balance, are within the prohibition. It has been argued in support of such security, that a deposit of title deeds by a customer, to secure his account current, is and has always been so universally done, and is so popular and convenient a form of security, that a corporation formed and empowered to carry on banking business, must be assumed to have the right to take such security, as one of the necessary and customary incidents of banking; that a corporation denied that right could not possibly compete with those that had it; and that had the Legislature intended to interfere with such a recognised custom of banking, it would have made its intention unmistakable, and would, for the sake of impartiality, have done so by a special Act, binding on all banks equally. It may be further urged that the nature of the security leaves it free from any objection on the principles of mortmain, the legal estate not passing to the bank ; the remedy of the bank as against the lands, requiring the intervention of a Court of Equity ; and the Court being able, if public policy required it, to decree a sale, and not foreclosure ; so that at no time would the lands belong to the bank.

Are equitable mortgages within the prohibition.

It is apprehended, however, that an equitable mortgage *created by a deposit of title deeds, accompanied by a memorandum or letters of lien, authorising on default a sale of the lands, or undertaking to substitute a legal mortgage at the will of the bank,* is within the prohibition, and that the above arguments only prove the inexpediency, not the non-existence of the restraint. In one case Mr. Justice Molesworth, though he upheld the security, seems to have conceded that it was in violation of the bank's charter (*d*) ; and in a case before the Privy Council (*e*), in which the point was raised, the judgment, though it upheld the security, was not based on the ground that such security was outside the prohibition (which would have been the broadest basis possible), but on a much narrower one, peculiar to the case. There may, however, be some doubt as to whether a naked deposit of title-deeds is within the prohibition (though this appears to have been all that was done in the case lastly cited) ; but where such a deposit is made, it is possible the bank's security would lie not in

Quære, a naked deposit of deeds.

(*d*) *The London Chartered Bank* v. *Hayes*, 2 A.J.R., 60 ; 2 V.R. (Eq.), 104.

(*e*) *The National Bank of Australasia* v. *Cherry and others*, L.R., 3 P.C., 299 ; see also *Bank of N.S. Wales* v. *Campbell*, 11 A.C., 192 ; and *Barton* v. *Bank of N.S. Wales*, 6 N.S.W. L.R. (Eq.), 82 ; 9 N.S.W. L.R. (Eq.), 78 ; 15 Ap. Cas., 379 ; where the Supreme Court in Sydney held that there is nothing in the incorporating Acts of the Bank of New South Wales to prevent it from holding land absolutely.

equitable mortgage over the *land*, but in general lien over the *deeds* so deposited, and that the bank would have that lien; for whether the security be valid or not, the debt is a valid debt.

Warrants of attorney.

A warrant of attorney, though it charges lands (or at least can be made to do so), is not within the prohibition (*f*).

Pledges of merchandise.

Bills of sale.

Liens on wool and crops.

The prohibitory clauses in bank charters usually include by name "pledges of merchandise." It is conceived that this phrase does not include bills of sale; for though a bill of sale is in effect a mortgage, and the word "mortgage" means a dead pledge, yet a distinction has long been drawn and judicially recognised between a mortgage and a pledge (*g*); also, that it does not include statutory liens on wool or crops. A "pledge" is distinguishable from a "lien," inasmuch as actual or constructive transfer of possession is essential to a pledge (*h*), and this, no doubt, is what was deemed objectionable. It is also questionable whether unshorn wool is merchandise. The statutory lien partakes much more of the nature of a mortgage than a pledge.

Consequences of acts *ultrâ vires*.

It now remains to be seen, what are the consequences, and what the weight and operation, of an act, done by a bank, in violation of its charter. In some cases an abuse of powers might possibly influence the Crown or Legislature as to continuing the privileges conferred

(*f*) *Croft* v. *Lumley*, 6 H.L.C., 672; *Avision* v. *Holmes*, 1 Johns. & H., 530.

(*g*) Notes to *Collins* v. *Blantern*, 1 Sm. L.C., 10th ed., pp. 378 *et seq.*; *Spence Eq. Jur.*, vol. II., p. 771.

(*h*) Notes to *Coggs* v. *Bernard*, 1 Sm. L.C., 10th ed., pp. 192-196.

by the charter, and lead to a forfeiture. Mr. Justice Molesworth in one case says:—"A violation of its charter subjects it, according to its language, to having that charter revoked; I am inclined to think without *scire facias*; independent of such language it would be, I think, subject to revocation by *scire facias*, and I rather think to punishment, by criminal information" (*k*). In another case (*l*), Lord Justice Mellish says:—"There may be also a question whether under any circumstances the effect of violating such a provision (a provision prohibiting certain securities) is more than this: that the Crown may take advantage of it, as a forfeiture of the charter."

Operation of an act *ultrà vires.*

As to the weight and operation of an act done in violation of the charter, if the act is *ultra vires*, according to the definition above adopted, it is null and void *ab initio*, and incapable of ratification or cure; and if of the nature of a contract, cannot be enforced by or against the corporation, *quâ* corporation (*m*). Those purporting to represent the bank in the transaction may have rights and liabilities in respect of such act, but only as individuals wholly apart from the corporation. Of course, as mortgagees, creditors, and otherwise, a bank has frequently to carry on a business, occupy a position, and do acts in themselves foreign to bank business, but necessary to the enjoyment and exercise

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(*k*) *The London Chartered Bank* v. *Hayes*, 2 A.J.R., 60; 2 V.R. (Eq.), 104.

(*l*) *Ayers* v. *South Australian Banking Co.*, L.R., 3 P.C., 559.

(*m*) *Ashbury Railway Carriage Co.* v. *Riche*, L.R., 7, H.L., 653; *The National Permanent Building Society, ex p. Williamson*, L.R., 5 Ch., 309; *Earl of Shrewsbury* v. *North Staffordshire Rail. Co.*, 35 L.J. (N.S.), Ch., 156.

of its legitimate powers, and its authorised position of mortgagee, creditor, &c. (*n*). Ancillary powers are, as before stated, impliedly given by the charter; and their exercise, if *bonâ fide,* is no violation of it; and even if abused, such abuse would constitute an act *extra vires,* not *ultra vires.*

Acts *extra vires.*

If the act be *extra vires*—that is, an act which, in the absence of prohibition, would be within the scope of the business of the corporation, as, for instance, the taking security over land, it would appear that, as a rule, such act is operative and binding, passing the legal estate, and giving the same rights and remedies as though done by or between private individuals. Mr. Justice Molesworth said :—" I do not think that the act being in violation of the charter makes it inoperative. Various acts prohibited must have effect, as between the bank and persons dealing with it." The Privy Council has decided that although the advances are contrary to the bank's charter, it is entitled to recover as a private person might, having a similar document of lien (*o*). Lord Justice Mellish, in the judgment, says :—" The only point which it appears to their Lordships is necessary to be determined, in the present case, is this: that whatever effect such a clause (namely, a clause prohibiting the taking of certain security) may have, it does not prevent property passing either in goods or in lands, under a conveyance or instrument, which, under the ordinary circumstances

(*n*) *Harrison* v. *Smith,* 6 W.W. & A'B. (E.), 205, 206; *Royal Bank of India's case,* L.R., 4, Ch. App., 252; *Bank of Victoria* v. *Forbes,* 13 V.L.R., 760; *Droop* v. *Colonial Bank of Australasia,* 6 V.L.R., (Eq.), 234, and on appeal 7 V.L.R. (Eq.), 71; *Bank of New South Wales* v. *Campbell,* 11 App. Cas., 192.

(*o*) *Ayers* v. *South Australian Banking Co.,* L.R., 3 P.C., 559.

of law, would pass it." "And their Lordships are of opinion that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing, or of preventing an action of trover being maintained if there is a wrongful conversion." And other decisions and dicta show that a bank can acquire, hold, and pass a good title to property acquired in violation of its charter (*p*).

In a case decided in South Australia the customer obtained an advance on the deposit of title-deeds—a security prohibited by the bank's charter—but subsequently, when that advance had matured into a past debt, he made a fresh agreement with the bank, by which he, in effect, re-deposited the deeds as a security; and it was held that, there being on this second occasion, a valid subsisting debt, the security was not within the prohibition; the case, therefore, is only useful in showing inferentially that such a security, if for a present advance, would have been within the prohibition (*q*). It appears, then, that whilst the act *extra vires* is one which the manager or directors (certainly as against the shareholders) must do at his or their own risk, and could not be properly advised to do by a legal adviser; yet the penalty is remote and uncertain.

As to taking prohibited security, the fact appears to be that so much of the act is good, legally and equitably,

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(*p*) See also *The National Bank* v. *Cherry*, L.R., 3 P.C. App., p. 307; *Bank of N.S. Wales* v. *Campbell*, 11 Ap. Cas., 192; *Barton* v. *Bank of N.S. Wales*, 15 Ap. Cas., 379.

(*q*) *National Bank of Australasia* v. *Cherry*, L.R., 3 P.C. App., 299.

that the Courts will not declare it altogether void; for instance, the bank has power to lend the money, and take security, and the customer has power to convey his property as and to whom he likes; the bank does lend, and a valid debt is contracted, wholly irrespective of the nature of the security (for such contracts are not void in the same way that contracts made void by the old usury laws were); the shareholders are not injured, they get a better security; the customer is not injured, for he would not get the money without, nor does it lie in his mouth to complain; and it is difficult to see how his creditors are injured; on the contrary, they commonly participate in the money advanced. All these circumstances combining, the Courts seem inclined to uphold such contracts, as against the customer and his assignees, even in insolvency. Of course, shareholders fearing the risk of forfeiture of their charter, might object, and perhaps invoke with success the intervention of the Court.

Security partly within and partly outside the prohibition.

There does not appear to be a case reported in which a security prohibited for a present or future advance has been given for an indebtedness, partly pre-existing and partly present or future; but from the principle which seems to control recent decisions and the progressive tendency of the Courts to narrow the restraint imposed by charters, it may be reasonably inferred that the blending the two sorts of indebtedness in the same security would not invalidate the security as a security for the pre-existing indebtedness, and it is possible it might give the bank an advantage as regards the entire indebtedness. The case nearest in principle is that of a bill of sale given partly for a pre-existing, and partly for a further advance, in which, if the present advance is not illusory, the bill of sale is a valid security for the entire amount (*r*). It is also evident, from the cases cited, that although a portion of the consideration would be in violation of the charter, it would not have the ordinary effect which illegality in any part of the consideration for a contract has—namely, render the entire contract void.

As to acts *ultra vires* of the directors, and informal acts *intra vires*, it is sufficient to say that in the majority of cases they are susceptible of adoption, ratification or cure.

Distinction between a charter and an Act of Parliament.

For any of the matters touched upon in this chapter the only material distinction between a charter granted by letters patent from the Crown and one conferred by Act of Parliament, appears to be that drawn by Mr. Justice Molesworth :—" If the Sovereign in a charter prohibits an act by a corporation, that does not make the act illegal; but it is for the Sovereign to punish it. But this is a prohibition by an Act of Parliament, making the act illegal: and that not by way of protecting the shareholders from acts of the governing body, but protecting some interest of the public which its framers supposed would be affected by a bank taking landed security " (*s*).

(*r*) *Re Bamford, ex p. Gauss*, L.R., 12 Ch. D., 314 ; *Shaw* v. *Solomon*, 1 W.W. & A'B. (Eq.), 153.

(*s*) *Droop* v. *Colonial Bank of Australasia*, 6 V.L.R. (Eq.), 234; see also *Mackenzie* v. *City Bank*, 14 S.C.R., L., 1, *per* Martin, C.J. ; *Bank of Victoria* v. *Forbes*, 13 V.L.R., 760; *Riche* v. *Ashbury Railway Co.*, L.R., 9 Ex., 262 ; *Bank of N.S. Wales* v. *Campbell*, 11 Ap. Cas., 192 ; and *post* p. 208, note (*f*).

CHAPTER XV.

SOME BANKING SECURITIES.

§ 1. MERCHANDISE AND SHIPS.

Merchandise. OCCASIONALLY, banks are or were prohibited by their charters or statutes of incorporation from advancing money upon the security of merchandise, though in these cases they are generally allowed to take such security in respect of pre-existing debts. Many questions of great difficulty and importance might be raised upon the effect of such a provision. It has, for example, been maintained that it is merely a regulation for the internal management of the bank, with which the public have no concern. But this contention was decisively rejected by the Privy Council, who held that the restriction is founded on considerations of public policy, upon the validity of which they refused to speculate (*a*). One reason for imposing it may have been to prevent the banks from risking the deposits of the public in securities and investments which were perhaps regarded as inconsistent with sound principes of banking; while the permission to take such securities for pre-existing debts may have been given on the ground that,

(*a*) *National Bank of Australasia* v. *Cherry*, L.R., 3 P.C., 299, 307.

after an unlucky advance has been made, almost any security for it is better than none.

But whatever may be the effect of such clauses in a statute or charter it has been decided that they do not make void contracts for advances from the bank to the customers, though they do make it *ultra vires* of the bank to take, upon the occasion of contracts for those advances, securities, which are prohibited by the instrument of incorporation. In short the contract for a loan is a valid, and not an illegal agreement although the bank may have no power to take the security for which it stipulates, except under the conditions specially authorised by its charter (*b*).

It is also clear such restrictive or prohibitory clauses do not prevent the property, in goods, which have been taken by the bank in contravention of their charter, from passing to the bank by any instrument or means which, under the ordinary circumstances of law, would pass it to others. Accordingly, if a bank whose charter contains such a prohibition advance money upon the security of bills of exchange with bills of lading attached as a collateral security, the property in the goods mentioned in the bills of lading may pass to the bank, and they can then, by sale or otherwise, confer a title upon a purchaser which the original owner who obtained the advances on the goods could not successfully impeach (*c*). And where a bank had obtained a preferential lien over wool for the purpose of securing a loan, it was held that they could maintain an action against the lienor's assignee in insolvency for wrong-

(*b*) *National Bank of Australasia* v. *Cherry*, *ubi supra*.

(*c*) *Ayers* v. *South Australian Banking Co.*, L.R. 3 P.C., at p. 559.

fully depriving them of their securities, although a clause in their charter rendered it unlawful for them to make advances on merchandise. But in that case it was observed by the judicial committee of the Privy Council, that the assignee had not raised the question of the bank's right to the wool by pleading specially that the preferential lien under which they claimed was illegal (*d*). It has been held by the Supreme Court of South Australia that a future clip of wool is not merchandise within the meaning of this prohibition (*e*).

Ships.

The prohibitory clauses referred to generally include ships amongst the securities which banks cannot take except for pre-existing debts; but nevertheless it has been held that a bank with such a clause in its statute of incorporation may, under a mortgage to secure a present or future advance, acquire a valid title to a ship (*f*).

Other securities.

If a bank made advances upon the deposit of securities or deeds contrary to its act of incorporation, and if they were subsequently conveyed or transferred to the bank in satisfaction of the debt the transaction would be upheld (*g*).

(*d*) *Ayers* v. *South Australian Banking Co.*, *supra.*

(*e*) *Bank of South Australia* v. *Ayers*, 3 S.A.L.R., 25; and see further as to advances on similar securities, *Brice on Ultra Vires*, 209, 210.

(*f*) *Mackenzie* v. *City Bank*, 14 Sup. Ct. R., L., 1. In this case Martin, C.J., dissented from the judgment of the Court on the ground that though a bank prohibited by *charter* could acquire such a title, a bank prohibited by *statute* could not. See *ante* p. 105; also *Droop* v. *Colonial Bank of Australasia*, 6 V.L.R., Eq., at p. 234; *Bank of Victoria* v. *Forbes*, 13 V.L.R., at p. 763.

(*g*) *Bank of Victoria* v. *Forbes*, 13 V.L.R., 760.

§ 2. SHARES IN COMPANIES.

Where a bank was forbidden by its statute of incorporation to invest any of its capital in any trading or mercantile speculation not within the usual operation of banking transactions, it was held that the purchase for the bank in the names of its nominees of shares in a gold-mining company, deposited as a security, with the view of rendering them more available, was not within the prohibition ; that though the Court would in a proper case intervene for the protection of shareholders, they ought not to interfere with the discretion of the directors in dealing with shares deposited in the usual course of business, or with the mode in which it was proposed to render them more valuable to the bank ; that the directors were at liberty to take every reasonable course for obtaining the full value of their securities ; and that, therefore, the bank's nominees could hold the shares for it, and the directors pay calls upon them (*h*).

Shares as security.

It is within the ordinary course of a banker's business to make advances on the deposit of scrip or shares in public companies. Such a deposit confers upon a bank an equitable security for the loan which it may convert into a legal right to the shares, by obtaining a transfer of them to its own name. For there is not, either by the common or statute law, anything to prevent one trading corporation from holding shares in another, unless prohibited from so doing by its instrument of incorporation (*i*).

(*h*) *Harrison* v. *Smith*, 6 W.W. & A'B., Eq., 182; affirmed on appeal, *sub nom. Smith* v. *Bank of Victoria*, 41 L.J.P.C., 34.

(*i*) *Re Barned's Banking Co.*, *ex p. Contract Corporation*, L.R. 3, Ch., 105 ; *Lindley on Company Law*, 5th ed., 478.

Transfer to bank.

If a bank does obtain a transfer into its own name of shares which have been deposited as a security, it might be put on the list of contributories if the company was afterwards wound up. In one case the directors of a bank advanced money upon the deposit of shares in several companies. The borrower deposited the shares and also transfers executed by him in blank with vacant spaces for the names of the transferees. Among the shares so taken were 1000 shares in the Asiatic Banking Corporation. The directors became alarmed by some judical opinion that shares held in this way remained in the order and disposition of the shareholders (*k*). They then passed a resolution to have these shares transferred into the name of the bank. The shares were accordingly so transferred, and the bank was duly registered as a shareholder in the Asiatic Banking Corporation. By taking this course they unfortunately, to use a homely illustration, got out of the frying pan into the fire. For the Asiatic Banking Corporation soon afterwards became insolvent and was ordered to be wound up, and thereupon the bank which had advanced its money upon the shares was placed upon the list of contributories (*l*).

Title of bank.

In general the equitable mortgagee who receives a deposit of stock or shares by way of security can acquire no better title to them than the depositor possesses. A bank therefore should ascertain that the customer

(*k*) Their alarm seems to have been quite groundless ; see *Colonial Bank* v. *Whinney*, 11 Ap. Cas., 426.

(*l*) *In re the Asiatic Banking Corporation, The Royal Bank of India's Case*, L.R. 4, Ch., 252 ; and see *Victorian Mortgage &c. Bank* v. *Australian &c. Co.*, 19 V.L.R., 680, 691.

who deposits shares or security has the right to do so, and is not a trustee of them for any other person (*m*).

Liens on bank shares.

The regulations of many companies provide that the companies are to have a lien on all shares for all moneys due to them by the shareholders whether for calls or otherwise, and give the companies a power of sale in default of payment by the shareholders. A bank therefore before it makes any advance upon the security of shares should inquire whether they are subject to such prior liabilities (*n*). If a bank takes such shares as security it should at once give notice to the company, which will not then be entitled to claim priority over the bank in respect of debts that may become due from the shareholder to the company after it receives notice of the deposit of the shares with the bank (*o*).

Deposit by customer of blank transfers.

If blank transfers or shares not registered in the name of a customer are deposited by him as security for his own indebtedness under circumstances from which the bank ought to be aware that they belong to others, the bank cannot retain them against the real owners. What are such circumstances must be a question of fact to be determined upon the evidence in each particular case. Much may depend upon the business of the customer. Thus a money lender as such has no right to pledge as cover for his own overdraft, the securities he has obtained from borrowers, and if he did the bank could not retain them (*p*). It would however be different in the case of a London

(*m*) *Shropshire Union Railway and Canal Co.* v. *The Queen*, L.R. 7 H.L., 486 ; cf., *Williams* v. *Colonial Bank*, 38 Ch. D., 388 ; and see *ante* the chapter on Liens, p. 186.

(*n*) See *Lindley on Company Law*, 5th ed., 456, *et seq.*

(*o*) *Bradford Banking Co.* v. *Briggs*, 12 Ap. Cas., 29.

(*p*) *Lord Sheffield* v. *London Joint Stock Bank*, 13 Ap. Cas., 333.

sharebroker part of whose business is to raise loans for clients upon the security of their share certificates. In this respect scrip or shares transferable by deed or writing are quite unlike negotiable securities (*r*), or debentures transferable by delivery, upon which advances may be safely made unless the bank knows or suspects that there is something wrong about the bearer's title (*s*).

Sub-pledge.

A pledgee has a right to pledge his security, and the sub-pledgee holds it upon the same terms as it was held by the person who deposited it with him (*t*). Accordingly, where mining shares were handed to the customer of a bank as security for advances made by him to the owner of the shares, and the customer deposited them with the bank as security for his own overdraft, it was held that the owner of the shares was entitled to get them back from the bank upon paying to it the amount that had been advanced to him by the customer (*v*).

Wrongful sale.

If a bank wrongfully sell shares deposited as security by a customer, he may bring an action against the bank and recover the amount of any loss he may have sustained (*w*).

Where shares deposited as security are sold to pay off the debt, the creditor should not, nor should a trustee for him, purchase the shares (*x*).

(*r*) *Simmon* v. *London Joint Stock Bank*, (1892) A.C., 201; *Collis* v. *Hibernian Bank*, 31 L.R. Ir., 261, where previous decisions are collected and reviewed.

(*s*) *Goodall* v. *Australian Freehold Banking Corporation*, 16 V.L.R., 29.

(*t*) *Halliday* v. *Holgate*, L.R. 3, Ex., 299.

(*v*) *Colonial Bank* v. *Mitchell*, 3 V.L.R. (L.), 12.

(*w*) *Hicks* v. *Commercial Bank*, 5 V.L.R. (E.), 228; 1 A.L.T., 60; *Amoretty* v. *City of Melbourne Bank*, 13 V.L.R., 431; 8 A.L.T., 171.

(*x*) *Ryan* v. *MacIntosh*, 4 W.W. & A'B. (Eq.), 8.

Where shares in a company which has no power to register trusts are deposited as security, it has been recommended that the bank should give notice in writing to the company of the bank's charge upon the shares (*y*). It is not quite clear that a bank will gain any priority or advantage by giving such a notice (*z*). But it is more prudent to give it, until the point is finally decided.

Notice where company cannot register trust.

§ 3. EQUITABLE MORTGAGES.

Deposit of deeds.

An equitable mortgage by means of a simple deposit of title deeds is often accepted as a security. Such a deposit, as security for a debt, will, even without writing, create a charge upon the land (*a*).

It is advisable to obtain a written memorandum from the customer, expressly stating the purpose for which the title deeds are deposited, so as to avoid any question as to whether the deposit is made to secure past, present or future advances.

Where a debtor owns land which is under the general law he may create an equitable mortgage over it by depositing the title deeds thereto with his creditor (*b*).

Future advances.

And such a deposit is sufficient to cover the case of

(*y*) *Grant on Banking*, 5th ed., 150, 151.

(*z*) *Lindley on Company Law*, 5th ed., 477; *Société Générale de Paris* v. *Walker*, 14 Q.B.D., 424, *per* Lindley L.J.; 11 Ap. Cas., 30, 41. But see *Bradford Banking Co.* v. *Briggs*, 12 Ap. Cas., 29.

(*a*) See *Bank of New South Wales* v. *O'Connor*, 14 App. Cas., 273.

(*b*) *Russel* v. *Russel*, 2 White and Tudor's Leading Cases (7th ed.), p. 76.

future advances by the creditor to the debtor, if it was so agreed when the first advance was made, or if it can be proved that the subsequent advances were made upon an agreement, express or implied, that such deeds were to be the security for them also (*c*). If, however, the deeds have been deposited as security for future advances only, the creditor cannot retain them for a past debt (*d*).

But the deposit of the deeds is not absolutely necessary to the creation of an equitable mortgage, as an agreement to deposit them as security for a debt, or, indeed, an agreement to execute a mortgage creates an equitable mortgage (*e*).

Equitable mortgages under *Transfer of Land Act.*

In the case of land under the *Torrens system of Land Transfer*, although equitable mortgages are not referred to by name in the Victorian *Transfer of Land Act*, there is no doubt that an equitable mortgage of land under that Act may be created by deposit of the duplicate Crown grant or certificate of title (*f*).

Memorandum in writing.

Another way of creating such a mortgage of land under the Torrens system is by a memorandum in writing. These are the only two ways of creating a

(*c*) *Ex p. Mountfort*, 14 Ves., 606 ; *Ex p. Whitbread*, 19 Ves., 209.

