ELEMENTS
OF
MERCANTILE LAW.

T. E. SCRUTTON.

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MERCANTILE LAW

BY

THOMAS EDWARD SCRUTTON

BARRISTER-AT-LAW

Lecturer in Common Law to the Incorporated Law Society; Author of "Charter-parties and Bills of Lading," etc.

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PREFACE.

THE contents of this volume were delivered as a Course of Lectures on Mercantile Law by the Author, as Lecturer in Common Law to the Incorporated Law Society. In consequence of suggestions made by students and others, they are now, with the permission of the Council of the Society, published from a shorthand report, which has been carefully revised. This will account for their form, which is that of spoken discourses, though the Lectures have been broken up in chapters. It is hoped that the following pages may be useful to students of both branches of the profession and to men of business, though they make no pretence of dealing with more than the outlines of the subject.

T. E. S.

1, ESSEX COURT, TEMPLE,
February 16, 1891.

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CHAPTER I.

THE LAW MERCHANT AND ITS HISTORY.

Books recommended.—The best, and almost the only satisfactory sketch of the history of the Law Merchant with which I am acquainted, is the Introduction prefixed by Master Macdonell to the tenth edition of Smith's Mercantile Law. See also the Prefaces to Chalmers on Bills of Exchange, and Lowndes on Marine Insurance; and Scrutton on the Influence of the Roman Law on the Law of England, chapters xiii., xiv.

THE Council of the Incorporated Law Society have assigned to their Common Law lecturer a wide sphere of subjects. Besides the subjects that are ordinarily treated of in the Queen's Bench Division, the Common Law lecturer is at liberty to range over the miscellaneous class of matters that are dealt with by that Division of the High Court which is popularly described as dealing with "bad wives, bad wills, and bad wessels." He may go further afield and deal with the Law of Bankruptcy, the Criminal Law, and with the Ecclesiastical Law.

Obviously a lecturer must have a perfectly hydraulic power of compression, and his audience must have perfectly ostrich-like powers of digestion if in the course of nine lectures he is to cover anything like the subjects that are assigned to him.

(2) But the fact that so wide a meaning is given by the Council to the term "Common Law," may properly call your attention to the different meanings that the term "Common Law," itself has. In the first place "Common Law" is used in distinction to "Equity." The Common Law alone was administered by the King's Courts in this country, and suitors who complained of the rules of the law addressed petitions to the King, as the fountain of justice, asking for "Equity." The King, if he had time or inclination, dealt with these petitions himself; but when, as generally happened, he had not time or inclination, he referred them to his Chancellor, and the Chancellor dealt out "Equity" to petitioners injured by the stringent rules of the Common Law. The Equity administered at first was variable; as Selden said, it "varied with the length of the Chancellor's foot," but by degrees Equity itself came to settle down to rigid rules, until with the same case you might know beforehand that you would be successful on the Common Law side of Westminster Hall and unsucoessful on the Equity

side. At last under the Judicature Act (*a*) the rules of Equity prevailed over the rules of Common Law, and the distinction became abolished except in as far as certain subjects were assigned to the Court of Chancery, and that certain subjects were assigned to the Queen's Bench Division.

A second meaning of the term "Common Law" is when it is used in opposition to "Statute Law." In that sense Common Law is the unwritten law of the kingdom which exists *in gremio legis*, in the bosoms of the judges, which they bring forth from that mysterious recess when new points have to be dealt with; while the Statute Law is the written law of the kingdom as it has been laid down by the Legislature in Acts of Parliament.

Another sense in which the term "Common Law" is used is when it is distinguished from the "Civil Law," and in that sense the Common Law is the law of England; the Civil Law is the law of those countries who have founded their system upon the Roman Law. For instance, if you go north of the Border to Scotland, you find a system administered differing from the Law of England, and founded upon the Civil Law. If you cross the Atlantic to the United States you find the States in the North, such as Massachusetts, administering a system founded on

(*a*) 36 & 37 Vic. c. 66, § 5, ss. 11.

