tion, this short-hand and privileged mode of assigning does not seem competent for carrying a protest which has been taken on the bill; or any other proceeding, for the purpose of obtaining diligence; or the diligence itself.[1] These seem to require a conveyance by assignation.

8. A collateral engagement may be undertaken by signing as indorser in circumstances which do not admit of a proper indorsement. Thus, no one can properly indorse who has no right to the bill. But the subscription as an indorser, with the intention of giving credit to the bill, is an effectual collateral undertaking.[2] See above, p. 400.

9. A blank indorsement makes a bill or note transferable by mere delivery. And it has this effect, notwithstanding subsequent indorsements in full. On these being cancelled, the full efficacy of the blank indorsement is restored;[3] so that it is a proper precaution to fill up all the preceding blank indorsations, to prevent accidents, in case of the bill being lost.

§ 3. OF THE PARTIES BY WHOM, AND AGAINST WHOSE ESTATES, A DEMAND MAY BE MADE ON BILLS AND NOTES.

A demand on bills or notes is commonly made effectual by means of summary diligence, or by ordinary action. But where the parties are bankrupt, the debt must be proved on the bankrupt estate, by producing the bill, and making affidavit to the debt.

Such demand or claim may, according to circumstances, be made by any of the several parties whose names appear on a bill or note: In real transactions, by the porteur or payee, by an indorsee, by the drawer, or by one paying for honour: In accommodation-bills, by the holder before payment, or for relief by the person who has paid for behoof of the person accommodated, in whatever character he may appear on the bill.

No one can be made liable as a party to the bill, unless his name or firm be on it.[4]

1. DEMAND ON BILLS AND NOTES IN REAL TRANSACTIONS.

1. DEMAND BY THE PAYEE.—The payee is the person in whose favour the draft is made; the proper original creditor in a bill of exchange or promissory-note. A bill may be drawn blank in the name of the payee, and afterwards effectually filled up by a bona fide holder with his own name.[5]

[1] FREER against RICHARDSON, 18th November 1806; 13. Fac. Coll. 579. (supra, p. 402. Note [9]). The Court took occasion to say, that the bill was carried by the indorsation, but not the protest. It came into competition with arrestments, and the indorsees were preferred.

[2] DON against WATT, 26th May 1812; 16. Fac. Coll. 647. Watt having bought goods from Don, gave his note for the price at seven months' credit. Watt's father signed his name, 'Thos. Watt,' on the back of the note, without any previous indorsation. He was held liable.

[3] SMITH against CLARKE, 1. Espin. Cases, 180. A bill was indorsed in blank. After some other indorsements it came to Jackson, who sent it to Muir and Atkinson, but did not indorse it. They discounted it with Smith, who struck out all the indorsements but the first, which continued in blank. Lord Kenyon held this good. See also CHATERS against BELL, 4. Esp. Rep. 129. See also 1. Camp. 175.

[4] TELFORD (Stirling Bank) against JAMES, WOOD and JAMES, 5th February 1822; 1. Shaw, 320. Arnot, general agent of James, Wood and James, drew a bill in his own name for the price of goods of theirs sold to Paterson; but their name was not on the bill. He discounted it with the Bank. He and Paterson failed, and the bank brought an action against James, Wood and James, as liable for Arnot their agent's act. They were held liable. But this was reversed in the House of Lords, May 1825.

[5] CRUCHLEY against CLARENCE, 2. Maule and Selwyn, 90. Clarence drew a bill of L. 200 in Jamaica on H. Man of London, leaving a blank for the payee's name. It was afterwards negociated in England by Vashon, who indorsed it to Cruchley for an old debt, and Cruchley filled up his own name in the

1. AGAINST THE ACCEPTOR, 1. A demand by summary diligence, or by action, may be made by the payee, or porteur of a bill or note, for the sum in the bill or note, with interest from the day of payment, (or, on a bill or note payable on demand, from the presentment), if the bill is due, but has not been protested; or also for the costs of protest, correspondence, and diligence occasioned by the dishonour of the bill if protested. 2. If the acceptor has become bankrupt, a claim may be made on his estate; either, if the term of payment of the bill be past, for the sum with interest, (limited in the case of sequestration to the date of the bankruptcy), or for the sum in the bill, with a rebate of interest if the term of payment be not yet arrived.

2. AGAINST THE DRAWER the claim of the payee is for the sum in the bill, with interest, costs, and damage. In order to give this remedy, the bill must be duly protested, and notice of dishonour given.

3. In the responsibility of these two parties, there has been some difference in respect to damages. The damages consist not merely of costs, to which both acceptor and drawer are clearly liable, but of the expense also of exchange, re-exchange, &c.; and this by 1681, c. 20. a bill-holder is entitled to recover.[1]

EXCHANGE is the difference in the value of money at the place where the bill is drawn and at the place of payment.

RE-EXCHANGE is a damage accruing from the dishonour of the bill, and the necessity of having recourse back on the place of drawing. In settling this claim in bankruptcy, the law of Scotland is not perplexed by many of the distinctions which the rejection of contingent debts occasions in England; but the matter in bankruptcy is on the same footing as between the parties in the ordinary case. Re-exchange may arise in two ways; by a redraft or bill drawn by the payee from the place of payment back upon the drawer; or by the accumulation of the exchange of the several countries through which the bill may have been negociated.

The former is the direct re-exchange which must necessarily be in contemplation of the drawer as the consequence of the dishonour of his bill. The evidence which grounds the claim is the protest against the acceptor, and all concerned, for non-payment, (or non-acceptance), and for all costs, damage, interest, exchange, and re-exchange; together with the new bill or redraft.[2] The bill or redraft is composed of the sum in the former bill, the commission or exchange, the foreign interest from the term of payment to the term of payment of the new bill, the costs of protest, correspondence, stamps, &c. and the exchange on the return.[3] This redraft is to be made directly on the place of the original draft, where there is

blank. Lord Ellenborough said, as the defendant (the drawer against whom action was brought) had chosen to send the bill into the world in this form, the world ought not to be deceived by him. The drawer, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill. The rest of the Court concurred.

[1] 1681, c. 20. In providing for summary diligence on the registered protest on non-acceptance or non-payment of foreign bills, from or to this realm, the effect is described, as 'for the whole sums contained 'in the bill, as well exchange as principal.' And further, it is declared leisom to the party charger to pursue for the exchange, if not contained in the said bills, with re-exchange, damage, interest, and all expenses, before the Judge Ordinary; or in the case of suspension, to eik the same to the charge at the discussing of the said suspension, to the effect the same may be liquidate, and decree given therefor, either against the party principal, or against him and his cautioners, as accords.

[2] It was farther necessary by the French mercantile ordonnance, (Ordon. de 1673, tit. 6. art. 4.), that proof should be shown of an actual exchange having taken place, by certificates of traders, bankers, agents, &c. to the fact of the loan having been made;—Jousse, Nouv. Com. p. 141. This continues to be required by the modern French commercial code;—Code de Commerce, l. 1. tit. 8. § 177. 186.

[3] The bill is accompanied by a note of those charges; and this note may (though not necessary) be certified by the banker or merchant who has transacted the matter. On a contest arising, evidence of the exchange, foreign interest, &c. &c. will determine the matter.

regular commercial intercourse rendering that practicable; otherwise it may be drawn in the next best or most direct practicable course; and the additional expense will form an effectual charge against the drawer, provided due notice of this has been given. But it is not necessary, in Britain, that there should have been money actually raised abroad by redraft. . It is sufficient that there is a course of exchange, direct or circuitous; and on the part of the bill-holder a liability to pay re-exchange:[1] The damage will be fixed by the course of exchange according to mercantile usage; and this either on the knowledge of special jurymen, or on evidence. It will be no answer to the claim of re-exchange, that the dishonour arose from inevitable accident, the order of the foreign government, &c. With all this the payee of the bill is held to have nothing to do.[2]

The rule is, that the drawer must answer to all the direct damage accruing from the dishonour of his bill; and this has been justly held, in England, to comprehend circuitous exchange, or the accumulation of the several exchanges in the fair return of the bill back through the several holders:[3] It has been contended against such responsibility, that the intermediate negociation is a fortuitous event, which the indorser could not foresee nor prevent.[4] But this cannot correctly be said of a mercantile document intended to circulate by indorsation, and serve the purpose of money. The drawer must be taken to have in contemplation all the loss which may arise in the fair course of negociation, either before or after acceptance. This remedy, however, must always be under the restraint of equity; and where there appears any manifest breach of equity in the negociation, redress will be given.[5]

[1] De Tastet against Baring, 11. East, 265. Two bills of exchange were drawn at London on Lisbon. They were indorsed at London to one who again indorsed them to Baring; and Baring at London indorsed them to De Tastet. He again indorsed to Trives and Company, who, at Lisbon, presented the bills to the person drawn on, who refused to pay; and so they were protested, and returned to De Tastet, as indorser. He did not appear to have paid any re-exchange, and counts were laid to cover the question as on his responsibility for it. The defence was grounded on the fact, that Lisbon was at the time blockaded by a British squadron, and no exchange existed between the two countries. On the other hand, one or two instances were shown of an exchange through the medium of other bills on Holland or America. Lord Ellenborough directed a verdict for the plaintiffs, if they had *paid* re-exchange, or were in mercantile dealing *liable* for it; reserving the question, whether in a state of hostility exchange could legally be demanded?

The jury was special, and in it were several very eminent merchants, whom Lord Ellenborough encouraged to take an active part in examining the witnesses, which they did, and gave verdict for the defendant, *i. e.* rejecting the claim of re-exchange. This proceeded on the ground, that the plaintiff, as indorser, was not liable for re-exchange, there being no course of exchange between the countries at the time.

[2] This determined in England in 1794, by the Court of Common Pleas, in Mellish against Simson, 2. Hy. Blackst. 378., where two bills of exchange were drawn by Simson on Boyd and Company in Paris, payable to the order of Mellish and Company. The bills came into the hands of Audroine at Paris, and Boyd and Company refused acceptance, but promised payment when due. Then the French Convention having passed a decree, prohibiting the payment of bills drawn from countries at war with France, the bills were not paid. The bills came back on Mellish and Company with a great accumulation of re-exchange, and they paid them. The defence, in an action by Mellish and Company against Simson, the drawer, was rested on the prohibition by the French government. Lord Chief-Justice Eyre and Mr Justice Buller, Heath, and Rooke, were of opinion, that the drawer's engagement was for payment at all events.

[3] In the case above cited of Mellish and Company against Simson, the bill drawn at Paris had been negociated through Holland; and, when dishonoured, it was returned from Paris to the Dutch indorser, with a re-exchange of L. 300, and from Holland to the English indorser, at another re-exchange of L. 8. 2. Hy. Blackstone, 378.

[4] Glen on Bills of Exchange, 240, 241.

[5] On this question, both of direct and circuitous re-exchange, the equitable considerations which ought to rule the responsibility of the parties are stated very fully by Dupuy de la Serra, L'Art des Lettres de Change, p. 110. The whole of the 15th chapter of that treatise is worthy of perusal. See also Ordon. 1673, tit. 6. Des Interets de Change et Rechange, with the 'Nouveau Commentaire' de M. Jousse, p. 134. et seq. See also Code de Commerce, liv. 1. tit. 8. § 13. De Rechange.

But it has been questioned, whether the acceptor's estate is liable to a claim for re-exchange? The foreign jurists seem to hold the claim good against the acceptor.[1] It is not a demand which naturally arises against the acceptor by the porteur, for his proper recourse is against the drawer. But as the drawer will, on answering that demand, have his claim against the acceptor, provided he have funds in his hands, for indemnification,[2] it does not appear that any bar would lie to a claim by the porteur against the acceptor's estate, in the case of the drawer becoming bankrupt; for it seems to be implied in the nature of the acceptor's engagement to this peculiar sort of instrument, that he is tacitly bound for the common mercantile damage arising from its dishonour. In England, however, there are cases denying to the bill-holder a claim for re-exchange against the acceptor, and restraining the remedy to a claim against the drawer.[3] And these will certainly deserve very great attention when such a question shall arise in Scotland.

4. The payee is entitled to recover on an accepted bill, though not signed by the drawer, the name of the creditor being in the bill.[4]

2. Demand by the Drawer.—The Drawer is the proper creditor in an inland bill between two parties. It sometimes happens that such bills are sent to the drawer accepted; and that they lie over without being signed by him either as drawer or indorser. If such a bill be found in the repositories of the drawer after his death, his representative may subscribe his own name, and claim the amount;[5] and it is said that new diligence may proceed on a bill so completed.[6]

The drawer, when obliged to indemnify the holder of the bill, has his remedy against the person drawn on. His claim is in the nature of damages; and will extend not only to the principal, interest, and expenses, but also to the exchange and re-exchange which he has been forced to pay on account of the refusal to accept, when the bill ought to have been accepted; or on account of the failure to pay, after having accepted. See above, p. 405. et seq.

3. Demand by Indorsees.—Strangers to the original transaction acquire the payee's right to insist for payment by means of indorsation, which confers a right to the contents of the bill, free from every exception, of which notice is not given at the time, or which at least is necessarily to be implied in the circumstances in which the indorsement is made.

1. Against the acceptor the indorsee has full right to enforce payment, without any previous notice, at whatever time he may make his demand, within the term of the sexen-

[1] Pothier says, 'L'accepteur est censé avoir accédé par son acceptation.' Tr. du Cont. de Change, No. 117. vol. ii. p. 142. Dupuy de la Serra, L'Art des Lettres de Change, c. 15. and 16.

[2] This in effect admitted in England. See 2. Brown's Chan. Cases, 599.

[3] Woolsley against Crawford, 1810, by Lord Ellenborough; 2. Campbell, 445. The bill was drawn in Quebec upon the defendant in England. It was indorsed in Canada by the payee, and was returned to Canada dishonoured, in consequence of which the payee was forced to pay L. 20 per cent of re-exchange, and L. 6 of interest. Lord Ellenborough said, You may as well state, that, by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder of the consequences. The acceptor's contract cannot be carried farther than to pay the sum specified in the bill, and interest, according to the legal rate of interest, when it is due.

Napier against Schneider, 12. East, 420. was a case of a bill from Scotland, on the defendant in England. The Court of King's Bench refused to refer it to the master to tax principal, interest, and costs, including re-exchange. The Court were clearly of opinion, that this could not be allowed against an acceptor in England, who, by his acceptance, only charges himself with a liability to pay according to the law of that country; and if he do not pay, the holder has his remedy against the drawer.

[4] Drummond against Drummond, 8th February 1785; 9. Fac. Coll. App. p. 11.

[5] See above, p. 391.

[6] Fair against Cranston, supra, p. 391. Note [2].

nial limitation; and any one who stands in the character of acceptor, is so far in less favourable circumstances than an indorser, that the bill-holder is not bound to any rules of negociation or notice.

2. Against the drawer, or any other previous indorser, the indorsee has claim for principal, interest, exchange, re-exchange, and costs. And it is not necessary for an indorsee to prove, in claiming against an indorser, that he has actually paid re-exchange. It is enough if he be liable for it. He is not, in mercantile practice, liable, if there be no course of exchange at the time.[1]

PRESENTMENT, PROTEST, AND NOTICE.

It is essential to the indorsee's demand against the drawer or previous indorsers,—1. That the bill or note shall have been duly presented for payment, and, in some cases, for acceptance; 2. That when dishonoured, a notarial protest shall have been taken of the non-payment or non-acceptance; and, 3. That notice shall have been given of the dishonour and claim of recourse. This is called, in Scottish law, 'the due negociation 'of the bill,' and proceeds on a contract, (implied in the receiving of the bill or note, and available to every person who on paying it would be entitled to an action), that the bill shall be presented in proper time; that no extra time shall be allowed for payment; and that notice shall, without delay, be given of the dishonour, and of the claim of recourse thence arising; otherwise, that the holder of the bill or note shall be held to renounce all claim of recourse, and to rest satisfied with the acceptor's obligation alone.[2]

I. PRESENTMENT OF BILLS is either for acceptance; or for payment; or for both.

1. PRESENTMENT FOR ACCEPTANCE.—The neglect to present a bill, null for want of the proper stamp, will not discharge the debt; though, if presented, the bill would have been paid, and the acceptor afterwards failed.[3]

Where the bill is unobjectionably drawn, it is to be observed,—

1. That a presentment for acceptance is not necessary where the bill is drawn at a day certain; nor is it a good answer to a demand against the drawer, or prior indorsers, that it was not presented till the day of payment arrived.[4]

2. That where the draft is within a limited time after sight, the recourse will be lost by a neglect to make presentment within a reasonable time.[5] What is a reasonable time will depend on the custom, with all the circumstances; as that the delay was occasioned by the draft being kept in circulation, &c. It has been doubted whether this be a proper jury question, or a point of law to be inferred by the Judge from the facts found by the jury;[6] and the matter seems still to be unsettled. The bill must be put in circulation, not locked up for any length of time.[7] But both a foreign and an inland bill may be put

[1] See above, DE TASTET against BARING, p. 406. Note [1].

[2] Bayley, 171, 172.

[3] WILSON against VYSAR, 4. Taunt. 288.

[4] Molloy, B. 2. c. 10. § 16.; Beawes, Lex Mercat. p. 454. § 18. 4th edition.
Bayley, 182.; Chitty, 206.; 1. Selwyn, N. P. 410.
JAMESON against GILLESPIE, 28th June 1748; Kilk. 87.
Proof of mercantile usage to this effect in the case of G. HAMILTON and Company. See below, p. 409. Note [2].

[5] See authorities in preceding Note.

[6] DARBISHIRE against PARKER, Dict. of Mr Justice Lawrence, 6. East, 2. FRY against HILL, 7. Taunt. 397. GOUPY, p. 409. Note [1].

[7] MUILMAN against D'EGUINO, 2. H. Blackstone, 565.

into circulation before acceptance, and kept in circulation without acceptance, as long as the convenience of the successive holders requires.[1]

3. That where the draft has been sent to an *agent* to be negociated; or where the payee is directed expressly to present it; the payee or agent must present it, otherwise be answerable for the debt.[2]

4. In presenting a draft for acceptance, (differently from presenting for payment), it may be left with the drawee for twenty-four hours, unless in the interim he either accept, or declare a resolution not to accept.[3]

5. That if the drawee cannot be found, the bill should be protested at the market-cross; and if there be two persons of the same name, and both refuse, there should be a protest against both.[4]

6. That in all cases, whether presentment for acceptance be necessary or not, if the draft has actually been presented without a protest and notice at the time, recourse is excluded.[5]

2. PRESENTMENT FOR PAYMENT.—Unless presentment is made on the day of payment; or, if there be no day, within a reasonable time after receipt of the bill; and by a person holding right to the bill, or entitled to give a legal receipt for the money;[6] and at the place where, by special appointment or implication, the money is to be paid; or to the proper debtor in the bill personally; there can be no legitimate protest, and the recourse is lost.

[1] GOUPY against HARDEN, Holt, 842. as to foreign bill. Here L.1000 was remitted to Paris from London, by bills on Portugal at thirty days' sight. The drawers were in great credit, and the bills were put in circulation unaccepted, and were in negociation in various parts of the Continent. They were in circulation for six months, at the end of which there was notice of the persons drawn upon having refused to accept the bills. The holders brought action against their own agents, who had, at their desire, procured the drafts, and in so doing had indorsed them. Answer,—1. That they indorsed only as agents. This held no defence; the indorsement being general. 2. That the bill had been neglected to be presented in due time. The Court of Common Pleas (Gibb, Ch. J.) held, that the bill having been put in circulation, there were no laches; 7. Taunt. 159.

FRY against HILL, 7. Taunt. 397. as to inland bill, where the same rule was sanctioned.

[2] BANK of SCOTLAND against G. HAMILTON and Co.; 16th January 1810. A draft for L. 780 on Bogle of Glasgow, discounted at the branch of the Bank of Scotland at Greenock, by Dunlop, the agent there, payable three days after date, was, in regular course, sent to G. Hamilton and Company, the bank agent at Glasgow, for negociation. G. Hamilton and Company did not present it for acceptance, (as it is not customary for porteurs of bills at dates so short to present them), but kept it by them till the day of payment should arrive, with a view to present it at once for acceptance and for payment. Before that day the drawers failed; and when, on the day of payment, the bill was presented, Bogle, the person drawn upon, refused to accept. It was not clear whether he would have accepted if the draft had been presented at first; but he had then no funds, and the practice had been to make provision for such drafts against the day of payment. The action was by the Bank of Scotland against the two agents, G. Hamilton and Company, the agent at Glasgow, and Dunlop, the agent at Greenock; and the point was to settle the responsibility between them. The Court held, that, *as agents*, Messrs G. Hamilton and Company were bound immediately to present the bill in question for acceptance; and that having failed to do so till the day of payment arrived, they were bound to relieve the Greenock agent. 15. Fac. Coll. 497. under the name of DUNLOP against G. HAMILTON and Company.

[3] 1. Lord Raymond, 281.

In the case of FALLS against PORTERFIELD, 17th June 1766, 4. Fac. Coll. 374. there is an example of undue delay in getting back a bill so left for acceptance. It was a bill drawn at three days after sight, and so indorsed to Messrs Falls, which they sent to the drawee for acceptance. He was not in town, and his clerk said he would be home soon, when he doubted not the draft would be accepted. It so lay for a fortnight, and it was at last protested. The Court found the indorsees had lost recourse.

If the drawee have lost a bill so left for acceptance, he ought to give a note for the amount, if he had intended to accept it: if not, protest should be taken as for non-acceptance.

[4] Forbes, Treatise on Bills, 120.

[5] BLESARD against HIRST, Burr. 2670. GOODALL against DOLLEY, 1. Term. Rep. 712. This expressly decided by Lord Ellenborough at Nisi Prius in ROSCOE against HARDY, 2. Camp. 459.; and by the Court of King's Bench, 12. East, 434.

[6] COORE against CALLAWAY, 1. Esp. Rep. 115.

And where the bill still remains with the porteur or indorsee, it must so be presented for payment, although acceptance may have been refused.[1] It is not enough to supersede the necessity of presentment, that the drawee has previously said he will probably not accept.[2]

It is important in this matter of presentment, to explain the doctrine respecting days of grace, and the various terms of payment at which bills may be drawn.

Days of Grace are a prolongation of the term of payment, (formerly by mere indulgence, now for a long time as matter of right), where a bill is drawn payable at a certain distance of time after date, or after sight. The number of those days differs in different countries; and the rule is according to the usage of the country where the bill is payable. In Britain, three days of grace are allowed, excluding the day on which the bill falls due.

Usance means the customary time at which bills are drawn between two countries. Between Britain and France, the usance is thirty days: with Hamburgh, a calendar month: with Leghorn, three calendar months; and so on. Double and treble usance is an extension of the term to double or treble the customary period: Half usance is a shortening of the time by one-half.

The time is to be reckoned exclusive of the day of the date, or presentment for acceptance. The days of grace are curtailed by the occurrence of Sunday or a holiday on the last: The bill is then payable on the second.

With these explanations the rules of presentment for payment are these:—

1. Day of Presentment.—A bill payable *on demand*, or without any mention of time, is paid on presentment; no days of grace are allowed, and, unless put into circulation, it must be presented for payment within a reasonable time.[3] It is still unsettled in England in this, as in the question of presentment for acceptance, (above, p. 408.), whether the question is of fact for the jury, or of law for the Judge, to direct that, in the circumstances, the delay has been reasonable, or otherwise.[4]

Where the bill is payable in the place of its date, the chief elements of a decision on what is reasonable will naturally be, *first*, The usage of the place; and, *secondly*, How far that usage ought to be controlled, if inconvenient or unjust, in a case where the least unnecessary delay may be fatal to the right of third parties, for whom the bill-holder is bound to act. The observation of Lord Ellenborough respecting this rule of mercantile law, is entitled to the greatest regard, namely, that it is always to be considered, whether, under the circumstances of the case, the bill has been presented with reasonable diligence; and the result of this in England seems to be, that a person receiving a bill or note has the whole of the next day (or, in the case of a banker, the banking hours of next day) to present it.[5]

[1] Pothier, No. 133.; Beawes, 460.

[2] Prideaux against Collier, 2. Starkie, 57.

[3] Bayley, 187.; Chitty, 345.

[4] See Chitty, p. 345, 346.; Bayley, 187.

[5] Rickford against Ridge, 1810; 2. Camp. 537. Ridge, on 13th June, got Rickford and Company, bankers at Aylesbury, to cash a check of Mingay, Nott and Company, of London, on Smith, Payne and Company, bankers, London. The check was not sent to London by the post, which set off at six in the evening, but by a coach at eight in the morning of the 14th. Rickford's correspondents, Praid and Company, got it between three and four afternoon of the 14th. They presented it for payment at eleven next morning the 15th, when the answer was, 'No effects.' Mingay, Nott and Company, paid till four o'clock, and then stopt; but no application was made to pay this check. Notice of dishonour was sent on 16th. It was proved to be the usage to send out checks and bills for payment only once a-day, generally before letters by post are delivered, and checks and bills by post lie till next day; and that had the check arrived by post of 14th, it would not have been presented before the 15th. The practice was allowed to be different east of St Paul's.