(*d*) *Mountford* v *Scott*, Turner & Russell, 274.

(*e*) *Tebb* v. *Hodge*, L.R. 5 C.P., 73.

(*f*) *London Chartered Bank* v. *Hayes*, 2 V.R. (E.), 104 ; *National Bank* v. *Morrow*, 13 V.L.R., 2; *Colonial Bank of Australasia* v. *Riddel*, 19 V.L.R., 280 ; *In re Nathan*, 1 S.A.L.R., 166 ; *Richards* v. *Jones*, 1 S.A.L.R., 167 ; *In re Wildash and Hutchinson*, 1 Q.L.R., Pt. II., 47 ; *Wheaton* v. *McGeorge*, 10 S.A.L.R., 29 ; and in *Ex p. Patterson*, 4 A.J.R., 110, the Court would not order, under a section corresponding to s. 80 of the *Transfer of Land Act* (Vic.) 1890, an equitable mortgagee of the certificate of title to bring it in to be cancelled without payment of his lien.

valid equitable mortgage of land under the *Transfer of Land Act.* If there is a memorandum in writing it need not be formal, but it must contain enough to show the agreement between the parties, and that there has been either a deposit of the title deeds or their equivalent, or some agreement for the execution of an equitable mortgage. Whenever there is a deposit of the deeds, then parol evidence can be given to show what the real agreement between the parties was, although there was no memorandum in writing (*g*).

An equitable mortgagee of land under the Act should protect himself by lodging a caveat against any subsequent dealings adverse to his interests (*h*); otherwise a new proprietor may be registered without any notice to the equitable mortgagee, and he may thus lose the benefit of his security (*i*).

§ 4. STOCK MORTGAGES AND LIENS ON WOOL.

Owing to the vast stations and large flocks and herds common in Australia, many difficulties formerly arose which demonstrated the inutility of the ordinary bill of sale as a security for money advanced upon sheep and cattle. Questions as to whether the progeny of mortgaged sheep were intended to be included in Necessity for legislation.

(*g*) *Per* Holroyd, J., in *Colonial Bank* v. *Riddel,* 19 V.L.R., 280, at p. 285. From the remarks of the learned judge at p. 282 it would appear that an equitable mortgage might be registered as an encumbrance upon the certificate of title.

(*h*) See *Cowell* v. *Stacey,* 13 V.L.R., 80; *In re Shears and Alder,* 17 V.L.R., 316; *In re Kauri Timber Co.,* 7 N.Z.L.R., 452; *In re Innes,* 12 N.S.W. L.R. (L.), 180; *Tierney* v. *Loxton,* 12 N.S.W. L.R. (L.), 308.

(*i*) See *Richards* v. *Jones,* 1 S.A.L.R., 167; cf., also *Neale* v. *Adams,* N.Z.L.R., 4 S.C., 177; *Patchell* v. *Maunsell,* 7 V.L.R. (E.), 6.

the mortgage were continually arising, as was also the more difficult one of identifying the sheep or stock mentioned in the bills or documents relating to them. Accordingly the help of the Legislature was sought, at an early period in the history of the colonies, in order to protect those who advanced money on the security of stock and wool (*k*), and at present statutory stock mortgages and preferable liens on wool constitute an important feature of Australian mortgage jurisprudence. For the details of the law affecting such subjects the reader is referred to works dealing solely with them, and only a brief sketch or outline of the law relating to them comes within the scope of the present work (*l*).

Generally speaking, the main features of legislation on stock mortgages and liens on wool in the different colonies are very much alike (*m*), and they are shortly summarised in the following paragraphs.

General legislative provisions.

All liens and stock mortgages should be registered.

A duly registered preferable lien on wool of the then next ensuing clip entitles the lienee to the wool, and the

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(*k*) See *Fiegert* v. *Sperling*, 17 A.L.T., 248 ; *per* Madden, C.J.

(*l*) The reader is referred to *McHugh on Bills of Sale, Liens and Stock Mortgages* ; *Weir on Bills of Sale*.

(*m*) The different Acts in the different colonies differ in some of their details, *e.g.*—

"*Person*" includes a company incorporated or not (*Victorian*).

"*Station*" includes any land used wholly or partly for depasturing stock, and need not necessarily be freehold (*Victorian*).

"*Stock*," sheep cattle or horses (*Victorian*). In *Tasmania* it includes pigs and other live stock, of every description. In *New Zealand* it also includes pigs, poultry, ostriches, and llamas.

possession of the lienor is, in law, deemed to be the possession of the lienee.

Satisfaction of the lien revests the possession and property in the wool in the lienor, subject to any intermediate charges of the lienor.

A receipt may be indorsed upon stock mortgages and liens on wool, signed by a public officer (*n*), and specifying the time of registration.

The right of the lienee of the ensuing wool clip is not impaired by subsequent sale, mortgage or incumbrance of the stock, nor by insolvency of or execution against the lienor.

If the lienor refuse to shear the sheep included in a mortgage, power is given to the lienee to do so and charge the expenses thereof as though part of the lien.

Effect of valid stock mortgage.

Stock mortgages made *bonâ fide* and for valuable consideration and duly registered are protected against insolvency and execution although the stock (and other chattels) remain in the possession, order and disposition of the mortgagor. But no such mortgage is protected in the event of the insolvency of the lienor unless executed a certain length of time before the date of sequestration, or unless the consideration is an advance or loan made at the time or in contemplation of the mortgage (*o*).

(*n*) See *Sutherland* v. *Cooley*, 24 V.L.R., 410 ; as to proof of signature of the Deputy Registrar General to such an indorsement, see now Act No. 1611.

(*o*) If the registered statement of the consideration corresponds with the statement on the mortgage, the mortgage is valid and duly registered. *Hutton* v. *Goldsbrough*, 14 A.L.T., 84 ; followed by *Victorian Farmers &c. Co.* v. *Lindo*, 19 V.L.R., 599 ; in which it was held that a stock mortgage made *bonâ fide* and for valuable considera-

Stock mortgages comprise the stock for the time being on the station, including not only the increase and progeny of the stock mentioned in the mortgage, but also all stock, &c., belonging to the mortgagor at any time during the continuance of the security depasturing or being at, on or upon any station mentioned in the mortgage. Under them the mortgagee may take possession thereof and of other chattels on the station when the power of sale becomes exercisable (*p*).

All stock mortgages, to be valid as against purchasers *bonâ fide* and for value, must be registered.

Liens and stock mortgages may be transferred, but all such transfers must be in writing.

The subject-matter of a stock mortgage is usually sheep, cattle or horses upon a station (*q*), that is to

tion, though it does not state the consideration for which it was given, is not thereby invalidated, and that if in registering such a stock mortgage the memorial is in accordance with the deed, the deed is properly registered. On the question of consideration, see also *Sutherland* v. *Cooley*, 24 V.L.R., 410; *Baker* v. *Bennett*, 21 V.L.R., 270; *Geddes* v. *McDonnell*, 22 V.L.R., 330; *Elder, Smith and Co.* v. *McKellar*, 21 V.L.R., 664.

(*p*) As to whether the seizure of sheep to protect the bank's security is within the scope of a branch manager's authority, see *Bremner* v. *Union Bank*, 17 N.S.W. L.R. (L.), 74. As to seizure after notice of suspension of payment, see *Re Missen*, 14 N.S.W. L.R. (B.), 24.

(*q*) A small portion of land known as "Crown allotment 94A, parish of Yarrawonga," was held to constitute a "station"; *Camplin* v. *McNamara*, 19 V.L.R., 542. But a small paddock near sale yards where stock were kept prior to sale is not a "station"; see *Slee, Ogilby and Co.* v. *Murphy*, 16 V.L.R., 636. A mortgage of horses in a stable cannot be registered as a stock mortgage under the Victorian Act; *Ficgert* v. *Sperling*, 17 A.L.T., 248. See further, *Thomson* v. *Harris*, 15 A.L.T., 132.

say, land used wholly or in part for the purpose of depasturing stock. In Victoria, however, "other chattels" as well as stock can be included in a stock mortgage (*r*).

Duty of bankers in dealing with stock mortgages.

Australasian bankers very often take mortgages over stock and stations in conformity with the above-mentioned enactments. In doing so care should be taken that they do not contain a covenant, which would have the effect of merging in them any acceptance or other liability of the mortgagor (*s*). It is not necessary that the same particularity as to witnesses and the residence of the parties should be observed as in bills of sale (*t*). But the stock should be correctly described (*u*). The description of stock in the stock mortgage should set out the exact place where the stock are depasturing at the time of the execution of the mortgage. Thus, where the horses mentioned in a stock mortgage were at the time working at a place three miles distant from the land described in the stock mortgage, the error was held fatal (*v*).

Where branded sheep and cattle, with the issue, increase, and produce thereof, were mortgaged to secure

(*r*) Victorian Act, s. 169. "Other chattels" include all such rticles as are reasonably necessary for working a station—*e.g.*, furniture in house of station manager; *Anderson* v. *Carter*, 20 V.L.R., 246; a stack of hay, *Camplin* v. *McNamara*, 19 V.L.R., 542; farming implements, cf. *Woolcott* v. *Kelly*, 3 V.R. (L.), 62.

(*s*) See *Synnott* v. *Parkinson*, 4 V.L.R. (L.), 521.

(*t*) *Goldsbrough* v. *M'Culloch*, "Argus," 5th October, 1868.

(*u*) *Synnot* v. *Ettershank*, 3 V.L.R. (L.), 136; see also *Re Geoghegan*, 18 N.S.W. L.R. (B.), 26.

(*v*) *Allen* v. *Parish*, 17 A.L.T., 58.

a debt, it was held that these words did not include other sheep afterwards purchased and brought on the run (*w*).

After-acquired stock.

Although the statutory enactments provide that a registered mortgage of stock is deemed to include after-acquired stock, it must be remembered that the effect of this is not to convey, in respect of after-acquired property, a legal title to the mortgagee, but only to place him in the same position as if the mortgage had contained in it an assignment of after-acquired property (*x*). So that after-acquired property under the Acts relating to stock mortgages would appear to be in a similar position to such property under the ordinary law (*y*), under which it has been held that although assignments of after-acquired chattels are void at Common Law, yet if a grantor of such property afterwards becomes possessed of chattels answering the specified description, a Court of Equity will compel him to specifically perform his contract (*z*). Such an equitable title to the goods will not, however, prevail

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(*w*) *Webster* v. *Power*, L.R. 2 P.C., 69. As to what charges will be allowed to a first mortgagee of stock, as against a second mortgagee, see *Fenton* v. *Blackwood*, 2 A.J.R., 124; 5 A.J.R., 39; L.R. 5 P.C., 167.

(*x*) See *Groom* v. *Paterson*, 12 V.L.R., 230; *Victorian Farmers' Loan Co.* v. *Lindo*, 19 V.L.R., 599; *Anderson* v. *Carter*, 20 V.L.R., 246; cf., *In re Bray*, 11 N.S.W. L.R. (L.), 301.

(*y*) As to which see *Holroyd* v. *Marshall*, 10 H.L.C., 191; *Official Receiver* v. *Tailby*, 13 Ap. Cas., 523; *Weir on Bills of Sale*, pp. 94, 164; *Bruce* v. *McCluskey*, 21 V.L.R., 262.

(*z*) *Holroyd* v. *Marshall*, 10 H.L.C., 191; *Collyer* v. *Isaacs*, 19 Ch. D., 351; and see *Weir on Bills of Sale*, p. 93.

against a person obtaining the legal title without notice (*a*).

If a mortgage contains a covenant that stock subsequently placed on the run shall be subject to the mortgage, and if stock be afterwards sold to the mortgagor upon a condition as to payment which has not been fulfilled, the mortgagee has no better title to the stock, as against the seller, than the mortgagor; he cannot claim the sheep until the condition is performed (*b*).

Registration of liens on wool.

Registration, it has been held, is not essential to the validity of a lien on wool, except in cases of insolvency (*c*).

A lien, therefore, which is void or inoperative under the Statute, may nevertheless be valid at common law, and may be binding on the lienor (*d*).

Second liens.

A second lien on wool, without the consent of the first mortgagee, although invalid as against him, is valid as against the grantor's official assignee (*e*).

Where there is a stock mortgage over sheep, it is not necessary to obtain a preferable lien over the wool of the ensuing clip of the same sheep, for a sale con-

(*a*) *Joseph* v. *Lyons*, 15 Q.B.D., 280; *Hallas* v. *Robinson*, 15 Q.B.D., 288.

(*b*) *Hyland* v. *Smith*, 3 A.J.R., 109.

(*c*) *Stevenson* v. *Landale*, 1 V.R. (L.), 31; 1 A.J.R., 45; cf., *In Re Bray*, 11 N.S.W. L.R. (L.), 301.

(*d*) *White* v. *Colonial Bank*, 2 V.R. (Eq.), 96; 2 A.J.R., 49. As to the effect of this statutory lien on a carrier's lien, see *Goldsbrough* v. *M'Culloch*, 6 W.W. & A'B. (L.), 113.

(*e*) *Clough* v. *Laing*, 1 W. & W. (L.), 20; see further *Fraser* v. *Australian Trust Co.*, 3 A.J.R., 1, 83.

ditional or otherwise of sheep simply, will carry with the sheep as a matter of course the wool on their backs, just as well as any other portion of them (*f*).

Assignments of liens on wool.

Liens on wool and stock mortgages are assignable at law by writing (*g*).

An agent or principal actually in possession is a "proprietor of stock," and may give a preferential lien on wool to secure advances (*h*).

Wool taken from mortgaged sheep belongs to the mortgagee, and cannot be retained by a person into whose hands it may have come without the mortgagee's consent (*i*).

Duty of persons taking possession.

The mortgagee should, in all cases, exercise extreme care in complying with the necessary preliminaries before taking possession of the mortgaged stock (*k*).

§ 5. LIENS ON CROPS.

Registration of liens on crops.

In order to enable advances to be safely made upon the security of growing crops, legislation in many respects analogous to that above alluded to has also been enacted in most of the Australasian Colonies. In most of the Australasian Colonies it would appear that a transfer of growing crops, in order to be valid, must

(*f*) *Per* Martin, C.J., in *Taylor* v. *Bank of New South Wales*, 5 N.S.W. L.R. (E.), at p. 58.

(*g*) cf., *Cheesbrough* v. *Thomson*, 5 N.S.W. S.C.R. (L.), 366; and Act No. 1103, s. 172.

(*h*) *Ayers* v. *South Australian Banking Co.*, L.R. 3 P.C., 548.

(*i*) *Dunn* v. *Lynch*, 1 V.R. (L.), 4; but see *Courtney* v. *Thorne*, 1 V.L.T., 100.

(*k*) *Moore* v. *Shelly*, 8 Ap. Cas., 285.

either be registered as a bill of sale or under the provisions of the statutes relating to liens on crops (*l*). A lien given for a past debt is not valid if the person giving the lien contracted without any promise to give a lien (*m*).

Effect of lien.

In the case of a lien under the *Instruments Act* 1890 (Vic.), Part VII., the property in the goods, it would seem, passes to the person taking the lien, and consequently his title is paramount to that of a later *bonâ fide* purchaser from the grantor of the lien (*n*).

Effect of registration.

After the preferable lien has been registered it is protected against subsequent sale or incumbrance of the farm; against the insolvency of the lienor and execution against his property; and by provisions for entry and charging expenses, from the neglect of the lienor to harvest the crop (*o*).

(*l*) See *MacHugh on Bills of Sale*, p. 80; see also *Weir on Bills of Sale*, pp. 78, 92, 165, as to sales, &c., of growing crops.

(*m*) *Powell* v. *Dawson*, 7 V.L.R. (L.), 143; *Bennett* v. *Baker*, 21 V.L.R., 270.

(*n*) *Múeller* v. *White*, 3 V.L.R. (L.), 92. In New South Wales it has been questioned whether the Official Assignee of the estate of a person to whom growing produce has been mortgaged (under the N.S.W. Act 1865), has a right to seize it before the day appointed for payment; *Iron* v. *Humphery*, 9 N.S.W. S.C.R. (L.), 314.

(*o*) Victorian Act, s. 159. The following are the principal Acts in the different colonies relating to the matters mentioned in §§ 2 and 3 of this Chapter:—

New South Wales.—	*Lien on Crops and Wool and Stock Mortgages Act* 1898—consolidating all the previous Acts on the above subjects.
Victoria	*Instruments Act* 1890 (No. 1103), Parts VII. and VIII.

Similar provisions to those in the liens on wool legislation exist with reference to the transfer of liens on crops, registration and frauds by the grantor.

South Australia ... *Bills of Sale Act* 1886 (No. 389), a consolidating and amending Act.

Queensland ... *Mercantile Act Amendment Act* 1896, 60 Vic., No. 10.

Western Australia—*Bills of Sale Act* 1899, 63 Vic., No. 45, a consolidating Act.

Tasmania ... ... *Chattels Transfer Act of* 1889. The amendments thereof in 1895 and 1896. *Bills of Sale Act* 1896, 60 Vic., No. 52.

CHAPTER XVI.

Bills for Discount and Bills for Collection.

§ 1. BILLS FOR DISCOUNT.

It is usual for merchants and traders, besides their drawing accounts, to open discount accounts. Merchants, when they sell their goods, are most frequently paid by bills with some time to run, and as they generally wish to convert these into cash immediately, they take them to their bankers to be discounted. The banker, if he approves of a bill, may buy it from his customer, and after deducting a certain sum from the amount of the bill as his profit or discount, credit the customer in his current account with the balance. When a banker takes a bill in this way, he is said to discount it. Discount accounts.

A separate account is then opened for the customer in the discount ledger, which is so kept as to show at once to what amount any party may be under discount. It contains a description of all bills discounted by the bank, of which the customer is acceptor, and thus exhibits a complete view of his engagements to the bank arising either from bills indorsed by him to the bank or bills of which he is the acceptor. Discount Ledger

Nature of the transaction.

It is not uncommon to say that when a bank thus discounts a bill for a customer it *lends* him a sum of money on the security of the bill. But this is not, it is submitted, quite accurate. The bank does not look to the customer for repayment, as it would do if it had lent him money. It looks to the acceptor for payment in the first instance, and it is only in the event of his refusal or inability to pay that recourse is had to the customer. The transaction is in effect a *sale* of the bill to the bank. They purchase the full value of the instrument (*a*), and it becomes a portion of their assets (*b*).

Unconditional sale of a bill without indorsement.

In legal language, a bill, strictly speaking, is only said to be sold when it is transferred for value by delivery without indorsement (*c*). The seller then warrants only the *genuineness* of the bill, but not the solvency of the parties to it (*d*).

But the word "sale," when applied to the transfer of bills, has not, in mercantile language, the narrow meaning which it has in legal phraseology. Foreign bills, for instance, are never said, in the dialect of the London money market, to be *discounted*, but to be *sold* (*e*).

Effect of indorsements.

Bankers do not, however, buy or discount bills unless they are indorsed by the customers. The transaction, then, may be compared to a sale with a warranty. An

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(*a*) *Morley* v. *Culverwell*, 7 M. & W., 174, *per* Parke, B. ; *Re Gomersall*, 1 C.D., 142, *per* Mellish, L.J.

(*b*) *Carstairs* v. *Bates*, 3 Camp., 301.

(*c*) *Byles*, 16th ed., 188.

(*d*) *Gurney* v. *Womersley*, 4 E. & B., 133 ; 24 L.J., Q.B., 47

(*e*) Gilbart's *Principles and Practice of Banking*, p. 110 ; Chalmers' *Bills of Exchange*, 5th ed., p. 84.

indorser, in effect, warrants that the drawee will accept the bill and pay it at maturity. He also guarantees that if it be not so paid he will himself pay the holder what the drawee ought to have paid, subject nevertheless to the strict condition that he shall receive due notice of the drawee's default, otherwise he will not be liable for the amount of the bill (*f*).

Rights of indorsers.

It frequently happens that two customers of a bank have such business relations that one of them gives a promissory note to the other in the ordinary course of business. The payee then indorses and discounts it at the bank. The maker is primarily liable to the bank upon the note, and the indorser only becomes liable if the maker fails to pay the note at maturity. If in such a case the bank holds security for the note from the maker, the indorser can claim the benefit of it. The indorser is in the position of a surety for the payment to the bank, and one of the privileges of a surety is that, on paying the debt of the principal debtor, he is entitled to the benefit of any securities to cover it deposited with the creditor by the debtor, whether at the time of his indorsement he knew or did not know of the deposit of those securities (*g*).

Double insolvencies.

When both the drawer and acceptor of a bill discounted by a bank become insolvent, and the acceptor holds property which has been lodged with him by the drawer as security for the payment of the bill, the bank is entitled to have the security realised and the proceeds applied in discharge of the bill, when the

(*f*) *Roquette* v. *Overman*, L.R. 10 Q B., 525.

(*g*) *Duncan Fox and Co.* v. *North and South Wales Bank*, 6 Ap. Cas., 1.

estates of both the insolvents are wound up by the Court of Insolvency. The security obviously does not belong to the acceptor, and therefore cannot be divided amongst his creditors. Nor does it belong absolutely to the drawer who is only entitled to get it back on payment of the bill, and therefore it is not available for distribution amongst his creditors. The Court accordingly applies the security in payment of the bill for which it was deposited as cover. If the proceeds are only sufficient to pay the bill in part, the bank is entitled to prove for the unpaid balance; and if they are more than sufficient to pay the bill in full, the surplus is paid to the estate of the drawer who deposited the securities with the acceptor (*h*). This is a positive rule of English law, and not the result of equitable principles (*i*).

Discounting forged bills.

If a banker discounts a bill for the indorsee purporting to be accepted by one of his customers, he may, on discovering the acceptance to be a forgery, recover the amount from the person to whom he paid it, notwithstanding that he might be taken to know his customer's handwriting (*k*). And generally if a bank discount a forged acceptance for a customer who is ignorant of the forgery, they may recover from him the price paid for it, for there is a total failure of consideration (*l*).

(*h*) *Ex p. Waring*, 19 Ves., 345; 13 R.R., 217; *In re Suse*, 14 Q.B.D., 611, *per* Cotton, L.J.; and *Byles on Bills*, 16th ed., 474, 475; *Chalmers Bills of Exchange*, 5th ed., 299, 300.

(*i*) *Royal Bank of Scotland* v. *Commercial Bank of Scotland*, 7 Ap. Cas., 366.

(*k*) *Fuller* v. *Smith*, 1 Car. & P., 197.

(*l*) *Gurney* v. *Womersley*, 24 L.J., Q.B., 46; 4 E. & B., 133; *Jones* v. *Ryde*, 5 Taunt., 488; 15 R.R., 561; *City Bank* v. *Allen*, 1 N.S.W. L.R., 179; *Bills of Exchange Act* 1882, s. 58 (3).

Discounting lost bill with notice.

If a banker were to discount a bill, after receiving notice from the lawful holder that he had lost it, the loser might recover the amount of the bill or its value from the banker. For the latter would have bought it with notice of the loser's title (*m*).

Where proceeds are to be applied in a particular way.

If a bill be discounted by a customer with his bank upon an agreement that the proceeds of the bill are to be applied by the bank in a particular way, an action might be brought against the bank if they applied the proceeds to a purpose not authorised by the agreement. But if the bill were dishonoured by the acceptor, and an action were brought upon it by the bank against the customer, he could not, it seems, defeat their claim on the ground that the proceeds of the bill had been misapplied by them in fraud of the agreement. That, it seems, would only be a ground for a cross action (*n*).

It is conceived that if a customer remitted bills for discount to his banker, with a direction that the proceeds should be applied to a specific purpose, he could recover the value of the bills from the bank if it applied the money realised by discounting them to any other object (*o*).

Banker has no lien on cash balance for bills under discount and not due.

A banker who has discounted bills for a customer has no lien on the customer's cash balance during the currency of the bills, and ought not, therefore, to dishonour his cheques during that time, provided the account is in funds (*p*). But where a bank dishonoured

(*m*) *Lovell* v. *Martin*, 4 Taunt., 799; 14 R.R., 668.

(*n*) *Bank of Australasia* v. *Ehrenfield*, Macass., 439.

(*o*) *Muttyloll Seal* v. *Dent*, 8 M.P.C.C., 319.

(*p*) *Bower* v. *Foreign &c. Gas Co., ex p. Metropolitan Bank*, 22 a customer's cheques, and retained his balance as a security for bills under discount, but not then due, on the ground that the acceptors were likely to fail, a court of equity granted an injunction to restrain the customer from prosecuting an action against the bank for the dishonour of his cheques, on proof that after the action was commenced several of the discounted bills, to a larger amount than the balance, had been dishonoured by the acceptors (*q*).