Common Law; and if you go to Louisiana, in the South, you find a system founded on the old Roman Law, and known as a Civil Law system.

There was yet another distinction which leads me to the subject of this course of lectures. If you read the law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable. But it is a curious fact that one finds in the reports of that century, two hundred years ago, hardly any commercial cases. If one looks up the Law of Bills of Exchange, "the cases on the subject are comparatively few and unimportant till the time of Lord Mansfield." (*b*) If you turn to Policies of Insurance, and to the work of Mr. Justice Park on the subject published at the beginning of this century, you find him saying: "I am sure I rather go beyond bounds if I assert that in all our reports from the reign of Queen Elizabeth to the year 1756, when Lord Mansfield became Chief Justice of the King's Bench, there are sixty cases upon matters of insurance." (*c*) If you come to Charter Parties and Bills of Lading, which have always been productive of litigation, you find

(*b*) Chalmers, Bills, Pref. p. 36. (*c*) Park, I. Pref. 43.

Sir John Davies in the seventeenth century saying that "until he understood the difference between the Law of Merchants and the Common Law of England, he did not a little marvel what should be the cause that in the books of the Common Law of England there should be found so few cases concerning merchants and ships, but now the reason was apparent, for that the Common Law did leave these cases to be ruled by another law, the Law Merchant, which is a branch of the Law of Nations." (*d*)

The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old-established law and largely based on mercantile customs. Gerard Malynes, who wrote the first work on the Merchant Law in England, called his book, published in 1622, "*Consuetudo vel Lex Mercatoria,*" or the Ancient Law Merchant; and he said in his preface: "I have entituled the book according to the ancient name of *Lex Mercatoria,* and not *Jus Mercatorum,* because it is a customary law approved by the authority of all kingdoms and commonweales, and not a law established by the sovereignty of any prince." And Blackstone, in the middle of the last century, says: "The affairs of

(*d*) Zouch, Jurisdiction of the Admiralty (1686), p. 89.

commerce are regulated by a law of their own called the Law Merchant or *Lex Mercatoria*, which all nations agree in and take notice of, and it is particularly held to be part of the law of England which decides the causes of merchants by the general rules which obtain in all commercial countries, and that often even in matters relating to domestic trade, as for instance, in the drawing, the acceptance, and the transfer of Bills of Exchange." (*e*) Later than Blackstone, Lord Mansfield lays down that "Mercantile Law is not the law of a particular country, but the law of all nations"; (*f*) while so recently as 1883 you find Lord Blackburn saying in the House of Lords that "the general Law Merchant for many years has in all countries caused Bills of Exchange to be negotiable; there are in some cases differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the Law Merchant are the same in all countries." (*g*)

Now if we follow the growth of this Law Merchant or Mercantile Law, which was two hundred years ago so distinct from the Common Law, we find it in England going through three stages of develop-

(*e*) Blackstone, Commentaries, I. 273; IV. 67.
(*f*) *Luke* v. *Lyde*, 2 Burr. at p. 887.
(*g*) *M'Lean* v. *Clydesdale Bank*, 9 App. C, at p. 105.

ment. (*h*) The first stage may be fixed as ending at the appointment of Coke as Lord Chief Justice in the year 1606, and before that time you will find the Law Merchant as a special law administered by special Courts for a special class of people.

In the first place as to the special Courts. The greater part of the foreign trade of England, and indeed of the whole of Europe at that time, was conducted in the great fairs, held at fixed places and fixed times in each year, to which merchants of all countries came; fairs very similar to those which meet every year at the present time at Novgorod in Russia, and at other places in the East. In England, also, there were then the great fairs of Winchester and Stourbridge, and the fairs of Besançon and Lyons in France, and in each of those fairs a Court sat to administer speedy justice by the Law Merchant to the merchants who congregated in the fairs, and in case of doubt and difficulty to have that law declared on the basis of mercantile customs by the merchants who were present. You will find this Court mentioned in the old English law books as the Court *Pepoudrous*, so called because justice was administered "while the dust fell from the feet," so quick were the Courts supposed to be. "This Court is incident to every fair and market