Lord Ellenborough,—The holder of a check is not bound to give notice of dishonour to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due

Where the bill is to be sent to another place for presentment, the rule is, that it must be sent by the post of the next day after receiving it.[1]

Where the bill is payable *at sight*, it does not seem to be settled whether days of grace are to be allowed or not. On the Continent, days of grace seem to be allowed:[2] In England, the mercantile usage seems at one time to have been otherwise, as established by the verdict of a special jury;[3] and so Beawes lays down the law:[4] But it is still considered as a point unsettled.[5]

Where the bill is payable a certain number of months, weeks, or days, *after date*, or *after sight*, the day of presentment for payment is the last of the days of grace, and a reasonable time before the expiration of that day.[6] The time is to be computed by calendar months, with a due attention to the difference of style in foreign bills; or by usances, if so the bill be drawn. If by days, the day on which the bill is dated is excluded; if by weeks, they are to be reduced to days, reckoning seven days for each week; and the days of grace are to be reckoned according to the number allowed by the law of the country where the bill is payable. Where the last day of grace falls on a Sunday or other holiday, the presentment must be on the second.[7]

2. Hour of Presentment.—The bill must be presented within a reasonable time before the expiration of the day on which it falls due. And if, by the known custom of the place,

diligence to the bankers on whom it is drawn, and gives notice of its dishonour to those only against whom he seeks his remedy. 'The question here is, 'Whether, if the check had arrived by post on the 14th, 'the bankers were bound to present it for payment the 'same day? This must be decided by the law-mer- 'chant. I cannot hear of any arbitrary distinction be- 'tween one part of the city and another. It is not 'competent to bankers to lay down one rule for the 'eastward of St Paul's, and another for the westward. 'They may as well fix upon St Peter's at Rome. It 'is always to be considered, whether, under the cir- 'cumstances of the case, the check has been presented 'with reasonable diligence. This is what the law- 'merchant requires. The rule, that the moment a 'check is received by the post, it should invariably be 'sent out for payment, would be most inconvenient 'and unreasonable. In Liverpool, and other great 'towns, different posts arrive at different hours; but it 'would be impossible to have clerks constantly ready 'to carry out all the bills and checks that may arrive 'in the course of the day; nor, if it were possible, is 'it requisite that, all other business being laid aside, 'parties should devote themselves to the presenting of 'checks. The rule to be adopted must be a rule of 'convenience; and it seems to me to be convenient 'and reasonable, that checks received in the course of 'one day should be presented the next. Is this prac- 'tice consistent with the law-merchant? It cannot 'alter it. Bankers would be kept in a continual fever 'if they were obliged to send out a check the moment 'it is paid in. The arrangement mentioned by the 'plaintiff's witnesses appears subservient to general 'convenience, and not contrary to the law-merchant, 'which merely requires checks to be presented with 'reasonable diligence.'

Williams against Smith, 1819; 2. Barn. and Ald. 496. Here, for precaution, Newbury country notes, received at Wantage, were sent in halves by Saturday and Sunday's post—received in London on Monday—not presented till Tuesday, when the Newbury Bank had failed. Held, that the receiver of the notes had till the day after to send them to London, and the London banker till the day after he received them (Tuesday) to present them.

See Robson against Bennett, 2. Taunt. 388.

[1] See the above cases of Rickford and of Williams, preceding note.

[2] Jousse, Com. sur l'Ord. 1763, p. 70. Pothier, No. 172. where he argues the point.

[3] Janson against Thomas, Bayley, 42.

[4] Lex Merc. 256.

[5] Bayley, 198. gives the rule absolutely for days of grace. Selwyn, N. P. 4. edit. 339.; Chitty, 343—345. The bias of authority seems to favour the indulgence of days of grace.

[6] Cruickshanks against Mitchel, 29th January 1751; Kilk. 89, 90. It once was doubted whether a bill is to be presented and protested till *after* the days of grace were expired; but decided that it must be *within* the days.

Confirmed, British Linen Company against Hepburn and Company, 19th May 1807, where the notary's clerk had presented the bill in due time; but the notary thinking it not lawful to make his instrument of protest but on a presentment by himself, which was not made till the day after the days of grace, the protest proceeding on that presentment was held bad.

[7] Tassel against Lewis, 2. Lord Raymond, 743.

Smith and Payne against Laing, Arthur and Company, 29th June 1786; 9. Fac. Coll. 434.

bills are payable only within limited hours, a presentment beyond those hours will not be sufficient.[1] If the bill is payable at a banker's, it must be presented within the hours at which in that place banks are open.[2] It has been held a sufficient presentment, though after bank hours, if a person is there to answer, and refuses.[3] Where the person drawn on is a common trader, much greater latitude is given.[4]

3. Place of Presentment.—Presentment at the place mentioned is *sufficient* to charge all the parties, and seems to be *necessary* for recourse against drawer and indorser. Whether it be also necessary to a demand against *the acceptor*, where loss has arisen by the neglect, has been much doubted. 1. If a place for payment be specified in the bill, it must be presented there;[5] and it has been held sufficient incorporation of this condition in the bill, that, the note being partly printed, the place of payment is printed as part of the note from the first.[6] 2. But where the place is only mentioned on the margin, or at the foot of the bill, this has been said to be a mere notice of the place in which the person drawn on may be found.[7] 3. Where the place is mentioned only in the acceptance, it was doubted whether presentment there was necessary, if there was not an absolute restriction 'and not elsewhere:' Some Judges holding such a condition to be acceded to when the acceptance so qualified was received; others, that such direction did not qualify the acceptance.[8] The latter was the general understanding of merchants. It is now settled

[1] Bayley, 180.

[2] Parker against Gordon, 7. East, 385. where a bill was not presented at a banker's, (being in a part of London where bankers shut at six o'clock), till after six, it was held bad by Lord Ellenborough. And the Court of King's Bench, on a motion for a new trial, held, that if a party take an acceptance payable at a banker's, he binds himself to present the bill during the banking hours. Lawrence and Le Blanc, however, said he was not *bound* to *take* such an acceptance.

See also Elford against Teed, 1. Maule and Selwyn, 28.

[3] Garnett against Woodcock, 1. Starkie, 475. Here a bill of L.670 in the hands of an indorsee, drawn on Woodcock of London, was accepted payable at Dennison and Company's, bankers. It was presented between seven and eight in the evening, and a boy answered, 'No orders!' The defence was on the want of due presentment, and Parker and Gordon's case was cited. Lord Ellenborough held it sufficient that a person was stationed there to answer, and that then there was no difference between a banker and a merchant. And the Court of King's Bench refused a new trial.

See Henry against Lee, 2. Chitty's Rep. 125.

[4] Barclay against Bayley, 2. Camp. 527. where a presentment at eight o'clock held reasonable in point of time. Jameson against Swinton, 2. Taunt. 224. Bancroft against Hall, Holt's Cases, 476. Morgan against Davison, 1. Starkie, 114.

[5] This is fixed by many cases: Sanderson against Bowes, 14. East, 500. Dickenson against Bowes, 16. East, 110. Roche against Campbell, 3. Camp. 247. Trecothick against Edwin, 1. Starkie, 468. Bayley, 174.

[6] Trecothick against Edwin, 1. Starkie, 468.

[7] In the case of a promissory-note, it seems to be settled that a memorandum at the foot does not qualify the contract, and that it is not necessary to prove presentment at the place there mentioned. Saunderson against Judge, 2. H. Blackst. 509. Price against Mitchell, 4. Camp. 200. Richards against Lord Milsington, Holt, 364.

See Exon against Russell, 4. Maule and Selwyn, 405. Hardy against Woodrooffe, 2. Starkie, 319.

[8] The doctrine of the King's Bench in favour of the latter agreement will be found in Fenton against Gouadry, 13. East, 459. Lyon against Saundies, 1. Camp. 423. Head against Sewell, Holt, 363. Huffan against Ellis, 3. Taunt. 415. Sebag against Abithol, 4. Maule and Selwyn, 462.; 1. Starkie, 79.

The opposite doctrine, as adopted in Common Pleas, will be found in Gammon against Schmoll, 5. Taunt. 344.; 1. Marshall, 80. Callaghan against Aylett, 2. Camp. 549.; 3. Taunt. 397.

The point was brought into the House of Lords, and the opinion of the whole Judges taken. The determination was, That the holder of a bill, accepted 'payable at a certain place,' without other words, must present the bill at that place, that being a condition of the acceptance. Rowe against Young, 2. Brod. and Bing. 165.; 2. Bligh, 391. But this was so contrary to general understanding, that by 1. and 2. Geo. IV. c. 78. the reverse was established as the rule. Rowe against Williams, Holt, 366.

See cases in preceding note. Ambrose against Hopwood, 2. Taunt. 61.

by statute :—1. That where the acceptance mentions a place of payment simply, presentment at that place is not a condition. And, 2. That where such place is mentioned restrictively, with the addition, 'only, and not elsewhere,' presentment there is a condition necessary for charging the acceptor.[1] 4. Where there is no place mentioned, the bill-holder must present to the person; or at his counting-house, during business hours; or at his dwelling-house, if not in trade.

But the acceptor will still be chargeable, if no loss in such cases has occurred from the neglect.[2]

4. Absence or Death of the Drawee, Acceptor, or Maker.—The holder must, in case of absence or removal, use all diligence to find out the residence of the drawee or acceptor of a bill, or maker of a note.[3] If not to be found, or dead, inquiry should be made after his representative, and the bill should be presented to him; and his refusal, if he shall refuse, protested, and notice given.[4] If he has absconded, and is not to be found, and has no house or place of trade, the bill may be considered as dishonoured.[5] Although bankrupt or insolvent, and his bank or shop shut, the bill must be presented.[6]

II. Protest of Bills and Notes.—Protest is a semi-judicial act; which, in Scotland, is performed by a notary-public before two witnesses, and evidenced by an instrument written on stamped paper; but which must, of course, in each country, be completed in the form, and by the officers which the law of that country requires.[7] The purpose and effect of it is,—1. To state the demand and the answer, in order to establish the fact of the acceptor's failure to accept, or to pay the bill; and, 2. To make a solemn assertion of the bill-holder's claim of recourse against the drawer and indorsers. The protest is, in Scottish law, the sole foundation of summary execution; and in other countries, as well as in Scotland, it is the proper ground of the action or claim of recourse, and cannot be dispensed with, or the want of it supplied by the testimony of witnesses, or oath of party.[8]

[1] 1. and 2. Geo. IV. c. 78. By this Act, 1. 'If' (after 1st August 1821) 'any person shall accept a 'bill of exchange payable at the house of a banker, 'or other place, without further expression in his ac- 'ceptance, such acceptance shall be deemed and taken 'to be, to all intents and purposes, a general accep- 'tance of such bill:' But, 2. 'If the acceptor shall in 'his acceptance express that he accepts the bill, pay- 'able at a banker's house, or other place, only, and 'not elsewhere, such acceptance shall be deemed and 'taken to be, to all intents and purposes, a qualified 'acceptance; and the acceptor shall not be liable to 'pay the said bill, except in default of payment when 'such payment shall have been first duly demanded at 'such banker's house, or other place.'

This statute seems to be applicable to Scotland as well as to England.

[2] Rhodes against Gent, 1821; 5. Barn. and Ald. p. 244.

[3] Collins against Butler, 2. Strange, 1087. Bateman against Joseph, 12. East, 433. Beveridge against Burgess, 3. Camp. 262. Browning against Kinnear, 1. Gow, 81.

[4] Molloy, b. 2. c. 10. § 34. Pothier, Tr. du Cont. de Change, No. 146. tom. ii. p. 154.

[5] Chitty, 213.

[6] Easdale against Sowerby, 11. East, 114. The general rule laid down by Lord Ellenborough, 'It is 'too late now to contend that the insolvency of the 'drawee or acceptor dispenses with the necessity of a 'demand for payment, or of notice of the dishonour;' and this has been referred to by Lord Chancellor Eldon as the settled rule, 11. Ves. 412. and 18. Ves. 21.

Howe against Bowes, 1813; 5. Taunton, 30.; where the Workington Bank having been shut, and having refused to pay their notes, this was held no excuse for not presenting.

In Scotland, although the decisions have sometimes been a little unsteady, the doctrine is settled so. Langley against Hog, 17th June 1748; Kilk. 80. Ferguson and Company against Belch, 17th June 1803; 13. Fac. Coll. 244. Calder against Lyall, 22d December 1808; 15. Fac. Coll. 66. See Thomson on Bills of Exchange, 470. Note [4].

[7] Dupuy de la Serra, p. 109. Pothier, No. 155.

[8] It is laid down by foreign jurists, that even an action brought against the acceptor, and a decree against him, would not supply the want of protest. Pothier, Contrat de Change, No. 136. p. 148. tom. ii.

It forms a necessary part of the proof to be produced, along with a claim in bankruptcy, against drawer or indorsers.

In England, a distinction seems to exist between foreign and inland bills at common law. The former was regulated by the custom of merchants, according to which a protest is the only way in which the drawer could be charged on default of the person drawn on: But inland bills, not being properly bills of exchange according to the law of merchants, but introduced in imitation of them, simple notice was held sufficient, without the solemnity of a protest, to charge the drawer on dishonour of his draft, or failure of the acceptor. But this greater facility, as at first sight it appears, proved a disadvantage; since, without protest, only the principal sum could be recovered. This was remedied by statute permitting protests on inland bills and promissory-notes to the effect of recovering principal, interest, and charges.[1] But in Scotland, no such distinction ever has existed. Inland, as well as foreign bills, have always been considered as in the same situation in this respect; a protest being with us an ordinary remedy for preserving rights entire.[2]

It is not necessary to specify in the protest that the bill was presented at the place of payment, provided it be said that the bill was duly protested.[3]

In the instrument of protest, the bill and indorsements, in full or in blank, must be transcribed verbatim as a preliminary to the instrument. The names of the witnesses must be mentioned, as ought also their designations. But the designations are not indispensable; nor do the witnesses sign the instrument.[4] The notary himself must, according to our practice, make the presentment, or be present; though in some places a different custom prevails. This was said in one Scottish case not to be required in London; and a presentment by the notary's clerk, with an instrument extended by the notary, was thought sufficient.[5] But it does not appear to be law in England more than here, that the presentment can be made by any one except the notary himself, who is trusted as holding the character of a public officer.[6]

It is no justification of the want of a protest, that the bill was lost; the protest is, in that case, to be taken on a copy, or on a general statement of the bill as lost.[7] Where, by contrary winds, the bill has not arrived in due time, or has been sent to a person whose death, absence, or sickness, has prevented the bill from being presented, it would appear that recourse will not be lost, provided a demand for payment be made, and notice sent as soon as possible.[8] Death, absence, or impossibility of finding the acceptor, drawee, or maker, will not justify the want of protest: It must be made against his heirs, or at his dwelling-house, or at the house where he last had his domicile. Bankruptcy is no justification of want of protest; at least not of want of notice. See below, p. 421.

[1] 9. and 10. William III. c. 17.; 3. and 4. Anne, c. 9.

[2] Ferguson and Company against Belch, 17th June 1803; 13. Fac. Coll. 244. It was observed on the Bench, 'That with us no distinction has ever been 'made relative to protesting between foreign and in-'land bills. In both the same rules hold, making it 'in all cases essential to protest upon the last day of 'grace, in case of non-payment.'

[3] Commercial Bank against Hannah, 24th February 1818; 19. Fac. Coll. 484.

[4] Inglis against M'Kie, 1697; Forbes on Bills, 118. These form an exception to the common rule, as being instruments juris gentium.

[5] Stevenson against Stewart and Lean, 14th November 1764; 3. Fac. Coll. 348.

[6] See Leftley against Mills, 4. Term. Rep. 175.; Chitty, 217.

[7] Pothier, Cont. de Change, No. 145. Dehers against Herriot, 1. Shower, 164. Here a first bill of exchange drawn on Dublin, had been sent and lost; and the second was not sent, lest it should also be lost; but an exact copy was sent. On a demand, the drawee refused, on account of an attachment made in his hands. The protest was made on the copy, and held good.

[8] Pothier, No. 154. Molloy, b. 2. c. 10. § 27.

As acceptance should be pure, the payee is not obliged to take a conditional acceptance, or an acceptance for a part only, or an acceptance at a protracted term: And, in that case, he must protest to preserve his recourse.[1] If a partial acceptance be taken, there cannot, without a protest for non-acceptance as to the residue, be any recourse to that extent.[2] If the holder take the acceptance, though conditional, it becomes absolute to all intents as soon as the condition is performed; and a neglect to give notice of the condition, will not, in that case, liberate the drawer and indorsers.[3] If the acceptance be partial, a neglect to give notice is available to discharge the responsibility only as to the residue unaccepted.[4]

The reason for refusal should be stated in the protest.

Protests for *non-acceptance* may validly be made by any one having the custody of the bill. Protest for *not-payment* is a disgrace where the bill has been accepted; and it can be taken only by the bill-holder, or one having authority from him.

Under the Stamp Laws, no more than one bill can be included under an instrument of protest.[5]

III. Of Intimation, or Notice of Dishonour.—Notice is the third indispensable requisite for recourse against the prior indorsers and the drawer. The omission of it imports a legal discharge of all but the person drawn on, or the acceptor of a bill, or maker of a note. This rule may now be held as absolute; although at one time the consideration of the purpose of the notice, namely, that the parties may take measures to secure themselves, so far prevailed, as to occasion a great fluctuation of opinion.[6]

Form of Notice.—No particular form is prescribed for notice. On the Continent it is much more strictly a 'denonciation de protêt.'[7] But notice must at least import, 1. That the bill (which should be minutely described and identified) was not accepted or not paid: 2. That it was thereupon protested: And, 3. That the bill-holder claims in recourse against the person to whom the notice is given, the sum in the bill, interest, costs, and re-exchange. The notice must be such as to enable the party not merely to conjecture, or from circumstances to collect, what the bill dishonoured was; but so minute and clear as to make it safe to proceed against the drawer or prior indorser for relief or security.[8]

The notice *ought* to be accompanied by a copy of the protest; but this seems not to be *necessary*, at least where the drawer is not abroad.[9] It must, however, be sent when demanded.

[1] 1. Stair, 11. § 7.

[2] Molloy, b. 2. c. 10. § 21.

[3] Bayley, 206.

[4] Ib. 206.

[5] Napier against Carson, 17th January 1824; 2. Shaw and Dunlop, 622. This was only the passing of a bill of suspension, but the Court was clear on the point.

[6] Littlejohn against Allen, 12th December 1746; Kilk. 76. See also Langley against Hog, supra, p. 413.; and Henderson against Duthie, 19th January 1799; 12. Fac. Coll. 341.

In England the course of the law has been similar. Chitty, 197–8.

[7] Pothier, No. 148.

[8] Johnston against Hog, 21st July 1747; Kilk. 79.; 1. Falc. 270.

[9] Cromwell against Hynson, 2. Espinasse Cases, 511.

Robins against Gibson, 1813; 1. Maule and Selwyn, 288.; there was a regular protest, and the drawer having arrived in England before the bill became due, a letter was sent to his house, stating that the bill was dishonoured, but not sending the protest or a copy of it. The Court of King's Bench held, that the drawer, having come to England from Buenos Ayres, where the bill was drawn, notice of dishonour, though not of the protest, was sufficient. Lord Ellenborough said, the defendant had due notice of the dishonour of the bill; and as the circumstances of parties alter, the rule respecting notice also changes according to the circumstances of the case. If the party is abroad, he cannot know of the fact of the bill having been pro-

It is not indispensable that the notice should be in writing, though that be the most common form of it. It is sufficient to give verbal notice, provided the evidence of such notice be clear.[1] In such verbal notice, the exhibiting of a written intimation sent to the giver of the notice, or of the bill noted, or of the instrument of protest, strengthens the evidence without altering the principle.[2] In England it is ruled, that if in sending verbal notice to a merchant's counting-house, there be no clerk to answer or take the intimation, it is not necessary to leave or send a written one; the abandoning or shutting of the shop being substantially a refusal to pay.[3] Neither is it necessary to seek out the dwelling-house.[4]

It is the usual practice to give notice in writing to the drawer and indorsers, residing in the same place with the holder of the bill, as well as to those at a distance. This appeared in the above case of Sir G. Colebrooke to be the usual practice in Scotland.[5] But the improvement of the post-office establishment affords now the best of all means of communication, and it is universally adopted. The rule has been sustained in England, that if notice is proved to have been put into the general or twopenny post, properly addressed, and in due time, it is sufficient, although said not to have been received.[6] So also it has been held in Scotland as to the general post;[7] and in Edinburgh, it would seem, that the penny post will, in the same way with the twopenny post in London, be available as a proper medium of intimation: It is generally used as such.

Where there is no post, the ordinary mode of conveyance is sufficient, it not being requisite that a special messenger should be sent with the notice, unless there happens to be no regular means of intercourse: Nor is it necessary, when there is a post, or carrier,

tested, except by having notice of the protest itself; but if he be at home, it is easy for him, by making inquiry, to ascertain the fact.

[1] GOLDSMITH against BLAND, 1800; Bayley, 224. Below, Note [3].

SYME against FERGUSON, 25th June 1813; 17. Fac. Coll. 406. See also DOUGLAS, HERON and Company, against ALEXANDER, 13th February 1781; 8. Fac. Coll. b. 59. STIRLING BANK against DUNCANSON'S Representatives, 20th February 1794; Bell's Cases, p. 111.

[2] Sir G. COLEBROOKE and Company against DOUGLAS, 18th July 1780; 8. Fac. Coll. 217.; affirmed in House of Lords 15th May 1781. A bill drawn from Glasgow on London was not accepted. Notice by letter was sent to Douglas, Heron and Company, the indorsers. Their cashier sent the letter to Brown, who had indorsed the bill to Douglas, Heron and Company; and Brown read the letter, or shewed it to the drawer, which fact he had noted on the cashier's letter. The question was, whether this was good notice to the drawer? The Court of Session, after inquiring into the practice of merchants, held that the notice, as evidenced by Brown's jotting on the letter, confirmed by his testimony, established a sufficient notice.

[3] GOLDSMITH against BLAND, cor. Lord Eldon at Guildhall, 1800; Bayley, 127. Here a clerk of the indorsee went to the indorser's counting-house, found it shut, and no one there; saw a servant girl, who said nobody was in the way; and he then went away without leaving a message. The notice was held sufficient.

HOWE against BOWES, 1812; 16. East, 113. CROSSE against SMITH, 1813; 1. Maule and Selwyn, 545.; where a clerk took a bill between ten and eleven in the morning to the counting-house of the indorsers, to give notice; knocked, and found nobody there; on his return met their attorney, and told him what he had done. Next day went in the same way without effect. Lord Ellenborough delivered the opinion of the Court. It was held, that from ten to eleven is a time during which a banking-house should be open, and some person there: that law does not require notice in writing to be left at the counting-house, or put into the post-office: that there was no one with whom to leave it in this case; and that a letter by post is only one mode of giving notice, and in the same place not the best: and that shutting up shop is substantially a refusal.

[4] CROSS against SMITH, 1. Maule and Sel. 545.

[5] See in this case (above, Note [2].) the report of Sir William Forbes and Company, and of Mansfield, Ramsay and Company.

[6] This held as to the *general* post. KUFH against WESTON, 3. Esp. Cases, 54. cor. Lord Kenyon, 1799.

Also held as to *twopenny post*. SCOTT against LIFFORD, 1808; 1. Camp. No. 246. and 9. East, 347.

[7] STEWART against WRIGHT and SCOTT, 13th December 1821; 1. Shaw and Ballantine, 232.

or packet, to take the opportunity of an irregular conveyance, which, though indirect, may bring the notice sooner.[1]

Proof of Notice is regulated by the ordinary rules of evidence according to the law of Scotland, except in one respect, namely, that the objection of interest will not exclude the proof by the marking or testimony of the cashier, or other proper officer of a bank, although he should happen to be a partner of the establishment.[2]

Time for Notice.—The time for notice is, by the law of Scotland, different in the case of Foreign and of Inland Bills.

1. In the case of Foreign bills, it is expressly declared by statute, 'that notification of 'dishonour is to be made within such time as is required by the usage and custom of 'merchants.'[3] In England, so far as any rule of law appears to be fixed, it would seem, —1. That to such of the parties as reside in the same place, the notice must be given at farthest by the expiration of the day following, but not necessarily on the day on which the dishonour is known; and if that be Sunday, it is the same as if the arrival were on Monday.[4] 2. That in successive notices, in the same circumstances, each should have a day to give notice;[5] and that a bill-holder, placing his bill with his banker to recover payment, in effect augments the number of persons from whom notice must pass by one; and in a question with the drawer and indorsers, time will accordingly be allowed.[6] 3. That to those who reside elsewhere, notice should be given by the next post, unless that should be so early after the dishonour as to make this impossible, or inconvenient, as a general rule in trade.[7] 4. That if the proper day of notice be a day of public

[1] Although in honour one may be bound to seize all opportunities, it may be otherwise in law: and so, to send notice by the first regular ship bound for the place to which it was to be sent, was held sufficient. Muilman against D'Eguino, 2. Hy. Blackst. 565.