A bank may, however, specially stipulate with its customer that it shall have a lien upon his credit balance or securities for bills under discount and not yet at maturity (*r*).

Discounting cheques.

A bank or a tradesman may discount a cheque as well as a bill.

When a bank cashes a cheque for the holder, whether a customer or not, a question may arise, if it be dishonoured, as to their right to sue him for the money. It is apprehended that the determination of this point would depend upon whether the holder had sold the cheque to, or discounted it with the bank, or whether

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W.R,, 740; cf., *Jeffreys* v. *Agra and Masterman's Bank*, L.R, 2 Eq., 674.

(*q*) *Agra and Masterman's Bank* v. *Hoffman*, 34 L.J., Ch., 285. This case, however, was compromised, the bank paying defendant's costs, as between solicitor and client, both of the equity suit and the action at law, and also refunding some of the money on which they had sought to establish a lien. The result of the compromise was that the points raised by the bank were not finally determined by the Court. The case therefore does not seem to be of much value as an authority; and see *Robey* v. *Oriental Bank*, 2 Sup. Ct. R. (L.), N.S., 57.

(*r*) *Chartered Bank of India &c.* v. *Evans*, 21 L.T. N.S., 407; *McCooey* v. *Bank of N.S. Wales*, 5 A.J.R., 53.

the bank cashed it solely upon his credit, or that of the drawer. If they bought or discounted the cheque without obtaining the holder's indorsement they could not, it is conceived, sue him upon it, or for the money they advanced. But if they cashed the cheque on the credit or for the convenience of the holder they might, if it proved worthless, recover from him what they had paid upon it. Thus, when a cheque drawn on one branch, was presented for payment at another, where the holder was known to the officers and they cashed it for him, it was held that under the circumstances, the cheque had been cashed on the credit of the holder, and that the bank were, on its dishonour, entitled to charge him with the money he received (*s*). In all such cases it seems advisable to procure the holder's indorsement.

§ 2. BILLS FOR COLLECTION.

Bills discounted distinguished from bills deposited for collection.

Customers also frequently place the bills or other negotiable instruments they receive in the hands of their bankers for the purpose of collection. The banker presents the bills for payment, and if they are paid, carries the amount to his customer's credit in his current account. In the reports of English cases, bills so deposited are often termed "short bills." This name, it is said, took its rise from a system of book-keeping which is not, it is believed, practised in Australia, and which is thus explained by Mr. MacLeod in his well-known work on banking:—" For the sake of convenience, it is usual to note down the amount of such bills on the proper day in the customer's account in a column 'short of' or before the column for cash. Hence these

Short bills.

(*s*) *Woodland* v. *Fear*, 26 L.J., Q.B., 202.

bills are said to be 'entered short,' and the banker is said to hold such bills 'short'" (*t*). This must be borne in mind when applying English cases and law books to the solution of difficulties that occur here.

Property in bills deposited remains in the customer.

The chief difference between bills deposited for collection and bills discounted is, that the latter become the property of the bank, while the former remain the property of the customer. Important consequences may result from this distinction, which often gives rise to questions of great nicety.

Thus, if bills deposited were accidentally destroyed or lost without the default of the banker, the loss would not fall on him but on his customer. It would be different in regard to bills discounted. The bank would have to bear the loss of them (*u*).

Again, on the insolvency of a customer, the bills he has deposited are a portion of his assets, though the bank may have a lien upon them in respect of his liabilities to it; while the bills which the bank has discounted for him, belong to it, and do not vest in his assignees (*v*).

Advances on bills deposited.

It is not however, to be supposed that advances are never made on bills deposited for collection. This is often done under a special arrangement with the customer. A banker may be of opinion that the bills offered by a customer are not such as he would care to discount. He may think, however, that though separately weak, they are collectively a sufficient cover

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(*t*) *MacLeod on Banking*, Vol. II., 417 ; *Campbell* v. *O'Connor*, 9 V.L.R. (L.), 297.

(*u*) *Carstairs* v. *Bates*, 3 Camp., 301.

(*v*) *Grant*, 337.

for a limited advance. He may then agree to allow an overdraft of a certain amount in the pound on the bills deposited, upon the condition that they are to remain in his hands as a security for the advance. He might even consent, if he thought fit, to allow the customer to draw against them to their full amount. Should any dispute arise as to whether they had been discounted or only deposited, the sole question, it is apprehended, would be whether there was any agreement, either express or to be inferred from the course of business, that such bills should become the absolute property of the banker, or whether he was merely to have a lien upon them to cover the cash balance that might be due from the customer, and a right to deal with them as the exigencies of the case might require (*w*). It behoves both bankers and customers, therefore, to have a distinct agreement on the point in order to avoid litigation, and it would be prudent to reduce all such agreements to writing. If the bills were only intended to be a security for the advance, the customer might demand them back, provided the account showed a balance in his favour without them. But if the course of dealing showed that it was intended that the banker should consider and deal with them as his own property, they would not be recoverable (*x*).

In one case a customer indorsed bills to his bank to be discounted. The bank immediately discounted some of them, and held the others "pending discount," *i.e.*, pending the result of inquiries to be made as to the solvency of the acceptors. But the customer was allowed to overdraw on the credit of these bills. On

(*w*) *Ex p. Barkworth*, 27 L.J. Bank., 5; 2 De G. & J., 194.

(*x*) *MacLeod*, Vol. II., 418; where the cases are collected.

the insolvency of the customer, it was held that they formed no part of his estate, and did not pass to his assignees, but belonged to the bank (*y*).

Bank's right to sue.

Though a bank may sue any of the parties to a bill which it has discounted, and which has been dishonoured, and may retain the amount recovered, it cannot sue its customer on a bill indorsed by him to it for the purpose of collection, except when it has a lien on the bill in respect of an overdraft or other liability (*z*).

If the customer merely delivers the cheque or bill to his bank for collection "in the same way as a merchant would hand a cheque to his clerk to carry that cheque to the bank in order to get money for it, or as he would hand a draft to his clerk to carry that draft in order that he might get it accepted and the like," then the bank, like a mere agent, has no property in it. It was not intended that it should have any, and it has none. In short, the bank is not the holder (*a*), and cannot sue upon the instrument.

But if a customer's account be overdrawn, and he leaves a cheque or bill for collection, or if the bank gives credit to a customer in his account for the amount of a cheque which he has paid in for collection, the bank is a holder for value, and is entitled to sue the drawer if it

(*y*) *Ex p. Schofield*, 12 C.D., 337; cf., *Re Renniger, ex p. Commercial Bank*, 7 Q.L.J. (N.C.), 93.

(*z*) *Ex p. Schofield*, 12 C.D., 337; *Bank of New South Wales* v. *King*, 2 A.J.R., 75.

(*a*) *McLean* v. *Clydesdale Banking Co.*, 9 Ap. Cas., at p. 109; *per* Lord Blackburn.

thinks fit to do so (*b*). The usual practice of bankers, however, is not to sue the drawers of dishonoured cheques or bills. They return them to the customers, and leave them to take such proceedings as they may consider proper for the assertion of their rights.

Lien on documents left for collection.

The House of Lords decided in a recent case that all documents deposited with a bank for collection may be subject to a lien in respect of any balance due to the bank from the customer. The material facts of that case were substantially as follows :—A., a customer of the bank, whose account was overdrawn, sold to B. some foreign bills of exchange, and gave his bank an order or draft on B. for the price. The bank took the order to B., who, in exchange for it, gave them his cheque in favour of A. Before the cheque could be presented for payment, B. discovered that the foreign bills were worthless, and would not be paid. He accordingly stopped payment of the cheque, and thereupon the bank brought an action against him. It was contended for B. that the consideration for the cheque having failed, A. could not maintain an action upon it, and that, as the bank held it only as A.'s agent for collection, they had no better title than their customer. In the Exchequer Chamber it was held (1) that the consideration for the cheque had failed ; (2) that therefore A. could not maintain an action on it against B. ; (3) but that the bank, by reason of their having previously granted an overdraft to A., were holders for value and entitled to recover (*c*).

(*b*) *Ex p. Richdale,* 19 Ch. D., 409, approved ; *Royal Bank of Scotland* v. *Tottenham,* (1894) 2 Q.B., 715 ; *McLean* v. *Clydesdale Bank,* 9 Ap. Cas., 95 ; but see *Commercial Bank* v. *Dyer,* Mac., 509.

(*c*) *Misa* v. *Currie,* L.R., 10 Ex., 153, thus in effect overruling the

On appeal to the House of Lords this decision was affirmed, but on different grounds. For it was held (1) that A. could have maintained an action on the cheque, as the consideration for it had not failed, B. having received precisely what he gave it for, namely, the foreign bills; (2) that the bank held the cheque for value, because, in exchange for it, they had given up A.'s draft or order on B., which was a valuable security; (3) that even if the order was not a security, but only, as was contended, an authority to the bank to receive and collect B.'s cheque for A., they were entitled to a *lien* on that cheque, and on all other documents left by A. with them as bankers for collection; and (4) that no bank is bound to inquire as to what equities may subsist between a customer and other persons, so as perhaps to affect themselves with the equities regarding that customer, and consequently render themselves unable to give that credit which their right of lien enables them to allow, and thereby contribute so much to the promotion of commerce (*d*).

A bank therefore may have a lien on share certificates deposited with it by a customer in order that it may collect the dividends for him (*e*).

Bank may sue on its lien.

A bank may, by virtue of its lien, where the customer is indebted to it, proceed against the acceptor of a bill

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doctrine of *The English, Scottish and Australian Chartered Bank* v. *Levinger*, 4 W.W. & A'B. (L.), 208; cf., *Davis* v. *Bowsher*, 5 T.R., 488; 2 R.R., 650.

(*d*) *Misa* v. *Currie*, 1 Ap. Cas., 554. This decision apparently conflicts with *Ford* v. *London Chartered Bank*, 5 V.L.R. (Eq.), 28, where, however, all the previous cases do not seem to have been brought to the notice of the Court.

(*e*) *Re United Service Co.*, L.R, 6 Ch., at p. 217.

or the drawer of a cheque paid in for collection, and may recover the amount in an action against him (*f*). Indeed, it has been held that a bank to which a bill has been indorsed for collection may, if authorised by the indorser, sue the acceptor, although there was no consideration whatever for the indorsement (*g*).

Differently dealt with in bank books.

As the manner in which a bill is dealt with in the bank-books may often afford important evidence when the question arises whether a bill has been discounted or simply deposited for collection, it is proposed briefly to describe the modes in which bills deposited and bills discounted are respectively treated.

When a bill is discounted, its amount, less the discount is immediately entered to the customer's credit in his current account; but the amount of a bill for collection never appears there until it is paid, and then the whole amount of it is entered. In the former case the customer is immediately credited with the "proceeds of bill discounted"—which is the amount allowed to the customer after deducting the discount. In English banking the practice is to credit the customer with the full amount of his bill when it is discounted, and at the same time to debit him with the amount of

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(*f*) *Bank of New South Wales* v. *King*, 2 A.J.R., 75; *Bank of Australasia* v. *Walters*, 2 W.W. & A'B. (L.), 89; *Commercial Bank* v. *Dyer*, Macassey, 509; *Colonial Bank* v. *M'Donald*, 5 V.L.R. (L.), 214; *Ex p. Richdale*, 19 Ch. D., 409; *M'Lean* v. *Clydesdale Banking Co.*, 9 Ap. Cas., 95.

(*g*) *Bank of New Zealand* v. *Bird*, Macassey, 381; and see *Law* v. *Parnell*, 7 C.B., N.S., 282; 29 L.J., C.P., 217; *Ancona* v. *Marks*, 7 H. & N., 686; 31 L.J., Ex., 163. In such a case, a bank it seems could have no better title to recover than its customer. *De la Chaumette* v. *Bank of England*, 9 B. & C., 208; as explained in *M'Lean* v. *Clydesdale Banking Co.*, 9 Ap. Cas., at p. 114.

the discount, and an entry of this kind is often relied on in evidence (*h*). A discounted bill always appears in the discount ledger, while a different ledger, called the Bills for Collection Ledger, is used for bills deposited. If a bill for collection is dishonoured, notice is sent to the customer, who is left to protect himself, and no entry or debit appears in his current account. But if a discounted bill is dishonoured, the customer, when he is in funds, is immediately charged with the amount, and in the notice of dishonour he is informed of that fact (*i*). If he has not a sufficient amount to his credit to meet the bill, it then becomes what is known as a past due bill; and it is immediately entered in a general account called the Past-Due Bills Account, in which dishonoured bills for collection never appear. Legal proceedings may then be taken against the parties. In England it is a common practice to credit the customer with the amount of a bill for collection on the day it is due, and if it be not paid, to debit him with the amount of it on the day following.

Bills for Collection Ledger.

Past due bills.

Accounts of branch banks.

A similar distinction between discounted bills and bills for collection is generally drawn in communications from one branch to another. Suppose, for example, the head office has to obtain payment, through a branch, of a number of bills, some of which it has discounted, while others have been deposited by customers for collection. In the letter of advice sent to the branch along with the bills, they are divided into two classes, one called "remittances" consisting of the

(*h*) *E.g.*, *Carstairs* v. *Bates*, 3 Camp., 301.

(*i*) A misdescription of the bill in the notice of dishonour is of no consequence unless it misleads. *Billson* v. *Hood*, 5 V.L.R. (L.), 125.

discounted bills which are assets of the bank, and the other consisting of bills for collection. The branch is then debited with the amount of the " remittances " in the books at the head office, while the branch again will, in its accounts, credit the head office with the same amount. It then debits an account opened in its books under the head of " bills receivable," with all remittances not then matured, and credits it with their amounts when paid. If they are not paid, they are returned to and charged against the head office, which will then debit them against the indorsers, when they are in funds; and when they are not, the dishonoured remittances are entered in the " past-due bills account," and dealt with in the usual way.

In some banks no credit or debit entries are made in the accounts with regard to bills and cheques forwarded for collection unless and until they are paid; when, if they have been lodged by a customer, a " transfer warrant " for their amount is returned to the head office; but, if they have been lodged by another bank, a " draft " is made out for the amount and transmitted for delivery to them.

It will thus be seen that important inferences may be drawn from the mode in which bills are dealt with in the bank books. Formerly this source of evidence was chiefly available to parties who sued a bank, and used the books as admissions made by the bank against itself. For it was thought that a banker's books, in which he might record anything he pleased, could not be evidence for him, though they might be against him. But by the recent Act already referred to, a bank's books may be made *primâ facie* evidence for or against it of the matters contained in them.

After collection.

After a bill has been collected, the bank becomes a simple debtor for the amount, less the commission, if any has been charged; and should the sum be retained by the collecting bank, no interest is payable, unless there is a contract, express or implied, to pay it (*k*).

(*k*) *Reid* v. *Bank of New Zealand*, 3 N.Z. Jur., N.S., 40.

CHAPTER XVII.

On Collecting Mercantile Paper.

§ 1. BANKS AS AGENTS FOR COLLECTION.

When banks undertake the duty of collecting mercantile paper, they are simply agents for their customers, and as such are bound to use due diligence in performing the duties of collection (*a*). It is proposed to offer in this chapter a few remarks upon what those duties are.

Commission.

Banks in Melbourne charge a commission for collecting bills, notes, and cheques. Sometimes in country towns the competition between local branches of different banks induces them to collect without making a charge, in the hope of attracting customers and increasing business. If a bill or cheque is dishonoured, no commission is, in any case, charged for endeavouring to obtain payment of it.

When banks make no charge for collecting bills, merely in the hope of attracting or retaining business, it might, perhaps be held that they are acting for their customers gratuitously, and without consideration. In

(*a*) *Bank of Van Diemen's Land* v. *Bank of Victoria*, L.R., 3 P.C., 526; *Beven on Negligence*, 2nd ed., 1529.

the case of goods deposited for safe custody by customers, a similar inducement appears to have been regarded as insufficient to take it out of the class of gratuitous depositaries or bailees (*b*).

§ 2. ON COLLECTING BILLS.

With regard to bills for collection, it may, in the first place, be observed that foreign or intercolonial bills are almost the only bills that banks undertake to present for both acceptance and payment. Customers are required as a rule to obtain acceptance for themselves of the domestic bills which they deposit for collection.

Collecting foreign or intercolonial bills.

When an unaccepted foreign or intercolonial bill is left with a banker for collection, he will be liable for any loss that may occur from his negligence to present it. There are three cases in which a bill must be presented for acceptance before it is presented for payment, in order to render liable any party to the bill. First, where a bill is payable after sight; secondly, where the bill expressly stipulates that it shall be presented for acceptance; thirdly, where the bill is drawn payable elsewhere than at the residence or place of business of the drawer (*c*). In this last case, if the bill comes into the hands of the holder so late that there is not sufficient time to present the bill for acceptance before presenting it for payment, the delay caused by present-

(*b*) *Giblin* v. *McMullen*, L.R., 2 P.C., 317; see however, *Byles on Bills*, 16th ed., 204, and notes to *Coggs* v. *Bernard*, 1 Sm. L.C., 10th ed., 182.

(*c*) *Bills of Exchange Act*, s. 39; *Beven on Negligence*, 2nd ed., 1531.

ing it for acceptance is excused (*d*). In the case of a bill payable at a certain time after sight, the bank should present it for acceptance within a reasonable time (*e*). The law in such a case does not lay down any time which is reasonable or unreasonable for the performance of this duty. What is a reasonable time is always a mixed question of law and fact for the decision of a jury, and will depend upon the peculiar circumstance of each individual case (*f*). But inasmuch as the object of depositing an unaccepted bill for collection is to obtain acceptance and payment of it, or, if it is not accepted or paid, to guard the rights of the customer against the drawer, by giving due notice of dishonour, in case recourse is to be had to the drawer, it is clearly the duty of the bank to obtain acceptance if possible. Yet a bank should not press unduly for acceptance or in such a way as to lead to a refusal, provided the steps for obtaining acceptance or refusal are taken within the limit of time which will preserve the rights of the customer. When a bill is left for acceptance, it is the duty of the party who leaves it to call again for it, and to enquire whether it has been accepted or not. It is not the duty of the drawer to send it, unless there is an established course of dealing between the parties that requires him to do so (*g*).

But though the law is silent as to what is a reasonable time, a jury in one case found by their verdict

(*d*) See *Chalmers on Bills of Exchange*, 5th ed., p. 133; *Bills of Exchange Act*, s. 39 (4).

(*e*) *Bills of Exchange Act*, s. 40.

(*f*) *Mullick* v. *Radekissen*, 9 M.P.C., 46; *Bills of Exchange Act*, s. 40 (3).

(*g*) *Per* Bayley, J., in *Jeune* v. *Ward*, 1 B. & Ald., at p. 659; *Chalmers on Bills of Exchange*, 5th ed., 139.

that there exists in Melbourne a mercantile usage requiring a bank to present foreign bills for acceptance on the day they are received. It is believed that this verdict, though it was never disturbed, is at variance with fact, and that there is no such custom. The case was carried to the Privy Council on appeal, but in the view which that Court took, this finding was passed over as immaterial. The Supreme Court, however, seems to have considered that it was not supported by the evidence (*h*).

Bill payable after sight may be left for twenty-four hours with drawee.

A banker who engages to collect an unaccepted bill may leave it for twenty-four hours with the person on whom it is drawn, in order that he may decide during that time whether he will accept it. In some cases, indeed, it may be left even longer. For instance, if a bank in Melbourne left a bill for acceptance with the drawee at 2 o'clock on Friday, they need not call for the bill until the following Monday morning. For Saturday is a short day; business hours terminate at twelve, and the twenty-four hours would not run out until two hours after business ceased on that day (*i*). The high character of a drawee is not a justification for leaving a bill with him for acceptance for a longer time than otherwise would be reasonable.

Though a bill payable after sight may be left for twenty-four hours with the drawee, it appears to be the custom to date the acceptance from the day of its presentment, and not from the day on which it was returned to the holder. Thus, if a bill was presented

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(*h*) *Bank of Van Diemen's Land* v. *Bank of Victoria*, 6 W.W. & A'B. (L.), 178; L.R., 3 P.C., 526.

(*i*) *Bank of Van Diemen's Land* v. *Bank of Victoria*, *ubi supra*, see also *Chalmers on Bills of Exchange*, 5th ed., 38.

on Saturday and accepted on Monday, the former is the day at which the time after sight begins to run. If a bill payable after sight is presented for acceptance and refused, and if it is presented again and accepted, the practice is to ante-date the acceptance to the day on which it was first presented (*k*).

If a bill is not accepted within the customary time, the bank should treat it as dishonoured by non-acceptance, otherwise the customer would lose his right of recourse against the drawer and indorsers (*l*), and the bank would be liable to make good the loss.

Death of drawee.

Where the drawee is dead or insolvent, the bank may take one or other of two courses. If the drawee is dead, presentment may be made to his personal representative, or if he is insolvent it may be made either to him or to his trustee. Or in such cases presentment may be dispensed with, and the bill may be treated as dishonoured by non-acceptance (*m*).

Accepted bills.

It has been stated that customers often leave their domestic bills when accepted with their bankers for collection. The banks then undertake to present them for payment, and are of course responsible to their customers for any loss arising from negligence and for not taking proper proceedings to give notice of dishonour (*n*). Such bills are almost invariably accepted payable at a bank. Foreign bills also are generally accepted in the same way. Enough has already been

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(*k*) *Chalmers on Bills of Exchange*, 5th ed., 38, 41; *Bills of Exchange Act*, s. 18 (3).

(*l*) *Bills of Exchange Act*, s. 42.

(*m*) *Bills of Exchange Act*, s. 41 (1) and (2).

(*n*) *Bank of Scotland* v. *Dominion Bank* (*Toronto*), 1891 A.C., 592.

said as to the mode of presenting bills accepted in this manner for payment. The presentment of other bills does not come within the scope of this book, and any reader who may require further information on the subject must be referred to the ordinary treatises on bills of exchange.

Notice of dishonour.

A banker who holds a bill deposited for collection is not bound to send notice of dishonour to the depositor on the day on which the bill is dishonoured. He has another day for that purpose. He is, in fact, in the position of an ordinary holder, and should give or send notice of dishonour to the customer not later than the next post day, and the customer should give or send notice not later than the next post day after the receipt of such notice to his indorsee or other antecedent parties to the bill (*o*). It is, however, advisable to forward the notice if possible on the evening of the day on which the bill is dishonoured.

§ 3. ON COLLECTING CHEQUES.

Banks collect cheques for their customers. When a cheque is lodged for collection, it is generally entered to the customer's credit in his current account. If it be not paid, notice of its dishonour is immediately sent to the customer, in order that he may be able to take such steps as he thinks proper to protect himself. Some banks return the cheque along with the notice, but others do not. The customer is then debited with the amount of the dishonoured cheque.

As a bank is bound to use due diligence in collecting

(*o*) *Bills of Exchange Act*, s. 49 (12) *a*, *b*, (13); *Byles on Bills*, 16th ed., 233, *et seq.*

cheques, an action would lie against it for negligently delaying to present a cheque for payment (*p*), if it could be proved that had the cheque been presented in time there was a reasonable prospect that it would have been paid (*q*).

Presenting for payment.

A bank which receives a cheque for collection should, as a rule, present it for payment not later than the day after it has been received, if the bank on which it is drawn carries on business in the same place. If the cheque be drawn on a distant bank, the collecting bank may employ an agent to present it, and should forward it to him not later than by the next day's post or the next opportunity in the ordinary course of post (*r*). He should present it not later than the next day after he gets it. Every agent to whom a cheque is regularly forwarded for collection has a whole day within which to present it (*s*).

When a customer pays into his bank for collection a cheque drawn by another customer, the bank is entitled to the same time for ascertaining whether the cheque will be paid, and for giving notice of dishonour in case there are not funds to meet it, as if it were drawn upon another bank (*t*).

Where holder and drawer have the same bank.

A customer paid into his bank for collection a cheque drawn by another customer who had overdrawn his account. The next day the bank wrote to the customer

(*p*) *Hare* v. *Henty*, 30 L.J., C.P., 302.

(*q*) *Hopkins* v. *Ware*, L.R., 4 Ex., 268.

(*r*) *Hare* v. *Henty*, 3 C.B., N.S., 534, 30 L.J., C.P., 302; *Rickford* v. *Ridge*, 2 Camp., 537.

(*s*) *Prideaux* v. *Criddle*, L.R., 4 Q.B., 455.