(*h*) Macdonell, Preface to Smith's Mercantile Law, p. 82.

because that for contracts and injuries done concerning the fair or market there shall be as speedy justice done for advancement of trade and traffic as the dust can fall from the feet, the proceeding there being *de hora in horam.*" (*i*) Indeed, so far back as Bracton in the thirteenth century, it had been recognised that there were certain classes of people "who ought to have swift justice, such as merchants, to whom justice is given in the Court Pepoudrous." (*j*) The records of these Courts are few, for obviously in Courts for rapid business law reporters were rather at a discount. As a consequence, "there is no part of the history of English law more obscure than that connected with the maxim that the Law Merchant is part of the law of the land." (*k*) We are, however, fortunate enough to have one or two records of the Courts of the Fairs. The Selden Society has succeeded in unearthing the Abbot's roll of the fair of St. Ives held in 1275 and 1291, (*l*) containing a series of cases which show how the merchants administered the Law Merchant in the Courts of the fair, and why such cases did not come into the King's Court. For instance :—"Thomas, of Wells, complains of Adam Garsop that he unjustly

(*i*) Coke, Inst. IV. 272.
(*j*) Bracton, f. 334.
(*k*) Blackburn on Sale, 1st ed. p. 207.
(*l*) Selden Society, Vol. II. pp. 130 *et seq.*

detains and deforces from him a coffer which the said Adam sold to him on Wednesday next after Mid Lent last past for sixpence, whereof he paid to the said Adam twopence and a drink in advance"—(it appears to have been a very good mercantile custom, still existing, to "wet a bargain," and the drink was a matter to which great importance was attached by the merchants present); "and on the Octave of Easter came and would have paid the rest, but the said Adam would not receive it nor answer for the said coffer, but detained it unconditionally to his damage and dishonour, 2*s.*, and he produces suit. The said Adam is present and does not defend. Therefore let him make satisfaction to the said Thomas and be in mercy for the unjust detainer; fine 6*d.*; pledge his overcoat." The next defendant was not so fortunate as to have an overcoat. "Reginald Picard of Stamford came and confessed by his own mouth that he sold to Peter Redhood of London a ring of brass for 5½*d.*, saying that the said ring was of the purest gold, and that he and a one-eyed man found it on the last Sunday in the churchyard of St. Ives, near the cross." (One fancies one has heard that tale about the brass ring before.) "Therefore it is considered that the said Reginald do make satisfaction to the said Peter for the 5½*d.* and be in mercy for the trespass; he is poor; pledge

his body." The next case introduces the Law Merchant. "Nicolas Legge complains of Nicolas of Mildenhall for that unjustly he impedes him from having, *according to the usage of merchants,* part in a certain ox which Nicolas of Mildenhall bought in his presence in the village of St. Ives on Monday last past to his damage 2*s.*, whereas he was ready to pay half the price, which price was 2*s.* 6*d.* And Nicolas of Mildenhall defends, and says that the Law Merchant does well allow that every merchant may participate in a bargain in the butcher's trade if he claim a part thereof at the time of the sale; but to prove that the said Nicolas Legge was not present at the time of the purchase nor claimed a part thereof he is ready to make law." Then they went to the proof. The custom of the Law Merchant relied on admitted any merchant standing by to claim a share in any bargain on paying a share of the price. The defence is, "You were not there, so you cannot claim." The next and last case is one which puzzled the Court, and therefore I omit the details, but it is recited in the Abbot's roll: "And the case is respited till it shall be more thoroughly discussed by the merchants. And the merchants of the various commonalties and others being convoked in full Court it is considered"—and then they go on to discuss it. There you see the Merchants' Court at work,

giving quick justice in all mercantile disputes, and in cases of doubt calling upon the merchants present to declare what the Law Merchant is. So much for the fairs.