[2] Colebrooke and Company against Douglas, 18th July 1780; 8. Fac. Coll. 217.

Douglas, Heron and Company, against Alexander, 13th February 1781; Fac. Coll.

Padon against Bank of Scotland, 10th July 1824; 3. Shaw and Dunlop, 250.

Stewart against Wright, supra, p. 416. Note [7].

[3] 12. Geo. III. c. 72. § 41.

[4] Bayley, 219. Smith against Mullet, 2. Camp. N. P. 208.

[5] See much valuable matter in Darbishire against Parker, 6. East, 12. The rule laid down since. Scott against Lifford, 9. East, 347. Langdale against Trimmer, 15. East, 291.

In Bray against Hadwen, 5. Maule and Sel. 68. a bill payable at a banker's in London on 14th July was presented that day about twelve o'clock, and dishonoured. It was returned with notice by post on 15th to Launceston. The letter reached Launceston on Sunday morning, 17th. On Monday, 18th, notice was sent by the bankers there to Bray, by whom the bill had been deposited with them, and Bray forwarded the notice to another indorser, who gave notice to Hadwen. Between the arrival and departure of the post at Launceston there are four hours. The banker there did not put in his letter till after the four hours were expired, by which it did not leave Launceston till next post, and was a day later of reaching Bray. The verdict was for the plaintiff. And on a motion for a new trial, Lord Ellenborough, delivering the opinion of the Court, said,—'It has been laid down, I believe since 'the case of Darbishire against Parker, as a rule of 'practice, that each party, into whose hands a dishon- 'oured bill may pass, should be allowed one entire day 'for the purpose of giving notice; (see Scott against 'Lifford, 9. East, 347.; and Langdale against Trim- 'mer, 15. East, 291.) A different rule would subject 'every party to the inconvenience of giving an account 'of all his other engagements, in order to prove that 'he could not reasonably be expected to send notice 'by the same day's post which brought it. This rule is, 'I believe, in conformity with what Marius states upon 'the subject of notice, and it has been uniformly acted 'upon at Guildhall, by this Court, for some time. It 'has, moreover, this advantage, that it excludes all 'discussion as to the particular occupations of the 'party on the day.'

Wright against Shawcross, 2. Barn. and Ald. 501. Notice received on Sunday of dishonour of a bill,—might have been communicated on Monday; but no notice was transmitted till Tuesday's post, in the evening. Held not bound to open the letter till Monday, nor to send notice till Tuesday.

[6] A banker is now a distinct holder, though he has the bill merely to receive for his customers. Robson against Burnet, 2. Taunt. 388. Langdale against Trimmer, 15. East, 291.

[7] Darbishire against Parker, 6. East, 10, 11.; Lawrence, J.

rest,[1] or of similar sanctity, according to the religion of the person bound to give notice, it will be sufficient on the following day.[2]

Probably these rules would be followed in Scotland, as grounded in sound discretion and mercantile usage. The same general rule is to be held as established, namely, that every delay of notice, which can fairly be ascribed to neglect or omission, and which is not justified by the circumstances of the case, will be fatal to the claim of the bill-holder.[3] Mr Erskine has laid down a rule, 'that the dishonour must be notified to the 'drawer or indorser within three posts at farthest:'[4] But this is not law;[5] and the Court has sanctioned the general doctrine already alluded to. In applying the doctrine, the Court has sustained the claim of recourse, where a post-letter had miscarried.[6]

2. INLAND bills and notes, both in England and in Scotland, are under the regulation of particular statutes. In Scotland, by 12. Geo. III. c. 72. § 41. (made perpetual), the rule is, that 'it shall be sufficient to preserve recourse, if notice is given of the disho-'nour within fourteen days after the protest is taken.' In England, also, in the case of inland bills and notes, fourteen days is the term within which protests for non-acceptance or non-payment are to be sent, or notice given of them.[7] But there is a most remarkable difference in the construction which has been put on those statutes in the two countries, grounded on the difference respecting protests, already explained, p. 414.

In England, prior to the statute of William and of Anne, the remedy on an inland bill or note was, not by protest, but simply by noting and reasonable notice; but this gave a demand for the *sum in the bill or note only*, not for the *interest or costs*. The Act of William first made it competent to protest inland bills, to the effect of giving a claim for damage, in which is included interest: This claim was given under the condition, *first*, Of a protest; and, *secondly*, Of notice of such protest within the fourteen days.[8] The remedy on the bill or note itself, for the sum contained in it, still remains on the original footing of reasonable notice;[9] the penalty for neglecting a protest being, that the person 'failing or neglecting is and shall be liable to *all costs, damages, and interest, which do* '*or shall accrue thereby*.'

In the Scottish Act there is very properly no distinction made between notice for the bill, and for the interest and costs. But in borrowing, as we appear to have done, from the

[1] SMITH against MULLET, supra, p. 417. Note [4]. TASSEL against LEWIS, 2. Lord Raymond, 743. where evidence given of custom of merchants.

[2] LINDO against UNSWORTH, 2. Camp. 602.; where a Jew was excused from giving notice on the day of the great Jewish festival, when Jews are prohibited from attending to any secular affairs.

[3] In the case of HODGSON and DONALDSON against BUSHBY, decided in the Court of Session 18th July 1782, 9. Fac. Coll. 88.; and affirmed in House of Lords, 12th May 1783; the indorser having left London, and gone to reside in Scotland, in which country the bill-holder was not acquainted, no notice was given for twenty-one days. It was held a sufficient justification, that, on leaving London, (the indorser's place of residence when he indorsed the bill), he left no notice where he might be found; and that the bill-holder made every inquiry after him.

[4] 3. Ersk. 2. § 35. He quotes 21st July 1747, JOHNSTON, as reported in Tinwald's MS. The case as reported by Kilkerran, 79., and by Falconer, vol. i. 270., contains no such point, but merely that for which I have already quoted it, supra, p. 415. Note [3].

[5] The rule has since been held as ill laid down by Erskine, and not law. CARRICK against HARPER, 23d May 1790; 10. Fac. Coll. 259.

[6] HENDERSON against DUTHIE, 19th January 1799; 12. Fac. Coll. 241. This was a very narrow case, there being something in the address not quite precise. But one principle seems to have influenced the decision, which ought not to have been admitted, viz. that the neglect is not a discharge of the claim of recourse, but the ground of a claim of damages; and here there was no damage, the makers of the note being bankrupt before the note fell due.

[7] 9. and 10. William III. c. 17.; 3. and 4. Anne, c. 9. § 4. How the period of fourteen days came to be fixed on, instead of taking the rule as it stood in bills of exchange, is not any where explained. But it is probable that this term in the Scottish statute was borrowed from the English.

[8] HARRIS against BENSON, 2. Strange, 910. LUMLEY against PALMER, Bayley, 121.

[9] See Bayley, Edit. Barnes, 123.; DARBISHIRE against PARKER, 6. East, 3. and numerous other cases.

English statute, no attention seems to have been paid to the peculiarity of that Act as qualified by the rule of common law; and fourteen days were taken as the term of notice to rule the whole claim of recourse, without observing, that, in England, that long term of notice was confined to the remedy for costs, damages, and interest. It is enacted,—1. That all inland bills and notes shall be protested, &c. otherwise there shall be *no recourse* against the drawers or indorsers: 2. That it shall be *sufficient to preserve the said recourse*, if notice is given of the dishonour within fourteen days. These words are too strong to be overcome but by the legislature: And it is heartily to be wished that a remedy were so applied; for while, in practice, the rule is generally understood to be the same as in England, and similar to that which regulates the notice on foreign bills, so that a drawer or indorser concludes the bill to be paid if he has no notice within the same short time as in foreign bills,—it has been decided under this statute, that notice on inland bills and promissory-notes at the distance of *twelve* days is sufficient.[1] It is so far happy, that in this question an English bill drawn on Scotland, or a bill from Scotland drawn on England, is held not to be inland;[2] so that the effect of the peculiar structure of the Act of 12. Geo. III. is strictly confined to Scotland.

Whether, according to the true construction of the words, 'if notice is given of the 'dishonour within fourteen days,' it is necessary that the notice shall have been actually *received*, or sufficient that it shall have been *dispatched?* has not yet been determined. The safe course undoubtedly is, to take care that the notice shall actually reach the party within the term: And there will naturally be a disposition judicially to enforce this as the true construction, considering how far the rule of the Act stretches beyond the utmost license of mercantile usage, and how reprehensible it must ever be to delay for a day that notice on which the safety of the party may depend. But, on the other hand, the words are precise enough, and may be thought rather to be pointed to the act of him from whom the notice is to proceed. There is a case now depending on this point, in which probably the rule of construction may be settled.

By whom Notice is to be given.—The notice of dishonour is to be given by the bill-holder; or by one who is empowered to act as his agent in that matter; or by one who has himself been called upon to answer for the bill, and who on doing so will have a claim of recourse. Information from a third party, not thus interested or entitled to give notice, or to act for the holder, is unavailing to preserve recourse to the proper party.[3]

[1] Baird against Belch, 9th July 1803; Mr Baron Hume's papers. A bill was drawn by M'Gregor and Company of Glasgow on John Hill of the same city for L.178, and was, after acceptance, indorsed to James Baird, also of Glasgow, and again by him indorsed to D. and T. Bryce of Glasgow, by whom it was discounted with Andrew Belch, a banker, and by him made over to J. Belch. The bill was due 21st October 1802. Verbal notice was given of the dishonour to D. and T. Bryce, but none whatever to the other indorsers, or to the drawer, till 3d November, when a written notice, put into the post-office by Belch on the 2d, reached Baird. Summary diligence was then raised against Baird; and in a suspension he pleaded the palpable, if not fraudulent, neglect to give notice for twelve days. The answer was grounded on the statute. Lord Cullen held Baird liable, and gave costs; and to this judgment the Court adhered.

See also Andrew against Adam, 2d June 1812; 16. Fac. Coll. 660.

[2] Ferguson and Company against Belch, 17th June 1803, 11. Fac. Coll. 244.; where a bill was drawn from England on Scotland. Reynolds against Syme, 4th February 1774; where the bill was drawn from Scotland upon England.

[3] In Tindal against Brown, 1. Term. Rep. 167., where the question turned chiefly on what was reasonable notice, there is a good deal of doctrine on the above-mentioned point also. Thus, Buller, J. says,—'The purpose of giving notice is to let the party know 'that *he is looked to for payment*, that he may have his 'remedy over by an early application;'—'and a notice 'from another person cannot be sufficient; it must be 'from the holder.' Ashhurst, J.—'Notice means 'something more than knowledge; because it is com-'petent to the holder to give credit to the maker '(or drawer);'—'the party ought to know whether 'the holder intends to give credit to the drawer, or to 'resort to him.'

In Barclay, ex parte, 7. Vesey, 597. Kemp drew two bills on Dearlow, which were afterwards indorsed by Clay to Barclay. They were dishonoured; and of this Clay gave notice to Kemp. A commission having been issued against Kemp, Barclay petitioned to be

But if notice has been given to one indorser, he may, even before paying the bill, give notice to the drawer or another indorser, that shall be available to the holder.[1]

To WHOM NOTICE IS TO BE GIVEN.—The rule is, that notice must be given to every one against whom the holder means to claim his recourse. In his selection of persons to be responsible to him, the holder is not restrained by any rule. He is not bound to give notice to the drawer, though it seems once to have been thought, that if he did not, he discharged the indorsers.[2] He may select the last indorser, who will, of course, be entitled to his remedy against the others; or he may restrict his demand to an intermediate indorser, by which, of course, he will discharge the subsequent indorsers,[3] and also the prior, including the drawer, if that intermediate indorser do not give notice.

It is an important question, how this rule is to be applied as to inland bills and notes in Scotland? If it is sufficient to give notice of the protest within fourteen days, the holder may on the fourteenth day make his demand on any indorser: How is that indorser to secure his relief against the other indorsers, including the drawer? The natural rule should be, that of reasonable notice to those against whom the indorser might choose to take recourse,[4] the statute ruling only the notice by the bill-holder: And yet it is much to be wished that the words of the Act were held strong enough to require, within the fourteen days, notice to all against whom recourse is to be preserved; and it would, in that case, seem to follow, that even against the last indorser recourse would be lost by such a delay as should discharge *his* recourse against the rest.

It is held in England, that notice to one of several partners, or joint drawers or indorsers, is notice to them all.[5] This will also be held sufficient in Scotland.

It is sufficient to give notice to a clerk in the counting-house of the drawer or indorser. But it would not seem to be sufficient to give notice to a clerk met in the street, or in any other place not appropriate to his master's business.

admitted to prove under it: the question was, whether the notice from Clay, and not from Barclay, was sufficient? Lord Eldon, Chancellor, held that the notice ought to have come from the holder, and dismissed the petition.

STEWART against KENNET, 1809; 2. Camp. 177. The notice must be by holder himself, or some one authorized by him, and not by a stranger.

BAKER against BIRCH, 3. Camp. 107. Here the acceptor went to the drawer a few days before the bill became due, and told him he could not pay it, and gave him five guineas, being all he could command, for that purpose. The drawer received the five guineas, and promised to take up the bill. The bill was not presented for payment till some days after it was due. There were two questions:—Whether the want of notice discharged the drawer? and whether he held the five guineas for the bill-holder? Lord Ellenborough was of opinion, 'that the defendant was discharged 'upon the bill for want of due notice, but that the 'plaintiff was entitled to recover the five guineas as 'money had and received to his use.'

This contradicts SHAW against CROFT, cor. Lord Kenyon, 1798.

But the matter seems to be thrown into doubt by an opinion of Lord Ellenborough in the case of ROSHER against KIERAN, 1814, 4. Camp. 87.; where Kieran drew a bill for L. 1000 on Rowcroft, which was accepted and indorsed to Rosher, but not paid when due. On the same day the acceptor wrote to the drawer that he had not paid the bill, and that it was in the hands of Rosher. 'Lord Ellenborough held this notice from 'the acceptor sufficient; and the plaintiff had a verdict.'

[1] JAMESON against SWINTON, 1810; 2. Taunton, 224. Here notice was given to Elsham, the last indorser, by the bill-holder; and Elsham gave notice to Swinton, from whom he had it. Mr Justice Lawrence was of opinion, that Elsham gave the notice soon enough to enable him to recover against Swinton; and that if Elsham might recover against Swinton, Jameson, to whom Elsham gave the bill, might also recover against Swinton.

[2] In BROMLEY against FRAZIER, 1. Strange, 441., this negatived in the case of a foreign bill. And in HEYLIN against ADAMSON, 2. Burrows, 669., it was negatived in the case of an inland bill.

These two reports deserve very attentive perusal, as laying down the law in the most satisfactory way, in all the three cases of bills of exchange, inland bills, and promissory-notes.

[3] HENDERSON against DUTHIE, 19th January 1799; 12. Fac. Coll. 241.

[4] CARRICK against HARPER, 23d May 1796; 10. Fac. Coll. 259. BATCHIN against ORR, June 1792; 3. Dict. 87.

[5] PORTHOUSE against PARKER, 1807; 1. Camp. 82. JONES against RADFORD, 1806; ib. 83. Note.

IV. Equivalents of Protest and Notice, and Waiving of Negociation.—1. The death, imprisonment, known insolvency, or bankruptcy of the acceptor, are not equivalent to notice of dishonour given to the drawer or indorser. This is settled in England by many cases.[1] In Scotland, some doubts seem once to have prevailed:[2] But a clear series of cases has established the necessity of notice.[3]

The bankruptcy or insolvency of the drawer is no excuse for not giving notice to him; or to the trustee, &c. on his estate.[4] In England, it once was otherwise held, (by Lord Thurlow); but it has been since settled, that notice must be given.[5]

Whatever infers knowledge at once of the dishonour and of the resolution to claim recourse, so as to entitle the indorser or drawer to take measures of precaution against the acceptor or others, would seem to be equivalent to notice,—as a meeting of the parties for arranging their responsibility.[6]

[1] Russell against Langstaffe, Doug. 497.; where this doctrine is in his presence stated to have been frequently ruled by Lord Mansfield, as many means may remain of obtaining payment by the assistance of friends or otherwise.

Esdaile against Sowerby, 11. East, 114.; where the indorser knew that the acceptor had no funds, and that the drawer, as well as acceptor, were insolvent. The Court were clear, that the insolvency of the drawer and acceptor, and the knowledge of it, did not dispense with the necessity of giving notice of the dishonour of the bill.

Nicholson against Gouthit, 2. H. Blackst. 609. This was a very strong case of knowledge of the acceptor's insolvency; and the Court were satisfied that the justice of the case was with the bill-holder. But instead of trying to reach the justice of the case, perhaps it is better, said the Chief-Justice, to adhere to a rule, however strict, than relax it. It sounds harsh that a known bankruptcy should not be equivalent to a demand or notice; but the rule is too strong to be dispensed with.

Ex parte Wilson, 11. Ves. 412.

Boulton against Stubbs, 18. Ves. 21. In these cases the Lord Chancellor held the rule to be settled.

[2] Case of Poor Irvine, 1791; Bell's Cases, 120. Here there was not merely private knowledge, but that sort of intercourse among the parties, which left it to be inferred that the indorser was aware, not merely of the dishonour, but of the holder looking to him for payment,—particularly there was a meeting of the parties, at which the acceptor made a partial payment. This case was not very fit for bringing out the question, and was not very carefully prepared.

[3] The first is a very clear case. Langley against Hog, 17th June 1748, Kilk. 80. This was a bill on London at forty-five days, indorsed by Hog; not protested till two days after the days of grace were out. The acceptor was bankrupt, and in the Gazette, some days before the bill fell due; and this was known to Hog, the indorser, so that he wrote to his correspondent to pay on protest for his honour. 'Found that no 'recourse lay, the bill not having been protested in 'due time.'

Ferguson and Company against Belch, 17th June 1803; 13. Fac. Coll. 244. This was a bill on London, accepted; but, before it was due, Risk the acceptor was a bankrupt. It was due on 3d June, not protested till 29th. Held that the bill not being duly negociated, there was no recourse.

Thomson, Still and Company, against M'Ruer, 20th January 1808, 15. Fac. Coll. 68. Note. This was an inland bill drawn by M'Ruer, and accepted by Fleming, and indorsed to Thomson, Still and Company. It was due 24th April, but no notice to drawer till 17th June. The acceptor had previously been imprisoned, and cited the drawer as one of his creditors in a cessio. This was offered to be proved by the drawer's oath; and the point was the relevancy of this fact, if proved. Lord Robertson held the private knowledge insufficient to supply the want of notice. The Court unanimously approved of this determination, and of the principle on which it proceeded.

Calder against Lyal, 22d December 1808; 15. Fac. Coll. 66. The bills here were drawn by Calder, accepted by Paterson, and indorsed to Petrie, and then to Lyal. Paterson was sequestrated 6th August; the bills due in September. On Paterson's bankruptcy, Lyal lodged money with his agent to retire the bills. They were dishonoured and protested, and notice given to Lyal, but none to Calder, the drawer, for seventeen days. Lyal demanded recourse against Calder. But the Court approved of the decision in Thomson, Still and Company's case, and held the rule to be without any exception but that of the case of accommodation-bills.

[4] The above cases may be taken generally to prove this point.

[5] Cook, B. L. p. 167, 168. Whitmarsh, p. 181, 182. Cullen, B. L. p. 100.

[6] Coulter against Martin, 21st June 1775, 7. Fac. Coll. 90.; where the drawer of a bill having pleaded want of due notice of the acceptor's failure, the Court held it a sufficient answer, that in a conveyance to trustees for his creditors, he had acknowledged the holder as a creditor for L. 518, which was admitted to comprehend the bill; and it was not regarded that by

2. The parties may, by anticipation, WAIVE the rules of negociation; or may discharge the objection afterwards; and this will be a good answer to the objection of want of protest or notice. Thus,—

(1.) If the drawer say to the holder before the bill falls due, that he has no regular residence, and that he will call and see whether the bill has been paid by the acceptor, it is a waiving of notice.[1] (2.) Payment of a part, after neglect known to the indorser,[2] or a promise to pay the whole, in full knowledge of the default,[3] will bar the exception of want of notice. But such payment or promise will not be sufficient, if made in ignorance,[4] or on the supposition of liability when truly not liable.[5] It would seem that the waiver must be express in the case of an indorser, although a drawer may impliedly waive his defence.[6]

Ignorance of the neglect to give notice, though it may entitle an indorser to recover from the bill-holder the money wrongfully paid, will not entitle him to demand recourse from the drawer or other prior indorser acquainted with the neglect.[7] But there may be a neglect which would be fatal to a claim of recourse by the person guilty of it, which yet will not affect an onerous indorsee. Thus, the holder of a bill drawn at a day certain is not required to present it for acceptance, (p. 408); but if he do present it, he must give notice, (p. 409). If such bill, however, have been, after such presentment, and without notice, indorsed to a stranger for value, he will not be liable to the objection of want of notice.[8] But where, from the bill itself, or the attendant circumstances, knowledge of the objection is necessarily to be inferred, it would be otherwise; as if there were a *noting* on the bill, or if the bill were past due.[9]

a clause of the deed it was stipulated, that this enumeration of the debts did not discharge objections. This decision may be doubted.

Something like this took place in Irvine's case, supra, p. 421. Note [2].

[1] PHIPSON against KNELLER, before Lord Ellenborough, 1815; 4. Camp. 285.; 1. Starkie, 116.

[2] VAUGHAN against FULLER, 2. Strange, 1246.; where a part having been paid, Lee, C. J. held it sufficient to supersede all proof of a demand.

So in HORFORD against WILSON, 1. Taunt. 12.

[3] HADDOCK against BURY, 7. East, 236. Note. WHITAKER against MORRIS, 1. Esp. Cases, 58. LUNDIE against ROBERTSON, 7. East, 231. WOOD against BROWN, 1. Starkie, 217. ROGERS against STEPHENS, 2. Term. Rep. 713. ANSON against BAILEY, Buller's N. P. 276. GIBBON against COGGAN, 2. Camp. 188. See also Bayley, 234.; Chitty, 301.

[4] Bayley, 272. Chitty, 307. STEVENS against LYNCH, 12. East, 38. HOPLEY against DUFRESNEY, 15. East, 276.

[5] BORRODALE against LOWE, 1811, 4. Taunton, 93.; where the indorser of a bill wrote, that he would not remit till he received the bill, and desired that it might be returned to a certain banker, who was an indorser subsequent to him; but afterwards, discovering that, in law, he was discharged, refused to pay. The Court of Common Pleas held, that this was no express promise, but a letter written under supposition that he was liable.

[6] A drawer never has any one to look to but the acceptor, and on him he may come at any distance of time; an indorser loses his recourse against the rest by delay.

[7] ROSCOE against HARDY, 12. East, 434.

[8] O'KEEFFE against DUNN, 1815; 6. Taunton, 305. The bill here was drawn by Dunn on Rickets at one month after date. Sinclair, the payee, presented it for acceptance, but it was refused; of which no notice was given. Sinclair then indorsed the bill to O'Keeffe, who presented it for acceptance; and it was again refused; when he took recourse in the regular way against the drawer. The defence was, discharge by laches of the payee. Lord Chief-Justice Gibbs, with Dallas, J., and Heath, J., were clearly of opinion, that a holder not being bound to present a bill for acceptance, and there being nothing on the face of an unaccepted bill to awaken a suspicion that it has been presented for acceptance, and refused, the indorsee was entitled to recover. Mr Justice Chambre dissented from this opinion: He founded on ROSCOE against HARDY, which the Chief-Justice explained.

[9] Lord Chief-Justice Gibbs said, in O'Keeffe's case, —'He who takes a bill, after it has arrived at matu-'rity, takes it subject to all the defences which could 'have been made by any previous holder; for the bill 'being unpaid, its date is notice to him sufficient to 'put him on inquiry: but if he takes the bill before it 'is due, he takes it not subject to the same infirmity 'of title; because he then takes it without notice of

What has now been laid down as to Presentment, Protest, and Notice, applies to the case of Bills for Value. Accommodation-Bills will be considered afterwards.

Before leaving this subject, there are two observations to which it may be useful to attend.

1. The holder of a bill may, at the time of its dishonour, be in possession of funds belonging to the acceptor: and the drawer and indorsers have a clear interest to insist that he shall apply those funds in extinction of the bill, before claiming recourse against them: The same interest arises to the creditors of the drawer and indorsers on their bankruptcy. Taking the simplest case of a sum of money in the hands of the holder of the bill on the day of payment, without any other debt between those parties, on which the bill-holder can claim right to apply the fund in security of other engagements; and supposing that no competing creditor has interfered with diligence to attach the fund; it would appear that the bill-holder would be bound to apply the monies in his hands in extinction of the bill.[1] But if the holder have other transactions with the acceptor, and is creditor on them, he seems to be entitled, by compensation, to secure himself, and to resist the demand of the drawer and indorsers to apply it for their relief.[2] And if, instead of a sum of money, the holder of the bill be only in possession of a security given on another account, but out of which he might himself derive relief, it does not appear that a drawer or indorser will be held entitled to an assignment of such security on paying the bill.[3]

'any suspicious circumstances that may break in upon 'his remedy against any former holder. This is the 'general law.'