(*t*) *Boyd* v. *Emerson*, 2 A. & E., 184.

who paid it in, stating that it had not been honoured or carried to his account, but that they would retain it in the hope of its being provided for, and they promised the drawer that they would pay it when they had funds. On that day the drawer paid in funds, all of which, however, the bank appropriated to the reduction of the drawer's liabilities to them. It was held that they had no right to do so, as they had constituted themselves agents to receive the money for the owner of the cheque, and therefore they were bound to pay it before they applied any portion of the drawer's funds to their own purposes (*u*).

Collecting through the post.

A cheque may be presented for collection through the post where this practice is authorised by agreement or usage (*v*). It may be sent direct to the banker who is the drawee. There is, it is believed, no case which determines what is then his duty or position, or whether, on the receipt of the cheque through the post, he is bound to send its amount by post to the transmitter. It has, however, been suggested that, under such circumstances, he is probably the agent of the person who presents the cheque; that if he dishonours it he ought to give notice of dishonour with reasonable diligence; and that the sender may presume, from the absence of a reply, that it is dishonoured, and give notice accordingly (*w*).

It is believed, however, that amongst bankers the

(*u*) *Kilsby* v. *Williams*, 1 D. & R., 476; 5 B. & A., 815; 24 R.R., 564.

(*v*) *Heywood* v. *Pickering*, L.R., 9 Q.B., 428; *Prideaux* v. *Criddle*, L.R., 4 Q.B., 455; *Bills of Exchange Act*, s. 41 (1) *e*.

(*w*) *Per* Erle, C.J., in *Bailey* v. *Bodenham*, 33 L.J., C.P., 252.

presumption is that the cheque will be paid if no answer is received.

Cheques on distant branches.

If cheques on one branch exceeding in the aggregate the sum of £20 are lodged for collection at another, it is usual to forward them direct by post to the branch on which they are drawn, in order to ascertain whether they will be paid; while cheques under that amount in the aggregate are sent to the head office in Melbourne, and thence transmitted by post for collection. This is done, it is believed, in order to save clerical labour and postage, as a large number of small cheques received from different branches can then be forwarded through the head office in one parcel to the branch on which they are drawn. But it has been held that a collecting bank or branch cannot enlarge the time for presenting a cheque by unnecessarily circulating it through other branches, or through the head office; and accordingly, if loss resulted to a customer from the delay occasioned by presenting small cheques through the head office, instead of sending them direct by post, the bank, it is conceived, might be held liable in damages (*x*).

Crossed cheques.

By virtue of the *Bills of Exchange Act*, all crossed cheques must now be collected through a bank. Formerly, if a banker collected for a customer a cheque payable to order, the banker would have been obliged to refund the proceeds to the drawer, or lawful holder, if the customer's title to it depended on the forged indorsement of the payee (*y*). But now, if a banker collect a cheque in the ordinary course of business, he is no longer responsible for the title of his customer,

(*x*) *Moule* v. *Brown*, 5 Bing. N.C., 208.

(*y*) *Ogden* v. *Benas*, L.R., 9 C.P., 513.

or for the genuineness of any indorsement upon the cheque. The customer of the bank has no claim against the collecting bank, but only against the person to whom it has been paid by the bank, and whose title is defective (z).

But this protection is restricted to those cases in which the bank collects the cheque for one of its own customers. Therefore, where a bank collected a cheque for a stranger who had no account there, it was held that the bank was not protected, inasmuch as a person who had no previous dealings at the bank could not be reckoned as one of its customers (a).

Where a cheque is crossed specially to more than one banker, it should not be paid, unless it has been so crossed for the purpose of collection; and any banker paying a crossed cheque contrary to the provisions of the Act, is liable to the lawful owner of the cheque for any loss the latter may consequently sustain (b).

§ 4. BANKS AS SUB-AGENTS FOR COLLECTION.

When a customer deposits a bill or other negotiable paper with his bankers for collection, they may be obliged to employ another bank as their agent to obtain payment of it. This, for instance, may occur if a bank has no branch of its own at the place where the bill is payable. The customer's bank, however, remains liable

(z) *Bills of Exchange Act*, s. 82, cf., *ibid*, s. 60; *Matthiessen* v. *London and County Bank*, 5 C.P.D., 7.

(a) *Mathews* v. *Williams Brown & Co.*, 63 L.J.Q.B., 424; cf., *Kleinwort* v. *The Comptoir D'Escompte de Paris*, (1894) 2 Q.B., 157.

(b) As to the duties of a banker in regard to crossed cheques, see *Bills of Exchange Act*, s. 79; *ante*, p. 95.

to him in respect of the bill, and he cannot be called on to suffer any loss that may be occasioned by the conduct of his bank's agents, between whom and himself no privity exists (*c*).

The law has been thus stated and illustrated by Lord Cottenham :—"If I send to my bankers a bill or draft upon another banker in London, I do not expect that they will themselves go and receive the amount and pay me the proceeds; but that they will send a clerk in the course of the day to the Clearing House, and settle the balances, in which my bill or draft will form one item. If such clerk instead of returning to the bankers with the balance should abscond with it, can my bankers refuse to credit me with the amount? Certainly not. If the bill had been drawn upon a person at York the case would have been the same; although instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at York to do so; and if such correspondent received the amount, am I to be refused credit because he afterwards became bankrupt when in debt to my bankers?"

Sub-agent responsible to his employer.

But a banker when acting as sub-agent will be accountable to his employers for the consequences of his negligence. Thus, if one bank, as the agent of another, undertakes to collect bills of exchange drawn against bills of lading and other shipping documents, upon the terms that it is to exercise due care for the interests of its principal, and is not to hand over the shipping documents until payment of the bills, it will

(*c*) *Mackersy* v. *Ramsays*, 9 C. & F., 818, 848; and see *Prince* v. *Oriental Bank*, 3 Ap. Cas., 325.

be liable to its principal for any loss that may arise from surrendering the documents to a consignee or drawee who accepts the bills and becomes insolvent before they mature (*d*).

(*d*) *Barclay* v. *Bank of New South Wales*, 5 Ap. Cas., 374; 2 Sup. Ct. R., N.S.W. (L.), p. 117.

CHAPTER XVIII.

THE MELBOURNE CLEARING-HOUSE.

As in the preceding pages mention has occasionally been made of the clearing-house, and as it occupies a very important place in the practice of banking in Melbourne, especially as regards the collection of mercantile paper, it is thought that a brief explanation of the operations of the clearing-house system may not be unacceptable. Established in London more than a hundred years ago by the private bankers of the metropolis for their own convenience, it has long since become an absolute necessity of the very existence of that vast extension of credit represented by modern commerce, and an economiser of the monetary representative of capital, without which the mercantile operations of to-day could not possibly be carried on. The daily transactions of the London clearing-house average about £50,000,000; but, on the 13th February, 1899, the cheques and bills actually presented there for payment reached the enormous total of £82,210,000; and the whole of this stupendous claim was settled without the intervention of a single note or coin, by means of cheques on the Bank of England, where each clearing bank keeps a drawing account. The respective amounts once agreed, a few entries in the ledgers of

London clearing-house established by the private bankers.

the Bank of England, half an hour of a clerk's time, sufficed to round off transactions that, if settled in notes and gold over the counters of the respective banks, even supposing such a vast drain on the currency of the country could have been provided for, would have taken a large staff of experts more than a week to check.

Admission of the joint stock banks.

It was not until the year 1854 that the private bankers admitted the joint-stock banks in London to the clearing-house; and prior to that date the latter were obliged to keep a very large staff of "out tellers" or clerks to collect in cash all the cheques and bills domiciled at other banks, which were lodged with them by their customers. The notes thus gathered in every day were paid to the credit of the respective banks with the Bank of England on the following morning, and as that institution never reissues its paper, it follows that the labour of cancelling its note issue was increased in a wasteful and extravagant manner, which, at length, with the rapid development of the joint-stock system, it became difficult to meet. Under considerable pressure, the private bankers withdrew their opposition, and the companies were admitted to share the benefits of the labour and currency saving association in Lombard-street, where the London clearing-house is situated.

System extended to America.

In 1853 the principle was extended to New York, where there are nearly twice as many banks as in London, and it there works with admirable smoothness.

Established in Melbourne.

It was not until 1868 that it was introduced to the colonies, and as yet its operations are confined to Melbourne, several efforts to establish a clearing-house in

Sydney having failed, through the disinclination of one of the leading banks to be a party to it.

In the first year of its existence in Melbourne, the transactions passing through the house represented something over £68,000,000: for the year 1899, they reached the respectable total of £159,000,000; and although these large operations have not been carried through as in London without the intervention of any coin, for reasons hereafter to be explained, the labour, risk and loss attendant on actual specie payments has been minimised.

As there is no bank in this colony standing to the others in the relation which the Bank of England occupies to the other London bankers, it follows that the resulting differences have to be paid in Melbourne in gold or its equivalent. To save the wear and tear, and also the expense of carting to and fro so much gold coin, the banks, in association, have deposited in special safes under triple keys a sum of £650,000, against which are issued parchment certificates, each representing the holder (being one of the banks whose name is indorsed) to be entitled to £1000 of such deposit; and for all purposes of account, average statement, or payments between bank and bank, these certificates are treated as coin. The reserved gold coin is verified at intervals by a changing committee of the associated banks, and for all practical purposes the amount is found to be sufficient, each bank being required to hold a certain proportion of certificates, relatively to its capital, and empowered to demand gold if it elects to do so for anything beyond the prescribed amount. Of course it follows that if any one bank is largely decreasing its advances, or increasing its deposits, and has the

Certificates.

exchanges in its favour for several weeks running, it has a tendency to accumulate the certificates far beyond its assigned proportion. In such case it becomes the duty of the clearing-house inspector, to call upon those banks that hold less than their quota to take up their proportion by paying gold for them. Hence, as a matter of fact, the settlements between the banks involved the use of nearly two per cent. of the total amount in actual coin. The figures for the year 1899, £159,000,000, were settled by weekly payments aggregating £15,300,000 in certificates, and £5,130,000 in coin. The prime disturbing element in the operation of the certificate principle is found in the transactions of the Royal Mint. A very large proportion of the gold received from the mines is sold by the banks to the Mint for coinage, and is paid for by the Deputy Master's cheque on their bankers, to provide for which cheques, gold coin is paid in. The exchanges, under such circumstances, will naturally be pretty continuously against this bank and must be settled in coin, since the magnitude of the transactions would soon exhaust its fair proportion of the certificates.

Royal Mint.

Modus operandi.

Having thus in general terms indicated the economic advantages of the clearing-house system, over the practice of a house-to-house collection in cash, it remains only briefly to describe the *modus operandi,* referring the reader who is interested in the subject to the admirable book of Professor Jevons, on "Money and the Mechanism of Exchange" (*a*), for the best account of its important bearings on modern commerce.

The Melbourne Clearing House, to which nine banks

(*a*) London: Kegan Paul & Co., 1878. International Scientific Series.

only are admitted, is a commodious hall, No. 337 Collins-street, handsomely fitted up with separate enclosed desks, ranged on each side for the nine banks represented in association, and a raised dais and desk at the end, for the inspector. There are six clearings daily, except on Mondays, when there are eight. The times fixed for the several clearings, which are observed with inflexible strictness, and an abstract of the rules for the management of the house, will be found in the Appendix to this volume.

Each bank requires at least two clerks to represent it in the house, one sitting at the desk to receive the "charges," *i.e.* the claims against the bank in respect of cheques and bills, and the other to deliver the documents domiciled at the other banks, at the desks of the respective representatives. At the times fixed for the several "clearings" each bank promptly deposits on the desks of the other nine banks a folded packet of cheques, &c., accompanied by a printed memorandum with the total amount filled in. The "in-clearing" or receiving clerk rapidly enters the vouchers in his book (amounts only), and on agreeing the total, initials the slip, which is then reclaimed by the "out-clearing" or delivering clerk, and forms his warrant for a claim to that extent against the receiving bank. At the subsequent clearings later in the day, the same initialled slip is again left with fresh "charges" of cheques, and an added amount, until at the close of the day it represents the total amount of the holder's claim for documents he has surrendered, and forms the basis upon which the inspector makes up his general statement, balancing the total transactions of the day, and certifying how much is due to, or by, each of the nine banks represented. Immediately on the re-opening of the doors after each clearing, the receiving clerks take the cheques and bills to their respective banks, where they are either paid or dishonoured by the proper authorities. To avoid confusion, "returns," *i.e.* dishonoured cheques and bills, are not handed back and deducted from the amount already initialled for, but are included in the next succeeding "out-clearing," and given credit for by the bank from which they were received, in the same manner as if drawn on themselves. They must, however, be returned promptly to ensure their reception. Thus a cheque received by the clearing clerk of the Bank of Victoria from the Colonial Bank at half-past nine o'clock must, if not paid, be included in the charge of Colonial Bank cheques delivered to that bank's representative in the house by the Bank of Victoria, by twelve o'clock noon—and similarly with regard to later clearings. Bills, if not provided for on presentation, may be retained by the bank, where they are domiciled for the whole day, but must be returned to ensure acceptance not later than 3.45 p.m. on ordinary days, or 4.15 on Mondays.

The main features requisite for the performance of the clerical duties of the clearing-houses are accuracy and rapidity. All the work is literally done "against time," and it is surprising what developments are attained in this respect by some of the practised clerks.

The rules with regard to closing the doors at specified times are most rigidly enforced, and it occasionally happens in very busy times that a bank is "shut out," and has to await the ensuing clearing. To ensure uniformity and prevent excuses from diversity of clocks, the clock at the clearing-house is connected by telegraph with that of each bank in the city, and the whole are controlled by the standard at the Observatory.

Inspector.

The duties of the inspector, in addition to maintaining the discipline of the house, and the efficiency of the clerks deputed to represent each bank, consist in certifying daily to the correctness of the individual and total balances, arranging and superintending the weekly settlements of coin, and regulating the holding and handling of the exchange vouchers or certificates. In addition he furnishes to the *Bankers' Magazine*, and the committee of the London clearing-house, periodical returns of the amount of business transacted. The general management of the house is entrusted to a committee of three members of the associated banks, by whom the rules for its working have been compiled and to whom the inspector makes his official report.

Spontaneous growth of the system.

It is worth noting in connection with the vast extent of the operations of the clearing-house, that although in London it would be absolutely impossible to conduct one-half of the business of the banks without its employment, it has, to use the words of Professor Stanley Jevons, " grown spontaneously, uninvented, unauthorized by the Legislature, and only recognised by the judges when firmly established as a matter of business custom. No Act of Parliament has ever been passed to facilitate the operations of clearing, and it is only by an understanding between the banks that the presentation of cheques and bills through the clearing-house, or their settlement by the payment of a balance, is regarded as legally valid " (*b*).

(*b*) *Money and the Mechanism of Exchange*, by W. Stanley Jevons, p. 283. As to the mode in which the usages of bankers become incorporated into the law merchant, see *ante*. For the rules regulating the practice of the Melbourne Clearing-House see the Appendix.

CHAPTER XIX.

LETTERS OF CREDIT AND LETTERS OF HYPOTHECATION.

§ 1. CLEAN CREDITS.

Usual definition.

A letter of credit may be described as a written request addressed by one person to another, requesting the latter to give credit to the person in whose favour it is drawn.

The letters of credit in most frequent use amongst colonial bankers and merchants are of various forms, and often contain much more than a mere request to honour drafts. They are extensively used in foreign and intercolonial transactions, and, indeed, are almost indispensable to merchants who have to do business with other colonies or countries.

Clean credits.

The credits created by these letters are chiefly of two kinds, "clean credits," as they are called in Australia, and "document credits." A "clean credit" is, generally speaking, a mere authority from the bank to its agent to honour the cheques or negotiate the bills of the customer or his agent or nominee to a certain amount, provided the credit be availed of within a specified time. The following is a form of such a letter taken from a reported case (*a*) :—

Union Bank of Scotland,
Glasgow, 22nd October, 18—.

Please to honour the drafts of A. B. to the extent of £460 and charge the same to this bank.

L. M., Cashier.

To the Manchester and Liverpool
District Bank, Liverpool.

Not transferable.

Customers when about to travel frequently get such letters of credit in their own favour. "Clean credits" are so called to distinguish them from "document credits," which are credits secured by the deposit with a bank of documents of title relating to goods. They will be described in the sequel.

A clean letter of credit, simply giving authority to a bank to honour the drafts of A, is a justification to the bank for making the payments, but its possession by the bank to whom it is addressed does not prove that the payment has been made. To show that the payment has been made there should be a draft by A. As the person who presents a letter of credit may have obtained it by improper means he is not necessarily the person to whom it was granted. A banker, therefore, to whom a letter is addressed ought to see that the signature to the draft is genuine. If he does not, and if a draft not bearing the proper signature is paid, the bank must bear the loss (*b*).

Where a banker grants a letter of credit for a sum

(*a*) *Orr* v. *Union Bank of Scotland*, 1 Macq., H.L.C., 513; cf., *Ellis* v. *Bank of Australasia*, 3 N.S.W. L.R., 96.

(*b*) *Orr* v. *Union Bank*, 1 Macq., H.L.C., 513; *British Linen Co.* v. *Caledonian Insurance Co.*, 4 Macq., H.L.C., 107; 3 L.T. (N.S.), 162.

paid to him at the time of granting it, he must either show that the money has been paid away in compliance with the terms of the letter, or he must repay the amount to the person who obtained it, and in such a case the banker, in the absence of any stipulation to the contrary, cannot insist on having the letter of credit returned to him before he repays the money (*c*). If, however, the time during which the letter of credit might be used had not expired, the banker, it is submitted, might reasonably refuse to repay the money unless the letter was returned to him.

Endorsing letters of credit.

In England it is not unusual for banks to pay a clean letter of credit upon the simple indorsement of the payee, who indorses the letter and hands it to the bank. Such an indorsement, however, is not an order for payment or a draft within the meaning of the letter (*d*). It has been held that the indorsee of such a letter is not bound, in the absence of notice, to make inquiry as to the purpose for which the letter was granted (*e*).

Letter stating a credit has been opened.

A letter from a bank informing a person that a credit has been opened in his favour at the instructions of a customer does not constitute a specific appropriation or equitable assignment to such person of the amount of the credit. It is in fact a simple statement or undertaking that the bank will make payments pursuant to the terms of the credit (*f*).

(*c*) *Orr* v. *Union Bank*, 1 Macq., H.L.C., 513.

(*d*) *R.* v. *Wilton*, 1 F. & F., 391.

(*e*) *Maitland* v. *Chartered Mercantile Bank of India*, 2 Hem. & M., 440.

(*f*) *Morgan* v. *Larivière*, L.R., 7 H.L., 423, 432.

Such transactions are not in England or Australia confined to bankers. Frequently a credit is opened with a particular house of business in favour of another house of business. A credit of that kind is generally, to use the mercantile phrase, "operated upon" by bills of exchange being drawn upon the house which undertakes to give the credit. But a credit when granted by a bank may be operated upon by means of cheques or bills or otherwise as may be agreed upon (*g*).

Telegraphic remittance.

A contract to transmit money by telegraphic advice differs in no essential respect from the contract entered into in transmitting money by letter of advice, or in granting a letter of credit or bank draft. Where the customer's London agent paid a sum of money to a bank in London to be remitted by telegraph to its branch in New Zealand, and the bank refused to pay over the money to the customer because his name had been mis-spelt in the telegram, the bank was held liable to an action for retaining the money until it received a letter of advice explaining the error, and it had to pay interest on the money during that time (*h*).

Forged letters of credit.

A person who procures advances by means of a letter of credit which he knows to be a forgery, may be indicted for obtaining money or credit by false pretences. Thus a bank manager in Melbourne was induced to discount bills under a forged letter of credit purporting to have been granted in London. The proceeds of the bills were placed to the credit of the person in whose favour the letter was supposed to have been issued,

(*g*) *Morgan* v. *Larivière*, L.R., 7 H.L., at p. 432. For a form of clean credit to be operated on by bills of exchange see *Re Agra and Masterman's Bank*, L.R., 2 Ch., 391.

(*h*) *Smythies* v. *Bank of New Zealand*, N.Z. J.R. (C.A.), 23.

and he drew them out by cheques. It was held by the Supreme Court that he was rightly convicted of obtaining money by false pretences (*i*).

§ 2. DOCUMENT CREDITS AND LETTERS OF HYPOTHECATION.

Intercolonial and English credits.

A great deal of the export and import trade between the colonies themselves, and also with England and other countries, is carried on by means of what are called intercolonial, English, and foreign document credits. These credits are used in mercantile transactions, and money is not advanced under them except in connection with the purchase of goods. They are engagements to honour drafts conditionally upon their being accompanied by bills of lading or other documents of title relating to goods which are pledged as security for the advances made by the bank under its letters of credit. Thus a merchant who desires to import produce by sea from another colony or country may obtain from his bank a letter of credit, directing or requesting its agent in the other colony or country to discount the drafts of the merchant's correspondent upon him, provided they are accompanied by "shipping documents," that is to say, insurance policies, invoices and bills of lading for the produce, which are taken by the bank as collateral securities for the bills. Such a letter of credit might be to the following effect (*k*) :—

(*i*) *R.* v. *Levy*, "Argus," 8th Sept., 1858 ; and see *R.* v. *Garrett*, Dear., 232 ; 23 L.J.M.C., 20.

(*k*) For other forms see *Re Agra Bank, ex p. Tondeur*, L.R., 5 Eq., 160 ; *Re Barned's Bank, Coupland's claim*, L.R., 5 Ch., at p. 168 ; *Yglesias* v. *Mercantile Bank of River Plate*, 3 C.P.D., at p. 31 ; *Ex p. Dever, in re Suse*, 13 Q.B.D., 766 ; *Selignan* v. *Huth*, 37

To the Manager of the Imperial Bank, Sydney.

Melbourne, 1st July, 1900.

At the desire of Messrs. J. S. and Co., of Melbourne, you are hereby requested to negotiate the drafts of Messrs. A. B. and Co., of Sydney, upon Messrs. J. S. and Co., to the extent of £5000 against shipments of goods to Melbourne. Such drafts are to be accompanied by the invoices, bills of lading and insurance policies relating to the goods which are to be handed to you as collateral security for the said drafts.

We agree with you and all *bonâ fide* holders of bills drawn in compliance with this credit that the same shall be accepted on presentation and paid at maturity.

This credit to be in force for three months from this date.

For the Australian Bank, Melbourne.

A.M., Manager.

When the merchandise is on board, the shipping documents are handed by the merchant's correspondent to the bank's agent who negotiates the bills, and then transmits the shipping documents and the bills to the bank that granted the credit. Such bills are said to be supported by shipping documents, and the bank retains possession or control of the goods until the bills drawn against them are paid, or until other satisfactory arrangements are made for retiring the bills.

Letters of hypothecation.

But in addition to the shipping documents, a bank frequently requires that the correspondent or agent of the importer shall be empowered to give it on behalf of his principal what is generally known as a letter of hypothecation which is addressed to the bank. It may be shortly described as a document by which goods shipped for export to another colony or country are pledged to a bank or a merchant, to protect ad-

L.T. (N.S.), 488; *The Brazilian, &c., Bank* v. *The British and American, &c., Banking Corporation*, 18 L.T. (N.S.), 824; *Key* v. *Cotesworth*, 7 Ex., 595.

vances made to the exporter on the security of the goods.

The chief use of a letter of hypothecation is to point out what is to be done with the goods represented by the shipping documents in case the bills drawn against them should be dishonoured, and to define the rights of the parties. Such letters, of course, vary in their terms. They generally authorise the bank, (1), to ensure the goods against loss at sea if it think fit and charge the customer with the cost; (2) to take conditional acceptances to any of the bills, to the effect that on payment of the bills at maturity, the bank will hand over the shipping documents to the acceptor; (3), to sell the goods if the acceptances are dishonoured either by non-acceptance or non-payment, and to apply the proceeds in payment of the dishonoured bills; (4), to accept payment of the bill before maturity if required, and on such payment to surrender the shipping documents to the acceptor, the bank then undertaking to allow a discount on all such pre-payments at the current rate for the time during which the bills may have to run; and further, it is stipulated (5), that the delivery of the shipping documents to the bank shall not prejudice its rights on the bills if they are dishonoured, and (6), that no proceedings taken by the bank to enforce payment of the bills shall affect its title to the securities (*l*).

Legal effect.