In most seaport towns also you would find a similar Court dealing with cases arising out of ships. In the Domesday Book of Ipswich (*m*) it is stated, "The pleas between strange folk that men call 'pypoudrous' should be pleaded from day to day. The pleas in time of fair between stranger and passer should be pleaded from hour to hour, as well in the forenoon as in the afternoon, and that is to wit of plaints begun in the same time of fair, and the pleas given to the law marine for strange mariners passing, and for them that abide not but their tide, should be pleaded from tide to tide." Any ship coming into the port of Ipswich with a dispute about its Charter Party or Bill of Lading may get summary justice at once from this Court at Ipswich between tide and tide. Stress may be laid on the fact that the Courts sat in the afternoon, because at that time the King's Courts only sat from eight in the morning till eleven and then adjourned for the rest of the day. "For in the afternoons these Courts are not holden. But the suitors then resort to the perusing of their writings, and elsewhere consulting with the serjeants-

(*m*) Black Book of Admiralty, Rolls Series, II. 23.

at-law and other their counsellors," (*n*) so that the time taken up in consultation by the Courts in London was taken up by the Courts at Ipswich in dealing summarily with cases, and letting the strange mariners go who were only waiting for their tide.

There were special Courts by statute, of which a number of "grave and discreet merchants" were necessary members, in order that the Mercantile Law founded on the custom of merchants might be duly applied to the case before them. (*o*) The law which these Courts administered was what was called by merchants the Law Merchant and Law of the Sea, and it was common to nearly every European country. Much of it was to be found in a series of codes of Sea Laws, such as the Laws of Oleron and Wisbury, and the Consolato del Mare, embodying the customs and practices of merchants of different countries, and it was not the Common Law of England. Further, it was only for a particular class. You had to show yourself to be a merchant before you got into the Mercantile Court; and until about two hundred years ago it was still necessary to show yourself to

(*n*) Sir J. Fortescue.

(*o*) *E.g.* the Court established by 43 Eliz. c. 12, of which eight "grave and discreet merchants" were to be members, who were to determine all insurance cases in a brief and summary course, without formalities of pleadings or proceedings.

be a merchant in the Common Law Courts before you could get the benefit of the Law Merchant. (*p*)

Now the second stage of development of the Law Merchant may be dated from Lord Coke's taking office in 1606, and lasts until the time when Lord Mansfield became Chief Justice in 1756, and during that time the peculiarity of its development is this: that the special Courts die out, and the Law Merchant is administered by the King's Courts of Common Law, but it is administered as a custom and not as law, and at first the custom only applies if the plaintiff or defendant is proved to be a merchant. In every action on a Bill of Exchange it was necessary formally to plead "secundum usum et consuetudinem Mercatorum"—according to the use and custom of merchants; (*q*) and it was sometimes pleaded that the plaintiff was not a merchant but a gentleman. (*r*) And as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts; as a result little was done towards building up any system

(*p*) *Vide post*, pp. 29, 30.

(*q*) Chalmers, Bills, Pref. p. 44.

(*r*) Cf. *Sarsfield* v. *Witherby* (1692), Carthew, 82.

of Mercantile Law in England. The construction of that system began with the accession of Lord Mansfield to the Chief Justiceship of the King's Bench in 1756, and the result of his administration of the law in the Court for thirty years was to build up a system of law as part of the Common Law, embodying and giving form to the existing customs of merchants. When he retired, after his thirty years of office, Mr. Justice Buller paid a great tribute to the service that he had done. In giving judgment in *Lickbarrow* v. *Mason*, (*s*) he said: "Thus the matter stood till within these thirty years. Since that time the Commercial Law of this country has taken a very different turn from what it did before. Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period we find in Courts of Law all the evidence in mercantile cases was thrown together; they were left generally to the jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principle, not only to rule the particular case under consideration, but to serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged, and explained till we have been lost

(*s*) 2 T. R. 73.