[1] In CALDER and Company against LEITH BANK, 30th May 1816, Calder and Company had discounted with the Leith Bank a bill for L. 330, of which John Sibbald and Company were the acceptors. A month before the bill was due, John Sibbald and Company failed. At this time it was understood that John Sibbald and Company had funds in the Leith Bank, who were their bankers; and Calder and Company, in a letter to the bank, desired, that if such funds were in their hands, they should be applied in extinction of the bill. The bank did not acknowledge the existence of such funds, but alleged that the account was unsettled, and the result doubtful. Calder and Company suspended a charge on the bill. The Court, 'in re-'spect that it is not established that there are any 'funds in the hands of the chargers,' refused the bill of suspension. Even in these circumstances, where the balance, though not ascertained, might exist, the Judges were equally divided, and Lord Craigie was called on, as Lord Ordinary, to give his opinion. Had the balance been clear, and the fund unquestionable and free, the plea of Calder and Company would have been sustained. Session papers.

In COWAN and SONS against HURRY, 19th December 1816, 19. Fac. Coll. 241. a similar plea was urged by the *acceptor* of a bill, which was said to be for the drawer's accommodation. He insisted that the bank, who held a general security for the balance that might arise on the drawer's bank-account, were not entitled to payment from him or the acceptor, without assigning their mortgage, reserving their own interest in it. The late Lord RESTON passed the bill of suspension; but the Court altered the judgment, on the ground, 'that the suspending of a charge on an accepted bill 'by an onerous indorsee, upon a claim by the party 'paying it, for an assignation of a security for a gene-'ral balance held by the indorsee against another 'debtor in the bill, even a prior debtor, was without 'authority and precedent, and would destroy the cur-'rency of bills; and that this held more particularly in 'the present case, where the party demanding the 'assignation was ex facie of the bill the primary debt-'or, and proposed to establish by extrinsic evidence 'that another party to the bill was truly the primary 'debtor; that a charge on a bill by an onerous indor-'see could not be suspended on an allegation that it 'was accepted without value; that in a question of 'payment of a bill, nothing can be believed except 'what appears ex facie of it; and that any claims 'which the different obligants may have against each 'other, must be settled by a separate action afterwards.'

In the English case of CROSSE against SMITH, 1. Maule and Sel. 545., the same plea made one point in the case, but seems to have been rejected on two grounds:—1. That the banker had a right to set off the monies in striking the balance on his own transactions; and, 2. That at the bankruptcy of Tuke, the bill did not constitute an item in his banker's account.

[2] See CROSSE against SMITH, in the above Note.

[3] See the case of COWAN and SONS, in Note [1]. Mr Thomson has contended for an opposite result in these supposed cases, on the analogy of indefinite payment. But his argument is not so correctly deduced on this occasion as his reasoning generally is. Tr. on Bills of Exchange, 420—423.

2. If the holder of the bill happen to be indebted to any of the parties to the bill on another account, it may be of importance for him, on the supposition of the person to whom he is so indebted becoming a bankrupt, not to discount the bill; for if he be a debtor of that person on the bill at the time of his bankruptcy, he will, by compensation or set-off, be secure; whereas he may be deprived of this security if the bill be not in his possession at the time.[1]

DEMAND BY ONE ACCEPTING, OR PAYING ON PROTEST.—A friend or agent of any of the parties to a bill, may *accept* it supra protest, for their honour; and then he will be liable to all the parties in the bill, except to him for whose honour he has accepted: and, on paying under such protest, will have a good claim against the person for whom he has accepted, and against all who in the bill are responsible to him:[2] Or an accepted bill may, in the same way, be *paid* supra protest; and then the person paying will have his remedy against that person for whom he has so interposed, and against all who on the bill are responsible to that person.

The proofs of a claim by him who thus accepts and pays; or who, after due acceptance, pays supra protest, are, the protest, and act of honour, with the retired bill, and evidence of notice. The bill should be first protested before it is accepted or paid for honour of any of the parties; for, on the one hand, that is the sole check against officious, or fraudulent, or malicious interference for a sinister purpose; and, on the other, without protest, there can be no recourse against those responsible to him for whose honour the interference is.[3]

1. The drawee may refuse to accept simply, where he has no funds, and yet, after protest, accept for honour of the drawer, or of any one of the indorsers: Or a stranger to the bill may, after protest, accept for the honour of the drawer or any of the indorsers. In accepting for the drawer's honour, he will have his remedy only against the drawer, and will be responsible to all the other parties, as if the bill were regularly accepted. The use of acceptance supra protest, is to prevent the bill from going back with charges against the parties in the bill. Naturally, the acceptance is in honour of the drawer's order: But it may be made for any of the other parties, to the effect of the acceptor being liable to all to whom that party is responsible, and of preserving the remedy against that party, and those who are responsible to him; provided the acceptance is made specially for him, and notice given.[4]

2. In paying for honour, the bill should, in the same way, be protested first. The person so paying will have his remedy against him for whom he interposes, and against all on whom, had that person paid it, he would have had recourse.[5] But to give such claim there must not only be protest of dishonour, but notice given.[6] 3. The person on whom a bill is drawn, may have accepted on the faith of provision being made for the bill; and, if it be not made, he may suffer the bill to be protested on the day of payment, and then pay supra protest, to the effect of securing his recourse against the drawer.[7]

There is an exception to the rules of protest and notice in the case of a bill drawn on a person who has not effects of the drawer in his hands with which to answer the draft.

[1] Chitty, p. 182.

[2] See above, p. 401.

[3] Beawes, No. 53. Chitty, 312. 409. CARSTAIRS against PATON, 15th December 1703; Dalr. 51.

[4] Beawes, No. 89. Chitty, 310. et seq.

[5] Ex parte WACKERBATH, 5. Ves. 574.

[6] Chitty, 409.

[7] Beawes, § 52. Pothier, Tr. du Change, No. 114.

But this case it may be better to consider in the next Section, along with the case of accommodation-bills. See below, p. 427.

There is no exemption from those rules, although the bill is held only in security, or as a deposit.[1]

The bill-holder may enter his claim against all the parties who are liable on the bill; and from each he may claim the whole sum, taking care,—1. That he deduct in making such claim whatever he has already received from the estates of other obligants,[2] and whatever he is entitled to receive from dividends already declared;[3] and, 2. That he do not, on the whole, draw more than his full debt, but leave the excess for the relief of the other parties.

One who acquires a bill or note (whether originally a real, or only an accommodation-bill) for a smaller sum than that for which it is drawn, (as in pledge of a debt due to him to a less amount), may enter a claim to the full amount of the bill or note against each of the other parties, although he cannot *draw* on the whole more than the amount of the debt for which it was pledged;[4] but, on the estate of him who gave him the bill or note in security, he can enter his claim for nothing but the actual debt[5] for which the bill was pledged.

Remedy to the Bill-Holder beyond the Bill.—The question has been already considered, how far the indorsee of a bill which has been guaranteed by a separate letter, is entitled to the use of that guarantee, freed from any latent exceptions pleadable by the granter of the guarantee against him who originally held it.[6] But there is a prevailing notion among bankers, still more questionable perhaps, namely, that on discounting a bill, a banker is entitled to all the remedies extraneous to that instrument, which the drawer might have exercised as creditor under the contract out of which the bill originated. If a bill, for example, has been accepted by one who has ordered goods which ostensibly are for himself, but which turn out to be for the use of a joint adventure in which others are concerned, bankers hold, that by acquiring that bill they acquire also by implied contract a right of demand against all the joint adventurers. But this seems to be extremely questionable, and to involve considerations which deserve to be well weighed. The banker, in buying a bill, seems to be the purchaser merely of the remedies competent on that instrument; and although the drawer may have a remedy beyond this, and may assign it with the bill, or may even in equity be bound to communicate the benefit of it,

[1] See J. Murray against Grosset, 16th February 1762, as determined in the House of Lords, 17th March 1763.

Reid and Company against Coats, 21st February 1794; 3. Dict. 89.

[2] Cooke, B. L. 151. Whitmarsh, 179. See above.

[3] Ex parte Tod in Watson's bankruptcy, 1815; 2. Rose, 202. See as above.

This doctrine, however, may be open to question. If remedy lie against all the co-obligants, can it justly be said, that when I receive payment of a dividend from one of them, I take that dividend as a sum to be deducted from my claim on the co-obligants? May it not fairly be argued, that, by bankruptcy, the *obligation* is extinguished, and in its room comes an *assignation* to the bankrupt estates pro tanto? That one assignation is not extinguished in consequence of payment in part by arrears of another; the whole benefit derivable from each being necessary to extinguish the debt? Or, at least, it may be contended, that no payment, except from the estate of the principal or proper debtor, can operate as an extinction of the creditor's right.

[4] Cooke, B. L. 156, 157.

[5] Lord Chancellor Eldon, in Bloxam ex parte, said,—'I look upon it as settled, that you cannot hold 'the paper of the bankrupt, and prove beyond your 'actual debt upon it; but that you may have the paper 'of third persons, those persons being indebted to your 'debtor in more; and you may prove to the whole 'amount, not exceeding 20s. in the pound upon your 'original debt.' 6. Ves. 449.

[6] See above, p. 376.

the bill-holder should have no ground of action without assignment, in respect of the original contract of sale, any more than he would be liable to any latent exceptions on account of the quality of goods, which might enable the acceptor effectually to resist a demand by the drawer himself.

§ 2. DEMANDS ON ACCOMMODATION-BILLS AND NOTES.

Besides the proper mercantile use of bills and notes in transmitting money from one country to another; and in bringing into a discountable form the prices of goods sold on credit, so that the debt may be used as money; there is another purpose to which this form of obligation has been applied, namely, to supply traders, on occasion of sudden difficulties, or as the means of speculation, with money and commodities by the loan of credit. Bills and notes so used have been called ACCOMMODATION or WIND-BILLS. In this species of transaction, the person requiring the accommodation prevails with his friend to accept a note or bill for the sum to be raised, at such a date as a banker will discount; it being understood, that he for whose use the bill is intended, is to provide the means of paying it, or is himself to retire it. This bill is discounted, and produces money; and if he who receives the money provides for the due payment of the bill, the transaction is closed. This is done sometimes as a single transaction on the footing of mere friendship: it is sometimes done in consideration of a commission; and not unfrequently credit is thus supplied by means of a course of bills drawn and redrawn, the expense of which, in interest and commission, is enormous.[1]

But persons under the necessity of adopting this expedient, generally agree with some house which requires the same sort of accommodation, that they shall mutually draw on each other; or exchange acceptances; or even exchange the more dangerous instruments called skeleton bills. Sometimes it is necessary to have two or three houses engaged in the traffic; and the creation of fictitious firms, the use of feigned names, the careful avoidance of the same train of discounts, are the dangerous and discreditable expedients into which this ruinous practice leads the parties. This is not the place in which to discuss the question of policy, whether this trade in fictitious bills ought to be suppressed? and, if so, how far courts of law can exercise a wholesome control over it? The purpose of this Work is merely to state the law on the several points which may arise. But it is a subject of sincere regret with every one who considers this subject, that parties have ever been permitted to depart, in these accommodation transactions, from the character which they bear on the face of the bill, or to pretend to rights not strictly belonging to the place which, on the document, they profess to hold.

The obligations and the rights of parties to bills, are different in the case of accommodation-bills and in that of bills in real transactions.

1. In real bills the acceptor is the primary debtor, as holder of the drawer's funds, or indebted to him for money which, by his acceptance, he acknowledges: Each indorser also is debtor to the indorsee, by having received value from him for the indorsement of the original engagement of the acceptor, and is bound to guarantee that engagement for the indorser's indemnification; and the bill-holder is entitled to go back on the whole of the previous parties, who are, jointly and severally, responsible to him on the dishonour of the bill.

2. Accommodation-bills are either entirely so, or partially. So far as no money or other consideration passes, they are accommodation-bills: they become bills in real transactions

[1] This ruinous expedient was one chief cause of the fall of the Douglas Bank in Scotland in the year 1772. The expense of drawing and redrawing on London, and of the securities necessary to maintain this circulation, was so great as to exhaust the resources of the bank, and mainly to produce the failure.

from the moment that money is advanced upon them. As a bill is a mandate to pay money for the drawer, the effect of acceptance where there are no funds is, on payment by the acceptor, to raise a debt against the drawer. And so in regard to indorsation, each indorsation, where no money is given for it, is the creation of a debt against him for whose use it is intended, on the indorser paying the bill. The person for whose use a bill of this kind is made is the primary debtor, the others are sureties. Where they engage by concert, or in the knowledge of each other's accommodation to the same person, they are co-cautioners, in so far as concerns their reciprocal responsibility intra se. To the bill-holder, where he is not one of the accommodators, they are all responsible, jointly and severally, as if the bill had originated in a real transaction.

This difference in the nature of these two kinds of bills, deserves attention in several respects.

I. Rules as to Protest and Notice.—Accommodation-bills are not regulated by the same rules in this respect as onerous bills. The bill-holder, if an onerous bona fide holder, has not only all the advantages held by the indorsee of a real bill, but he may have the benefit also of not being bound to the same strictness of notice. Thus,

1. Where one has drawn a bill on a person not in possession of funds to answer it, and passed it as a real bill, he cannot defend himself, on the plea of neglect of protest or of notice, against the bill-holder's claim of recourse, in consequence of the refusal of the person drawn upon to accept. It will be an answer to that plea, that he necessarily was apprized of the dishonour, and required no notice, since he was by the instrument truly bound to pay it himself as primary debtor. This is settled law in England,[1] and rules the case of the dishonour both of an unaccepted draft, and even of an accepted bill: the only difference between these cases being, that the acceptance is prima facie evidence of effects, which the holder must redargue; whereas the onus probandi to show effects, seems to lie with the drawer, where acceptance has been refused.[2] This rule proceeds not on the ground, that in such a case the drawer does not suffer by want of notice: For it has been held, that where truly there were no effects, evidence cannot be offered to shew, that by want of notice damage has

[1] Bickerdike against Bollman, 1. Term. Rep. 405. The question here on a case reserved was,—whether a bill, having been drawn by a bankrupt in favour of the petitioning creditor, on a man who then, and from that time till the bill became due, was a creditor of the bankrupt; so much of the petitioning creditor's debt had, in consequence of his having failed to give notice of the dishonour, been discharged? Mr Justice Ashhurst says,—'It has never been disputed, that the want of 'notice to the drawer after the dishonour of the bill, is 'tantamount to payment to him. But that rule is not 'without exceptions; and, particularly, notice is not 'necessary to be given where the drawer has no effects 'in the hands of the drawee. Mr Justice Buller says, '—The law requires notice to be given for this reason, 'because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer's 'in his hands; and if the latter has notice that the bill 'is not accepted or not paid, he may withdraw them 'immediately. But if he has no effects in the other's 'hands, then he cannot be injured for want of notice.' And he proceeds to state a case where, at Guildhall, he had directed a full special jury in that way, who found accordingly. Besides laying down the doctrine thus, Mr Justice Buller puts it in another view, more in the way of special pleading:—'It has been truly argued, that 'the question is not whether an action could be main-'tained on the bill itself, but whether the want of notice 'extinguishes the debt; as to which the case is this:— 'A, not having any effects in C's hand, draws a bill of 'exchange for L. 100 on him in favour of B for value 'received. Now, if C does not accept, and B does 'not give notice to A, there is an end of the bill. Then 'how does the case stand? A has L. 100 of B's in his 'hand without any consideration, which, therefore, B 'may undoubtedly recover in an action for money had 'and received.' The case was decided in favour of the bill-holder; the Court being of opinion, that there was no sufficient neglect to discharge the petitioning creditor's debt; because here the drawer had no effects in the hands of the drawee, and could not, therefore, be injured, and is not entitled to any notice.

This followed as a precedent in Goodall against Dolley, 1. Term. Rep. 712. and in Legge against Thorpe, 12. East, 171. Rogers against Stevens, 2. Term. Rep. 713. See below, p. 428. Note [1].

[2] See Mr Justice Buller's note of the case of Tindal against Brown, 1. Term. Rep. 409. See below, page 429. Note [5].

occurred collaterally.[1] The doctrine has been placed on a different footing, namely, that the drawer of the bill, in drawing with previous knowledge that he has no effects in the hands of the person drawn on, and that the bill will be dishonoured, if not guilty of a fraud, at least takes an accommodation, which it requires no notice to inform him he must provide for.

2. But the bill-holder must run his risk of the defence, grounded on want of notice, being available, or otherwise; and so, wherever a drawer has good ground for drawing, he is held entitled to notice of dishonour; as otherwise he is exposed to a sudden and unexpected demand to pay a bill which he thought was provided for: Accordingly, where there were effects at the time of drawing, that has been held sufficient to entitle the drawer to notice, although the balance has afterwards shifted:[2] and it does not seem to be sufficient to discharge the necessity of giving notice, that the drawer *might* have known of the shifting of the balance. Where he does actually know, however, that there is no balance; as where, by an account rendered, he sees the balance against him; or where the balance, being in his favour, is paid over to him; it would appear that notice will not be necessary.[3] And where the drawer has effects in the hands of the person drawn on, although it turns out on the balance of accounts that the debt is against him, it has been held that he is entitled to notice, as he might in these circum-

[1] ROGERS against STEVENS, 2. Term. Rep. 713.; where a bill was drawn by Stevens from Newfoundland on Birbeck and Blake, in favour of Rogers, for value given to Calvert: acceptance was refused, and the bill was protested, but no notice sent to Stevens, and he on this grounded his defence. Lord Kenyon, at Guildhall, directed a verdict for Rogers, on the ground that the drawers had no effects. On a motion for new trial, and on the rule to show cause, Stevens farther stated, that, by want of notice, he had suffered damage; for Calvert and he had dealings from which he had right to draw on Calvert, and Calvert desired him to draw on Birbeck and Blake, his agents, instead of drawing on himself; and that believing, from having no notice, that this draft was honoured, he settled accounts with Calvert, gave him credit for the payment, and delivered up goods and effects of greater value than the amount of the bill. The new trial was refused. Mr Justice Ashhurst said,—'The case 'being now fully established, that notice of non-ac-'ceptance of a bill of exchange to the drawer is not 'necessary where the drawee has no effects belonging 'to the drawer in his hands, every person must be 'supposed to know the law.' And when the plaintiff 'found that the drawees of this bill had none of the 'defendant's effects in their hands, he knew that he 'was not bound by law to give notice of the non-'acceptance. He was not bound to take cognizance 'of any private transactions between the drawer and 'a third person, which did not appear on the face of 'the bill.'

[2] ORR against MAGINNIS, 1806, 7. East, 359.; where a bill was drawn by Maginnis, the captain of an African ship, on Mullier and Company, for stores furnished at Demerara. He had then effects in the hands of the drawee, (to what amount did not appear); but before they had notice of the bill, they paid him the balance which at settling stood on his account, and about two months afterwards the bill was presented, when they refused to accept. Afterwards it was presented for payment, but having yet no effects, the drawees refused it. The bill was noted, but not protested for non-acceptance. It was protested for non-payment. No notice of non-acceptance. Lord Ellenborough had at the trial directed a nonsuit for want of a protest for non-acceptance, and for want of notice of non-acceptance. He now, on a motion for a new trial, said, 'that the case of Bickerdike' (see p. 427. Note [1]) 'went on the ground, that the drawer had no 'effects in the hands of the drawee *at the time of the* '*bill drawn*; and the other cases followed on the same 'ground: but no case has gone the length of extend-'ing the exemption farther to cases where the drawee 'had effects of the drawer in his hands at the time of 'the bill drawn, though the balance might vary after-'wards, and be turned into the opposite scale: And 'I know it has been a subject of regret with the very 'learned person who was counsel for the plaintiffs in 'that case,' (Lord Chancellor Eldon), 'that the old 'rule requiring notice to be given in all cases to the 'drawer of the non-acceptance of his bill, was so far 'broken in upon. But I shall anxiously resist the far-'ther extension of the exemption. The case is diffe-'rent where there are no effects of the drawer in 'the hands of the drawee at the time; because the 'drawer must know that he is drawing on accommo-'dation: but if he have effects at the time, it would 'be very dangerous and inconvenient, merely on ac-'count of the shifting of a balance, to hold notice not 'to be necessary: it would be introducing a number 'of collateral issues, in every case upon a bill of ex-'change to examine how the account stood between 'the drawer and drawee, from the time the bill was 'drawn down to the time it was dishonoured.'

[3] See Lord Ellenborough's doctrine in BLACKHAN against DOREN, p. 429. Note [1].

stances expect that his bill would be accepted.[1] The doctrine appears to extend to all cases in which there was at the time good ground to look for acceptance.[2] Where the drawer, at any time between the time of drawing and the time of the bill falling due, has effects in the drawee's hands, he is entitled to notice.[3]

3. In Scotland, recourse is not lost by the omission of protest and notice, if the person drawn on had no effects of the drawer in his hands.[4] No case has occurred to bring out the question, which has been decided in England, as already stated above, namely, whether the exemption from the necessity of giving notice is to be extended to the case of effects in the drawee's hands at the date of drawing, where those effects have been withdrawn before the bill is presented? But the true case for the application of the rule, that no notice is necessary where there are no effects, is that of a proper accommodation-bill. Accordingly, where the bill is drawn for the accommodation of the drawer, and he is to provide for it, no notice to the drawer is requisite.[5] Where, however, the accommodation is not for the drawer's behoof, but for the use of some of the other parties on the bill, (as the acceptor), the drawer has been held entitled to notice.[6]

[1] BLACKHAN against DOREN, 1810; 2. Camp. 503. Doren drew a bill in Jamaica on Hunter and Company of London, for L. 250. Acceptance was refused; and it was proved that, when the bill was presented, Hunter and Company had produce in their hands to the amount of L. 1500, but that he owed them L. 10,000, and that they had appropriated the effects towards satisfaction of this debt. In these circumstances, action was brought against Doren, as drawer, without notice or protest. Lord Ellenborough said,—'If a man draws 'upon a house with whom he has no account, he knows 'that the bill will not be accepted: he can suffer no 'injury from the want of notice of dishonour; and 'therefore he is not entitled to such notice. But the 'case is quite otherwise where the drawer has a fluc-'tuating balance in the hands of the drawee. Here 'notice is peculiarly requisite. Without this, how can 'the drawer know that credit has been refused to 'him, and that his bill has been dishonoured? It 'is said here, that the effects in the hands of the 'drawees were all appropriated to discharge their 'own debt; but that appropriation should appear by 'writing, and the defendant should be a party to it. 'I wish that notice had never been dispensed with, 'and then we should not have been troubled with in-'vestigating accounts between drawer and drawee. I 'certainly will not relax the rule still farther, which 'I should do if I were to hold that notice was un-'necessary in the present instance.' Plaintiff non-suited.

[2] See LEGGE against THORPE, 12. East, 171. particularly Lord Ellenborough, 176.

In RUCKER against HILLER, 3. Camp. 217. bills were drawn on consignments; but one cargo, against which the bill in question was drawn, was detained in Russia, and spoiled. Lord Ellenborough held notice necessary.

In ROBINS against GIBSON, ib. 334. the bill was drawn on a cargo, the proceeds of which were expected to be with the drawer. Lord Ellenborough held notice necessary.

[3] HAMMOND against DUFRESNE, 3. Camp. 145. THACKRAY against BLACKET, ib. 164.

[4] M'KENZIE against URQUHART, January 1731; 1. Dict. 100. LITTLEJOHN against ALLAN, 12th December 1746; Kilk. 76. See LANGLEY against HOG, 17th June 1748; Kilk. 80. A case was decided the other way, HART against GLASSFORD, 21st June 1755; 1. Fac. Coll. 227. But it is not held to be law. See next Note.

[5] M'ADAM against M'WILLIAM, 14th June 1787, Fac. Coll.; where M'William drew bills for his own accommodation, which were accepted, but not paid by the acceptor. No notice of the dishonour was given to the drawer, who pleaded neglect. I see from a note of Mr Ross, Dean of Faculty, that the Court was unanimous in holding that a wind-bill intended to be retired by the drawer, does not require strict negociation and notice of dishonour, in order to give recourse against the drawer; and that when the drawee has no effects of the drawer in his hands, recourse lies against the drawer without notice.

This confirmed, M'ALPINE and Company's Creditors against PARSONS, 21st January 1792; 10. Fac. Coll. 419.; and HILL against MENZIES and ANDERSON's Creditors, 5th June 1805; 13. Fac. Coll. 471.

See the English case, COLLOT against HAIGH, 3. Camp. 281.

It may be observed, however, that, in the case of M'Adam, Lord Braxfield appears to have laid down the proposition too broadly, in holding the burden of proof to be on the drawer; for in that case the bill had already been accepted; and, in these circumstances, Mr Justice Buller's doctrine seems to be correct. See above, p. 427. and Note [2].