The effect of such a transaction is to make the bank a pledgee of the bills of lading or the goods they represent, and the bank might maintain an action

(*l*) For forms of letters of hypothecation, see *Latham* v. *Chartered Bank of India*, L.R. 17 Eq., 205; *Oriental Bank* v. *Lembke*, 41 L.T. N.S. (P.C.), 385; *Ex p. North-Western Bank*, L.R. 15 Eq., 69.

against any carrier or warehouseman who improperly parted with the goods or refused to deliver them to the bank (*m*). But the legal property in the goods remains in the shipper and does not pass to the bank so as to make it liable on the bills of lading to the shipowner for the freight, unless the bank takes actual possession of the goods (*n*).

A consignee often objects to make himself liable by accepting the bills of exchange drawn against the goods unless he gets the security of the goods. Accordingly, letters of hypothecation authorise the bank to take conditional acceptances of bills supported by shipping documents. By accepting a bill payable on delivery of the documents, the consignee gives himself security on the goods, without depriving the bank of theirs. For he is not obliged to pay the bill unless he gets the documents (*o*). But if a consignee who has given a conditional acceptance of this kind, becomes insolvent without paying it, the goods represented by the documents are, it is apprehended, a part of his estate which the bank holds as security, and they can only prove for the amount of the bill, less the value of the goods (*p*). Power to take conditional acceptances.

A power of sale may be so framed that if the bank, upon receiving the bills and shipping documents, doubt the credit of the consignee, they may at once act upon their dissatisfaction by resorting to an immediate sale; while if they obtain his acceptance of the bills without Power of sale.

(*m*) *Bristol and West of England Bank* v. *Midland Railway Co.*, (1891) 2 Q.B., 653.

(*n*) *Sewell* v. *Burdick*, 10 Ap. Cas., 74.

(*o*) *Smith* v. *Virtue*, 9 C.B., N.S., 214.

(*p*) *Ex p. Brett*, *re Howe*, L.R. 6 Ch., 838.

expressing dissatisfaction and without a sale, they may then be bound to await the dishonour of the bills at maturity before their right to sell would revive. In such a case they might be held liable for any loss that might arise from a sale by them at any time between the acceptance and the dishonour of the bills (*q*).

Forced sales. Sometimes, when a forced sale might result in a great loss, customers enter into special arrangements with the bank, to give additional security, in order to induce them not to sell the goods under the power. Thus a bank advanced money to a customer under a letter of credit on the security of shipping documents and bills of exchange accepted by the consignee. They were empowered to sell the goods on non-payment of the acceptances, and the customer made himself liable for any deficiency. The acceptances were dishonoured, but the bank consented not to sell the goods on the customer depositing with them a certain sum as security. The customer paid the deposit, and authorised the bank to settle the business, so as to cause him as little loss as possible. Under this authority, they took insolvency proceedings against the consignee, with a view to his being declared insolvent, and the goods were then sold, as required by the law of the country where the consignee resided, and the bills were cancelled and given up. The sale of the goods, together with the deposit, was not sufficient to pay the bills. It was held that though the bank sold the goods when requested not to do so, and cancelled the bills, they were entitled to the deposit; for in the course pursued

(*q*) *Owston* v. *M'Donald*, 1 V.L.T., 258; and see as to construction of a power of sale, *Law* v. *Rand*, "Argus," 28th June, 1859; *Bank of Bengal* v. *Mitter*, 4 M.P.C.C., 140.

they acted under the authority, and with the implied assent of the customer, who had authorised them to do what seemed best (*r*).

Policy of insurance.

Where a letter of hypothecation contained a power to insure the goods against sea risks, and also a power to sell them in case of non-payment of the bills, and to apply any balance after satisfying the bills, towards the discharge of other debts due from the consignor to the bank, it was held (the goods having been lost at sea) that the proceeds of the policy could not be applied in payment of anything beyond what was due on the bills (*s*).

Surrendering the goods to the consignee.

According to the usual form of a letter of hypothecation, the bank have the option of surrendering the goods to the consignee, either when he accepts the bills, or when he pays them. They may use their own discretion in the matter. In such cases the drawer of the bills will remain liable upon them to the bank, even when the bank part with their security on the acceptance of the bills to a consignee who becomes insolvent after acceptance and before payment of them. The letter of hypothecation, therefore, confers little or no benefit upon the drawer of the bills; but it increases the security of the bank. It gives them a control over the goods, and allows them to take those proceedings at their option, which may be necessary for their protection in case they should have reason to suspect

(*r*) *Yglesias* v. *Mercantile Bank*, 3 C.P.D., 330.

(*s*) *Latham* v. *Chartered &c. Bank*, 43 L.J., Ch., 612; L.R., 17 Eq., 205. As to the insurable interest of a consignee, and whether he can insure for anything beyond his own pecuniary liability in respect of the cargo, see *Ebsworth* v. *Alliance Co.*, L.R., 8 C.P., 596, reversed by consent, 43 L.J., C.P., 394.

that the drawer and acceptor may become unable to meet their liabilities (*t*).

When the letter of hypothecation is silent as to whether the shipping documents are to be surrendered on the acceptance of the bills, or where the bank has received no instructions on the subject, it is the Australian practice or custom for the bank to retain the shipping documents till the bills are not only accepted but paid or satisfactory security is given that they will be paid, and if in such cases the bank parts with the shipping documents before the bills are paid and loss results the bank is answerable for it (*u*). If the bank was bound by its instructions or by the letter of hypothecation to hold the bills of lading and the goods until the bills drawn against them were paid, and if through the negligence of the bank the consignee obtained possession of the goods and disposed of them, the bank would be liable to the consignor if the bills were not paid at maturity (*v*).

If the shipping documents were handed over to a consignee who purchased the goods, on his acceptance of the bills of exchange and before payment, it is apprehended that neither the bank as holder of the bills nor the drawers would have any claims against either the goods themselves or the proceeds of their sale in the hands of the acceptor, should he afterwards become insolvent, and dishonour the bills at maturity (*w*).

(*t*) *Oriental Bank* v. *Lembke*, 41 L.T. (N.S.), 385.

(*u*) Cf., *Coventry* v. *Gladstone*, L.R., 4, Eq., 493, where, however, the proof of such a custom failed.

(*v*) *Banque Franco-Egyptienne* v. *Bank of New Zealand*, N.Z. L.R., 4 S.C., 281.

(*w*) *Re Entwistle*, 3 Ch. D., 477 ; and see *Ex p. Banner*, 2 Ch. D., 278, 289, 290 ; *Phelps* v. *Comber*, 26 C.D., 755.

A letter of hypothecation frequently contains a clause authorising the bank to accept payment of the bills from the drawees or acceptors before maturity, and on payment to deliver up the goods and shipping documents to them, the bank agreeing in such an event to allow a rebate or discount on the bills for the time they have to run.

Power to accept payment of the bills before maturity.

Letters of hypothecation are also used by merchants who export their own produce to other colonies and to England without any letter of credit being required. The consignors draw on their agents or purchasers there as soon as the goods are on board. They then discount the bills with a bank, and hand over the shipping documents for the goods, together with a letter of hypothecation as a collateral security for the acceptance and payment of the bills by the consignees of the shipments. In such cases it is usual for the consignor to authorise the bank to surrender the shipping documents on the acceptance of the bills by the consignee should the bank think fit to do so.

Exporters of produce.

It has been held that letters of hypothecation are not bills of sale and therefore do not require registration (*x*).

In the Eastern and American trades, another form of document credit is in common use. In these trades, commodities and cargoes for Australia are paid for by bills on London and not by drafts on Australia. The reason is that bills drawn upon London can always be negotiated in foreign countries upon more favorable terms than bills that are payable in Australia. When,

Foreign document credits.

(*x*) *Ex p. North-Western Bank,* L.R., 15 Eq., 69 ; *In re Hall, ex p. Close,* 14 Q.B.D., 386, 393.

therefore, an Australian merchant wants to purchase goods in say Mauritius or America, he generally gets a letter of credit from an Australian bank, which usually consists of two parts—1st, an authority to the merchant's correspondent to draw bills on the bank's London agency for the price of the goods ; and 2ndly, an agreement with the drawers, indorsers and *bonâ fide* holders of the bills, that the bills shall be duly honoured by the bank in London, if accompanied by a certificate from the bank's American agent that the bills of lading for the goods have been deposited with him for transmission to Australia.

Each bank, however, has its own forms, which vary with the circumstances of each case. Such a letter might be to the following effect:—

Melbourne, 12th July, 1900.

To Messrs. A.B. & Co.,
Port Louis, Mauritius.

At the request of Messrs. J.S. & Co., Melbourne, you are hereby authorised to draw upon our branch in London at three months sight for any sum or sums not exceeding £10,000 against merchandise to be shipped to Melbourne, such draft or drafts to be covered by the invoices, bills of lading, and policies of insurance relating to the said merchandise, which must be deposited with Messrs C.D. & Co., Port Louis, as agents for this Bank.

We hereby agree with you, and with the *bonâ fide* holders respectively of the bills drawn under this credit, that the same shall be duly accepted and paid at maturity by the branch in London provided the same are accompanied when presented for acceptance by the certificate duly signed by the said C.D. & Co., stating that the said invoices, bills of lading, and policies of insurance have been deposited with them.

For the Bank of Australia,
A.M., Manager.

Undertaking by customer.

When a customer gets a foreign or Eastern credit, he generally enters into an undertaking to pay the amount of the bills at the place where the credit is granted, before they mature in London, and contracts that the shipping documents shall be handed over to the bank's agent at the place where the credit is used. He also gives the bank power, in the event of any default by him, to sell or dispose of the cargo which has been shipped to Australia pursuant to the letter, and undertakes to pay any deficiency that may arise, together with expenses.

Agreement with holders.

The second portion of such a credit containing the undertaking with the *bonâ fide* holders of the bills drawn under it, is a valid and legal contract between the bank and every indorsee or holder of a bill drawn under the credit, that the bill shall be accepted and paid in London if accompanied by the certificate. If the bank refused to accept and pay such a bill, it would be liable to an action at law, at the suit of the holder, for a breach of its contract with him (*y*). In any proceedings, either at law or in equity, by the holders, the bank could not set-off against their demands any claim it might have against the merchant to whom it issued the credit (*z*).

The insolvency of a bank after a letter of credit had been issued, but before it could be used, would not amount to a breach of their contract with the grantee of the letter. Accordingly, when a bank issued a letter of credit on the terms that the bills which they agreed to accept were to be covered by bills of lading, it was adjudged that the holder of the letter could not in the winding-up of the bank sustain a claim for damages

(*y*) *Re Agra and Masterman's Bank, ex p. Asiatic Banking Co.*, L.R., 2 Ch. Ap., 391; *Maitland* v. *Chartered &c. Bank*, 38 L.J., Ch., 363; *Union Bank of Canada* v. *Cole*, 47 L.J., C.P., 100; and see *Laing* v. *Barclay*, 1 B. & C., 398; 25 R.R., 430.

(*z*) *Re Agra and Masterman's Bank*, L.R., 2 Ch., 391.

for breach of contract, inasmuch as the suspension of payment by the bank did not amount to a repudiation or infraction of their agreement (*a*).

Obligation to accept.

A bank is not bound to accept bills drawn under letter of credit unless they are presented for acceptance in conformity with its terms. Thus, where it was provided that certain bills of lading should be forwarded to the bank, and one of those bills was not forwarded, but was retained by the holder of the bills of exchange drawn under the credit, it was held that the conditions in the letter of credit on which the bank agreed to accept the bills of exchange were unperformed, that consequently the obligation upon the bank to accept them under the letter never attached, and that an action could not be maintained at the suit of the holder against the bank for refusing to accept them (*b*).

Such a letter of credit, it is apprehended, gives the holder of a bill drawn under it no claim whatever against the shipping documents or the goods represented by them, in the event of the bank failing to meet its engagement to accept and pay the bill. For this mode of dealing with the shipping documents is entirely for the security of the bank, and is not in any way for the protection of the persons who negotiate the bills (*c*).

(*a*) *Re Agra Bank, ex p. Tondeur*, L.R., 5 Eq., 160; *Ex p. Agra Bank, in re Barber & Co.*, L.R., 9 Eq., at p. 733.

(*b*) *Brazilian &c. Bank* v. *British &c. Banking Corporation*, 18 L.T. (N.S.), 823; *Union Bank of Canada* v. *Cole*, 47 L.J.C.P., 100; *Chartered Bank of India* v. *Macfadyen*, 64 L.J.Q.B., 367.

(*c*) *Banner* v. *Johnson*, L.R., 5 H.L., 157; *Ex p. Dever, re Suse*, 13 Q.B.D., 766; cf. *Brown, Shipley & Co.* v. *Kough*, 29 Ch. D., 848.

The consignee cannot in these cases obtain possession of the shipping documents from the bank unless he accepts, or both accepts and pays the bills of exchange which are drawn against them (*d*); but if he tenders the amount of the bills to the bank before it realises the goods to satisfy its claim, he will, it is apprehended, be entitled to receive them (*e*).

Collecting bills drawn against shipping documents.

It may be here stated that when a bank undertakes to collect a bill of exchange drawn against shipping documents it does not warrant their genuineness. A bill of exchange was drawn upon a merchant by his correspondent abroad against a bill of lading, and was sent to bankers for presentation and collection. The bank presented the bill to the merchant with this memorandum: "The bank holds bill of lading and policy for 251 bales of cotton." The merchant thereupon accepted the bill, and retired it before it was due. He then received the bill of lading, which proved to be a forgery. It was held that the memorandum was not a guarantee by the bank that the bill of lading was genuine, and that the merchant was not entitled to repayment of the amount of the bill (*f*). Where a merchant instructs his bank to accept the drafts of his correspondent if accompanied by bills of lading, the bank is only bound to see that the bills of lading appear to be regular and in order. If the correspondent deposits forged bills of lading with the bank, the merchant, and not the bank, must bear the loss (*g*).

(*d*) *Turner* v. *Liverpool Docks* (*Trustees*), 6 Ex., 543.

(*e*) *Mirabita* v. *Ottoman Bank*, 3 Ex. D., 164.

(*f*) *Leather* v. *Simpson*, L.R., 11 Eq., 398; *Baxter* v. *Simpson*, 29 L.T., 642.

(*g*) *The Ulster Bank* v. *Synnott*, I.R., 5 Eq., 595.

CHAPTER XX.

Bank Notes and Bank Drafts.

§ 1. BANK NOTES.

Goldsmiths' notes were the first bank notes.

It has been stated in a former chapter, that the London goldsmiths were the first English bankers, and that their customers used to draw on them by means of "cash notes," which are said to have been the originals of the modern cheques. Bank notes, or "goldsmiths' notes," as they were at first called, came into use about the same time as the cash notes. When a customer deposited money with a goldsmith, the latter, instead of giving a receipt in the mode now practised, used frequently to issue to the customer a promissory note or notes, specially promising to pay the customer or bearer on demand the various amounts that had been lodged; and these goldsmiths' notes, it has been said, were the first bank notes that were used in England (*a*).

Bank notes.

A bank note may be described as a promissory note, made by a bank payable to bearer on demand, and

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(*a*) *Gilbart on Banking*, last ed., p. 17; *MacLeod on Banking*, vol. I., p. 210, where specimens may be seen.

intended to circulate as money (*b*). Bank notes are treated as cash. They pass by delivery, and without any further inquiry into or evidence of title than what arises from possession. A person taking a bank note *bonâ fide*, and for value, would be entitled to retain it against a former owner, from whom it had been stolen (*c*). And a person will be assumed to have obtained it *bonâ fide* unless he had notice and knowledge that the note was stolen, or the means of knowledge to which he wilfully shuts his eyes (*d*).

A Bank of England note is transferable in a foreign country or a colony so as to give the person who receives it *bonâ fide* and for value a good title to it (*e*).

Bank notes issued in Victoria are a first charge upon the Victorian assets belonging to the banks that issue them, and no bank is allowed to issue any notes unless it has a subscribed capital of not less than £250,000, and a paid-up capital of not less than £125,000 (*f*). There is a tax of £2 per cent. on all notes issued by banks (*g*).

Bank notes are a legal tender, unless objected to on As legal tender.

(*b*) *Byles*, 16th ed., 10. As to the note issues of banks in Victoria see *Banks and Currency Act* 1890, Part II.

(*c*) *Miller* v. *Race*, 1 Smith's L.C., 10th ed., 447 ; *Solomons* v. *The Bank of England*, 13 East. 135 ; 12 R.R., 341.

(*d*) *De la Chaumette* v. *Bank of England*, (No. 1) 9 B. & C., 208 ; 32 R.R., 643 ; *Raphael* v. *Bank of England*, 17 C.B., 161 ; and see *Bank of Bengal* v. *M'Leod*, 7 M.P., P.C., 35 ; *Jones* v. *Gordon*, 2 Ap. Cas., 616.

(*e*) *De la Chaumette* v. *Bank of England*, (No. 2) 2 B. & Ad., 385 ; 36 R.R., 599.

(*f*) *Banks and Currency Act* 1890, ss. 12, 14.

(*g*) *Ibid*, s. 15.

the ground that they are not cash. It seems, too, that a bank's own notes are not a valid tender to the bank if it object. For though it promises to pay them on demand, it does not therefore treat them as cash (*h*).

Dishonoured notes.

If a bank note is taken in payment for goods sold, the seller, it has been said, takes it at his own risk, and, should the bank which issued the note become insolvent, he must bear the loss. The transaction is in effect a sale of the note to him. But if notes were taken in discharge of a pre-existing debt, the creditor would, if the bank failed, be entitled to return the notes to the debtor within a reasonable time, and treat them as non-payment, or he might sue the debtor, provided he presented them at the bank for payment within a reasonable time, and gave due notice of dishonour (*i*).

Notice of dishonour.

Interest is payable on all notes and other negotiable instruments current when a bank stops payment. It is not payable from the time of the stoppage, but only from the date when the claims for it are sent to the liquidators. For the stoppage of the bank does not dispense with the necessity for demanding payment in order that interest may be payable under the statute (*j*).

(*h*) *Per* Parke, B., in *Forster* v. *Wilson*, 12 M. & W., 201 ; 13 L.J., Ex., 209. This seems a useless distinction, for the bank must on demand provide the holder of the notes with cash which he can then tender.

(*i*) *Camidge* v. *Allenby*, 6 B. & C., 373 ; 30 R.R., 358 ; *Lichfield Union* v. *Greene*, 26 L.J., Ex., 140 ; 1 H. & N., 844 ; but see *James* v. *Houlditch*, 8 D. & R., 3 ; *Robson* v. *Oliver*, 10 Q.B., 704 ; 15 L.J., Q.B., 437.

(*j*) *Re Herefordshire Banking Co.*, L.R. 4, Eq., 250 ; *In re East of England Banking Co.*, L.R. 4, Ch., 14.

When a customer pays in to the credit of his account the notes of another bank, his banker becomes his agent to collect them, and if the notes turn out to be worthless, the loss must fall on the customer. In such a case there is no sale of the notes (*k*).

Paying in notes on account.

Bank notes are frequently cut in two, for the purpose of transmitting the parts separately by different posts. The sender does not give up his property in a note which has been so divided until he has sent the second part. At any time, before he has done this, he may reclaim the first part from the person to whom he sent it, and may insist upon its return to him. If the second part be lost in the post, the loss must, it is conceived, fall on the sender, who has selected that mode of forwarding the money (*l*).

Halves of notes.

A person who obtains goods by sending half notes by post in payment for them, and then sends the other halves to another person in payment for other goods, may be convicted of obtaining the first lot of goods by false pretences (*m*).

A bank note is a negotiable instrument, and therefore a person who loses a note may recover the amount of it from the bank that issued it, provided he give a proper indemnity to the bank against the claims of a *bonâ fide* holder (*n*). If half a bank note be lost in the post, it is said that the loser may recover the

Lost notes.

Lost half of a note.

(*k*) *Timmins* v. *Gibbins*, 18 Q.B., 722; 21 L.J., Q.B., 403.

(*l*) *Smith* v. *Mundy*, 2 E. & B., 22; 29 L.J., Q.B., 172.

(*m*) *R.* v. *Murphy*, Ir. R., 10 C.L., 508; 13 Cox. C.C., 298.

(*n*) *McDonnell* v. *Murray*, 9 Ir. Com. L.R., 495; *Noble* v. *Bank of England*, 2 H. & C., 355; 33 L.J., Ex., 81; *Australian Joint Stock Bank* v. *Oriental Bank*, 5 Sup. Ct. R. (L.), 129.

amount from the bank without giving any indemnity. For any person taking a half note must take it with notice of the loser's rights, and could not, therefore, be a *bonâ fide* holder, or entitled to claim the amount of the note from the bank (*o*).

Stopping payment of notes.

If a bank stop payment of a note, at the request of a customer or other person, it should insist on obtaining an indemnity from him. For the note might be presented for payment by a *bonâ fide* holder, who would be entitled to bring an action against the bank for the dishonour of the note, even though he had been guilty of gross negligence in taking it (*p*).

Finder of lost note.

The finder of a lost bank note is entitled to retain it as against every one but the true owner. Accordingly, where a person picked up a bundle of notes on the floor of a shop, it was held that he was entitled to recover them from the shopkeeper to whom he had handed them, with a view of their being restored to the true owner, who, however, did not return to claim them (*q*).

But if the finder knew to whom the notes belonged when he found them, he would, if he appropriated them, be guilty of larceny. Thus, if he had seen them drop from the pocket of the owner, or if there was any other circumstance which enabled him to know at the moment he got possession of them to whom they belonged, he might be criminally prosecuted if he did

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(*o*) *Redmayne* v. *Burton*, 2 L.T. (N.S.), 324.

(*p*) *Yarborough* v. *Bank of England*, 16 East. 6; 14 R.R., 272; *De la Chaumette* v. *Bank of England*, (No. 1) 9 B. & C., 208; 32 R.R., 643; *Raphael* v. *Bank of England*, 17 C.B., 161.

(*q*) *Bridges* v. *Hawksworth*, 21 L.J., Q.B., 75.

not return them to the true owner. But if at the time of finding the notes he had no means of discovering the owner, he would not be guilty of a criminal offence if he retained them and took no steps to find the owner (*r*).

Notes may be taken in execution.

Bank notes may be taken in execution where any sum is directed by any Act to be levied by distress and sale of goods (*s*).

Unlimited liability of banks as to their notes.

By the 162nd section of *The Companies Statute* 1890, it is provided that no banking company issuing notes in Victoria shall be entitled to limited liability in respect of its notes, but that so far as they are concerned the liability shall be unlimited, unless the contrary be provided by any Act establishing or regulating the bank. The members are liable for the whole amount of the notes, in addition to their ordinary liability as shareholders in a limited company.

A difference of opinion formerly existed as to what banks this section included, some thinking that it extended to banks formed pursuant to *The Companies Statute* 1864, others that it only applied to banks registered under that Act but constituted under different Acts. It has been recently held that the effect of the Act is to allow banking companies to be registered with limited liability in respect of their note issue provided they are formed under this Statute. But it does not allow them to be registered with limited liability in respect of their note issue if they were existing companies before the passing of this enactment, or were formed afterwards but not under it, and

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(*r*) *R.* v. *Dixon*, 25 L.J., M.C., 39.

(*s*) *Reeves* v. *McGuinness*, 2 V.R. (L.), 187.

decided to take advantage of the authority given them to register under the Act (*t*).

Altered notes.

It is an established principle of law that any alteration made in a material part of any instrument vitiates it and renders it wholly void and inoperative. It is not every small alteration in an instrument which will vitiate it—it must be a "material" alteration. Accordingly, if a bank note be altered in any material part the bank that issued it will no longer be bound to pay it.

This, however, leaves open the question—What is a material alteration in a bank note? It has been held in the case of a Bank of England note that the alteration of its number or its date is an alteration in such a material particular as to vitiate the note and prevent an innocent holder from recovering the amount of it from the bank. The grounds for regarding this alteration as material were—that the number enables the note to be identified and traced; that without it there would be no means by which the payment of the note could be stopped; that it is essential for enabling the bank to ascertain what notes are in circulation and for protecting the bank and the public against forgeries (*u*). These reasons appear to be equally applicable to the notes issued by other banks than the Bank of England.

Defacing bank notes.

In Tasmania and Victoria anyone who defaces a bank note by putting his name, or any advertisement or statement about his affairs upon it, is liable to be

(*t*) *Re Commercial Bank of Australia*, 19 V.L.R., 333, 374, 377.

(*u*) *Suffolk* v. *Bank of England*, 9 Q.B.D., 555; *Leeds Bank* v. *Walker*, 11 Q.B.D., 84.

fined, and so is any person who circulates a note so defaced, or who offers to deposit it in any bank. It is, however, permissible to indorse a note for the purpose of identification or any other lawful object (*uu*).