in admiration at the strength and stretch of the human understanding, and I should be sorry to find myself under the necessity of differing from Lord Mansfield, who may truly be said to be the founder of the Commercial Law of this country." Lord Mansfield, with a Scotch training, was not too favourable to the Common Law of England, and he derived many of the principles of Mercantile Law, that he laid down, from the writings of foreign jurists, as embodying the custom of merchants all over Europe. For instance, in his great judgment in *Luke* v. *Lyde*, (*t*) which raised a question of the freight due for goods lost at sea, he cited the Roman Pandects, the Consolato del Mare, laws of Wisbury and Oleron, two English and two foreign mercantile writers, and the French Ordonnances, and deduced from them the principle which has since been part of the Law of England. (*u*) While he obtained his legal principles from those sources, he took his customs of trade and his facts from Mercantile Special Juries, whom he very carefully directed on the law; and Lord Campbell, in his life of Lord Mansfield, has left an account of Lord Mansfield's procedure. He says: (*v*) "Lord Mansfield reared a body of special jurymen at Guildhall, who were

(*t*) 2 Burr. 883.

(*u*) Cf. the judgment of Willes, J., in *Dakin* v. *Oxley*, 15 C. B. N. S. 646, for similar authorities.

(*v*) Campbell's Lives of the Lord Chief Justices, II. 407, note.

generally returned on all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing freely with them in Court, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided. Several of these gentlemen survived when I began to attend Guildhall as a student, and were designated and honoured as 'Lord Mansfield's jurymen.' One in particular I remember, Mr. Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself."

Since the time of Lord Mansfield other judges have carried on the work that he began, notably Abbott, Lord Chief Justice, afterwards Lord Tenterden, the author of "Abbott on Shipping," Mr. Justice Lawrence, and the late Mr. Justice Willes; and as the result of their labours the English Law is now provided with a fairly complete code of mercantile rules, and is consequently inclined to disregard the practice of other countries. In Lord Mansfield's time it would have been a strong argument to urge that all other countries had adopted a particular rule; at the present time English Courts are not alarmed by the fact that the law they administer differs from the law of other countries. In a recent

case before the Court of Appeal, Lord Esher says: (*w*) "It was urged that even if the proposition is stated in terms larger than have hitherto been recognised in English Law, yet it ought now to be adopted in order to bring the principle of English Law on the subject into consonance with the laws of all other countries. But to this I cannot agree. It is useless to inquire whether the law is, as stated, the same in all European countries. For if it is, yet no English Court has any mission to adapt the Law of England to the laws of other countries; it has authority only to declare what the Law of England is." Lord Mansfield would have found out what the Law of England in mercantile matters was by considering what was the law of other countries, if there was no English decision laying down any clear rule. The Courts of the present day, in the wealth of English commercial law, feel entitled to disregard the law of other countries.

Further than this, the Law Merchant, which was originally based upon the usage of merchants, can now be extended by new usages which have sprung up, may be constantly added to by proof of fresh usages of the mercantile world. That is very clearly and strongly laid down in the case of *Goodwin*

(*w*) *Svendsen* v. *Wallace*, 13 Q. B. D. 73, cf. per Willes, J., in *Lloyd* v. *Guibert*, L. R. 1 Q. B. 119, 123.

v. *Robarts*. (*x*) It was a case involving the question whether a particular form of debenture scrip was negotiable, and it was alleged that by the custom of merchants it had been so for the last twenty years. It was answered to that, relying upon a judgment of Mr. Justice Blackburn, (*y*) that no addition could be made to the Law Merchant by so recent a usage as twenty years, but that it must be shown to be part of the ancient Law Merchant; but Chief Justice Cockburn, in delivering the judgment of the Court of Exchequer Chamber in *Goodwin* v. *Robarts*, said: "Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the Law Merchant is fixed and stereotyped, and incapable of being enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that Law Merchant is sometimes spoken of as a fixed body of law forming part of the law, and, as it were, coeval with it, but as a matter of legal history this view is altogether incorrect. . . . The Law Merchant is of comparatively recent origin; it is neither more or less than the usages of merchants and traders in the different departments of trade ratified by the decisions of the Courts of Law, which, upon