[6] GOLDSMIDT and MOOXON against M'NICOL, STEWART and Company, 26th May 1814; 17. Fac. Coll. 623. M'Nicol, Stewart and Company of Glasgow, drew a bill for L. 1037 on Hendry and Company of London, at three months after date. It was indorsed

4. In accommodation-bills, concerted by the parties for the purpose of aiding or raising money for one of their number, the understanding is, that he for whose use the money is to be raised shall provide for the bill; and as each person engaged, with the exception of him for whose behoof they interpose, has an action or remedy in case he be made to pay the bill, he is entitled to notice.[1] In Scotland, as already stated, this has been extended to the drawer, who has been held entitled to notice where the accommodation was for behoof of another.[2]

5. But it does not appear that, in Scotland, this has ever been carried so far as to entitle the *acceptor* to notice, and freedom on the neglect of it. This doctrine was held in England by Lord Ellenborough, a great authority in mercantile law, who, following the principle already explained, that a draft on one who has no funds is a mandate, which, when answered, raises a debt directly against the drawer, ruled, that where a bill is within the knowledge of all the parties an accommodation-bill, the acceptor can only be considered as a surety for the drawer: that the case is the same as if the bill, being for a real debt, had been drawn by the acceptor, and accepted by the drawer; in which case time given to the acceptor would have discharged the drawer.[3] But this doctrine has not been approved

by the drawers; and being intended for the accommodation of Hendry and Company, they discounted it, and it came by indorsation to Goldsmidt and Company, who having neglected to give notice of dishonour, claimed against the drawers. They pleaded neglect. 'The Court laid down this principle, that, in general, 'every holder of a bill is bound to notify the dishonour 'of that bill to the drawer, and is only relieved from 'this necessity by proving, that the bill was for the 'accommodation of the *drawer*. But, in the present 'case, it was clear that the bill was for behoof of the '*acceptors*, who got the money for it; in which case 'the holders were not relieved from the necessity of 'due negociation.'

[1] In England, the Court of King's Bench held this doctrine in SMITH *v.* BECKET, 13. East, 187.; where Canning made a note for L. 200 in favour of Becket, who indorsed it. The note indorsed was given to Canning, who thereupon raised money with his banker. It was a note payable on demand. Canning became bankrupt, and then a demand was made on him for payment; and afterwards the banker demanded payment from the payee, who pleaded want of notice. Lord Ellenborough held notice necessary; and under his direction the plaintiff was nonsuited. A new trial was refused on two grounds:—1. That notice was necessary in this case, since the payee might have taken means of security against Canning. 2. That the banker had renewed his advance to Canning without communicating this to the payee.

This was confirmed in BROWN against MAFFEY, 15. East, 216.; where Whitmarsh drew a bill for L.500, which was accepted by Neaves: he then indorsed it to Fiander, who indorsed it to Maffey, and so on to Woods, who discounted the bill with Brown and Company, bankers. It was a bill drawn for the accommodation of Woods. Maffey was not proved to have known the bill to be drawn without value in the hand of the person drawn on. The Court held, that as Maffey, if he had received notice, would have had his remedy against Woods, the right of action was lost for want of notice.

[2] See above, GOLDSMIDT *v.* M'NICOL, STEWART and Company, p. 429. Note [6].

[3] LAXTON against PEAT, 1809; 2. Campbell, 185. Here Hunt drew a bill, which Peat, for Hunt's accommodation, accepted. Laxton having notice of the circumstances, gave money for the bill. When it fell due he got part-payment from Hunt, and gave him time for the remainder, without the knowledge of Peat, the acceptor. Peat pleaded that he was discharged. Lord Ellenborough at Guildhall said, This being an accommodation-bill within the knowledge of all the parties, the acceptor can be considered only as a surety for the drawer; and in the case of simple contracts the surety is discharged by time given without his concurrence to the principal. The case is exactly the same, he added, as if the bill had been drawn by Peat, and accepted by Hunt, in consideration of a debt due. According to many authorities, the defendant, Peat, on that supposition, would have been discharged by the time given to Hunt; and the principle of these authorities applies with equal strength to the facts actually given in evidence. Plaintiff nonsuited.

COLLOT against HAIGH, 3. Camp. 281. Dufton accepted a bill drawn by Haigh for Haigh's accommodation. It was indorsed to Collot, who, on its falling due, gave time to Dufton, on his lodging some security, which turned out bad. The action was against Haigh, the drawer. Lord Ellenborough held the drawer here not to be discharged. The drawer of an accommodation-bill must be considered as principal debtor, and the acceptor only in the light of a surety. The reason why notice of the dishonour of a bill must, in general, be given to the drawer of a bill, is, that he may relieve himself by withdrawing his effects from the hands of the acceptor; and he is discharged by time being given to the acceptor without his consent, because his remedy over against the acceptor may thus

of by other Judges, as by Sir James Mansfield, Chief-Justice, and Sir Vicary Gibbs in the Court of Common Pleas. They held, and the Court concurred, that the bill-holder who gives indulgence to the drawer, does not thereby discharge the acceptor.[1] And on the authority of this determination, and several others, the law has been laid down, that although the holder of an accommodation-bill receive a part from the drawer, and take a promise from him for payment of the rest at an enlarged time, this will not discharge the acceptor.[2]

Claims on Counter-accommodations, or Cross-paper.—The most difficult questions which arise out of accommodation-bills, are those in which, on the bankruptcy of persons who have dealt together in this traffic, there appear mutual acceptances, or cross-paper, as it is called. But this forms a part of the doctrine of ranking on insolvent estates, and will be considered afterwards in explaining the principles of ranking.

CHAPTER IV.

OF MUTUAL CONTRACTS.

In reviewing the general principles of Obligation and Contract, the constitution and great divisions of contracts have been explained. It is now necessary to consider the essence and effect of the several contracts, properly called Mutual Contracts.

But, before proceeding to this, it may be proper to observe some points of doctrine applicable generally to all such contracts.

1. General Effect of the Reciprocal Obligations of the Parties.—A mutual contract is the reciprocal undertaking or engagement of two or more persons, whereby something is to be given, or done, or abstained from, on one side, for a valuable consideration or counter-engagement, to give, or do, or abstain from, something on the other: the engagement on either side being so certain and precise, that each party may be able to enforce performance.

These opposite engagements, or counter-obligations, are, in some contracts, strictly

be materially affected. But where the bill is accepted merely for the accommodation of the drawer, he has no effects to withdraw, and no remedy to pursue when compelled to pay. He therefore suffers no injury, either by want of notice, or by time being given to the acceptor; and in an action on the bill he cannot defend himself on either of those grounds.

See also English against Darley, 2. Bos. and Pul. 61.

On these authorities this is laid down as law by Mr Barnes, in his edition of Mr Justice Bayley's Summary, p. 92. and 152. See also 1. Selwyn, N. P. 329.

[1] The doubt first appears in the case of Kerrison against Cooke, where Lord Chief-Justice Gibbs says Lord Ellenborough's doctrine has been much doubted. Fentum against Pocock, 1813, 5. Taunt 192.; where Lord Chief-Justice Mansfield directed a verdict on the principle, that giving time to the drawer is no discharge of the acceptor. The Court confirmed this doctrine. There was a distinction between this case and those before Lord Ellenborough, namely, that in the latter the bill was from the first known to be an accommodation-bill for the use of the drawer: in this case, that circumstance was unknown till the bill became due. But this was disregarded, and the case decided on the general doctrine. The engagement of an acceptor was held to be such as nothing but payment or release can discharge.

See 6. Dow, 237. for a remark of Lord Chancellor Eldon on this case.

[2] Chitty, 381, 382. Ellis against Gallindo, Doug. 250. Kerrison against Cooke, supra. Anderson against Cleveland, 13. East, 430. *note;* and cases in the above Note.

Mr Justice Bayley does not state the law so absolutely. He says, Lord Ellenborough's 'doctrine has 'been doubted; especially if the holder, when he took 'the bill, did not know that it was an accommodation 'acceptance; or if it were duly presented when due to 'the acceptor, and he promised payment.' Bayley, 167, 168.

reciprocal; in others, they differ in point of time. Taking the contract of sale as an example, the commodity and the price, reciprocally engaged for, may be exchanged with each other at completing the contract; in which case, the counter-engagements are cotemporaneous; and payment of the price or delivery of the subject, are conditions precedent of each other: The one party cannot demand performance, or the other payment, without tendering the counterpart.

But, instead of this, it may be settled by agreement between the parties, that for a commodity to be delivered now, a price shall be paid hereafter. Under such agreement, the delivery may be insisted for without any right on the part of the seller to hold the payment of the price as a precedent condition: Equity, however, being admitted to alter this rule, where there is a change of circumstances by the intervening insolvency of the buyer; in which case, the seller may insist for security before delivery.

These effects, proceeding from the reciprocal engagements of the parties, give rise to the doctrines of retention, and of stopping in transitu; the former of which shall be commented on hereafter; the latter having been already considered at some length.[1]

2. General Rules of Construction of Mutual Contracts.—The construction or interpretation of a contract, is the inference, by the act of reason, or the collecting from proper indications, of the true meaning of the parties. And the great object which the law in all cases has in contemplation, as furnishing the leading principle of the rules to be observed, is, that justice is to be done between the parties, by enforcing the performance of their agreement, according to the sense in which it was mutually understood and relied upon at the time of making it. Where the contract is in writing, the difficulty lies only in the construction of the words; where it is to be made out by parole testimony, that difficulty is augmented by the possible mistakes of the witnesses as to the words used by the parties.

1. Where words are of precise and unambiguous meaning, leading to no absurdity, that meaning is to be taken as conveying the true intention of the parties. But should there be manifest absurdity in the application of such meaning to the particular occasion, this will let in construction for discovering the true intention. And so, 1. If the words are manifestly inconsistent with the declared purpose and object of the contract, they will be rejected:[2] as if, in a contract of sale, the price of the thing sold should be acknowledged as received, while the obligation was *not* to deliver the commodity.[3] So where one is made in the deed to bind 'his heirs,' instead of binding himself and his heirs; the meaning of the words, though intelligible enough, being inconsistent with the nature of the agreement, it is rejected as imperfect, and the obvious meaning of the parties adopted.[4] 2. If words be omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context.[5] 3. If the words, taken in one sense, go to defeat the contract, while they are susceptible of another construction which will give effect to the design of the parties and not destroy it, the latter will be preferred.[6]

[1] See above, p. 205.

[2] In conventionibus, contrahentium voluntatem potius quam verba spectari placuit. Dig. Lib. 50. tit. 16. De Verb. Sign. l. 219.

[3] Tenison against Vaughan, before Lord Hardwicke; 2. Atk. Rep. 32.

[4] Lord Justice Clerk against Hamilton, 21st January 1708; 2. Fount. 421.

[5] Verba debent intelligi cum effectu ut res magis valeat quam pereat.

Cochran against Bryson, 17th November 1713; Forbes, 2. Here an action for L. 238 was grounded on a bond in which the obligation was for '238 Scots, 'with 50 pounds of penalty and annualrent.' According to the tenor of the bond, it was good for nothing. But the context and the penalty indicated clearly, that the word 'pounds' was omitted, and the bond was held good to sustain action for L. 238.

[6] On this principle there is an admirable judgment of Lord Mansfield's in the case of Pugh against the Duke of Leeds, Cowper, 714. where the question of construction arose upon a lease in exercise of a power

2. The plain, ordinary, and popular sense of the words, is to be preferred to the more unusual, etymological, and recondite meaning; or even to the literal and strictly grammatical construction of the words, where these last would lead to any inefficacy or inconsistency. Rules of Construction.

3. Where a peculiar meaning has been stamped upon words by the usage of that particular trade or place in which the contract occurs, such technical or peculiar meaning will prevail.[1] It is as if the parties, in framing their contract, had made use of a foreign language, which the Court is not bound to understand, but which, on evidence of its import, must be applied.[2] But the expression so made technical and appropriate, and the usage by which it has become so, must be so clear that the Court cannot entertain a doubt upon the subject.[3] Technical words are to be taken according to their approved and known use in the trade in which the contract is entered into; or to which it relates; unless they have manifestly been understood by the parties in another sense.

4. In construing a contract, the place in which it was made, or in which it is stipulated to be performed, is a most material consideration.[4] So, lawful interest, in a foreign deed, is construed to be the interest of the country where the obligation is contracted; or where it is to be enforced, if that be different.[5]

5. Previous or contemporaneous conversations or communings, and all that passes in the course of correspondence or negociation leading to the contract, are entirely superseded by a written agreement. The parties having agreed to reduce the terms of their contract to writing, the document is constituted as the only true and final exposition of their admissions and intentions. It is the only instrument of evidence which law will recognize as the interpreter of their intentions; and nothing which does not appear in the written agreement will be considered as a part of the contract.[6] This is a rule so well

which permitted a lease in *possession*, but not in *reversion*; and the difficulty turned on the expression in the lease, to hold '*from* the day of the date of the indenture,' Whether this was *inclusive* of the day, which would make a valid lease in possession? or *exclusive*, which would destroy it as a lease in reversion? The conclusion of Lord Mansfield's argument is this: 'The 'ground of the opinion and judgment which I now 'deliver is, that "from" may, in the vulgar use, and 'even in strict propriety of language, mean either inclusive or exclusive; that the parties necessarily understood and used it in that sense which made their 'deed effectual; that courts of justice are to construe 'the words of parties so as to effectuate their deeds, 'and not to destroy them; more especially where the 'words themselves may admit of either meaning.'

[1] In policies of insurance, a peculiar meaning has been fixed by usage on certain expressions; and Lord Ellenborough laid down the rule thus:—'The same 'rule of construction which applies to all other instruments, applies equally to this,—viz. that it is to be 'construed according to its sense and meaning, as collected, in the first place, from the terms used in it, 'which terms are themselves to be understood in their 'plain, ordinary, and popular sense, unless they have 'generally, in respect to the subject-matter, as by the 'known usage of trade or the like, acquired a peculiar 'sense distinct from the popular sense of the same 'words, or unless the context evidently points out 'that they must, in the particular instance, and in order 'to effectuate the immediate intention of the parties 'to that contract, be understood in some other special 'and peculiar sense.' ROBERTSON against FRENCH, 1803; 4. East, 135. et seq.

[2] As where the practice is to compress bales of cotton by machinery to improve their stowage, a contract to load a full and complete cargo of cotton implies, that it shall not be stowed in uncompressed bags. BENSON against SCHNEIDER; 7. Taunt. 272.

So a purchase of scarlet cuttings for the Chinese market, means without serge, &c. BRIDGE against WAIN, 1816; 1. Starkie, 504.

[3] Lord Eldon's observations on the limits to which the admission of a technical and peculiar meaning should be restrained, are extremely important, as delivered in ANDERSON against PITCHER, 1800, 2. Bos. and Pul. 164.; also, 3. Starkie on Evidence, p. 1036.

See the case of CUTTER against POWELL, 6. Term. Rep. 320., with respect to an admission of evidence of usage to explain and authorize mercantile contracts.

[4] See the Duke of FITZJAMES'S case, 1. Bos. and Pull. 141.

[5] WILKINSON against MONIES, 28th June 1821; 1. Shaw and Ball. 89.

[6] This rule is held, in England, on the broad ground so well stated by Lord Coke: 'It would be inconve-

Rules of Construction.

established in Scotland that, although daily admitted and stated from the Bench, there is not any distinct authority to which reference can be made.[1] But this rule admits of this exception, that where there has been any thing stated in the way of inducement or representation in the previous communings or correspondence, and by fraud or collusion the correct truth has been concealed, evidence of this may be admitted.[2]

6. All contracts made in general terms, in the ordinary course of trade, are presumed to incorporate the usage and custom of the trade to which they relate. The presumption is, that the parties know such usages, and do not intend to exclude them. But where there is a special stipulation in opposition to or inconsistent with the custom, that will prevail.[3]

7. Where there is an ambiguity which impedes the execution of the contract, it is first, if possible, to be resolved, on a review of the whole contract or instrument, aided by the admitted views of the parties; and if indispensable, parole evidence may be let in to clear it, consistently with the words.

8. If the words cannot be reconciled with any practicable or consistent interpretation, they are held as not made use of 'perinde sunt ac si scripta non essent.'

SECTION I.

OF THE CONTRACT OF SALE.[4]

SALE is distinguishable from BARTER or EXCHANGE, as being a contract for transferring property in consideration of a price in money, while the other is a contract for the exchange of two subjects or commodities. In the vulgar use of the word, Sale is understood to imply the transference of the commodity, and with this the legal meaning in England accords: But in the law of Scotland, sale is only a contract for transferring, not in itself

'nient that matters in writing, made by advice and on 'consideration, and which finally import the certain 'truth of the agreement of the parties, should be con- 'trolled by an averment of the parties, to be proved 'by the uncertain testimony of slippery memory; and 'it would be dangerous to purchasers, and all others 'in such cases, if such wide averments against matter 'in writing should be admitted.' 5. Coke's Rep. 26. In a modern case, the rule is thus laid down by Lord Chief-Justice Abbot: 'Where the whole matter passes 'in parole, all that passes may sometimes be taken to- 'gether, as forming parcel of the contract, though not 'always; because matter talked of at the commence- 'ment of a bargain may be excluded by the language 'used at its termination. But if the contract be in the 'end reduced to writing, nothing which is not found 'in the writing can be considered as a part of the con- 'tract.' 2. Barn. and Cress. 634. See also PICKERING against DOWSON, 4. Taunt. 779.

[1] See GORDON against HUGHES, 15th June 1815; Fac. Coll. See also MILLERS against MILLER, 1. Shaw's App. Cases, 317. See next Note.

[2] So in the case above cited, (p. 433. Note [6].) the Chief-Justice proceeds to say, 'A matter antecedent 'to and dehors the writing, may in some cases be re- 'ceived in evidence, as shewing the inducement to the 'contract; such as a representation of some particular 'quality or incident to the thing sold: But the buyer 'is not at liberty to shew such a representation, unless 'he can also shew that the seller, by some fraud, pre- 'vented him from discovering a fault which he, the 'seller, knew to exist.'

See WHITE against BALLANTYNE, House of Lords, 1. Shaw's App. Cases, 472.

[3] YEATS against PIM, 1815; Holt, 95.; 2. Marsh, 141.

HORNE against REDPATH, 10th March 1824; 2. Shaw and Dunlop, 791.; where local usage of the North, in selling fish, to use Dutch weight, was admitted to rule the contract.

See GORDON against ROBERTSON, 1. Wilson and Shaw's App. Cases, 115. 135.

[4] Since the former Edition of this Book, a very elaborate Treatise on the Contract of Sale has been published, by M. P. Brown, Esq. Advocate. In that work will be found all the learning on the subject which can be usefully applied in questions on this contract; with a discussion, at all times acute, though occasionally too minute and detailed, on the doctrines of sale in the Roman law and law of England, as well as in the Scottish law; and there are throughout the work many valuable disquisitions and distinctions relative to the analogies of English law, as fit to be applied or rejected in Scottish practice.

a transference. It is the titulus transferendi dominii: the modus, by which the transfer is accomplished, is tradition.

The completion of the transfer by tradition, in so far as a question may arise relative to the property of the thing sold, has already been considered. In this place, sale is to be viewed merely as a contract on which claims may arise to the parties as personal creditors of each other.

§ 1. GENERAL PRINCIPLES RELATIVE TO SALE.

Under this head may be considered, 1. The constitution of the contract of sale; 2. The completion of the contract; 3. The conditions implied in it; and, 4. The effect of insolvency.

I. CONSTITUTION OF THE CONTRACT OF SALE.—Sale is a consensual contract, completed by consent alone.[1] And this consent may be proved by writing; or by parole evidence, where the parties have not previously settled that the contract shall be in writing,[2] or where the law has not required, as in the case of land, or of ships,[3] that there shall be a written contract to transfer.

The contract may be concluded between the principals, or by a broker or brokers acting for them.

1. The parties themselves complete their contract on the principles already pointed out.[4] It may further be observed, however, relative to the constitution of sale by offer and acceptance, that although it is an implied condition of a mercantile offer that it shall be accepted at the time specified, and especially where an answer is required in course, yet if any delay has been occasioned by the offerer, he will not be freed by mere expiration of the time, taken as in reference to his original offer.[5]

Brokers.

2. In the great emporiums of trade, the negociation of sales is chiefly carried on by BROKERS. They have no concern with the custody of the goods, but merely settle the terms of the sale between the parties.[6]

Bought and sold Notes.

Where a broker is authorized by one man to sell, and by another to buy, an entry made in his book of a sale of the goods so authorized to be bought and sold, is a contract binding between the parties, when communicated to them by the broker giving to each a note of the bargain, called a BOUGHT and SOLD NOTE. In one case it was questioned, whether the broker had any more than authority to propose the terms, leaving to the parties a power of dissent, provided it was immediately exercised. It was ruled by Lord Ellenborough, that after the broker has entered the contract in his book, neither party can recede from it; that he is the agent for both parties; and that they are equally bound by his entry of the bargain, as if they had themselves signed the entry in the broker's book.[7] But this doctrine has since been so far qualified, that the bought and sold notes sent to the parties have been held to be the constitution of the bargain; so that if there be any incongruity between the notes sent, there is no bargain.[8]

[1] 1. Stair, 14. § 1. 3. Ersk. 3. § 2.

[2] 3. Ersk. 2. § 4.

[3] Above, p. 160.

[4] See above, p. 294. et seq.; and p. 326. as to offer and acceptance.

[5] ADAMS against LINDSELL, 1818, 1. Barn. and Ald. 681.; where the offer was wrong addressed, and so delayed in reaching its destination. Acceptance in course from the time of arrival, was held to bind the offerer, although, on the day he had expected the answer, he had sold the goods to another.

[6] See afterwards the distinction between Brokers and Factors.

[7] HEYMAN against NEALE, 2. Camp. 337.

[8] CUMMING against ROEBUCK. Cumming having bought at the East India sales 140 bags of coffee, re-

Bought and sold Notes.

It is an understood condition in such transactions, that if the name of the purchaser has not been communicated, the seller shall have a negative on the sale, where the price is not in ready money, but on credit; provided he intimate his rejection as soon as he has time to inquire into the buyer's solvency.[1] But this rule does not extend to the case of a factor, whose power is held to be absolute to sell on credit.[2]

If the broker, in communicating the names of the parties to each other, or in any other respect, has made an innocent mistake, which can involve no important consequences to the parties, it will not furnish a ground for departing from the contract. Although, therefore, a broker should send to the seller a sale-note of a bargain on credit with A and Co., when truly the contract was made with A, B and Co., the seller might object; yet it would not appear that he could so object if the bargain were for cash. The buyer seems entitled, as well as the seller, to object on account of the person with whom the contract is formed, where the sale is on credit, as a man may have insuperable objections to become the debtor of a particular person. The more correct way, perhaps, would be to make an exception in granting powers to the broker: But though this be not done, the power of objection will remain.[3]

II. Completion of the Contract.—This, in many questions, is a very important point. The general rule is, that final and conclusive consent completes the contract.[4] But it may

sold by his broker 120 bags to Roebuck. It appeared that the bought and sold notes differed; on which an objection was taken by Roebuck's counsel against Cumming's action; and Lord Chief-Justice Gibbs directed a nonsuit.—'If the broker (said he) delivered a different 'note of the contract to each party contracting, there 'is no valid contract. There is, I believe, a case (he 'continued) which states the entry in the broker's 'book to be the original contract, but it has since 'been contradicted. Each is bound by the note which 'the broker delivers; and if different notes are given to 'the parties, neither can understand the other.' Holt's Cases, 170.

[1] Hodgson against Davies, 2. Camp. 530. In this case Davies sold to Hodgson by a broker 40 hhds. of tobacco, 20 by bill at two months, and 20 by bill at four months. The broker, having the usual authority, wrote out the bought and sold notes, and sent a copy to each. Five days afterwards Davies disapproved of the sufficiency of Hodgson, and pleaded that he had not ratified the contract. A proof of usage was offered. Lord Ellenborough was at first inclined to hold the contract as concluded by the broker, and absolute, unless his authority was limited by writing, of which the buyer had notice. But the gentlemen of the special jury said, that unless the name of the purchaser was previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough allowed that this usage was reasonable and valid. But he clearly thought that the rejection must be intimated as soon as the seller had had time to inquire into the solvency of the purchaser. Five days seemed to him a longer period than the exigencies of commerce would permit. However, he left it to the jury to say, whether it was according to the usual commercial practice to reject a contract so long after it had been entered into. The jury, without any hesitation, found for the plaintiff.

[2] So laid down by Mr Justice Chambre in Houghton against Matthews, 3. Bos. and Pull. 489.

[3] In Mitchell against Lapage, Holt's N. P. Cases, 254. this doctrine was sanctioned by Lord Chief-Justice Gibbs, though the example of inconvenience stated, seems rather questionable. The sale-note sent to the buyer bore Tod, Mitchell and Company as the sellers; but the firm had been dissolved, and new persons were in the company. It was at the trial objected, that the bought and sold notes were in the name of the old firm, and that the defendant had a right to settle with whom he was to deal. This was assented to by the Chief-Justice, to the extent that the buyer 'cannot be 'prejudiced by the substitution. If the defendant could 'shew any inconvenience which he has sustained by 'the inaccuracy of the broker, it might be an answer 'to the present action. Metcalf, the broker, has mis-'described the names of his principals; and if by this 'mistake the defendant was induced to think that he 'had entered into a contract with one set of men, and 'not with another, and if, owing to the broker, he has 'been prejudiced or excluded from a set-off, it would 'be a good defence.'