Flash notes.

If goods be paid for by a "flash note," that is to say, a piece of paper resembling or made in imitation of a bank note, the person who receives them may be convicted of obtaining them by means of a false pretence (*v*).

A person who fraudulently induced another who could not read to take a £1 note for a £5 note, and give change for it as such, might be convicted of obtaining money by false pretences (*w*).

§ 2. BANK DRAFTS.

Bank drafts.

Bank drafts are used in Australia instead of the bank post bills that are or were so common in England. They are largely employed for the purpose of remitting money to a distance. They differ in form, however, from bank post bills (*x*). The latter are generally documents containing promises to pay by the bank at

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(*uu*) Tasmanian *Bills of Exchange Act*, s. 100; Victorian *Instruments and Securities Act*, s. 106.

(*v*) *R.* v. *Allen*, 11 Sup. Ct. R. (L.), 73; *R.* v. *Kenning*, "Argus," 7th Sept., 1858; *R.* v. *Coulson*, 19 L.J., M.C., 182; *R.* v. *Jessop*, 27 L.J.M.C., 70; 7 Cox C.C., 399.

(*w*) *R.* v. *Jessop*, 27 L.J., M.C., 70.

(*x*) See *Willis* v. *Bank of England*, 4 A. & E., 21; 43 R.R., 282. The following is the material part of a Bank of England post bill:— "At seven days' sight I promise to pay this my *sola* bill of exchange to A.B. or order fifty pounds sterling value received of X.Y." The judges are not yet agreed whether a bank post bill is a bill of exchange or a promissory note; *Forbes* v. *Marshall*, 11 Ex., 167.

seven days' sight. They were first introduced in 1738, and were made payable seven days after sight, in order that, if the mail was robbed by highwaymen, the owners of the post bills might have time to stop payment of them at the bank before the robbers could present them (*y*).

A bank draft is an order by one bank or branch upon another to pay a sum of money to a person named therein or his order, and might be to the following effect:—

Bank of New South Wales,
Melbourne, 1st September, 1900.

On demand pay to A.B., or order, £500 for value received.

For the Bank of New South Wales.

To the Manager of the Bank of New South Wales, London.

E.F., Manager.
G.H., Accountant.

A draft, instead of being made payable on demand, may, like a bill of exchange, be made payable at any time. The draft is sent to the payee, who in the ordinary course will present it for payment (*z*). A banker paying such a draft is not responsible for the genuineness of the payee's indorsement. For, by *The Bills of Exchange Act* it is provided that a draft payable to order on demand, if purporting to be indorsed by the payee, shall be a sufficient authority to the banker to pay the draft, and that it shall not be incumbent on him to prove that the indorsement was made by the payee or under his authority (*a*).

(*y*) *Gilbart on Banking*, p. 30.

(*z*) As to the rights of a customer with regard to a bank draft when the bank goes into liquidation, see *Re the City of Melbourne Bank* (*Ferguson's Case*), 23 V.L.R., 78; 18 A.L.T., 261; 3 A.L.R., 106.

(*a*) *Bills of Exchange Act*, s. 60.

It would seem, therefore, to be sometimes prudent for a customer who desires to transmit money to a creditor or agent, to obtain a letter of credit in his favour instead of a draft. For a banker to whom a letter of credit is addressed ought to see that the payee's signature to a draft under it is genuine; if he does not, the loss will fall upon the bank (*b*).

If a bank receives from another bank a draft in favour of a particular individual, it is not responsible to him for the amount of the draft, unless it agrees or consents to hold the money for his use. Until it does so, it holds the draft as agent for the bank that remitted the money (*c*).

Lost draft.

If a bank draft were lost, it is apprehended that the holder might recover the amount from the bank issuing it on giving a sufficient indemnity.

(*b*) *Orr* v. *Union Bank of Scotland*, 1 Macq. H.L., 513.

(*c*) *Cohen* v. *Bank of New Zealand*, Mac., 620, 627.

CHAPTER XXI.

CHATTELS DEPOSITED FOR SAFE CUSTODY.

BANKERS are in the habit of receiving for safe custody boxes containing valuables or securities belonging to their customers. For undertaking this duty they make no charge. They doubtless consider that the inducement they thus hold out to customers to bank with them is a sufficient compensation for the trouble they take, and the space or warehouse room they provide. But, in point of law, they are regarded as acting gratuitously for their customers, and the liability they incur is only that which attaches to gratuitous depositaries or bailees. It becomes, therefore, expedient to describe the nature and extent of this liability, which was fully considered by the Judicial Committee of the Privy Council in a case that arose in Melbourne (*a*). A customer deposited with a bank securities which were stolen from the strong-room by a clerk. Under the circumstances, which need not be further detailed here, it was held by the Supreme Court, and their decision was confirmed on appeal, that the customer could not recover the value of what

(*a*) *Giblin* v. *M'Mullen*, L.R., 2 P.C., 317.

he had lost; from this case the following explanation of the law is abridged.

Liable if the chattels are lost through gross negligence.

A bank which receives no consideration for taking care of a customer's property is not liable for the loss of it, unless it has been guilty of gross negligence. There is some difficulty in defining what gross negligence is. It is different from negligence, but a strict line of demarcation cannot be readily drawn between them. In all cases a jury must decide whether gross negligence has been shown, and though degrees of negligence may not be *definable*, they are *distinguishable*, and the jury must discriminate as well as they can under the direction of the presiding judge the degrees of things which run more or less into each other. It is for the Court to define and explain the extent and limits of the duty the non-performance of which constitutes actionable negligence, and to decide whether there is any reasonable evidence to go to the jury in proof of such negligence, and if there be no reasonable evidence of actionable negligence a plaintiff may be non-suited, and the case withdrawn from the jury (*b*).

It is, however, clear that a bank is bound to use ordinary care, and the negligence for which alone it can be made liable is the want of that care which men of common prudence should exercise about their own affairs. It is not, however, sufficient for a bank to take as good care of its customer's effects as it does of its

(*b*) *Lewis* v. *M'Mullen*, 4 W.W. & A'B. (L.), 1, affirmed under the name of *Giblin* v. *M'Mullen*, L.R., 2 P.C., 317; *Mayor of Fitzroy* v. *National Bank*, 16 V.L.R., 342; *Brown* v. *National Bank*, 16 V.L.R., 475; and see *Heaton* v. *Richards*, 2 N.S.W. L.R., 73; *Oriental Bank* v. *Hewitt*, 1 S.C.R., 220.

own, unless it takes as good care of its own as a reasonable man would of his (*c*).

The fact that a bank took additional precautions after the occurrence of a loss, is not necessarily an admission that the previous safeguards were not such as a prudent man ought to have been satisfied with (*d*).

Securities left with bank to collect dividends.

Where a bank accepts the securities of a customer for safe custody, and receives dividends payable upon them, charging a commission for collection, it is a depositary for reward, and is bound to use a greater degree of care than is sufficient to exempt it from liability in the case of goods deposited for safe custody only (*e*).

(*c*) *Doorman* v. *Jenkins*, 6 B. & C., 225.

(*d*) *Giblin* v. *M'Mullen*, L.R., 2 P.C., 317.

(*e*) *Re United Service Co.*, L.R., 6 Ch. 212; Notes to *Coggs* v. *Bernard*, 1 Smith's Leading Cases, 10th ed., p. 167.

CHAPTER XXII.

BRANCH BANKS.

Branch banks numerous in the colonies.

THE system of branch banks, which prevails so extensively throughout Australia, appears to have originated with the Scotch bankers. It exists, but only to a comparatively limited extent, in England, where its functions are discharged by private bankers, who, for the most part, carry on business in partnerships. There are no private banks in Australia, and consequently the law relating to banking partnerships, which is fully dealt with in English books, need not be referred to in a work on the law relating to Australian banking.

Relations of a bank to its branches.

The existence on a large scale of the branch system in the colonies gives in them, comparatively speaking, a greater prominence to the law which regulates the relations between the head office of the bank and its branches. Under these circumstances, it is not perhaps a matter of surprise that the most important case on the subject appears to be one which arose in New South Wales, and which was carried on appeal to the Privy Council (*a*). The only point at first contended for was, that, for the purpose of collecting

(*a*) *Prince* v. *Oriental Bank*, 3 Ap. Cas., 325.

mercantile paper, a head office and a country branch were as distinct as an English country bank and its London agents. But the case finally turned on a much broader question, namely, the position or status of branch banks with reference to the head establishment.

For some purposes branches are distinct from the bank.

For some purposes, it appears that branch banks are regarded as distinct institutions from the principal bank; for others they are regarded as identical with it. It is clear, for instance, that a branch is to be considered as a separate bank, distinct from the head office, for the purpose of giving or receiving a notice of dishonour. Thus it was held in England, that if a bill was indorsed by a customer to a branch at A, and by it indorsed to another branch at B, and by it transmitted to the head office, each branch would be, in point of law, regarded as a separate indorsee or holder, and as such entitled to the usual notice of dishonour. It might be impossible for the head office to know the person from whom the bill originally came. It is, therefore, reasonable and necessary in the ordinary course of business, that the bill, if dishonoured, should be sent to the branches before notice of dishonour could be given to the customer, or any party liable upon it (*b*).

For the purpose of giving notice of dishonour so as to preserve the liability of indorsers of bills and notes, branch banks must be deemed as separate establishments. Accordingly, if a bill or note be made payable at a branch bank, it must be actually presented there in order to render the indorser liable upon it. If the

(*b*) *Clode* v. *Bayley*, 12 M. & W., 51; *Fielding* v. *Cory*, (1898) 1 Q.B., 268; cf. *Bosley* v. *Bank of Australasia*, 1 N.S.W. L.R., 287.

head office held the note, it would not be sufficient to telegraph to the branch manager to ascertain whether there were funds to meet it. If that were done and it was ascertained that the maker had no funds at the branch, still the note must be presented there in order to charge the indorser (*c*).

Again, branches may be regarded as distinct banks for the purpose of entitling a banker to refuse payment of a customer's cheque, except at the branch where he keeps his account. For a bank is only bound to pay the cheques of a customer at the branch at which his account is kept. It does not violate its engagement with him by declining to pay his cheque at another branch. Indeed, business could hardly be carried on by means of branches, if a customer who kept his account at one branch could draw cheques on another however distant, for the latter could not possibly know the state of his account. The bank, therefore, is under no obligation to honour a customer's cheque at any branch, except that at which he keeps his account (*d*).

Identity of a bank with its branches for certain purposes.

For other purposes it appears that branch banks are not to be regarded as distinct institutions. They are then, in principle and in fact, treated as different agents of one and the same principal. They are not independent establishments. They are separate agencies, but agencies of one principal bank, with which alone every customer contracts (*e*). He, therefore, who deals with a branch, deals with the bank itself.

(*c*) *City Bank* v. *Australian Joint Stock Bank*, 9 N.S.W. S.C.R., 259.

(*d*) *Woodland* v. *Fear*, 7 E. & B., 519; 26 L.J., Q.B., 202.

(*e*) *Prince* v. *Oriental Bank*, 3 Ap. Cas., 325.

Keeping accounts.

This identity in law of a bank and its branches leads to important results. It has, for instance, already been stated that a customer may have accounts at two or more branches, and that the bank may consolidate them and treat them as only one account (*f*).

But it has been held that a bank has a right to charge interest on a debit balance due by a customer at one branch of the bank while he has a credit balance at another branch; and that it is not incumbent upon the bank, before suing for interest, to blend the two accounts, crediting the amount which has been from time to time charged as interest on the overdrawn account by reference to the account which has been at the same time in credit (*g*).

Book-keeping.

As a further consequence of the legal identity of a bank and its branches, it has been held that the entries in the books of a branch bank, and the letters, drafts, transfer warrants, and other documents forwarded from it to the head office or to another branch, will not bind the bank until communicated to the party to be affected by them. They are transactions only by and between the respective officers of the same bank, and the officials at the head office or other branch may cancel drafts and transfer warrants, or dishonour a note, and write on it "cancelled in error," after the transmitting branch has marked it as paid and cancelled it, and may cause the entries to be corrected before any notification is given to the other parties concerned so as to prevent the bank from being bound

(*f*) *National Bank of New Zealand* v. *Hislop*, N.Z. L.R., 1 C.A., 47; *Garnett* v. *M'Kewan*, L.R., 8 Ex., 10.

(*g*) *National Bank of New Zealand* v. *Grace*, 8 N.Z. L.R., 706.

by them or charged with the sums to which they relate (*h*). It remains, however, to be seen whether the recent Act which renders bank notes *primâ facie* evidence of the matters therein recorded, will in any degree modify the doctrine that uncommunicated entries do not bind the bank.

Notice to head office is notice to the branches.

Again, notice to the head office of a bank is equivalent to notice to the branch banks from the time when information of it could be communicated to them (*i*). It may be here observed that a notice left at a bank after business hours only operates as notice from the time at which, in the ordinary course of business, it is opened and read (*k*).

Correspondence privileged.

For the purposes of correspondence the different branches will all be regarded as one establishment. Accordingly a letter written in the ordinary course of business by the manager of one branch to the manager or customer of another branch is *primâ facie* a privileged communication (*l*).

Right of colonial banks to have branches in London has been questioned.

During the session of the Imperial Parliament in 1875 a question of considerable importance to colonial bankers was raised, as to whether colonial banks of issue have a right to open branches or maintain establishments in London for the purpose of conducting banking business there. A Scotch bank opened

(*h*) *Simpson* v. *Ingham*, 2 B. & C., 65; 26 R.R., 273; *Prince* v. *Oriental Bank*, 3 Ap. Cas., 325.

(*i*) *Morris* v. *National Bank*, 13 N.S.W. L.R., 93; *Willis* v. *Bank of England*, 4 Ad. & E. 21, approved *Powles* v. *Page*, 3 C.B., 16; 15 L.J., C.P., 217.

(*k*) *Calisher* v. *Forbes*, L.R., 7 Ch., 109; 41 L.J., Ch., 56.

(*l*) *M'Nickle* v. *Bank of N. S. Wales*, 2 N.S.W., L.R., 7.

branches in the north of England. This proceeding excited the jealousy of the English banks, and at their instance Mr. Goschen introduced a bill, the object of which seems to have been to expel the Scotch banks from England.

The measure was referred to a select committee, and evidence was taken on the subject. According to the Imperial Statutes, it appears that no English bank of issue can carry on business in London, or within a circle of three miles round it, except the Bank of England, which has a monopoly, and that beyond three and within sixty-five miles its monopoly is shared with certain private banks, which were established previous to 1844. It was contended that these restrictions applied not merely to all English banks of issue, but to all other banks of issue, whether Scotch, Irish, colonial or foreign, and that consequently no colonial bank of issue could open a branch in London, even though it issued no notes there. The late Sir J. Fitzjames Stephen, who was examined before the committee, lent the weight of his high authority to this view, and stated that he was of opinion that no joint stock bank which issues notes *anywhere*, except English joint stock banks more than sixty-five miles from London, could carry on business *in any part of England*. But this conclusion seems to have been rather hastily adopted; for, as he admitted, the bankers who had consulted him, and for whom he was called, had not given him sufficient time for the due consideration of the subject.

Sir Henry Thring, now Lord Thring, agreed with Sir J. F. Stephen in thinking that such banks could not open branches in London or within the limit of sixty-five miles, but he thought that they might do so in other parts of England. Mr. MacLeod, the well-known writer on banking, who, for some reason, was not examined before the committee, maintained the opposite view in a letter published in the *Daily News* of the 8th of May, 1875, and contended that it was allowable for Scotch and other banks of issue which did not issue in England to open branches in London. This also appears to have been the opinion of Lord Campbell in 1833, and of Sir Roundell Palmer, now Lord Selbourne, in 1855. The question, it is believed, has never arisen in a court of law; but the right of the colonial banks to have their branches and establishments in London appears now to be certain, and it does not seem at all likely that it will ever again be seriously challenged or disputed (*m*).

(*m*) See *MacLeod on Banking*, Vol. II., 396, *et seq.*; and the *Bankers' Magazine* for 1875 in the Supplement.

CHAPTER XXIII.

Bank Officials.

§ 1. directors.

Duties of directors.

Of the directors of a bank, little need be said. They occupy much the same position as the directors of any other company or mercantile association. The bank is carried on under their superintendence and control. They determine the general principles on which the business is to be conducted. Reports are made to them of the actual condition of the bank in all its departments: all important matters are reserved for their especial consideration; but the general administration of the institution is usually entrusted to the manager. The board of directors also cause balance-sheets to be prepared at stated intervals, showing the financial condition of the bank from time to time. These, together with reports from the board, are submitted for the information of the shareholders at general meetings.

Preparation of balance sheets.

In preparing the reports and balance-sheets, considerable care and caution are required. The condition of the affairs of the bank must, if the conduct of it be just and honest, appear from the books kept by proper officers of the bank; and the reports of the directors would, *primâ facie*, be accepted by all persons acquainted with the subject as the results of the accounts, statements and reports of the manager (*a*), and perhaps the accountant. Directors in preparing their reports are entitled to rely upon the statements of their manager and officers, and except under special circumstances it is not their duty to test the accuracy or completeness of what the manager lays before them. Business cannot be carried on upon principles of distrust, and men in responsible positions must be trusted until there is reason to distrust them. But care and prudence do not involve distrust, and directors are not entitled to delegate their functions to the manager. The amount of care to be taken by them is difficult to define. Their negligence must be not the mere omission to take all possible care; it must be in a business sense gross and culpable (*b*).

Civil liability for issuing false reports.

If the directors fraudulently issue false reports or balance sheets concerning the affairs of the company, under such circumstances as show a fraudulent intent to deceive, they are civilly liable to those who purchase shares on the faith of such misrepresentation and suffer loss thereby; and not merely the directors, but all the subordinate officials of the bank who have assisted in preparing such misstatements may be sued, although they may not have signed the reports (*c*).

(*a*) *Cullen* v. *Thomson*, 4 Macq., H.L., 424, *per* Lord Westbury.

(*b*) *Re National Bank of Wales*, (1899) 2 Ch., at 672, 673; and see *Leeds Estate Building and Investment Co.* v. *Shepherd*, 36 Ch. D. 787, where the directors trusted their manager and were held liable. See also *Re New Mashona Land &c. Co.*, (1892) 3 Ch., 577.

(*c*) *Cullen* v. *Thomson*, 4 Macq. H.L., 441; *Western Bank* v. *Addie*, L.R., 1 Sc. App., 146; *Paternoster* v. *Hackett*, 6 V.L.R. (L.), 232, 396. A bank is liable in Victoria to a penalty of £10 to be recoverable with full costs of suit by any person who may sue for

A suit may be sustained by the executor of a deceased shareholder against the executor of a deceased director who published fraudulent statements concerning the property of a bank which induced the testator to become a shareholder in it (*d*).

Directors not the agents of each other.

One director is not the agent of another (*e*), and a director is not personally liable for a fraud, such as the issue of a fraudulent report, committed by his co-directors, or by any other agent of the company, unless he has expressly authorised or tacitly permitted its commission (*f*).

If a director is about to commit a fraud, it is to be presumed that he will not communicate the fact to his colleagues (*g*).

Criminal liability.

If the directors of a bank, in order to conceal from the shareholders and the public the true state of its affairs, either fabricate false accounts or balance-sheets or knowingly allow such balance-sheets to be published with an intention to deceive, they are liable to a prosecution, and may be imprisoned for seven years (*h*).

Where the directors of a joint stock bank, knowing it to be in a state of insolvency, concurred in issuing a

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it if the bank publish a misleading advertisement as to the amount of its capital; *Banks and Currency Act*, s. 25.

(*d*) *Davidson* v. *Tulloch*, 3 Macq. H.L., 783; and see *Peek* v. *Gurney*, L.R., 13 Eq., 79; L.R., 6 H.L., 377.

(*e*) *Lindley on Partnership*, 3rd ed., p. 258.

(*f*) *Cargill* v. *Bower*, 10 Ch. D., 502.

(*g*) *Re Carew*, 31 Beav., 39.

(*h*) *Crimes Act* 1890, s. 159; and see *R.* v. *Gurney*, 11 Cox. C.C., 414, also reported by *W. F. Finlason* (1870), (Stevens and Haynes, London), with the summing up revised by the Lord Chief Justice.

balance-sheet showing a profit, and then declared a dividend of six per cent., and issued advertisements inviting the public to take shares and stating that the bank was in a flourishing condition, it was held that they were rightly convicted of a conspiracy to defraud (*i*).

Difficult position of directors.

The position of the directors of a bank is often a most difficult one. For "a director is generally a man who has other avocations to attend to. He is not a professional banker. He is not expected to do the duty of a professional banker. He is a man selected from his position, from his character, from the influence he may bring to bear upon the welfare of the bank, and from the trust and confidence which are reposed in his integrity and general ability" (*k*). When a director has to give his assent to a balance-sheet he is entitled to trust the officials of the bank. It is not incumbent on him to go through the books or to test the accuracy of the results brought out from them. If such results are false or incorrect the director who honestly accepts them cannot be held to have practised any fraud on the shareholders or the public (*l*). But supposing a war, a famine, or a drought has ruined some of a bank's largest customers and has involved the bank in dangerous and irretrievable losses, what is to be done? "Then it is that the unprofessional director finds himself face to face with an emergency

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(*i*) *R.* v. *Brown*, 7 Cox. C.C., 442; 1 F. & F., 213; *Burnes* v. *Pennell*, 2 H.L.C., 479.

(*k*) Charge of the Lord Justice Clerk on the trial of the *City of Glasgow Bank Directors*, reported by C. J. Couper, Edinburgh, 1879, p. 433.

(*l*) See also *Re National Bank of Wales*, (1899) 2 Ch., 629, 673.

which beyond all question it is difficult and hard to meet . . . There is one rule that the director is bound to follow. In that, as in every case, honesty is the only policy; and neither the interests of the shareholders nor any of those considerations which, doubtless, when one is in the midst of them, seem to be almost overwhelming, can for a moment justify or excuse or palliate the deliberate statement of what is known to be false" (*m*). It is no excuse for concealment and deception to say that the real object was to keep the bank afloat until better times should come. Indeed so far from being an excuse, that is precisely the motive which constitutes the crime (*n*).

§ 2. BANK MANAGERS.

Manager. The head manager of a bank is its most important official. The managers of joint stock banks, Lord Westbury said in the House of Lords, "are well-known public officers whose due selection is more important than that of the directors themselves; for it may be taken as a fact of which we cannot be judically ignorant, that the credit of a banking establishment depends in no inconsiderable degree on the opinion entertained of the knowledge, ability, and character of the manager" (*o*).

The manager, although he acts under the superintendence and control of the directors, is not their servant, unless he is made so by the articles of associa-

(*m*) Charge of the Lord Justice Clerk on the trial *City of Glasgow Bank Directors*, p. 434, *ubi supra.*

(*n*) *Ibid*, p. 435.

(*o*) *Cullen* v. *Thomson*, 4 Macq. H.L., at 432.

tion or other constitution of the company. Both he and the directors are the fellow-servants and co-agents of the bank (*p*).

Manager's implied authority.

The head manager of a bank is its general agent. His duties are to conduct banking business on behalf of the bank, and what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority, and the bank is liable for his mistakes, and under some circumstances for his frauds in the management of such business (*q*).

Authority to waive bills.

It is within the scope of his implied authority to waive bills and notes, *i.e.*, to discharge parties from their liability upon them, without the sanction of the directors, provided he do so for a valuable consideration and in the course of transacting the business of the bank. But it is beyond the scope of his authority to waive the liability of parties to bills without consideration, and as a mere matter of favour. He cannot, in short, make a present of the value of the bills to the persons who are liable to pay them (*r*). The manager of a branch bank also has authority to waive bills for consideration (*s*).

Manager's authority to lend the bank's money.

A manager has authority to advance the money

(*p*) *Cullen* v. *Thomson*, 4 Macq. H.L., 424 ; and see *Weir* v. *Bell*, 3 Ex. D., 238 ; *Cargill* v. *Bower*, 10 Ch. D., 502.

(*q*) *Bank of New South Wales* v. *Owston*, 4 App. Cas., at 289 ; and see *Goulburn Valley &c. Co.* v. *Bank of N.S. Wales*, 25 V.L.R., 702 ; 22 A.L.T., 36.

(*r*) *Colonial Bank of Australasia* v. *Ettershank*, 4 A.J.R., 95,185, affirmed in the Privy Council, whose judgment is reported in 4 V.L.R. (L.), 239.