[4] The language used by Mr Brown is not strictly correct, as applied to the law of Scotland, although, perhaps, it is more so in English law. He says, that 'although the general rule be, that sale is perfected 'by sole consent, yet this proposition is subject to 'certain exceptions and qualifications.' He then proceeds to state as exceptions, the sale of commodities by weight, number, or measure; the sale of immoveable property, or ships; and sales of which it is pars contractus that the agreement shall be reduced to writing. Brown on Sale, p. 32. These are not exceptions to the

be observed, 1. That the conclusive consent is indicated in different cases by very different proofs: So where it is pars contractus, or required by law, that writing shall pass between the parties to bind them, the writing alone indicates the final consent. 2. That the completion of the contract may take place to one effect, though not to another: So the final engagement to sell 500 quarters of wheat, will bind the seller, though not to the effect of altering the risk, the commodity not being specific and identified. 3. That the contract may be of the nature called executory in England, binding from the first, but the effect of the contract depending on a future act or event. While the contract is completed by consent alone, it is necessarily implied in the very nature of sale, that the parties shall be at one in respect to the price and to the subject. Consent conclusive.

Price.—The price, not elusory,[1] must be certain, or ascertainable by reference to some criterion by which it may be fixed. The maxim in the latter case is, Certum est quod certum reddi potest; a reference to the fiar prices of grain is enough,[2] or to the market prices on a particular day;[3] a reference to the award of a third person, and even a reference to one of the parties themselves, is effectual.[4] Price.

Subject.—1. If the subject is specific and certain in all respects, and the price fixed, the contract is complete the moment that the parties have expressed their full consent to the sale.[5] Subject.

2. If the subject be not specific, but consist in quantity or number, the sale, to certain effects, may be complete before the identification takes place. The seller may be constrained to fulfil his obligation of separating and delivering the quantity; the buyer may be forced to pay on the quantity being ascertained. But although the contract of sale be completed, it will not change the risk, if the subject to which the risk and the obligations of the parties are to attach be not identified: As where the price depends on the weight or measurement, and the exact quantity and price has not been ascertained.[6] The risk may be changed even of a fungible, where it is either specifically separated and distinguished; or where it lies in a particular place, and (although the precise extent is not known) is all sold at a fixed price for the whole.

rule as to the completion of the contract, though in English law they are correctly exceptions to the transmutation of property. The sale of commodities by weight, &c. is complete by consent alone, though the risk is not altered, nor a particular commodity transferred; and the suspension of the contract in the other cases, is only till consent shall be indicated by those conclusive proofs, to identify the commodity, which law or convention has made necessary.

[1] 3. Ersk. 3. § 4.

[2] Treasurer of Aberdeen against Gordon, 5th August 1760; 2. Fac. Coll. 445.; Morr. Supp. 4415.

[3] In commodities of which the price is accurately fixed by the market, perhaps a reference to that price is to be implied where the price is not otherwise fixed. So it was held in Leslie against Miller, 27th January 1714; 2. Dict. 356.; Morr. 14,197.

[4] Earl of Montrose against Scott, March 13. 1639, Durie, 883. Morr. 14,155. where the price of land referred to the buyer, was fixed by him, and held binding. But such award is subject to question, if unfairly made, 1. Stair, 14. § 1.; 3. Ersk. 3. § 4. See 2. Noodt, 388. Graham against Graham in House of Lords, 1. Shaw's App. Cases, 365.

[5] Dig. lib. 18. tit. 6. De Peric. et Comm. Rei venditæ, l. 8.

[6] Dig. lib. 18. tit. 1. De Contra. Empt. l. 35. § 5. In Zagury against Furnell, 2. Camp. 240. a purchase was made of 289 bales of goat-skins from Mogadore, containing five dozen in each bale, at 57s. 6d. per dozen. It appeared that, by the usage of trade, the seller of goat-skins thus by bales counts them over, that it may be seen whether each bale contains the number specified. But before they were so counted, a fire at the wharf destroyed them all. Lord Ellenborough held, that as an act remained to be done when the fire happened, there was no complete transfer, and the skins were at the seller's risk. The number of skins actually contained in the 289 bales being uncertain, the plaintiff had failed to shew that he was authorized, by the terms of the contract, to draw the bills which the buyer had refused to accept. The same case was contrived to be tried in Common Pleas also, when Mansfield, Ch.-J. held the same doctrine. 2. Camp. 242. Note.

Consent conclusive.

3. Where the commodity is sold with reference to the taste, or any other criterion, the sale is not complete till the goods have undergone that test.

4. Where the sale is executory, referring to some future act or event, its efficacy depends on that event: And it is either a conditional sale, or a combination of the contract of sale with that of locatio operarum. Of the former, the sale of goods to be imported is an example;[1] of the latter, the sale of goods to be manufactured, as a ship or chariot to be built.[2]

Conditions.

III. CONDITIONS IMPLIED OR EXPRESS.—The constitution or the annulling of a sale may depend on a compliance with certain conditions in the nature and state of the commodity; or in the time and manner of the delivery; or in the mode of payment. These conditions may be implied or express.

Implied.

IMPLIED CONDITIONS.—Of these conditions it is important to mark the rules with the exceptions. 1. As it is an essential condition in every sale, that the subject of it shall be sound and fit for the implied or avowed use intended, the buyer will be quit of the bargain (where he has not previously inspected, or had an opportunity of inspecting, the commodity), if this condition be not fulfilled; and this however innocent the seller may be, or however ignorant of the defect.[3] So if goods be commissioned to be sent abroad, and they are found not to correspond with the description in the order, or (where no special description is given) with that of merchantable goods; they may be returned, or damages recovered.[4] And, 2. The commodity must be fit for the particular purpose specified by the buyer; and if it be found on examination not to be so, it may be rejected and damages claimed; or, if used before the defect is discovered, an abatement may be demanded in the price. Thus, ale bought for a warm climate must be prepared so as to endure the heat of that climate;[5] and if seed be bought for sowing, and if, after being sown, it turns out unfit for that purpose, damages may be claimed.[6]

These are the rules of the law of Scotland, not only where there has been no opportunity of examining the commodity, but where the defect or vice is latent; whether

[1] See below, p. 441.

[2] See above, p. 182.

[3] 1. Stair, ix. 10, 11. 3. Ersk. 3. 10. RALSTON against ROBB, 9th July 1808; 14. Fac. Coll. 251.

[4] GARDINER against GRAY, 4. Camp. 144. Assumpsit on a sale of waste silk to be landed from the Continent; found on arrival to be unsaleable: Held by Lord Ellenborough, and verdict accordingly, that the purchaser was entitled to a saleable article, as an implied warranty in the sale.

LAING against FIDGEON, 1815, 6. Taunt. 108. There was an order for saddles for exportation. On arrival abroad they were found unsaleable without being restuffed and relined. Buyer had a verdict under Lord Chief-Justice Gibbs' direction; 4. Camp. 169.; and this confirmed, though it was objected, that the price was so low that a well-conditioned article could not be expected.

[5] BAIRD against PAGAN, 14th December 1765; 4. Fac. Coll. 245.; Sel. Dec. 309.; Morr. 14,240.; where ale for the West India market was unfitly prepared, and great part of it spoilt and lost. In an action for payment of the price, the buyer's defence was held good.

In England, in a similar case of beer intended for Gibraltar, the defect would have been held sufficient, had the delay not barred the plea. FISHER against SAMUDA, 1808; 1. Camp. 193. See below, p. 439. Note[3].

[6] ADAMSON against SMITH, 14th May 1799; 12. Fac. Coll. 280.; Morr. 14,244. Adamson purchased 50 bolls of rye-grass seed, expressing his intention to purchase only *perennial* seed. The seed sold was *annual*, though the seller bona fide believed it to be perennial. The seed was sown, and gave only one crop; and the buyer was found entitled to damages by Lord Meadowbank, whose judgment was affirmed by the Court.

DICKSON and Company against KINCAID, 15th December 1808; 15. Fac. Coll. 57. This was a curious case of the same sort. A person had unconsciously sold as good Swedish turnip-seed, what, although the true produce of Swedish turnip, had by the floral influence or impregnation from other plants growing in the neighbourhood, degenerated into hybrids, a mixt and bastard species. This seed was sold to a dealer, who having sold it again, was made liable in damages, and sought relief by an action of damages against the original seller. The Court of Session found him entitled to full indemnification.

known to the seller or unknown :[1] In this respect the law of Scotland differs from that of England.[2]

Responsibility for Quality.

But the exceptions to the seller's responsibility for the quality are important. And, 1. If the sale take place between the parties themselves, or their authorized agents; if the defect be open to observation, and if a full opportunity is given of examining the condition of the commodity; the rule is, caveat emptor: In vulgar phrase, the buyer's eye is his merchant; and he will not be allowed to avoid the contract, unless the seller is guilty of fraud, or the buyer have required a special warranty. 2. If the fault be latent, or if the buyer have no opportunity of examining the quality, or inspecting the commodity, before it is sent to him, or to its destination abroad; he must make his challenge instantly on discovering the defect; or, at least, without any unreasonable delay.[3] But even where the delay has been such as to bar the purchaser from succeeding in his entire rejection of the goods, he may be allowed relief by abatement on making out a strong case of defect.[4] In the question of delay, the time is to be reckoned from the discovery of the fault: From the time of delivery, where it is palpable: where latent, from the time of its becoming apparent. And although it will not deprive the buyer of his remedy, that the article has been put to use, or partly or irretrievably disposed of; this must have been done in bona fide, and in ignorance of the defect. If the buyer has been even doubtful

[1] 1. Stair, 10. § 15.; and 14. § 1.; 3. Ersk. 3. § 10.

[2] In England the original rule was, that a full price implies a warranty of a sound commodity: But it is now held to be settled, that a warranty of quality is not implied on the sale or exchange thereof. STEWART against WILKINS, Doug. 18. PARKINSON against LEE, 2. East, 321. LA NEUVILLE against NOURSE, 3. Camp. 351.

BLUETT against OSBORNE, 1. Starkie, 384. Here, one sold a bowsprit, which, at the time of sale, the buyer had an opportunity of inspecting, and which appeared perfectly sound; but on the vessel's arrival at Madeira, the bowsprit, on being cut up, was found to be rotten. The seller brought his action for the price. The defendant pleaded, that he was liable only for the real worth on the seller's implied warranty that the article should be sufficient. Lord Ellenborough said, —'A person who sells impliedly warrants that the 'thing sold shall answer the purpose for which it is 'bought. In this case the bowsprit was apparently 'good, and the defendant had an opportunity of in-'specting it. No fraud is complained of, but the bow-'sprit turned out to be defective upon cutting it up. 'I think the plaintiff is not liable on account of the 'subsequent failure. What he deserves here, is the 'apparent value of the article at the time of delivery. 'Supposing the price to have been paid on delivery, 'could it have been recovered back?' Verdict for the plaintiff, L.60. The Court refused a rule Nisi for a new trial.

See the Scottish case of REID against STEELE, 2d July 1824; 3. Shaw and Dunlop, 201. Where the fact was doubtful, whether the breaking of the mast arose from inherent defect, or from bad management. The loss was divided.

[3] 1. Stair, 10. § 15. 3. Ersk. 3. § 10. BRISBANE against MERCHANTS in Glasgow, 28th November 1684; 2. Dict. 357.; Mor. 12,328. MITCHEL against BISSET, 22d February 1694; 1. Fount. 613.; Mor. 14,236. STEVENSON against DALRYMPLE, 28th June 1808; 14. Fac. Coll. 233. where a delay of nearly a month in challenging kelp, and the having used a part, were held fatal to the objection.

See the English case of FISHER against SAMUDA, 1808, 1. Camp. 193. before Lord Ellenborough, where beer for Gibraltar was known in July to be bad, and no notice of objection till December. Lord Ellenborough directed the jury to presume that the buyer had assented to the quality.

In HOPKINS against APPLEBY, 1. Starkie, 477. the consumption of the article without objection, held to bar a defence against payment of the price.

See also GRONING against MENDHAM, 1816, 1. Starkie, 257. where Lord Ellenborough called on the defendant's counsel, before going into evidence of bad quality, to shew that he had offered to return the seed on the discovery of its inferiority; and no sufficient proof of this being shown, the plaintiff had a verdict.

BRUCE against M'KENZIE and BALFOUR, 21st January 1821; 1. Shaw and Ballantine, 77. Linseed for sowing arrived in December; a bill for the price in February; the seed turned out unfit for sowing: But this defence was held to be too late.

BENNOCH against M'KAIL, 27th January 1820; Fac. Coll. 89. Delay of 37 days in the rejection of a horse fatal.

COSSAR against Sir J. MARJORIBANKS, 8th June 1826; 4. Shaw and Dunlop, 685.

[4] In ROWE against OSBURN, 1. Starkie, 140. before Lord Ellenborough, the Jury, with permission of the Court, asked the witnesses how much the value of bacon, which was the subject of the sale, fell short of what had been contracted for; and gave a verdict, making abatement accordingly.

Responsibility for Quality.

of its quality, he will forfeit his remedy by disposing of it.[1] The buyer may reject the goods, but he is not entitled to convert the contract into one of another description, nor to dispose of the goods on any other than the original footing, without the assent of the seller.[2] Where goods are so rejected at a distance from the seller's residence, and where he has no agent, the buyer must act fairly for the seller's interest, on the principles of negotiorum gestio; but in general it may be laid down, that he is not safe to proceed without the control of a magistrate. 3. Where the commodity may be applicable to several uses, the buyer is not entitled, without special stipulation, to reject it, because it is not fit for one particular use.[3]

Usage, a Condition.

The usage of trade in general, or even local usage, may establish an implied condition essential to the subsistence of a sale; non-compliance with which may entitle the party to avoid the contract, or have relief. All contracts made in the ordinary course of trade, and without special provision, are presumed to incorporate the usage and custom of the trade to which they relate: The trade as exercised, and its usual practice known to the parties, are naturally understood to be within their intention in forming their bargain, and to be relied on in the execution of it. And so a sale-note, in simple terms, and which, taken by itself, would seem to import a ready money bargain, has the implied condition of the usual credit fixed in such sales by the usage of trade. This doctrine, however, even in its terms, implies two exceptions:—1. That where an express stipulation or warranty has been introduced, it suspends the usage.[4] 2. That where the usage is local, and unknown to one of the parties, it cannot affect the contract.

Express Conditions.

Express Condition.—Where the bargain expressly contains any essential condition, the non-performance of that condition voids the contract.

1. Express warranties are conditions of this kind.

2. If a merchant agree to sell a commodity, or answer an order, on the buyer paying cash, or sending his acceptance in course; the sale is incomplete,[5] though the goods be

[1] Baird against Aitken, 13th February 1788; 10. Fac. Coll. 33.; Mor. 14,243.

Parker against Palmer, 1821; 4. Barn. and Ald. 387. Sale of rice per sample. The rice did not correspond, but the buyer had allowed it to be put up for sale again, after he knew of the discrepancy; and was held, by taking his chance of profit at that sale, to have precluded himself from claiming redress.

[2] Ross against Taylor and Company, 31st January 1823; 2. Shaw and Dunlop, 137. Here oranges were rejected as under the contract of sale, but agreed to be taken for sale to the vendor's behoof. The defender held to account as agent.

Jaffray against Boag, 7th December 1824; 3. Shaw and Dunlop, 375. Here goods were sent; not approved of; an offer made to take them on certain terms; and, too rapidly proceeding on the inference of assent, the buyer broke bulk. Goods held to be accepted on the original condition.

[3] Seaton against Carmichael, 28th January 1680; 2. Stair, 749.; Mor. 14,234.

[4] Yeats against Pim, 1815; Holt's Cases, 95. This was a sale of 60 bales of bacon, *warranted prime singed bacon*. Part of the bacon (3 bales) was landed and opened, and no exceptions taken. A bill was drawn for the price, accepted and paid. About two months after the sale, a final examination took place, when the buyers rejected it as tainted. The buyers then brought their action for breach of contract. The defence was on an alleged custom in the trade, upon the sale of bacon, to examine it a few days after landing, if not imported at the time of sale; and at the time of inspection to reject or accept it, or claim an allowance for damage or difference of quality, otherwise to accept the bacon. Evidence of this custom was objected to where there was an express warranty. Mr Justice Heath directed a verdict for the plaintiffs. He held it competent to give evidence of acquiescence, that the buyers were guilty of gross negligence in not examining and rejecting the bacon in time; but he refused to admit the evidence of custom to alter the contract. By requiring a warranty, the buyer is to be understood as excepting against all terms but such as are stipulated in the bargain.

Confirmed by the Court of Common Pleas; 6. Taunt. 446.; 2. Marsh. 141.

[5] Brodie, Trustee for Arnot's Creditors, against Tod and Company, 20th May 1814; 17. Fac. Coll. 609. Arnot, of Leith, agreed to buy clover-seed from Tod and Company, of Hull, payable by an acceptance at three months. Tod and Company, in sending the invoice and bill of lading, enclose a draft for acceptance, and add, 'which please return in course.' Arnot received this letter 24th April, but did not return the

sent off, if the cash has not been paid, or the acceptance has not been transmitted as stipulated; but if the vendor acquiesce in an alteration of this condition, it will be different.[1] Express conditions.

3. If he shall stipulate payment by 'a bill,' or 'an approved bill,' at a certain term of payment, the condition must be fulfilled in order to complete the contract: But the seller will not be suffered arbitrarily to reject a bill which ought to be approved. If it be one to which no reasonable objection can be made, it is, in England, deemed a sufficient compliance.[2] In Scotland, we are accustomed to consider discounting as the test: But this in all cases ought not to be held; and probably the rule applied in England would guide the decision.

4. If one sell a commodity expected from abroad, 'on arrival;' the arrival of the commodity is a condition, and there is no sale if it do not arrive. The same has been held when the bargain is to sell a particular commodity expected, 'on arrival of a particular 'ship:' If that ship arrive without a cargo, there is no sale.[3]

5. In the construction of all express conditions introduced into a bargain of sale, the fair and reasonable and customary interpretation of the condition is to be taken.[4]

6. If goods be sold 'as good merchantable goods,' this is a warranty or express condition, which will not be defeated by proving the goods to be equal to a sample shown.[5]

7. If a sale is by sample, it is a condition that the commodity shall answer to the sample, (to which effect the sample must be identified); and the buyer may reject the goods, notwithstanding any usage tending to establish a rule only of abatement.[6] The buyer is

acceptance till the 26th. Tod and Company, who should have received their answer on 26th, relanded the goods. The Court of Session held,—1. That the words above quoted formed a condition, on the fulfilment of which the bargain depended; and, 2. That the course of post meant the very next post.

[1] ARNOT against WATT, 12th May 1825; 4. Shaw and Dunlop, 4. In this case malt was sold for ready money. The buyer sent his bill at four months' credit for the amount. The seller kept this bill in his hand for some time, and then demanded cash, and for this he brought his action. He was held to have acquiesced in the bill.

[2] HODGSON against DAVIES, 1810; 2. Camp. 532. This made one point in the case already quoted, (supra, p. 436. Note [1]). The defendant proved a tender of his own acceptances. It was contended, that *by bill* is meant an *approved bill*. Lord Ellenborough held, that even if the phrase, approved bill, were introduced, it could only mean a bill to which no reasonable objection could be made; and that to allow the seller in an arbitrary manner to repudiate the bill, would enable him, according to his interest or caprice, to annul a contract by which the purchaser is absolutely bound.

[3] HAWES against HUMBLE, 2. Camp. 327. Note. Batley, for Humble and Holland, sold to Hawes, on arrival per the *Bon Fin*, 100 tons of barilla. The ship arrived without the barilla, accidentally, and without any imputation of fraud. Hawes, in an action of damages for non-performance, was nonsuited. Mr Baron Wood held that the contract was conditional; but intimated, that if any negligence could be proved against the captain in not procuring the barilla, he would receive that evidence. There being no negligence, the plaintiff was nonsuited, with liberty to move the Court on the question, Whether the contract was absolute? The Court was unanimously of opinion that it was conditional, and that the remedy was only by action of deceit grounded on fraud.

So in BOYD against SIFFKIN, 1809, 2. Camp. 326. where 32 tons of hemp exported by the Fanny Almira, were agreed to be sold on arrival of that ship, and she afterwards came without a cargo, Lord Ellenborough said,—'I think on arrival means on arrival *of the hemp*. 'The parties did not mean to enter into a wager. The 'hemp was expected by this ship. Had it arrived, it 'was sold to the plaintiff; as none arrived, the contract 'was at an end.'

[4] In HAYWARD against SCOUGAL, 2. Camp. 56. an agreement to sell all the hemp to be shipt by the seller's agent in the ship A, was held to include only what that agent ships for the seller, not what is embarked for others.

[5] TYE against FYNMORE, 1813; 3. Camp. 462. In this case sassafras wood was sold after a specimen had been exhibited to the buyer, with which the whole quantity was said to accord. But in the sale-note it was described 'as two tons of fair merchantable sassa-'fras wood, in logs, at six guineas per cwt.' Lord Ellenborough held this not to be a sale by sample; and it is not enough to prove that the wood corresponds in quality with the specimen exhibited to the defender before the sale. The question is, Whether it was in the understanding of the trade 'fair merchantable sas-'safras wood?' which it is clearly proved not to have been. The vendor was nonsuited.

[6] HIBBERT against SHEE, 1. Camp. 113. Sixteen hogsheads of sugar were sold by samples drawn, and

entitled to examine the commodity in bulk at any proper and convenient time; and if the seller refuse to shew it, after he is by the contract bound to have it in readiness, the buyer may rescind the contract.[1] But it is of no consequence that samples have been shewn at entering into the bargain, unless the sale has been made distinctly in reference to them.[2] Although the samples should not be referred to, so as to make it a sale on sample, the showing of samples is a relevant circumstance in evidence of a deceitful representation.[3]

8. If the sale be made in reference to the taste, or any other criterion, there is no sale or concluded bargain till that test has been applied, and expressly or tacitly the bargain bound by the seller's approbation.

9. Conditions may be suspending or dissolving conditions; as to the effect of which see supra, p. 236.

IV. Effect of Insolvency.—It is a rule in the law of contracts, that both parties are bound or neither. But sometimes there is a disposition to misapply this rule to the question between the creditors of a bankrupt, and one with whom the bankrupt has made an agreement. To clear this, the distinction must be correctly observed between the *contract* of sale, and the *transference* in consequence of that contract. The contract may be completed, without entitling the buyer to insist on having the commodity from the creditors; and yet so as to bind him if the creditors choose to insist that the bargain shall be implemented. So it may be effectual to bind the seller, although the buyer is bankrupt, provided the creditors choose to offer the full price; while the seller cannot have any thing but his dividend, if he persist in forcing the goods on the creditors. In all these cases the contract is binding, though its effects vary. If a merchant has bought wheat from another who fails, he will not be entitled to insist for delivery, although he may have paid the price, or may be willing to pay it down; for he is under the contract only a creditor for delivery of the corn, and the creditors are not bound by their debtor's contract. But the contract is available to the solvent party, in so far as the universitas of the bankrupt

which were admitted to be those produced at trial. The sugar did not in colour correspond, and dealers proved them to be less valuable by five or six shillings a hundred weight. The seller required the buyer to take them on abatement, which the buyer refused. The seller rested on the usage, and examined brokers to prove that such disputes were settled in this way. Lord Ellenborough said,—'The question here 'is, whether the contract has been substantially per- 'formed? Does the sugar accord with the sample ex- 'hibited at the sale? If I buy a commodity wholly 'discordant to that which is promised me, I am not 'bound to accept of a compensation for this dissimi- 'larity. This is not a performance of the contract: 'And though there should prevail a habitual mode of 'arrangement between dealers in the article, I have 'always a right to say, "Is this what I meant to pur- 'chase?" A spirit of candour and accommodation 'may lead to a compromise between the parties; but 'the legal mode of dealing is, that if the article agreed 'on is not furnished, I may reject it, and keep my 'money in my pocket.'

[1] Lorymer against Smith, 1. Barn. and Cress. 1. This was a sale of wheat by sample at Bristol. By the usage of the place, the buyer is entitled to inspect the wheat in bulk. On a demand to see it, part was shewn, but the buyer saying he did not choose to disclose his connexions, offered to send for a bushel at a time, but would not show it all. A few days afterwards, he said the wheat was now in his granaries, and might be seen. The buyer refused to hold to the bargain, and was held entitled to rescind it on the general rule of law, as well as the local custom. Ch.-J. Abbot, and Bayley, Holroyd, and Best, Justices present.

[2] See Tye against Fynmore, supra, p. 441. Note [5]. In Meyer against Everth, 4. Camp. 22. there was a similar deficiency of reference to the samples. So in Laing against Figeon, 4. Camp. 169., where sample saddles were shewn, but no reference to them in the sale-note; and the same in Gardner against Gray, ib. 144. The doctrine in all these cases was, that the sample could not be allowed to be incorporated in the contract, where the sale-note is silent as to the sample.

[3] Thus, in Meyer against Everth, 4. Camp. 22. Lord Ellenborough, holding that the samples were not made a part of the bargain, said,—'You should have 'declared in Case for a deceitful representation. It 'was no part of the contract that the sugar should be 'equal to the sample. Where goods are sold in this 'way, I think evidence might be admissible to shew 'that, at the time of the sale, a sample was fraudulently 'exhibited to deceive the buyers, whereby the plain- 'tiff had been induced to purchase the commodity, 'which turned out greatly inferior in quality and value.'

estate is bound to him as to other personal creditors; and so he may on his contract claim damages for non-execution. On the other hand, however, the obligations under the contract may be made available to the purchaser's bankrupt estate, either if the price has already been paid, or if the creditors are willing to pay the stipulated price; for the solvent party has no farther interest than to demand full performance of the bankrupt's obligation.

§ 2. CLAIMS IN RESPECT OF THE CONTRACT OF SALE.

CLAIMS ON THE PART OF THE SELLER.—The right of action, or of claiming in bankruptcy, which may arise out of the contract of sale, may be either after the goods have been delivered; Or, while the goods are still with him undelivered or stopt in transitu; Or, when they have accidentally perished after the risk has been changed.

Goods delivered.

1. Where the goods have been already delivered, the seller may have a personal action, or may claim as a personal creditor for the price; and take his dividend along with the other creditors.

Not delivered.

2. Where the goods are not yet delivered, the seller may raise action for the price, proffering delivery of the goods; or he may send the goods to a warehouse at the buyer's risk; or he may, in bankruptcy, offer them to the creditors, on payment of the price; and if they are unwilling to take them on that condition, he may apply to a Judge to have them sold as under lien, that he may rank for the balance of the price; or he may make his claim for the price, and retain the goods under lien. The seller is entitled to charge warehouse rent, and the expense of preserving the goods in marketable condition, during such time as the goods may have remained with him beyond the time specified in the contract.

Goods perished.

3. When the goods have accidentally, and without fault on the part of the seller, perished between the completion of the sale and the time of delivery, the seller may still have his claim as a creditor for the price in certain cases.[1] The general rule is, that the contract of sale being once completed as to a specific subject, the risk is thenceforward with the buyer—'Periculum rei venditæ nondum traditæ est emptoris;' and this notwithstanding that the buyer is bound to pay the price, 'emptoris damnum est, et tenetur 'pretium solvere.'[2] This is a question which has occasioned much controversy among lawyers;[3] but the true resolution seems to lie in the distinction between the *contract* of sale and the *transference* consequent upon delivery. By the completion of the contract the seller is bound to deliver; the buyer, to pay the price; and these obligations are counterparts and considerations for each other. The parties reciprocally may refuse performance, unless the counter-obligation is performed; but the destruction of a special subject, which the seller has undertaken to deliver, is a good defence against performance, provided it has not arisen from his fault.[4] This is the legal principle of a rule which is fully established in practice. Stair has doubted the efficacy of the rule where the subject has perished: Erskine says, that, at least, the seller is entitled to the full price, notwith-

[1] See above, p. 169. some discussion relative to periculum, as affecting the question of transference.

[2] Instit. De Empt. Vend. § 4.

[3] See Stair, b. 1. tit. 14. § 7., where he states shortly and clearly the grounds of the controversy. Pothier, Tr. du Cont. de Vente, No. 307. et seq. vol. i. p. 579. 3. Ersk. 3. § 7.

[4] This principle has been well explained by Pothier, by Stair, and by Erskine, in the passages referred to in the preceding note.

standing any accidental deterioration. But cases have again and again been determined to the full extent of the whole doctrine.[1]

Sale incomplete.

But while the sale is still incomplete, as where the quantity has not been separated from a common mass; or where the price is referred to weight or measurement, and the quantity has not been ascertained; or where the bargain is in reference to some test or criterion not yet applied,[2] the risk is with the seller; and if the goods have perished, he will have no claim for the price.

Where the bargain is to deliver the commodity at a particular place, the risk is with the seller till delivery at that place; so that if it perish on the voyage, it is lost to the seller, and he cannot claim for the price.[3]

Goods must be sent in ordinary course.

Where the goods are to be sent from a distance, and the seller neglects his duty in respect to the safe carriage, he will not be entitled to claim the price should the goods be lost. Thus the seller has to send the goods by sea, but they are delivered so carelessly into the vessel by which they are to be transported, that they are lost: Is he entitled to claim as a creditor for the price? The rule seems to be, that he can have no claim unless he shall have so fixed them on the wharfinger, or on the shipmaster, as to furnish a remedy to the buyer.[4] The same rule will hold as to a parcel sent by a coach or land-carrier. And the doctrine was in one case carried so far in England, that a person having executed an order for goods, by delivering them to the receiving house of a vessel trading between the two places, was nevertheless held to have no claim for the price,[5] as he had not paid

[1] See the case of M'Donald against Hutchison, supra, p. 170. Note [3]. determined by the Court of Session in 1744.

In Hinde against Whitehouse, in England, 1806, 7. East, 558., a quantity of sugars, which were in the king's warehouse, were sold by auction, and samples delivered in on 20th September. A fire on the 22d consumed the warehouse and the sugars. In an action of assumpsit by the seller against the purchaser, the case was tried before Mr Justice Rook, at Lancaster. There were several points on the English statute of frauds besides the question of periculum. The point was reserved, and argued in King's Bench at great length. Lord Ellenborough delivered the judgment of the Court, holding the sale to be complete, 'so as to 'cast the subsequent risk of loss upon the buyer.'

The case of Phillimore against Barry, in 1808, 1. Camp. 513., is of the same description. Here 13 puncheons of rum, lodged in a warehouse at Dover, were bought at auction, the purchaser to deposit 25 per cent, the rest of the price in 30 days, and to be chargeable with warehouse rent after the expiration of that time. About three weeks after the sale the warehouse was consumed by an accidental fire. Lord Ellenborough held the circumstances sufficient to satisfy the statute of frauds, and that the risk was with the buyer; so verdict went for the seller.

[2] See above, p. 442.

[3] Milne and Company against Miller, 1st February 1809, 15. Fac. Coll. 127.; where grain was by letters sold, 'to be delivered at Stirling shore at 'the mast,' and sample given. About three weeks afterwards it arrived at Stirling, and the buyer being from home, his clerk and servants took it, and lodged it in a barn, keeping it carefully apart, as it had been heated and spoilt. An inspection was ordered by the Sheriff, from which the grain appeared to have been damaged before its arrival at Stirling. The Lord Ordinary found, that 'in respect the grain was by the 'bargain to be shipt by the seller, and delivered at 'Stirling shore, the risk remained on the seller till 'delivery; and, therefore, found the buyer not bound 'to take the grain.' The Court affirmed this judgment. See also Spence against Ormiston, 25th January 1687; 1. Fount. 442.

[4] In Buckman against Levi, 1813, 3. Camp. 414., Lord Ellenborough directed a jury to find a verdict for the buyer, where the seller had neither taken a receipt when the goods were delivered to the wharfinger or carrier; nor taken care to have them booked; nor in any way fixed the goods on the carrier, so as to furnish the buyer with a remedy over against him: and verdict went accordingly.

[5] Clarke against Hutchins, 1811; 14. East, 475. In this case Hutchins at Gosport ordered goods from Clarke at Plymouth. The goods were in value L. 51. Clarke entered them at the receiving house of the carrying ship between those places, the owners of which had published cards, limiting their responsibility to packages of L. 5 value, unless entered and paid for at a higher rate. The goods were never delivered, and Hutchins refused to pay for them. The seller brought his action of assumpsit; but under the direction of Grahame, B. he was nonsuited. The Court of King's Bench refused a rule. Lord Ellenborough said,—'The plaintiff cannot be said to have deposited 'the goods in the usual and ordinary way, for the pur- 'pose of forwarding them to the defendant, unless he

the additional sum advertised as requisite to the carrier's responsibility for a package of that value. But that doctrine has been since doubted.[1]

The directions given by the buyer as to the carriage, must be followed with reasonable diligence and attention.[2]

On the same principle that the seller must secure to the buyer his remedy in case of loss, he is bound to furnish the means of insuring, otherwise to stand to the risk himself.[3] The regular course is, to deliver the goods to a particular ship, and send the bill of lading; and when that is done, the shipowners are charged with the goods; the buyer enabled to insure; and he has it in his power to dispose of the goods immediately; so that he has all his remedies. Where a bill of lading is taken in the ordinary course of navigation, it seems to be an absolute duty of the shipper to transmit it; and he will be liable for any loss which may arise from the neglect. But it is neither necessary nor possible in all cases to send a bill of lading. The seller may not know the ship by which the goods are to be sent; in which case, as insurance may be done on ship or ships, it seems to be sufficient to give notice that the goods are to go by the first ship; or by the first packet; or by a ship expected to sail soon, or against a certain day, the name of the ship unknown, &c.[4]

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'took the usual and ordinary precaution, which the 'notoriety of the carriers' general undertaking required, 'with respect to goods of this value, to insure them a 'safe conveyance; that is, by making a special entry "of them. He had an implied authority, and it was 'his duty to do whatever was necessary to secure the 'responsibility of the carriers for the safe delivery of 'the goods, and to put them into such a course of 'conveyance, as that, in case of a loss, the defendant 'might have his indemnity against the carriers.' The rest of the Court assented.

[1] COTHAY against TUTE, 1811; 3. Camp. 129. While the general principle on which the above judgment went is unquestionably sound, it has subsequently been said by the eminent Judge who delivered the opinion of the Court, that 'as it is in practice so un-'usual, under these notices, to enter and insure goods 'above the limited value, he will be inclined to hold 'that the vendor is not bound to do so without express 'instructions for the purpose. Were he to insure of 'his own accord with the carrier, how far would the 'purchaser be liable for the heavy additional expense 'thus incurred?' In this particular case the seller had a verdict, because this was an order for *more* goods; and although it was a part of the defender's case to shew that the former had been entered high, he did not attempt this.

[2] SWORD against MILLOY, 17th February 1813; 17. Fac. Coll. 209. Milloy ordered a cargo of coals to be sent by a particular ship; but that ship being engaged, he ordered the coal-merchant to 'freight a gabbart 'yourself at 2s. 9d. per cart.' He did freight a vessel then in employment at Broomielaw; but she sunk, and the cargo perished. In an action for the price, the defence was, that the ship was not seaworthy, and that this was notorious and manifest from the appearance of the ship. A proof was taken, and Lord Justice-Clerk Boyle thought, that, from the evidence, the pursuer had sufficiently discharged his obligation, the vessel being an ordinary trader there in employment. Lord Meadowbank held the action for the price to lie, unless it were proved that the pursuer was guilty of culpa lata; which was not shown here.

[3] This is taken for granted as the very groundwork of all the cases on the subject.

Thus, in ANDREW against ROSS, PARK, and Others, 6th December 1810, 16. Fac. Coll. 68., it was laid down from the Bench, 'as an essential part of the 'shipper's duty, to give notice immediately of the ship-'ment, that the purchaser may have it in his power to 'take measures for his safety;' and as to the special case it was said,—'Here no notice of the shipment 'or delivery at the wharf was given: indeed, the pur-'chasers had no reason to conclude that the goods 'were sent at all, in which case it was entirely out of 'their power to secure themselves by insurance.' See below, p. 447. Note [5].

[4] HOGG against KENNEDY, 24th July 1754; 1. Fac. Coll. 166.; Kames' Sel. Dec. 90. Kennedy and Company commissioned goods from Holland to be sent by the first ship for Leith, Greenock, or Borrowstounness. The goods were, accordingly, shipt in the Hopewell, Burton, for Leith. No bill of lading was sent, but information generally, that the goods were sent by Burton for Leith, but without naming the ship. The Court of Session held this sufficient, and gave decree for the price, although the goods were lost.

JOHNSTON and SHARP against BAILLIE, 2d June 1815; 16. Fac. Coll. 387. Baillie bought from Johnston and Sharp three hhds. of sugar, to be shipt for Ayr by the first opportunity. He received on 23d January an invoice, which did not mention whether the sugar was at Glasgow or Port-Glasgow, nor in what ship the sugar was to be sent. Two ships arrived at Ayr, but the sugars were not on board; on which Baillie, 16th February wrote, expressing his surprise and his conjectures, with provisional directions about shipping them if at Port-Glasgow. To

Information for Insuring.

General information of the time of sailing is sometimes the only notice that can positively be relied on. In the carrying trade, which is prosecuted to a great extent by shipping companies, as between London and Leith; London and Dundee and Perth; Leith and Glasgow; Leith and Hamburgh, &c. there are a number of ships belonging to the company, and their warehouses fill with goods against the day of sailing, and are emptied indiscriminately into whichever ship is first ready or most convenient: Or the intended order of the sailing of the smacks is interrupted by accidents, and the goods intended for one ship are put on board of another. The only safe mode of insuring in such cases, is to insure on ship or ships, and there can be no doubt that it will be perfectly effectual.[1] But a question remains of some importance: When goods are sent to a shipping company's wharf, the receipt, in general, appropriates the goods to a particular ship; the ship next in order for sailing. In this case there can be no doubt, that when the seller transmits such a receipt, bearing the name of the ship, he fulfils his duty; and if the goods are afterwards put on board of another ship, and lost, whatever question may be raised with the shipping company, no defence can be made against the seller's claim for the price.[2] But even where no such receipt has been taken, and from the wharfinger's information the seller has himself made up an invoice, expressing the name of a particular vessel, which turns out not to be the ship in which the goods were ultimately sent, the buyer is liable. The custom is held, in such cases, to construe both the receipt and the information of the wharfinger into an engagement, not so much to send the goods by a *particular* ship, as by the *first* ship in which they can be sent; the name of the loading ship being taken for the company's ships.[3] The cases quoted below are to be taken as charac-

this no answer was returned. The goods had been put on board the John on 2d February, and the bill of lading was delivered to Baillie's correspondent, whom he directed to call and inquire, on the 27th. It was sent to Baillie on the 28th. On that day the ship was lost, about ten miles from Ayr, and Baillie got the intelligence at the same time that he got the bill of lading. The Court were of opinion, that due notification of the shipment had not been made. They held, that there was a neglect not only of what was necessary to a correct insurance, but what was most essential to the purchase in many respects, as enabling Baillie to take measures of security during the navigation of the Clyde; and, in general, that it is salutary to require, in all cases, rigidly, that the rules of accurate mercantile jurisprudence should be observed. The seller's action for the price was dismissed. Against this judgment was the opinion of two very eminent Judges, Lord Robertson and Lord Pitmilly, who held that there was sufficient information given to the purchaser to enable him to insure, while the shipowners were fully charged with the goods.

[1] Marshall, 172. Park, ed. 1817, p. 22.

[2] Cooke against Ludlow, 2. New Rep. C. B. 119. Ludlow, near Bristol, ordered a patent chaff-cutter from Cooke, of London, who sent it to Symond's wharf, where Bristol vessels load, and received from the wharfingers a receipt:—'The Commerce, C. Far-'quharson, for Bristol, 17th December, received 13s. '6d. J. M.' The same day, Cooke, by post, informed Ludlow that the Commerce was to sail in January for Bristol, and that the agents were Tollard and Sons. It is the custom, when the vessels loading at the wharf are full, to reserve the overplus goods for the next. The chaff-cutter was thus sent by the Nancy in April, which was the next ship. When the chaff-cutter did not arrive by the Commerce, Ludlow gave himself no farther trouble. In the meanwhile it went safe, and lay at Pollard's for a year; and when the price was demanded, Ludlow defended himself on the circumstances. The Court held the compliance with the order to be reasonable, and that it lay with the buyer to give notice of non-arrival.

[3] In the following cases there is a degree of looseness in the printed reports, which I have endeavoured to correct.

1. Hesseltines against Arrol and Company, 15th January 1802; 13. Fac. Coll. 30. Arrol and Company, of Edinburgh, ordered three chests of tea from Hesseltine of London; and the tea was sent to the Berwick Shipping Company's wharf. Hesseltine, on sending to learn what ship was to sail for Leith, was told, that, if his goods came next day, they would go by the 'Kelso Packet, Robert Moir, master;' and on this he made up his invoice, and inserted those names in it. But, having occasion to send to the wharf in the evening, he learned that the tea would go by the 'Union, Jo. Paterson;' and he altered his invoice accordingly, and sent it off on 6th February. He sent the tea to the wharf, but does not appear to have taken a receipt. The goods went by the Kelso after all, and were stranded. Two boxes were lost; one delivered damaged. Hesseltine brought his action, and succeeded. The Court proceeded, I believe, on these grounds:—1. That the shipper having reason to

terized particularly by the custom of the trade; and this effect seems to be due to the custom in the opinion of the Judges of England.[1] Wherever the information is such that no effectual insurance can be made,[2] or where the information is unduly delayed till it is too late to insure,[3] the seller will not be entitled to claim the price. Where the orders of the buyer are not observed, the risk is with the seller.[4]

Buyer's Claims.

CLAIMS ON THE PART OF THE BUYER.—The buyer, in like manner as the seller, has a right to insist on implement of the contract, by delivery of the goods; and this either before or after he shall himself have done his part. And on the same footing, on the bankruptcy of the seller, the buyer can claim as a creditor, either before the price is paid, or after having paid it.

Price not paid.

If the price has not yet been paid, the seller's creditors have it in their option to close with the buyer's proposal, and proceed with the bargain. The desire to have the bargain fulfilled may be on their side, where the bargain is a good one; or where the price has fallen; or where the goods have been spoilt or lost at the risk of the buyer,—which cases have already been treated at large. Nay, should the buyer have failed, it may be more advantageous for the seller's creditors to insist even against the bankrupt estate of the buyer for such dividend as it will afford, leaving the trustee on that estate to make the

believe the information correct, and the buyer having it in his power to insure on ship or ships, it was enough; 2. That the goods being fixed with the wharfinger, the question thenceforward lay with him; and, by the custom of trade, there is no reliance on the particular ship by which a shipping company is to send a particular package.

2. HAMMOND and Company, against PORTEOUS and DEWAR, 13th December 1808; 15. Fac. Coll. 48. Porteous and Dewar, Perth, ordered nine chests of tea from Elton, Hammond and Company, of London. An invoice was sent, bearing, 'Per Bridport Packet, Wishart, for Perth;' but no bill of lading or receipt. The goods went by the 'Active.' The Bridport arrived in safety; the Active was lost. Lord Glenlee held the buyers liable for the price. The Court held Hesseltine's case as a precedent, and affirmed his judgment.

3. The same doctrine was held generally in the case of ARNOT against STEWART. See below, Note [2].

[1] See in COOKE against LUDLOW, supra, p. 446. Note [2].

[2] ARNOT against STEWART, 25th November 1813; 17. Fac. Coll. 462. Stewart ordered molasses from Redfairn, of London. They were sent to the shipping company's wharf, and went by the Kinloch, which sailed on 24th February. On 27th an invoice was sent, *dated on that day*, and bearing the Defiance as the name of the ship, but *not mentioning the day of sailing*. The Kinloch was lost; and Stewart refused to pay the price. The Judge-Admiral, and afterwards Lords Gillies and Bannatyne, in the Bill-Chamber, repelled the defence, and held the seller to have done his duty. The Court altered this judgment on these grounds:—1. That the invoice misled the buyer to believe, that the risk was not commenced till the 27th; and that an insurance, on that information, would have been ineffectual; and, 2. That although no insurance was here made and avoided, the buyer was entitled to use his discretion upon just information.

[3] ANDREW against ROSS, PARK and Company, 6th December 1810; 16. Fac. Coll. 68. Andrew, of Manchester, was agent for Perkins and Company, of London, porter brewers. He took orders from Scotland, sent them to London, and the invoices were then sent to him, and forwarded. His customers knew of this circuitous mode of transacting. Ross and others gave him orders in June, and the porter was sent to the wharf on 20th July. The ship was not to sail for a day or two; and the invoices were not sent off to Manchester till 27th. Andrew not being at home when they arrived, they lay till 10th August. The ship sailed 2d August, and on 10th was lost. The loss was known the day before the invoices came. The Court held clearly, that the buyers were not liable for the price. See above, p. 445. Note [3].

[4] HARLE against OGILVIE, 24th January 1749; Kilk. 377. Ogilvie, of Edinburgh, ordered sugars from Harle, of London, 'if the convoy be not sailed;' and in a postscript he says, 'if the ships be all sailed, 'there is nothing for it but wait the first convoy.' Harle shipt the sugars in a ship with army stores, which was to fall down to join convoy. But the convoy was gone; and she made a run and arrived, but the sugars damaged. Here it seems to have been admitted, 'that the property was certainly not transferred by being put on board, as it would have been 'had the ship come under convoy: that it was in 'suspense till her arrival; and although, had the sugars come safe, it might have been no excuse for 'the defender's not accepting them, that they had not 'come under convoy; yet as they came not safe, and 'that till they arrived at the port of delivery, the property of the sugars was not transferred to the defender, neither could they be on his risk.' The defence was sustained.

Price paid or tendered.

best of the goods. But the proper case to be discussed here is, where the buyer either having paid the price, or not yet having paid it, requires delivery of the goods; and the seller's creditors cannot, or do not choose to make delivery.

The contract of sale raises only a personal action or claim; jus ad rem. And the claim for delivery of goods sold, but not transferred, resolves into a personal demand for damages; all personal creditors, whether for money or ad factum præstandum, being only personal creditors marshalled in the same class, and to be paid by a dividend of the inadequate fund.

The claim of the buyer, then, to whom delivery is refused, is twofold: 1. For repayment of the price, if already paid to the seller; and, 2. For indemnification of the loss sustained by non-fulfilment.

Repayment of Price.

1. As to the claim for repayment of the price, the buyer will rank as a personal creditor for the whole price, undiminished by any intermediate fall in the value of the subject. Thus, it may happen that a ship, sold by the bankrupt, has, by sea-risk, been much injured; or that corn has fallen greatly in price; or that manufactures have become unfashionable; so that, if now to be bought or delivered to the buyer, the subject would not be nearly of the same worth as when originally bought; while, considering the dividend to be paid from the estate, it may still be of advantage to the general creditors to retain the subject, leaving the buyer to his personal claim. The buyer, as a personal creditor, in such a case will be entitled to rank for the whole price, not merely for the diminished worth of the subject;[1] his claim being truly in the nature of a condictio sine causa.

Indemnification.

2. As to the claim for indemnification of loss, the principle is, that where the person bound to deliver is prevented, by insolvency or other accident, from fulfilling his engagement, the buyer's claim is for such damage only as at the time of the contract was foreseen as a necessary consequence of the failure to deliver the article. This principle points out, as the proper object of such a claim, the indemnification of that sort of damage which is directly connected with the subject of the contract,—loss, arising from the want of the article purchased; or gain, of which, by the failure to deliver it, the buyer has been deprived.[2] Thus, a dealer who is himself under contract to deliver a quantity of corn, buys and pays for 100 bolls at 25s. per boll; and being, on failure to deliver, obliged to go elsewhere for it, he, in consequence of the augmentation of price, pays 50s. for the same quantity;—he will be entitled not only to claim repayment of the price which he paid, but to claim also as a creditor for 25s. more. And, in the same way, if he buy on speculation, and can shew that he might have sold the corn at 50s., he is entitled to claim repayment of the price paid, and 25s. more as gain, of which he has been deprived. He will not, however, be entitled to enlarge his claim, so as, by means of his dividend, to recover the whole difference. In one sense, indeed, this is the amount of his actual damage; but when analyzed, it resolves into two sorts of damage;—the damage on account of non-delivery; and the damage in consequence of insolvency. As every creditor, however, may be

[1] Among the civilians, this question was much discussed; and we find Domat, and others of great name, of opinion, that the contract of emptio venditio gives a secondary action to the buyer disappointed of delivery, only for the present value of his interest in the subject sold. See Domat, liv. 1. tit. 2. § 10. No. 15. But a more correct opinion came afterwards to be adopted, namely, that in default of tradition, as well as in case of eviction, the secondary action, Ex empto, has two objects:—1. The restitution of the price, if paid,—the discharge of it, if not yet paid; and, 2. The indemnification of the buyer's loss. Molinæus De eo quod interest, No. 68, 69. See this controversy well and shortly stated by Pothier, Tr. du Cont. de Vente, No. 69.

[2] Cum per venditorem steterit quo minus rem tradat, omnis utilitas emptoris in æstimationem venit: quæ modo circa ipsam rem consistit. Dig. lib. 19. tit. 1. De Act. Empt. l. 21. § 3.

said in the same way to suffer damage by his debtor's insolvency, the mutual claims, in this respect, would be neutralized. It is the amount of the loss, then, considered independently of the effects of insolvency, which constitutes the buyer's claim. Indemnification.