(*s*) *Bank of Australasia* v. *Cotchett*, 4 V.L.R. (L.), 226.

of the bank to all such persons as he may think fit (*t*). It would seem, accordingly, that he has an implied authority to advance money to himself, and to allow himself to overdraw. It has, however, been held, that he is not entitled to grant himself the same accommodation in respect of his own business, which he might obtain from another bank, and it would be necessary for him, in order to sustain any such transaction, to show that he had brought the whole of the circumstances fully and fairly before the directors. It would not be enough to show that he had not concealed anything. He would be obliged to refund all advances made to himself in respect of his private transactions, unless the directors afterwards assented to them on having the whole of the proceedings brought before them (*u*). An agreement by a manager to advance the bank's money in consideration of a personal advantage to himself is invalid. It is against public policy, being corrupt in principle, and likely to lead to a fraud upon the bank, and no action could be sustained upon it by the person to whom it was agreed that the advance should be made (*v*). A manager has no power to bind the bank by his promise to pay his private debt to a customer by placing the amount of it to the customer's credit in his current account (*w*). But he may in the ordinary course of business allow an over-

But may advance to a company of which he is a director.

(*t*) *Per* Sir J. Romilly, in *Collinson* v. *Lister*, 24 L.J., Ch., p. 766, affirmed 25 L.J., Ch. 38; 7 De G. M. & G., 634.

(*u*) *Gwatkin* v. *Campbell*, 1 Jur., N.S., 131.

(*v*) *Degraves* v. *M'Mullen*, 5 A.J.R., 8.

(*w*) *Blackwood* v. *Rourke*, 1 V.L.R. (L.), 201. See, however, *per* Stephen, J., who did not dissent solely on the ground that the promise was not carried out by corresponding entries in the bank-books.

draft to a company of which he is a director and shareholder (*x*).

Action against him for advancing to persons of bad credit.

It is conceived, however, that it is the duty of a manager to take care not to advance money to persons of bad or insufficient credit, or on bad or insufficient security, or to discount bad bills, and that if he negligently did so, and loss resulted to the bank, it might bring an action against him for his misconduct, and recover the money that had been lost (*y*).

Liability of bank for acts of the manager not within the usual course of business.

Occasionally the manager is empowered to do acts not within the usual course of banking business, and then the extent of his authority may be a question of fact, or of mixed law and fact, to be decided on evidence by a jury. In such cases unless it can be shown that he had the authority of the bank, it will not be answerable for his conduct.

Malicious prosecution.

Thus a bank manager has no implied authority to institute criminal proceedings on behalf of a bank, as the arrest and still more the prosecution of offenders are not within the ordinary routine of banking business. Accordingly, if it is sought to make a bank liable for a malicious prosecution by one of its managers, his authority to take the proceedings must in general be proved as a matter of fact by evidence. It is true that in cases of emergency, as where a man presents a forged cheque and it is necessary to catch him on the spot, or where a thief seizes the money of the bank, and it is in danger of being lost, the manager

(*x*) *Bank of Upper Canada* v. *Bradshaw*, L.R., 1 P.C., 479.

(*y*) *Bank of Upper Canada* v. *Bradshaw*, L.R., 1 P.C., 479; *Ward* v. *Greenland*, 19 C.B., N.S., 527; and see *Chartered Bank of India* v. *Rich*, 32 L.J., Q.B., 300; 4 B. & S., 73.

probably has authority to cause the arrest of the offender in order to protect the property of the bank. But if the arrest was ordered by a manager for the punishment of the thief, and not for the protection of the property of the bank, it would not be liable for his action (*z*).

Wrongful seizure of property.

Where it was proved that the manager of a branch bank had seized certain sheep and sold them, and that he had said that the bank would undertake all responsibility in the matter, but no proof was given of any special authority to the manager to seize the sheep, nor of the general scope of his authority, nor that he seized them in the belief that they were the property of a person indebted to the bank and with the object of protecting the bank's security over them, it was held that in the absence of such evidence the owner of the sheep was not entitled to recover damages from the bank for the alleged wrongful seizure of his sheep (*a*).

Extent of manager's authority to invest a customer's money.

It is not within the scope of a banker's general business to find investments for his customers (*b*). Therefore, before a bank can be made liable in respect of such a transaction by its manager, it must be proved that he was acting with the authority of the bank. For instance, the local manager of a branch bank persuaded a lady who had funds on deposit to give them to him for the purpose of buying an equitable mortgage from the bank, and then he appropriated

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(*z*) *Bank of N.S Wales* v. *Owston*, 4 Ap. Cas., 270, reversing S.C. Knox's Reports 36; cf *Hanlon* v. *Manson*, 2 N.S.W. L.R., 291.

(*a*) *Bremner* v. *Union Bank*, 17 N.S.W. L.R., 74; and see *Macauley* v. *Bank of N.S. Wales*, 14 N.S.W. L.R., 269.

(*b*) *Bishop* v. *Jersey*, 2 Drew, 143; 23 L.J., Ch., 483.

them to his own use. The jury were accordingly asked, in an action brought by the lady against the bank to recover her money, whether the manager induced her to believe that he was acting for the bank in the matter, and whether he had authority to assign the equitable mortgage. On these questions being answered in the affirmative, the bank was held liable for the amount that had been so misappropriated (*c*).

When bank is answerable for fraud of its manager.

A bank is liable for the fraud of its manager while acting within the scope of his authority if it receives a benefit from that fraud, and may be made responsible to the extent to which it has profited through his frauds in the management of its business (*cc*).

But if a manager who is also an executor fraudulently appropriates as executor funds in the bank belonging to the estate of the deceased, the co-executors cannot, it has been held, recover from the bank the amount which has been so misappropriated in an action at law, though perhaps the bank might be made responsible in equity for the amount lost through the misconduct of its agent (*d*).

Representations as to a customer's solvency.

A bank, however, it has been held, is not answerable for a fraudulent representation as to the solvency of a customer signed by its manager only. For it is necessary that a representation as to credit should be signed

(*c*) *Thompson* v. *Bell*, 10 Ex., 11.

(*cc*) *Mackay* v. *Commercial Bank, &c.*, L.R., 5 P.C., 394; *Swire* v. *Francis*, 3 Ap. Cas., 106; *Addie* v. *Western Bank*, L.R., 1 Sc. Ap., 145; *per* Lord Chelmsford; *Houldsworth* v. *City of Glasgow Bank*, 5 Ap. Cas., 317.

(*d*) *Nicol* v. *London Chartered Bank*, 4 V.L.R. (L.), 324; *Collinson* v. *Lister*, 7 De G. Mac. & G., 634; 25 L.J., Ch., 38.

by the party whom it is sought to make liable for it, and the signature of the manager is not the signature of the bank. The manager, however, may be personally responsible (*e*).

Privileged communications.

Communications from a manager made in reply to the inquiries of a customer respecting the commercial character of other parties are privileged, unless they are maliciously defamatory. The manager is not under a legal obligation to answer such inquiries; but, if he does answer them he is entitled to state what he knows. Thus, where a manager was asked for information regarding the character of a person who had transactions with the bank, and thereupon handed to the applicant an anonymous letter which he had received, and which contained libellous matter respecting the person about whom the inquiries were made, it was held that the communication was privileged, and that in the absence of any proof of actual malice on the part of the manager, an action could not be maintained against him (*f*).

Notice to manager.

Notice to the manager is, it seems, notice to the bank. Therefore, when a manager fraudulently obtained possession of certain acceptances, got them discounted by the bank, and lodged the proceeds to the credit of his own account, it was held that, under the circumstances, the bank had notice of the fraud, and could not be considered as *bonâ fide* holders of the bills (*g*).

(*e*) *Swift* v. *Jewesbury*, L.R., 9 Q.B., 301.

(*f*) *Robshaw* v. *Smith*, 38 L.T. (N.S.), 423.

(*g*) *Re Carew*, 31 Beav., 39; and see *Collinson* v. *Lister*, 7 DeG.M. & G., 634.

§ 3. AUDITORS.

The duty of the auditors of a bank is generally prescribed by the instrument of incorporation or articles of association of the company. Thus, in the case of several Victorian banks, it is provided in their instruments of incorporation, that the auditor "shall fully examine into the state of the accounts and affairs" of the companies, and shall "make a just, true and faithful report thereon" (*h*). In the articles of association of banks, formed under *The Companies Statute,* it may be provided that it shall be the duty of the auditors to examine the accounts and balance-sheets with the vouchers, and also to examine and report on the assets of the company, and to report to the directors any irregularity they may discover in the books or accounts (*i*).

And, apparently, the shareholders of a company formed under this statute are at liberty to impose whatever duties of examination they please upon their auditors.

Duty of auditors.

Auditors are bound to ascertain what duties are cast upon them by the articles or charter of the company. Ignorance of them or of the duties imposed by them would not afford any justification for not observing them.

It is the duty of an auditor to examine the books, ascertain that they are right, and to see that the balance-sheet shows the true financial position of the

(*h*) See the statutes relating to the National Bank, the Colonial Bank, the Bank of New South Wales, and the Bank of Victoria.

(*i*) See the 139th and 142nd sections of the precedent in *Grant on Banking*, 3rd. ed., p. 774.

company at the time to which it refers. In the discharge of this duty he is bound to use a reasonable amount of skill and care. He is not bound to be suspicious. He is justified in believing the tried servants of the company in whom confidence has been placed. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom, but in the absence of anything of that kind he is only bound to be reasonably cautious and careful (*j*).

Auditor's report is privileged.

An auditor's report is a privileged communication. Thus, when auditors attributed a deficiency to one of the agents of a company, and the directors caused a letter containing that portion of the report which injuriously affected the agent's character, to be printed and forwarded to absent shareholders, it was held that the letter was published on a privileged occasion, as it was the duty of the directors to communicate to the shareholders matters that materially affected the accounts, and that causing the letter to be printed was a reasonable and necessary mode of publishing it to absent shareholders (*k*).

§ 4. BANK CLERKS.

Ledger-keepers.

The authority of other bank officials has occasionally been the subject of discussion. Thus, in England it has been held that the "cashier" has an implied power to decide upon the genuineness of the handwriting in

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(*j*) *Re Kingston Cotton Mill*, (No. 2), (1896), 2 Ch., 279, 284, 288; *Re London & General Bank*, (1895), 2 Ch., 673.

(*k*) *Lawless* v. *Anglo &c. Co.*, L.R., 4 Q.B., 262 a cheque when presented for payment (*l*). In Australia, as in Scotland, instead of cashiers there are tellers, whose duties are less important than those of a cashier. For as a general rule they pay no cheques which have not been previously marked by the ledger-keepers, whereas a cashier is expected to decide without frequent reference to a ledger-keeper, whether cheques ought to be paid (*m*). It is conceived that a ledger-keeper has authority, arising from the nature of his employment, to decide upon the genuineness of the cheques when presented to him to be marked, and also to determine whether cheques presented for payment shall be dishonoured. Paying tellers.

It is the duty of a receiving teller to receive money in the ordinary way of banking, and upon the usual terms. If money be paid in subject to a special condition as to its application, he should inform the manager. If the teller or manager does not wish to receive the money upon that condition, it should be returned at once to the person who pays it in; and if a deposit be accepted by the teller, subject to a condition to which he had no authority to agree, and if it be retained by the bank, the bank will be bound by the condition (*n*). Receiving tellers.

§ 5. GUARANTEES OF GOOD CONDUCT.

The good conduct and integrity of a bank manager, or clerk, may be the subject of a guarantee to the bank by either a private individual or a company, and such a guarantee must be in writing.

(*l*) *R.* v. *Prince*, L.R., 1 C.C., 150.

(*m*) *Gilbart on Banking*, last ed., p. 358.

(*n*) *Chamberlain* v. *E. S. & A. Bank*, 4 V.L.R. (L.), 45.

Disclosure of facts.

If a bank before obtaining a guarantee for the good conduct of a clerk knew that he had previously been a defaulter, they should disclose that fact to the surety; for the concealment of it would be a fraud on him, and would entitle him to repudiate the contract (*o*).

Continuing guarantee.

A continuing guarantee for the honesty of a clerk is not usually revocable so long as he does not misconduct himself (*p*). But a surety would not be liable for what was done by a clerk after acts of dishonesty had been condoned by the bank. For on discovering such acts the bank might dismiss him, and they could not hold the surety responsible for subsequent losses if without his assent they chose to detain the defaulter in their service (*q*).

Change of duties or employment.

Any material alteration in the office or employment guaranteed, if made without the consent of the surety, will discharge him from liability (*r*). Even a change in the mode of remuneration, as by substituting a commission for a fixed salary, might have that effect (*s*).

A surety for the due discharge of the duties of a bank "clerk or of any office or other situation at branch A or elsewhere" is not discharged by the

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(*o*) *Lee* v. *Jones*, 17 C.B., N.S., 482; 34 L.J., C.P., 131; *Smith* v. *Bank of Scotland*, 1 Dow., 272.

(*p*) *Burgess* v. *Eve*, L.R., 13 Eq., at 457.

(*q*) *Phillips* v. *Foxall*, L.R., 7 Q.B., 666; *Saunderson* v. *Aston*, L.R., 8 Ex., 72.

(*r*) *Bonar* v. *Macdonald*, 3 H.L.C., 226.

(*s*) *North-Western Railway* v. *Whinray*, 10 Ex., 77; 23 L.J., Ex., 261.

promotion of the clerk to be the manager of another branch (*t*).

Death of guarantor.

The death of the guarantor and notice of it to the bank would not necessarily terminate the agreement (*u*).

Negligence.

A surety who guarantees the honesty of a clerk is not entitled to be relieved from his obligation merely because the employer fails to take all the precautions in his power to guard against the consequences of dishonesty (*v*).

As the extent of the surety's liability depends on the peculiar construction of the particular guarantee into which he has entered, no useful purpose seems likely to be served by a further discussion of the cases relating to such contracts, two or three of which are mentioned in the note (*w*).

(*t*) *London Chartered Bank* v. *Sutherland*, 2 A.J.R., 17.

(*u*) *Burgess* v. *Eve*, L.R., 13 Eq., 450; see also *Lloyds* v. *Harper*, 16 C.D., 290; *Coulthard* v. *Clementson*, 5 Q.B.D., 42; *Re Silvester*, (1895) 1 Ch., 573.

(*v*) *Black* v. *Ottoman Bank*, 15 M.P.C.C., 472; cf., *R.* v. *National Ins. Co.*, 13 V.L.R., 914.

(*w*) *National Bank* v. *Brock*, 1 W.W. & A'B. (L.), 208; *Colonial Bank* v. *European &c. Guarantee Society*, 1 W.W. & A'B. (L.), 15; *Boobier* v. *United Australian &c. Ins. Co.*, 7 A.L.T., 66.

CHAPTER XXIV.

Libels by and upon Banks.

An action for libel may be brought either by or against a bank.

Definition of a libel.

A libel for which an action will lie may be defined as a false and defamatory statement in writing, published without lawful justification or excuse, and calculated to convey to those to whom it is addressed an imputation upon a person which is injurious to him in his business or profession, or which holds him up to hatred, contempt, or ridicule. Statements which are true, or rather which are proved to be so, are not actionable.

Privileged communications.

Injurious imputations even though false are not libellous if there be a lawful justification or excuse for making them. When there is such an excuse, they are described as privileged communications, which may be defined as communications made *bonâ fide* and without malice upon any matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a person who has a corresponding interest or duty. In order to make a statement privileged it is not necessary that it should be true. But it is necessary that the person who makes it should believe it to be true, and should not be actuated by malice in making it. The privilege is not lost if the writer *bonâ fide* or accidentally addresses the communication to the wrong person (*a*).

The communications which pass between the officials of the bank in reference to the conduct of its affairs are privileged, and so are those which in the ordinary course of business are made to the customers and to the shareholders. Accordingly, a report made by the auditors to the directors is privileged (*b*); so is a report made by the directors to the shareholders even though it reflects upon the character of the officers of the bank, and the directors are justified in causing such a report to be printed for the use of the shareholders, provided the communication is made *bonâ fide* and without malice (*c*).

Communications from a manager in answer to the inquiries of a customer respecting the commercial standing of people in business, are privileged (*d*). A letter from a bank to its customer stating that a cheque or note left by him for collection has been dishonoured is privileged. But it has been held in New South Wales that the privilege is lost if the statement is incorrect. Thus, where a note payable at a bank was presented there for collection one day late, and the bank, according to the established custom, refused to pay it without a fresh cheque from the maker, and the collecting bank

(*a*) *Harrison* v. *Bush*, 5 E. & B., 344; *Thompson* v. *Dashwood*, 11 Q.B.D., 43.

(*b*) *Lawless* v. *Anglo-Egyptian &c. Co.*, L.R., 4 Q.B., 262.

(*c*) *Lawless* v. *Anglo-Egyptian &c. Co.*, L.R., 4 Q.B., 262.

(*d*) *Robshaw* v. *Smith*, 38 L.T. (N.S.), 423.

thereupon wrote to its customer erroneously stating that the note had been dishonoured, it was held that the privilege did not protect the misrepresentation, although there was no evidence of malice (*e*). A similar conclusion was arrived at in another case where a cheque was returned to a customer with a statement that payment of it had been refused. This was a mistake, for the cheque had not been presented. It was held that there was no privilege inasmuch as there had been no presentation, and therefore there was no duty to tell the customer it had been dishonoured (*f*). It has, however, been held by the Supreme Court in Victoria that innocent and *boná fide* mistakes of this kind do not take away the privilege of the bank (*g*). The Supreme Court of New South Wales appears to think that such a communication cannot be privileged unless it is true. The effect of this opinion is to deprive the bank of the defence of privilege in these cases. For if the statements are correct, the defence of privilege is superfluous, truth being in all cases a complete defence to an action for libel.

Libels on a bank.

A circular or letter imputing insolvency or dishonesty to a bank is libellous, and an action for damages would lie against the author of it (*h*).

(*e*) *McNickle* v. *Bank of New South Wales*, 2 N.S.W. L.R., 7.

(*f*) *Browne* v. *Bank of Australasia*, 2 N.S.W. L.R., 125; *Ellis* v. *Bank of Australasia*, 3 N.S.W. L.R., 96; *Hall* v. *Bank of New South Wales*, 10 N.S.W. L.R., 292; *Ballin* v. *Bank of Australasia*, 16 N.S.W. L.R., 15.

(*g*) *Hussey* v. *Bank of Australasia*, 15 V.L.R., 9; *Levy* v. *Union Bank*, 21 V.L.R., 728.

(*h*) *Forster* v. *Lawson*, 3 Bing., 452; *Capital & Counties Bank* v. *Henty*, L.R., 7 Ap. Cas., 741.

Inasmuch as the directors of a company, or even a majority of the shareholders at a general meeting, cannot authorise the employment of the funds of the company for any purposes other than those for which it is constituted, it would be *ultra vires* of a bank or other mercantile corporation to spend any portion of its funds in paying the costs of a prosecution for libel, and if the directors attempted to do so they might be restrained by injunction (*i*).

The above are the main principles of the law of libel in which banks appear to be interested. The object and scope of this volume forbid a fuller treatment of the subject, and the reader who requires further information is referred to works dealing specially with the law of libel.

(*i*) *Pickering* v. *Stephenson*, L.R., 14 Eq., 322.

APPENDIX.

EVIDENCE ACT 1890.

DIVISION 2.—BANKERS' BOOKS (*a*).

33. In this Division of this Part of this Act— Interpretation.

"*The Bankers' Books Evidence Act* 1878" *s.* 2.

"Bank." "Bank" shall mean and include any company engaged in the ordinary business of banking by receiving deposits and issuing bills or notes payable to the bearer at sight or on demand (*b*), and also mean and include any savings bank established or continued under the *Savings Banks Act* 1890.

"A Judge." "A Judge" shall mean a judge of the Supreme Court of the colony of Victoria.

"Legal proceedings." 39 & 40 Vict. c. 48 s. 2. "Legal proceedings" shall include all proceedings whether preliminary or final in courts of justice both criminal and civil and shall include all proceedings whether preliminary or final by way of arbitration examination of witnesses assessment of damages compensation or otherwise in which there is power to administer an oath.

"The Court." "The court" shall mean the court judge magistrate arbitrator or other person authorized to preside over the said legal proceedings for the time being, and shall include all persons judges or officers having jurisdiction and author-

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(*a*) This Division does not apply to books out of the jurisdiction of the Court.—*Bank of Australasia* v. *Pollard*, 8 V.L.R. (L.), 66.

(*b*) It is necessary to prove that the institutions, copies of whose accounts it is sought to put in evidence, are banks of deposit as well as of issue.—*Reg.* v. *Shipp and Stockall*, 14 V.L.R., 198.

"The Bankers' Books Evidence Act 1878."

ized to preside over or to exercise judicial control over the said legal proceedings or the procedure or any steps therein.

Entries in books to be admissible as evidence on affidavit.
Ib. s. 3.
39 & 40 Vict. c. 48 s. 3.

34. From and after the commencement of this Act the entries in ledgers day books cash books and other account books of any bank shall be admissible in all legal proceedings as *primâ facie* evidence of the matters transactions and accounts recorded therein on proof being given by the affidavit in writing of one of the managers or superior officers of such bank or by other evidence that such ledgers day books cash books or other account books are or have been the ordinary books of such bank and that the said entries have been made in usual and ordinary course of business and that such books are in or come immediately from the custody or control of such bank. Provided always that in any legal proceedings to which any bank shall be a party the cheques bills promissory notes orders for payment of money and other vouchers from which the entries in the ledgers day books cash books or other account books adduced in evidence in such proceedings purport to have been made shall be also produced in addition to such entries and affidavit or other evidence, and the production of any cheques bills promissory notes orders for payment of money and other vouchers signed by or by some person duly authorised on behalf of the person firm or company whose account has been debited with the amount thereof respectively in any such book together with an entry verified by affidavit as aforesaid as to such book and as to such debit entry or with an entry proved by other evidence as aforesaid shall be *primâ facie* evidence of payment thereof respectively having been in fact made by the bank to or for the use of such person firm or company.

Originals need not be produced.
Ib. s. 4.
Ib. s. 4.

35. Copies of all entries in any ledgers day books cash books or other account books used by any such bank may be proved in all legal proceedings as evidence of such entries without production of the originals by means of the affidavit of a person who has examined the same stating the fact of the said examination and that the copies sought to be put in evidence are correct (*c*).

Proviso as to notice to parties in a suit.
Ib. s. 5.
Ib. s. 5.

36. Provided always that no ledger day book cash book or other account book of any such bank and no copies of entries therein contained shall be adduced or received in evidence under this Division

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(*c*) A defendant bank may under this section prove the entries in books by secondary evidence of the copies, and need not under section 39 require the production of the originals.—*Oriental Banking Corporation* v. *Smith*, 1 A.L.T., 76.

of this Part of this Act unless five days' notice in writing or such other notice as may be ordered by the court containing a copy of the entries proposed to be adduced and of the intention to adduce the same in evidence shall have been given by the party proposing to adduce the same in evidence to the other party or parties to the said legal proceedings, and that such other party or parties is or are at liberty to inspect the original entries (*d*) and the accounts of which such entries form a part, and where any bank shall be a party to any legal proceedings that the other party or parties thereto is or are at liberty to inspect the cheques bills promissory notes orders for payment of money and other vouchers in respect of which such entries were made.

" *The Bankers' Books Evidence Act* 1878."

37. On the application of any party to any legal proceedings who has received such notice a judge may order that such party be at liberty to inspect and to take copies of any entry or entries in the ledgers day books cash books or other account books of any such bank relating to the matters in question in such legal proceedings, and such order may be made by such judge at his discretion either with or without summoning before him such bank or the other party or parties to such legal proceedings and shall be intimated to such bank at least three days before such copies are required.

Power under order of judge to inspect books and take copies.
Ib. s. 6.
39 & 40 Vict. c. 48 s. 6.

38. On the application of any party to any legal proceedings who has received such notice a judge may order that such entries and copies mentioned in the said notice shall not be admissible as evidence of the matters transactions and accounts recorded in such ledgers day books cash books and other account books.

Judge may order that copies are not admissible.
Ib. s. 7.
Ib. s. 7.

39. No bank shall be compellable to produce the ledgers day books cash books or other account books of such bank in any legal proceedings unless a judge specially orders that such ledgers day books cash books or other account books should be produced at such legal proceedings (*e*).

Bank not compellable to produce books except in certain cases.
Ib. s. 8.
Ib. s. 8.