But the general principles, already explained, will also extend to that sort of damage, which, although not strictly attaching to the article sold, is by stipulation, or by necessary consequence at the time of the sale, placed in view of the parties, as foreseen effects of the non-performance of the contract; and as dangers from which, expressly or tacitly, the seller is, by faithful performance, to save the buyer.[1] Thus, a shipowner, for example, has entered into a contract for beef, stipulating that it shall be delivered in due time, for the supply of his ship, which is destined to sail with a particular convoy, or on a certain voyage;—the seller of the beef fails; and, in consequence of the non-fulfilment, the voyage is lost: A claim will lie, not merely for the higher price to which beef may have risen, but for the damage arising from the loss of the voyage.[2] Necessary Consequences.

In the farther discussion of this matter of damages, for non-delivery, attention must be paid to the two cases of damage now distinguished.

1. Where the direct loss, arising from non-delivery of an article, is in question, it may sometimes amount to much more than double the price of the article. Where the failure is not fraudulent, equity interposes, in such cases, to restrain excessive damages; an interposition more frequent in cases of estimated damages or penalties expressed in the contract. But the law by which, in the Roman jurisprudence, Justinian restrained the taxing of direct damages to double the value of the article, that value included,[3] is held with us as an arbitrary rule, which does not regulate our courts.[4] Justice is now to be done by a jury, fairly estimating the damage according to the circumstances. One consideration, however, ought ever to be kept in mind in such estimation of damages, (and it has always prevailed while this matter remained with the Judges), that in matters of contract, regard must be had to the express or presumed will of the parties at entering into that contract; and so, in cases like this, the sum ought to be fixed with a view to the probable amount of the damage, in the circumstances in which the contract was made. Direct Damage.

It frequently occurs as a difficulty, in settling direct damage for non-delivery, At what point of time the estimate of the damage, to replace expected gain, is to be struck? It is to be observed, that, while delivery is possible, the buyer has his alternative to

[1] 'Quelquefois,' says Pothier, 'l'action *ex empto* 's'étend aux dommages et intérêts que l'acheteur a 'soufferts *extrinsecus* et dans ses autres biens. Cela 'a lieu toutes les fois qu'il paroit par les circonstances 'qu'ils ont été prévus lors du contrat, et que le vendeur s'y est soumis, au moins tacitement, en cas 'd'inexecution de son engagement.' Tr. du Cont. de Vente, No. 73. See also Tr. des Obligations, No. 161, 162. The difference of expression in the last of these passages may be observed: where it seems more correctly to be required, not only that, from circumstances, it shall appear that the consequences were foreseen, and in the view of the parties at the time of the contract, but 'qu'il paroit *que par le contrat ils ont 'été prévus*, et que le débiteur s'en est, ou expressément 'ou tacitement, *chargé en cas d'inexecution de son obli-'gation.*'

[2] Contrast DUNLOP against M'KELLAR, 31st May 1815, below, p. 450. Note [3], with ANDERSON against GODDARD and Company, 21st February 1809, below, p. 451. Note [1].

STRACHAN against PATON, 12th November 1824, 3. Shaw and Dunlop, 259. Damages found due for short fishing, in consequence of the insufficient repair of a whale ship.

[3] Cod. Lib. 7. tit. 47. De Sentent. quæ pro eo quod interest, l. unic.

[4] 'It is rather,' says Stair, 'in the arbitrement of 'the Judge to ponder all circumstances, and, accordingly, modify the value as at the time of dittay or 'citation, litiscontestation or sentence.' B. 1. tit. 17. § 16.

This is now the province of a jury, as the tribunal best of all suited for such a determination. 6. Geo. IV. c. 120. § 28.

Indemnification.

insist for delivery in specie, or for damage. It seems to follow,—1. That if it was a purchase on general speculation, he may select that point of time which to him would have been most advantageous, between the moment when delivery was, by the contract, due, and the date of the sentence.[1] And the Court has refused to qualify this by any speculative inquiry into what, in the circumstances, might probably have been the fate of the article if duly delivered. 2. If the non-delivery has arisen from bankruptcy, the alternative claim for delivery or damages stops on that event; the claim *then* resolves into damage, on the maxim, 'In loco facti imprestabilis subsit damnum et interesse.' 3. If the purchase was intended to supply a particular demand, and the buyer has been obliged to supply himself elsewhere, the claim of damage will lie for the price paid, in order to supply that demand.[2] 4. If the buyer, while yet he expected delivery, have entered into a contract to sell that article to another, he may claim, as direct damage, the difference between the price which he was to receive, and what he had paid or engaged to pay.[3] 5. It would seem that the buyer can be entitled to nothing more than the value of the article at the stipulated place of delivery.[4]

Extraneous Loss.

2. Where the damage is not, strictly speaking, direct, but extended to extraneous loss by construction of the contract; although this is not a case to which Justinian's rule was

[1] This was the principle of the case of MORISON against BOSWELL, 4th March 1806; 11. Fac. Coll. 544. This was a purchase of four puncheons of whisky, at 5s. 4d. per gallon. On the same day intelligence arrived of an intention to stop distillation, in consequence of the failure of crops, and the prices rose to 16s. per gallon; more-than three times the price at which the purchase was made. Damages were found due; and the estimation of them came to be fixed by the Court before the introduction of jury trial in civil causes. The damage was laid in the summons at L.200; and the Lord Ordinary found, 'that, 'from what is stated by both parties, it appears the 'loss sustained by the pursuer was at least equal to 'the sum of L.200 concluded for in the libel, on 1st 'November 1799, the date of citation to this action; 'modifies the damages, accordingly, to that sum, with 'interest.' The Court altered that judgment, and found damages 'according to the highest selling 'price of whisky per gallon, from 3d October 1799, 'the date of the sale, to 1st November thereafter, 'the date of citation.' But afterwards the Court returned to the Lord Ordinary's judgment, which gave more than the highest price between these points; and as high a price as could have been got before decree, and as the restriction in the summons would allow. In this case it was held,—1. That the buyer's demand was not to be limited to the price at the stipulated day of delivery. 2. That although the non-delivery be imputable to no fault, the buyer must be indemnified for his actual loss. 3. That the price at the day of citation was not to be taken as the criterion, since the call to fulfil his engagement would thus discharge the seller from the bad consequences of his subsequent refusal: And, 4. That it was not practicable, without throwing the matter entirely loose, to enter into the consideration of the probable time at which, had the delivery been duly made, the article would have been disposed of.

In SHIRRA and MAINS against HARVIE and Company, 11th December 1807, 15. Fac. Coll. 329. Note, the above principle was confirmed. Shirra bought a quantity of whisky to be delivered immediately. Harvie and Company having refused to deliver it, an action was brought before the Sheriff, in which Shirra was successful. In a suspension, Shirra was found entitled to the value of the whisky as at the date of the Sheriff's decree, deducting the contract price.

[2] TAYLOR and Company against MORISON, 17th June 1809; 15. Fac. Coll. 326.; where the action was laid for 'the difference of price between 8s. per gal-'lon, at which the spirits were sold to Taylor and 'Company, and the sum of 11s. 9d. per gallon, at 'which Taylor and Company were under the neces-'sity of purchasing spirits, in order to supply the 'place of the spirits which they should have received 'from the defender.'

[3] DUNLOP against M'KELLAR, 31st May 1815; 18. Fac. Coll. 382. Scougal and Company bought from M'Kellar 144 bags of coffee. He afterwards sold those 144 bags, with 30 more, to Balfour, Junor and Company. It became impossible for M'Kellar to deliver the coffee; and Balfour, Junor and Company, refused to have any part of their purchase. Scougal and Company having failed, the trustee on their estate brought an action of damages. The Court found him entitled to the sum of L.159, as the loss of profit on the 144 bags, by inability to fulfil the bargain with Balfour, Junor and Company; but refused to sustain any claim of damage for loss on the 30 bags, which was neither direct loss, nor in contemplation of the contract with M'Kellar.

[4] In ANDERSON against GODDARD and Company, observe that it appears to have been a part of the bargain, that the buyer was to send a vessel for the grain. See next Note.

intended to apply, the same equitable interposition will take place as in the former case. Indeed, the very principle on which this construction is grounded, dictates the limitation. For the damage, not being naturally direct, becomes so by construction of law, only in consequence of a presumption that the parties must have had this in contemplation, as a danger against which the faithful performance of the contract was to protect the buyer: and in forming that presumption, no more can be assumed as in contemplation, than the probable and manifest results of the transaction. The case quoted below, may serve to illustrate at once the rule and its limitation.[1]

SECTION II.

OF CONTRACTS OF HIRING.

THE CONTRACT OF HIRING, OR LOCATIO CONDUCTIO, is that by which the one party agrees, in consideration of a certain hire or rent which the other engages to pay, to give to that other, during a certain time, the use or occupation of a thing; or personal service and labour; or both combined. It may relate to lands, houses, moveables, (including horses, cattle, &c.) or human labour; or these may be hired in various combinations.

In considering this contract in so far as relates to the real right of the subject let, some niceties in questions of property were formerly taken notice of, which may, on bankruptcy, arise from the complication of locatio operis with that of sale.[2] At present the subject of inquiry relates to the claims which may arise out of the contract, in so far as the respective personal obligations of the parties are concerned.

§ 1. GENERAL PRINCIPLES OF THE CONTRACT OF HIRING.

The general principles of the contract are closely analogous to those which regulate the contract of sale; and, indeed, it may be said, that Hiring is nothing else than the sale of the use and benefit of the thing, or of the labour, which forms the subject of it.[3]

This contract is completed, like that of sale, by consent alone. When the parties have finally agreed as to the subject, the hire, and the time, the contract is perfect; and requires neither delivery, on the one hand, nor payment, on the other, to entitle the parties to enforce their several rights under it.

[1] ANDERSON against GODDARD and Company, 21st February 1809; 15. Fac. Coll. 206. William Goddard and Company agreed to sell 300 bolls of barley to Anderson. He was to send a ship for it to Leith from Beauly. The ship was accordingly sent; but Goddard and Company failed to implement their engagement; and an action of damages was raised. Lord Glenlee found 'the pursuer, Anderson, entitled 'to the difference between the price at which the defenders agreed to furnish the grain, and the market-'price thereof at Beauly, at the time when the vessel 'sent for it to Leith would have arrived at Beauly, if 'the defenders had delivered the cargo: and finds, 'that the pursuer cannot, at the same time, claim the 'above said difference in name of damages, and also 'the whole freight of the vessel, but must limit the 'claim, in that respect, to the additional expense incurred by him, in consequence of the vessel's having 'been detained at Leith a greater number of days than 'would have been necessary, if the defenders had fulfilled the bargain.' The Court unanimously adhered to this judgment.

Here, 1. The voyage and its successful issue, by placing the grain for sale at Beauly, was in contemplation of the parties, as a direct result of the contract, depending on faithful performance. 2. This supposed the payment of freight, (perhaps, correctly, it should have included the insurance); but it was a necessary consequence of delay that damage should be payable, and this also must have been in contemplation of the parties. The judgment pronounced, therefore, gives effect to these the true principles of the contract.

[2] See above, p. 255.

[3] 3. Ersk. 3. § 14.

The chief practical distinction which it is important to mark, is, that the risk does not alter, as in Sale: but in general the loss or injury of the property or labour hired, falls on the owner; unless he can establish a ground of liability against the hirer, by reason of negligent or faulty conduct.[1]

The several varieties of this contract may be reduced under the two great divisions of LOCATIO REI and LOCATIO OPERIS: the former comprehending all contracts for the hire of lands, houses, and moveables, including horses, cattle, ships, machinery, &c.; the latter including the hire of workmen or labourers, and all the varieties of contracts for the carriage of goods. The subject of leases of land or houses falling under the first head, has already been considered, and of those which come under the second, the hiring of ships, or charter-party, may be reserved for future consideration, as a maritime contract.

§ 2. HIRING OF MOVEABLES.

Without distinguishing the several occasions on which this contract is used in the daily intercourse of trade, it may be observed, 1. That fungibles[2] are not the proper object of this contract, since they are consumed by use; and, 2. That the contract may effectually be constituted, although specific subjects are not fixed upon; as a horse-hirer may engage to furnish horses for a carriage, although the parties have not fixed on any particular horses of which the use is to be given.

He who lets his property to hire, is called the locator, or lessor; he who hires, is called the conductor, or lessee.

CLAIMS UNDER THIS CONTRACT.

I. CLAIMS ON THE PART OF THE LESSEE OR HIRER.—The lessee or hirer may have several actions on the contract; or, on the bankruptcy of the person who lets the subject to hire, he may have different claims, according to the state of the contract.

Subject not delivered.

1. Where the subject has not yet been delivered, the lessee will be bound to take possession, and pay the hire, if the lessor or his creditors choose to insist on the contract; and he is, at all events, entitled to demand possession, or damages for the want of it.

The impossibility, however, of delivering the subject, (in consequence of its accidental destruction, for example), is a good answer to the lessee's action; and will save the lessor, on the one hand, from any claim of damages, while it will entitle the lessee to freedom from the hire, on the other.

But refusal to deliver, on account of insolvency, (the subject being extant), will expose the estate of the lessor to a claim of damages; and the lessee will, therefore, on a refusal by the lessor's creditors to fulfil the contract, be entitled to be ranked for the amount of his damage as a personal creditor. The same principles regulate the claim of damages under this contract, which have already been considered relatively to sale.[3]

Subject delivered.

2. If the subject has been delivered, the hirer is entitled to continue his possession of it under the contract, both against the lessor and against his creditors.

The lessee will be entitled to an abatement of the *hire*, proportioned to any partial destruction of the subject; for the risk is with the owner. The principle which distinguishes this case from sale is, that sale is the transference of the *property;* but in hiring, the *use and enjoyment* only is transferred.[4]

[1] See below, p. 453.

[2] See above, p. 255. Note [2].

[3] See above, p. 448. et seq.

[4] Pothier, Tr. du Cont. de Louage, No. 112.

The hirer or lessee will not be entitled to claim *damages* on account of any failure, destruction, or defect, occurring during his possession, if it should proceed from accident, without fault or neglect on the part of the person who lets to hire:[1] But he will be entitled to damage if that failure proceed from refusal, or from insolvency. Suppose, for example, that a person who has a steam-engine too powerful for his own occasions, lets out a share of the power, by affixing additional machinery, and communicating the motion to a manufactory in the neighbourhood, and fails; his creditors may find it inexpedient to keep the engine going; and so the hirer or lessee of the share of this moving power has his whole operations stopped: he will be entitled to claim his damages, with repayment of any advance of rent which he may have made.

3. Although the person who lets to hire will not be responsible, nor his estate on his bankruptcy, for any accidental failure or destruction of the subject, the hirer or lessee will be entitled to claim such expense as he has been under the necessity of laying out upon the subject let. To ground such claim, it will be necessary to show,—1. That the occasion of the expense was not to be ascribed to the hirer or lessee; 2. That the expense was indispensably necessary; and, 3. That the lessor had notice of it as soon as circumstances permitted.

II. Claims by the Person letting to Hire, or Lessor.—A ground of action, or, on the bankruptcy of the lessee, a claim, may arise to the person who lets the subject to hire, for payment of the hire of the subject, or for damages on account of injury to the subject of the contract.

1. The creditors of the hirer or lessee may, if they think proper, continue the possession, or insist in proceeding with the contract; in which case, the estate will be liable for the hire, not merely for a dividend. But although they should choose not to do so, the person who lets to hire is entitled as a creditor to rank for his rents or hire of the whole term agreed on, as being his damage; deducting, however, the value of the yearly possession, which is given up to him by the lessee's failure.

Principles of responsibility for neglect.

2. It is an important question, how far the lessee or his estate shall be held responsible for injury received by the subject? This forms a part of the great doctrine of Responsibility for Neglect; a doctrine which has relations to all the several degrees of reliance, which in different contracts it is necessary or convenient for one party to repose in another's diligence or care; and which, in Scottish jurisprudence, is treated under the name of Diligence prestable; in England, under Bailment.

This doctrine is the subject of an essay of Sir William Jones:[2] It also forms the subject of a short but admirable paper of Pothier.[3] The doctrine maintained by Pothier, and vindicated by Sir William Jones, is the established law of Scotland. It resolves Neglect into three species—Gross, or lata culpa; Ordinary, or levis culpa; and Slight, or culpa levissima: And the rule of responsibility under these three divisions is, that in contracts beneficial only to the owner, as Deposit or Mandate, good faith alone is required in the custodier, and gross neglect only can render him responsible: That where the benefit

[1] 3. Ersk. 3. § 15. Pothier, Louage, No. 117.

[2] Essay on the Law of Bailments by Sir W. Jones, Knt. In this essay Sir W. Jones has shown how the learning of a scholar, and the liberality of a gentleman, may be combined with the correctness of legal analysis.

[3] Printed as an Appendix to his Treatise on Obligations, vol. i. p. 455. This paper was occasioned by a tract of M. Le Brun, advocate of the Parliament of Paris, entitled, '*Dissertation sur la Prestation des Fautes, Paris*, 1764,' of which Pothier speaks highly. He professes not to refute the reasoning of this essay; but he gives in the paper now cited a complete answer to the principles of the tract; and in his Pandectæ Justinianæ answers his arguments on the several laws which he quotes. See Pand. Justin. vol. iii. p. 770. § 981.; vol. i. p. 489. § 32. Note f. &c.

Neglect. is reciprocal, as in Sale, Hiring, Pledge, Partnership, and Joint Property, the care of a prudent man is expected, and responsibility will follow upon ordinary neglect: And that where a person has the custody of subjects only for his own benefit, the slightest neglect will subject him to a claim for indemnification.[1]

As applicable more especially to the contract of hiring, where the risk, independently of fault, is with the owner, the rule is, that the lessee is liable in a middle diligence, 'præstat culpam levem.'[2]

A warehouseman having goods in his custody, or the hirer of goods having them in his possession, is not liable for loss by accidental fire.[3]

A person hiring a horse, is not liable for it if it be stolen from a livery-stable.[4]

The chief difficulty in such cases lies in the evidence. It has been held, in Scotland, that where any specific injury has occurred, not manifestly accidental, the onus probandi lies on the hirer or lessee to justify himself by proving the accident;[5] while, in England, the rule seems to be different, it being held necessary for the lessor to give some evidence of negligence.[6]

Where the hirer or lessee has taken a use of the subject excessive and beyond the limits of the contract; such as hiring a horse to carry a certain weight, and overloading him; or riding him farther than bargained for; or overriding him;[7] the lessee will be deemed guilty of a fault which will make him responsible.

[1] 3. Ersk. 1. § 21.

[2] 3. Ersk. 3. § 15.

Sir W. Jones properly corrects the looseness of Mr Justice Buller's expression, *(Introduction to Law of Trials at Nisi Prius, 72.)* where he says, 'that the 'hirer must take *all imaginable care* of the goods de- 'livered for hire,' reproving the words, 'all imagina- 'ble,' as too strong for practice, and as, even in the mildest sense, implying an *extraordinary* degree of care; p. 86. Sir W. Jones also corrects the expression of Lord Holt, that 'the hirer is bound to the *ut- 'most diligence*,' as entirely grounded on a grammatical mistake in the translation of Bracton, who borrows 'diligentissimus' from Justinian in the Institute, and which, again, was copied into the Institute from Gaius, a writer remarkable for the use of strong words, but who intended manifestly, instead of the superlative, to use merely the positive; p. 87.

[3] Garside against Trent and Mersey Navigation Company, 1792; 4. Term. Rep. 581. Here the distinction was drawn between a warehouseman and a carrier; the latter being liable on a peculiar rule. See below, p. 462.

Longman against Gallini, 1790; Lord Kenyon, Sittings at Westminster. The above rule applied to musical instruments burnt at the opera-house.

[4] Trotter against Buchanan, 28th February 1688; 1. Fount. 501. (10,080.)

[5] Binny against M. Veaux, 16th July 1679; 1. Fount. 51. (10,079.); where the Court held, that if a horse hired should die, or fall sick or 'crooked' by the way, the hirer 'must prove the casus fortuitus quem nulla 'præcessit illius culpa;' and that it will not be enough to prove that he rode modo debito, and no farther than the place agreed on. Fountainhall thinks this 'perquam durum.'

In Robertson against Ogle, 23d June 1809, 15. Fac. Coll. 348., a hired horse, after having been rode from Edinburgh to Aberdeen, and thence to Perth, was returned to the owner, as unable to carry the rider farther; and was found, on examination, 'to be 'swayed or strained over the kidneys or coupling of 'the back.' The sheriff held, that the horse was a good useful hack, and worth the sum libelled, (L. 9), when it was hired, but had been ill treated, and was useless when returned; and, therefore, found the owner entitled to the price of the horse, with costs. The Court held, that the onus probandi lay on the defender, the horse-hirer, to show that 'the horse's malady arose 'from any cause for which the defender was not 'blamable, and which he could not control;' and as no such proof was given, the Court adhered to the sheriff's judgment.

Marquis against Ritchie, 11th June 1823; 2. Shaw and Dunlop, 386.

[6] Thus, in Cooper against Barton, 1810, 3. Camp. 5. Note, it was held by Le Blanc, J., that where a plaintiff proved the hiring of his horse; that the horse had before been often let out to hire, and had never fallen down; and that it had been returned to him with the knees broken, in consequence of a fall; it was necessary for him to go farther, and give *some* evidence of negligence; and as none had been given, the Judge directed a nonsuit.

It may be said, (with old Fountainhall, in the Scottish case above quoted), that this 'is perquam durum.' It may be impossible to prove a negligence, at the commission of which no man may be present.

[7] Straiton, 10th July 1610; Haddington, 1. Dict. 208. (3148). Here a horse, hired to carry 16 stone, was overloaded with 20 stone, and died. Action was sustained for the price of the horse.

Moffat against Moffat, 29th June 1624; Nicolson, (10,073). Found relevant to raise responsibility, that a horse was overridden by galloping, and being hired to Stirling, was ridden to Dumblane.

Where, again, the hirer or lessee has either not taken due care to prevent or remedy an accidental injury, or has adopted means extraordinary or hazardous, he must run the risk. Thus, if a horse become ill in the hirer's possession, and he take no means to relieve the malady, and the horse die or become useless when it might have been saved, he will be responsible.[1] Or if he proceed himself to administer medicines when he might have had medical advice, and the horse die, he will be answerable where there is any unskilfulness in the means employed.[2] Neglect.

This implied obligation to diligence makes the master liable for his servants. The diligence is that of a bonus pater-familias.

§ 3. HIRING OF LABOUR.

Locatio Operis, or Hiring of Labour, includes the simple case of the hiring of Common or of Skilled Labour, which is 'Locatio operis faciendi;' and the hiring of that particular kind of labour to which special rules have been applied, namely, the Carriage of Goods, called 'Locatio operis mercium vehundarum.'

Referring to what has already been said respecting the property of the thing on which the labour is to be employed, the personal obligation, and the claims thence arising, are here to be considered.

Without being too curious about distinctions, there is some little difference observable between the hiring of the labour of an undertaker in any branch of art, and the hiring of the labour of workmen or servants. The former is a contract for performing some piece of work or operation of art, and has reference to its accomplishment; the latter is an engagement to labour under a master, and has reference to an appointed term.

A contract of locatio operis, to accomplish some particular piece of work or operation of art, implies that the materials shall be furnished by the employer, otherwise it is properly a sale.[3]

Two questions may arise on this contract:—

1. Where more has been done than the parties have stipulated and expressed in their contract, and there is, on the one hand, no acquiescence in the change, while, on the other, the work is inseparably connected with the property of the employer; it would seem that the employer is not bound to pay more than he has agreed to pay. But a departure from the contract, assented to by the employer, will, to the extent of that alteration, substitute for the contracted price the fair remuneration for work and materials, a Increase of Work.

[1] Bray against Mayne, 1818; 1. Gow, 1. Mayne took a horse on trial, to pay L.10 for the hire, if not purchased, or L.55 for the horse. He drove him from London to Worthing, where the horse appeared not to be affected otherwise than by a cold. Having afterwards driven him 20 miles in the morning, the ostler at the inn observed a swelling under his throat, and that he refused his food. Mayne, however, drove him from Ewell to London that day. During the journey, the horse was much distressed, and came to the stables in a much worse condition. This was held a want of due care, and verdict went for the price of the horse.

[2] Dean against Keate, 1811; 3. Camp. 4. Keate having jobbed a pair of coach-horses, and one of them being slightly indisposed, he wrote a prescription for him. The medicine was not calculated to do injury to the horse; but after administering it, Keate had put the horse into harness, given him strong exercise, and kept him exposed to the inclemency of the weather: the animal was seized with an inflammation of the intestines, when the defender gave him a doze of opium and ginger, and the horse soon after died. Medical advice was called in when too late. Dean, who had let the horse to hire, brought his action for the value of the horse. Lord Ellenborough held, that Keate had not exercised that degree of care which might be expected from a prudent man towards his own horse; and was, in consequence, guilty of a breach of the implied undertaking he had entered into, when he hired the horse from the plaintiff. The plaintiff had a verdict for 60 guineas.

[3] See p. 451.