40. Any judge of any county court court of insolvency or court of mines or any chairman of a court of general sessions may as to any

Powers of a judge extended to county court judges &c.
Ib. s. 9.

(*d*) *Semble*, the notice of intention to adduce copies of entries in a bank book will not be good if it omit to state that the original entries may be inspected.—*Bank of Australasia* v. *Pollard*, 8 V.L.R. (L.), 66.

(*e*) The court has power under this section to order the production of bank books at the trial of an action, although the bank is not a party to the action.—*Hay* v. *Patterson*, 15 V.L.R., 360.

"The Bankers' Books Evidence Act 1878.'

"legal proceedings" pending or to be pending in any such court respectively exercise any or all of the powers of "a judge" under the last three preceding sections of this Act.

THE BILLS OF EXCHANGE ACT 1882.

PART III.

Victoria—For Part III. *read* Division 2.

Cheques on a Banker.

Victoria.—(1) Generally.

Cheque defined.
[V., Q., W.A. 74.]

73. A cheque is a bill of exchange drawn on a banker payable on demand.

New South Wales.—At the end of paragraph add: to or to the order of a specified person, or to bearer.

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.

Victoria.—For Part *read* Division, *and insert the words* Part of this *before the word* Act.

Presentment of cheque for payment.
[V., Q., W.A. 75.]

74. Subject to the provisions of this Act—

Victoria.—Insert the words Part of this *before the word* 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 a cheque been paid.

Victoria.— *Tasmania.*— } *For words* of such presentment *read* at which the presentment ought to have been made.

(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.

Tasmania.—Insert the word to *before the words* the facts of.

(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. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by-- Revocation of banker's authority. [V., Q., W.A. 76.]

(1.) Countermand of payment :

(2.) Notice of the customer's death.

Crossed Cheques.

76. (1.) Where a cheque bears across its face an addition of— General and special crossings defined. [V., Q., W.A. 77.]

(*a*) The words "and company" or any abbreviation thereof between two parallel transverse lines, either with or without the words "not negotiable ;" or

New South Wales.—For words down to "abbreviation thereof" *read* The words "and company," or the word "bank," or any abbreviation thereof respectively.

Queensland.—Read The word "bank" or the words "and company" or any abbreviation thereof respectively.

Tasmania.—Read The word "bank."

New Zealand.—Read The words "and company" or "bank," or any abbreviation thereof.

(*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.]

Queensland.—For (2) *substitute the following* :—

(2.) Where a cheque bears across its face an addition of—

(*a*) The name of a bank, either with or without the words "not negotiable ;" or

(*b*) The word "credit," or any abbreviation thereof, followed by the name of some individual or firm, either with or without the words "not negotiable ;"

that addition constitutes a crossing, and the cheque is crossed specially, and to that bank, or to that individual or firm, as the case may be.

And add :—

(3.) But where a cheque crossed specially to an individual or firm also bears across its face, either before or after the name of the individual or firm, the name of a bank, the cheque is so far as regards the duties and liabilities of the bank on which it is drawn, a cheque crossed specially to the bank whose name it so bears across its face.

77. (1.) A cheque may be crossed generally or specially by the drawer. Crossing by drawer or after issue. [V., Q., W.A. 78.]

(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."

Queensland.—Add the following sub-section :—

(5.) When a cheque is crossed specially to an individual or firm, that individual or firm may again cross it specially to a bank.

[Q., 6.] (5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

Queensland.—Substitute to a bank, the bank to which, *for the words* the banker to whom.

[Q., 7.] (6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself.

Queensland.—Substitute bank for collection, such bank may cross it specially to itself, *for the words* banker —— to himself.

Crossing a material part of cheque. [V., Q., W.A. 79.]

78. A crossing authorised by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing.

Victoria.—Insert the words Part of this *before* Act.

Duties of banker as to crossed cheques. [V., Q., W.A. 80.]

79. (1.) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof.

Queensland.—For banker *and* whom *read* bank *and* which *respectively.*

(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.

Queensland.—For sub-section (2) substitute the following :—

(2.) Where the bank on which a cheque is drawn—

(*a*) If the cheque is crossed specially to more than one bank (except when crossed to an agent for collection, being a bank), pays the cheque: or

(*b*) If the cheque is crossed generally, or is crossed specially to an individual or firm, and is not also crossed specially to a bank, pays it otherwise than to a bank; or,

(*c*) If the cheque is crossed specially to a bank, pays it otherwise than to the bank to which it is crossed, or its agent for collection, being a bank;

such bank is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

And add :—

(3.) When a bank receiving payment of a cheque crossed specially to an individual or a firm pays the amount thereof otherwise than to the credit of such individual or firm, such bank is liable to such individual or firm for any loss he or they may sustain owing to the amount 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, [Q. Sub-sec. (4).]

Victoria.—Insert the words Part of this *before* Act.

the banker

Queensland.—For banker *read* bank.

paying the cheque in good faith and without negligence shall not be

Queensland.—Insert the words or receiving payment of *after* paying.

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

Victoria.—Insert the words Part of this *before* Act.

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

Queensland.—For banker *read* bank.

as the case may be.

Queensland.—Insert the words or of the amount of the cheque having been paid otherwise than to the credit of the individual or firm to whom it was crossed, *after the word* banker.

Protection to banker and drawer where cheque is crossed. [V., Q., W.A. 81.]

80. Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque,, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Queensland.—For passage "pays" down to "banker" insert:—

(*a*) If it is crossed generally, or is crossed specially to an individual or firm, and is not also crossed specially to a bank, pays it to a bank; and,

(*b*) If it is crossed specially to a bank, pays it to the bank to which it is crossed, or its agent for collection, being a bank; the bank

Effect of crossin on holder. [V., Q., W.A. 82.]

81. Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Protection to collecting banker. [V., Q., W.A. 83.

82. Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective

title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

Queensland.—For words banker *and* himself, *read* bank *and* itself *respectively.*

RULES FOR THE MANAGEMENT OF THE CLEARING HOUSE, MELBOURNE.

Time of Clearing.

	Clearing Commences.	Door Closes.
1. Tuesday, Wednesday, Thursday, and Friday—		
Morning Clearing - - - - - - -	9.0	9.25
Note Clearing - - - - - - -	9.30	9.35
Mid-day Clearing - - - - - - -	11.30	12.0
Afternoon Clearing - - - - - -	2.0	2.30
Country Clearing for Country and Suburban Cheques - - - - - - - -	3.10	3.20
Settlement - - - - - - - -	3.35	3.45
Saturday—		
Morning Clearing - - - - - - -	9.0	9.25
Mid-day Clearing - - - - - - -	11.0	11.30
Country Clearing for Country and Suburban Cheques - - - - - - - -	12.10	12.20
Settlement - - - - - - - -	12.35	12.45
Monday—		
Morning—Note—Mid-day—Afternoon and Country Clearings as on ordinary days		
Return Clearing - - - - - - -	4.0	4.15
Note Clearing - - - - - - -	4.30	4.35
Settlement - - - - - - - -	5.30	5.45
On all Bank Balance days, and days before two consecutive Holidays, including Sundays—		
Morning — Note — Mid-day—Afternoon and Country Clearings as on ordinary days.		
Extra Clearing for Town Cheques - - - -	4.0	4.15
Note Clearing - - - - - - -	4.30	4.35
Settlement - - - - - - - -	5.10	5.25

When Saturday is a Bank Balance day, or a day before two consecutive Holidays, including Sundays, the times of Clearing shall be—

Morning Clearing - - - - - - -	9.0	9.25
Note Clearing - - - - - - -	9.30	9.35
Mid-day Clearing - - - - - - -	11.30	12.0
Country Clearing - - - - - - -	1.0	1.15
Extra Town Clearing - - - - - -	1.30	2.0
Note Clearing - - - - . -	1.30	1.35
Settlement - - - - - - - -	2.10	2.25

The Settlement Clearings shall be available for Treasury Cheques.

2. The Inspector of the Clearing House may, on application to him, allow an extension of time, not exceeding one hour on the times specified, for the later Clearings and Returns on Bank Balance days, and whenever an unusual pressure of business, arising either from holidays or other public causes, may render it necessary. The Inspector may also, in his discretion, when a Bank balancing day falls on a Saturday, order a Special Note Clearing on the preceding evening. Notice of such extension of time or Special Clearing shall be posted in the Clearing House as early as possible, and not later than the Mid-day Clearing of the days on which it will be allowed.

3. The doors of the Clearing House shall be locked at the times specified for each Clearing, and, except for Note Clearing, reopened five minutes afterwards, but not sooner. The Inspector of the Clearing House is specially enjoined to see that this direction is strictly observed.

4. No Clearing shall, under any circumstances, be received after the re-opening of the doors.

RETURNS.

5. Notes and Town Cheques Dishonored must be returned in the next clearing.

6. Suburban Cheques Dishonored must be returned direct to the Bank whose stamp they bear by the first post after their receipt, *pro formâ* debits for the amount being passed through the Clearing House.

7. Country Cheques for £20 and under, which cannot be exchanged locally, may be sent through the Country Clearing of the Melbourne Clearing House at the option of the Bank holding the same.

8. Country Cheques Dishonored shall be sent direct by post to the

Bank whose stamp they bear, by the first mail after the close of business on the day of their receipt.

9. Town Bills Dishonored may be returned up to and in the Settlement Clearings, except on Bank Balance days and days before two consecutive holidays, when they must be returned not later than the Extra Town Clearing.

10. Suburban Bills Dishonored must be returned by post direct, for delivery at 9 a.m. on the day after they are due.

11. No return shall be received without bearing a written answer, and no Clearer shall refuse to credit a Return so answered. Any stale Return, and any Return wrongly delivered, may, however, be afterwards rejected by the receiving Bank.

Notes.

12. The door of the Clearing House shall, during the Note Clearing, be kept locked; and no person will be permitted to enter or leave the Clearing House, under any circumstances, until the Inspector declares the Clearing balanced.

13. Each Bank shall be represented by at least two officers; one who shall take the receiving desk, and the other who will present the Note Charges at the respective tables and see them counted.

14. No Note Charge is to be counted except in the presence of the Officer delivering the same. On an inward Exchange Clerk objecting to a note, full particulars thereof shall be furnished to the Inspector, with a memorandum of the objection; and the Bank receiving such Note may return the same dishonored, provided such return be made in the next subsequent Clearing.

15. Note Vouchers are to be handed to the Inspector, immediately after settlement with each Bank. The Inspector shall, after entry, sign the same, and return them to the Clerk after declaration of Balance.

16. Sorting of Notes in the House shall not be permitted after declaration of Balance.

17. The Notes of the Bank making delivery shall not be sorted with other Notes until the slip has been signed by the Receiving Clerk.

18. No notes shall be exchanged on Saturday (Bank balance days excepted) unless the following Monday be a holiday.

Mode of Clearing, &c.

19. At the times fixed for Clearing, each Bank shall deliver promptly the Charges of Cheques, &c., to the other Banks, with a memo. appended of total amount, which shall be verified by the Receiving Banks and the memorandum signed.

20. The Banks shall be at liberty to deliver as many Charges of Cheques, &c., during each Clearing, as they may think fit; and the Clearers shall be at their posts to receive the same, and shall not leave the House until the doors are re-opened after the close of each Clearing.

21. No Cheque or Bill shall be received that does not bear the stamp of the depositing Bank, and should any Cheque or Bill bear the stamp of more than one Bank, the ownership thereof must be clearly indicated by ticket or by special endorsement.

22. Where a cheque bears the name of two offices of the same bank, the stamp of the office to which the Cheque is to be returned shall be also impressed on the back thereof, which shall bear no other stamp.

23. The Banks shall have the Outward Clearing Books in the House at the settlement of each Clearing. In the Inward Clearing Books the amounts only of Cheques, &c., are to be entered, in the order in which they are received.

24. No books or loose documents shall be left by the clerks on the desks on leaving the House after any Clearing, and the House shall be quitted promptly when the work of each Clearing is finished.

Commission on Country Cheques.

25. Clearing-memoranda shall bear a note of the amount of Commission payable on any cheques on Country Branches included in each Clearing. At the last daily Clearing at which such Cheques are passed, a slip or cheque for the total amount of such Commission for the day shall be handed to the receiving Bank, to be included by it in any subsequent Clearing.

Clearing House General Balance.

26. Immediately after the last daily Clearing, the Clerk of each Bank shall furnish to the Inspector of the Clearing House a statement showing the amount and balance of the day's operations. From these statements the Inspector shall enter up the totals of the

transactions and the several balances, and prove the general balance; no officer shall leave until agreement is declared. *NOTE.— This Balance Sheet shall be retained by Inspector.*

27. Settlement of Balances shall be made on the following working days. All even sums of £500 and upwards shall be paid in Gold or by Exchange Vouchers. For smaller amounts the paying Banks shall hand their Cheques or Cash to the Inspector, who shall pay the same into a "Clearing House Settlement Account," at some Clearing House Bank; and the Inspector shall settle with the receiving Bank or Banks out of the funds so provided.

28. The Banks having to pay shall on every working day except Saturday hand to the Inspector their Exchange Vouchers and Cheques between 11.15 and 11.30 a.m., and the Banks having to receive shall receive between 11.45 a.m., and noon the respective Balances due to them, provided all the Balances due from the debtor Banks shall have been paid. On Saturdays the debtor Banks shall pay their Balances between 10 and 10.30 a.m., and the creditor Banks receive the amount due to them between 10.30 and 10.45 a.m.

Exchange Vouchers.

29. The Inspector of the Clearing House shall keep a Register of the proportion of Exchange Vouchers which may be allotted to each Bank, and of all Exchange Vouchers passing through his hands, or by delivery upon his Orders from and to each Bank, in order to show from time to time the numbers, denominations, and value of Exchange Vouchers held by each Bank.

30. Any Bank holding more than its proportion of Exchange Vouchers may apply to the Inspector for an order for Sovereigns, in exchange for Vouchers, on any Bank holding less than its quota of Vouchers; and no Bank shall deliver or receive Exchange Vouchers except on the order of the Inspector. Any Bank receiving Exchange Vouchers upon an order from the Inspector to deliver gold in exchange shall acknowledge the receipt of the Vouchers set forth upon the order, and forward such acknowledgment without delay to the Inspector.

31. Any Bank not holding any Exchange Vouchers, or not holding or ceasing to hold its proportion of Exchange Vouchers, on receiving notice in writing to that effect from the Inspector of the Clearing House, shall forthwith exchange Sovereigns for Exchange Vouchers to an amount equal to its proportion, or to

the amount of any deficiency thereof, with one or more Bank or Banks holding Exchange Vouchers in excess of their proportion.

32. No Bank shall deliver or receive Exchange Vouchers, except on the order of the Inspector.

Disputes and Irregularities.

33. Any dispute in the House shall be referred to the Inspector, whose decision shall be accepted for the time, but may be appealed against to the Clearing House Committee.

34. It shall be the duty of the Inspector to report any infraction of the rules, breach of discipline, or disorderly conduct to the Manager of the Bank whose officer may be in fault.

The Messenger.

Shall be in charge of the Premises, and keep them in a thorough state of cleanliness; he shall remain in attendance during all times of Clearing, and shall not leave the premises without the Inspector's permission.

Half-yearly Bank Balancing Days.

Bank of New South Wales	*31st March and 30th September.*
English, Scottish and Australian Bank Limited	*31st March and 30th September.*
Colonial Bank of Australasia Limited ...	*31st March and 30th September.*
National Bank of Australasia Limited ...	*31st March and 30th September.*
Bank of Australasia	*The first Monday after the 9th of April and 9th October.*
London Bank of Australia Limited ...	*The last Monday in June and December.*
Union Bank of Australia Limited	*The last day in February and August*
Bank of Victoria Limited	*30th June and 31st December.*
Commercial Bank of Australia Limited ...	*30th June and 31st December.*

R. MURCHISON, *Chairman.*

S. G. P. DAVIES, } *Members of Committee.*
E. SMITH, }

Adopted 30th April, 1878.

Revised 9th July, 1897.

THE GROWTH OF AUSTRALIAN BANKING.

The following account of early banking and of banking laws in Australia, which appeared in the *Daily News* some years ago, will be interesting to many readers :—

"Down to 1816 the state of the currency in New South Wales was very unsatisfactory. It chiefly consisted of promissory notes, which any one could issue, but which were not a legal tender if for a less sum than half-a-crown, and the notes of the Commissary-General, which were similarly restricted as to amount. This paper circulation was generally current at a discount of fifty per cent. on its "face" value, but no one was allowed to refuse it, under penalties which were stated in the proclamation of the Governor; and there were other severe penalties for those who should "express the rate of exchange or relative value on any foreign bill or note." The tatterdemalion paper currency was supplemented by a few European and Indian gold and silver coins, the value of which was fixed by proclamation. Things being in this unsatisfactory condition, Governor Macquarie took steps for the formation of a bank of issue in Sydney, but he nearly foiled his own efforts at the beginning by appointing, as one of his first directors, a person to whom he had granted a conditional pardon, apparently for the purpose of placing him in this position. Governor Macquarie held strong opinions on the propriety, and indeed the necessity, of restoring to a position in the Colonial world those convicts who had shown themselves worthy of clemency, but others did not approve of this, and a good deal of indignation was expressed by the colleagues of this person on the board of the new bank. This difficulty having been got over, the Governor granted in 1816 a charter for seven years to the "President and Company of the Bank of New South Wales." The charter authorised a capital of £20,000, the issue of notes, the receipt of deposits, the making of advances—10 per cent. being the maximum rate of interest, and limited the liability of the shareholders to the amount of their shares. The capital was to be £20,000 in £200 shares, but only £12,600 was subscribed, and on this small sum the Bank of New South Wales originally began business. Mr. Bigge, whose official report on the condition of the colony we quote from, said in 1823 that the bills discounted by the bank in 1817, in the first year of its existence in business, amounted to £12,[illegible]93, in 1818 to £81,672, in 1819 to £107,256, and in 1820 to £19,498, and that in 1818 and 1819 there was a great deal of speculation in the colony, which the bank had been blamed for encouraging. The circulation in 1821 had only reached £5,902, which shows how limited the business of New South Wales still was. For the paper circulation of "respectable" private individuals had apparently ceased, and, with the exception of a short time in 1820, the Commissary-General had not issued any of his papers since the opening of the bank. The Charter authorised the issue of notes of values suited to the circumstances of all classes of the community; they might be for 2s. 6d., 5s., 10s., £1, or £5, which was comprehensive enough at the time. The metallic currency was then chiefly Spanish dollars, at that time and before and afterwards the most widely disseminated coin in the world, and they had the current value of 5s. But there were too few of them, and therefore the centre of them was cut out and circulated under the name of "dumps" at 1s. 3d. each, the remainder of the coin—called by way of a pun, "holy dollars"—still retaining its currency value of 5s., and these valuations continued after 1821, when £10,000 worth of the coins were imported from Madras. A considerable part of the business of the Bank of New South Wales in its early years consisted in discounting or advancing against the bills given by the Commissary-General for his purchases of grain and other stores on account of the Government. The country people took these bills to the bank, which either discounted them or advanced a portion of their value, and they were at all times exchangeable for bills on Her Majesty's Treasury. Indeed, they formed almost the only means of remitting money to England at the time, and until the banks began to value exchange, which was not for over ten years afterwards. In 1823, Mr. Bigge tells us, the population of New South Wales was 23,939 persons, but enterprise, colonisation, and trade were increasing, and in or about 1825 the ill-fated Bank of Australia was established in the colony.

"The attention of capitalists at home was particularly directed to the Australian colonies between 1830 and 1840, and in 1832 the Bank of Australasia was formed in London, and four years later it received a Royal Charter, when its capital was increased to £200,000. At the commencement of its business in the Colonies it acquired a small concern in Tasmania called the Bank of Cornwall. The Union was formed in 1837, and at once took over the business of the Tamar Bank of Launceston, assuming its liabilities "proportionate to the guaranteed assets handed over." It was incorporated in 1880. Its capital was partly raised in the Colonies, and it shows how limited its business was at first and that of its principal English competitor, that the amount paid up was only

£143,972 in 1839. But in the following year it was raised to £373,337, and was increased yearly until 1845, when it was £820,000, by which time the Bank of Australasia had a paid-up capital of £900,000. Both banks then worked on their capital and not on their deposits, for at the tenth annual meeting of the Bank of Australasia the deposits were given as £478,146, and in 1845 the Union had no deposits in England, but it had somewhere about £200,000 in the Colonies. At this time the liabilities of the Union to the public, of all kinds, were only £114,476, of which £78,430 were bills payable. The Royal Bank of Australia was also established in this country, but it never held a good position, and eventually came to a disastrous end. In 1836 an Act of Parliament was passed, authorising the colonisation of South Australia by a company of well known persons, and free from the taint of convict labor, and in the same year the South Australian Banking Company was founded. It began business in the year 1837, and continued until about 1841, when the Government declined to give it a charter on account of the nature of its operations. It seems then to have been more of a land and advance company than a bank. But having amended its ways in this respect, it obtained a charter in 1847 as the Bank of South Australia; two years afterwards the Union Bank rejected its proposals for amalgamation—the same bank which took "some of it" over forty-three years afterwards.

"Australia was very prosperous in 1837, and this led to the establishment of banks in the colonies, and to wild speculation. The Commercial Bank of Sydney, which has been one of the most prosperous banks in the world, was founded in 1834, and a little later such local concerns as the Bank of Sydney, the Bank of Port Phillip, the Bank of Van Diemen's Land, the Derwent and the Colonial Banks of the same colony were established. The land and property boom increased between 1837 and 1841, by which time its force began to fail. Most people in New South Wales were in it, and Van Diemen's Land (Tasmania) sent a great deal of its capital to increase the mischief. Wealthy men in New South Wales borrowed money on their properties at 10 per cent. and upwards to enter upon speculations. Their example was generally followed, and extravagance in living became the rule. Sir George Gipps, the Governor, saw the fields near Melbourne strewn with empty champagne bottles in 1841. There were then 50,000 males in the colony, and the advances made by the banks were at the rate of £50 per head. Loans and bills were renewed by the banks at very high rates. The Governor called the attention of the Legislative Council to the state of affairs as disclosed in the returns of the seven banks then open in Sydney. These establishments had a total capital of £2,048,672; their deposits were £965,000; their circulation £199,125; their reserve in coin £488,000, and their discounts and advances £2,428,000. In 1842 the first Insolvency Act came into force in the colony, and 600 persons and firms took advantage of it, which was rightly regarded as ominous.

"In March, 1843, a firm in Sydney was known to be in difficulties; it had in fact scattered its resources all over the colony, and it owed the Bank of Australia £130,000, besides a further liability of £40,000 to £50,000. The alarm became general; it was said that the colony would be ruined if this house came down, and to save it the Bank of Australia agreed to advance £150,000. It had, however, no money of its own, and had to borrow this sum from the Bank of Australasia. The powers of the directors of the Bank of Australia to borrow this sum were contested by some of its shareholders, and, after two actions in Sydney and an appeal to London, the Bank of Australasia recovered £176,000 in 1848, to the great relief of its proprietors. The Bank of Australia suspended payment in 1843, with the Banks of Sydney and of Port Phillip, when the condition of the two former was found to be deplorable. The directors and officials had in several cases helped themselves largely to the funds of the banks. Affairs in the colony went from bad to worse in 1843; many people were ruined, and it was found practically impossible to extract calls from the unlucky shareholders of the Bank of Australia. The chief assets of that bank were land and household property, which had scarcely any market value at the time, and to realise these a method was proposed which would certainly not commend itself, at least in England at the present time. An Act was passed by the Legislative Council authorising the realisation of the assets of the bank by lottery, or, as it was called in the Act, by "lot." It passed the Council by a large majority, and amongst those who voted for it was Mr. Robert Lowe, afterwards Lord Sherbrooke, who "thought it should not be rejected under the circumstances." It was quite contrary to the law of England. The Governor, however, declined to ratify the Act, and it was referred to Lord Stanley, then Colonial Secretary, who negatived it. But a number of merchants in Sydney had taken up the plan in the meantime and carried it through before the law could be set in motion against them. This saved the unfortunate shareholders in the bank, and those who took shares in the lottery became possessed of houses and land, which soon became of value, for matters quickly mended in the colony. This improvement was greatly due to the establishment of tallow-making in 1843, by which sheep, which were then unsaleable, became of the value of from 6s. to 10s. a head."

[For another interesting account of some phases of Australian banking, see an article entitled "Fifty Years Banking Reminiscences," which appeared in the *Bankers' Magazine of Australasia* for February, 1900. See also Mr. Rusden's *History of Australia.*]

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