(*x*) L. R. 10 Ex. 346, 352.
(*y*) *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 386.

such usages being proved before them, have adopted them as settled law with a view to the interests of trade and public convenience, the Court proceeding herein on the well-known principle of law that, with respect to transactions in the different departments of trade, Courts of Law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing in that particular department." Thus it is that Courts of Law continually take notice of customs of trade, only to the word "customs" they give a much wider meaning than it bears in the Common Law. A well-known lawyer said rather cynically once that he had heard a good many customs found by juries, but he had never heard one proved yet; and it is so that the evidence on which a mercantile jury, who know a great deal more about the matter than the lawyers or witnesses, very often will find that a custom exists, is such as would not suffice to establish any custom under the strict rules of the Common Law.

For according to the Common Law a custom must have six attributes. In the first place it must date from time immemorial, which has been conveniently fixed by the Common Law as when our Lord Richard returned from Palestine, in 1189. Now, obviously, when our Lord Richard returned from Palestine, the

amount of mercantile custom existing in England was of the very slightest description, and if one is to trace all one's mercantile customs back to his return from Palestine, or if a custom is liable to be defeated by proof of a later origin, very few mercantile customs can possibly be proved. The custom must be continuous from that date in the second place. In the third place it must be universally acquiesced in. In the fourth place it must be reasonable. In the fifth place it must be certain; and in the last place it must be binding. Now in proving a mercantile custom you can dispense with our Lord Richard at once; it is sufficient for you to prove that the custom is certain, so that people know what it is; that it is reasonable; that it is fairly universal (of course it is not quite universal, because somebody is disputing it in the action in question); that it has existed for some time (five years may suffice); and that merchants in the trade consider it binding; and on those lines the law is continually being added to by the finding of customs by special juries.

The Law Merchant has developed in this way, and for the remainder of this course of lectures I shall be dealing with the particular instruments used in mercantile circles, and with the incidents which the custom of merchants or the Law Merchant has attached to those instruments. I shall deal

first of all with negotiable instruments, bills of exchange, promissory notes, cheques, bank notes, and other instruments, that have been held by the Courts negotiable. I shall then go on to shipping documents, charter-parties and bills of lading, considering also the position of a bill of lading as a document of title, with the kindred subjects of stoppage *in transitu*, delivery orders, dock warrants, and the Factors' Acts. I shall then hope to deal with policies of insurance, and with sold and bought notes and the mercantile contract of sale.

CHAPTER II.

GROWTH OF THE LAW MERCHANT; HISTORY OF NEGOTIABLE INSTRUMENTS.

For authorities, see the Preface to Mr. Chalmers' work on Bills of Exchange; the notes to *Miller* v. *Race* in 1 Smith's Leading Cases, 9th ed. p. 491; and the judgment of Cockburn, C. J., in *Goodwin* v. *Robarts*, L. R. 10 Ex. 346.

MANY of the rules of Mercantile Law, the Law Merchant, are directed to evade inconvenient rules of the Common Law. The Common Law in its ancient strictness greatly interferes with the free course of commerce, and its first rule, and the rule which has caused the greatest difficulty to merchants, is apparently a very simple one. The Common Law says a man cannot give what he has not got; *nemo potest dare, quod non habet*; therefore a man who has not got a title to goods cannot give a title to another; and consequently, if you are to be sure when you have bought a thing that you have got a title to it, you must inquire into the title of that thing back to its remote possessors, to see

that there is nobody in the chain who stole it, or obtained it by fraud. In the same way, if anybody comes to you with goods which he says were entrusted to him by his principal for sale, you must inquire into his authority and his principal's title; because if he has not a title, if he has not authority from his principal to deal with the goods in the way in which he is dealing with them, you will get no title. That is the rule of the Common Law, and that is the rule that the Law Merchant has set itself to rectify, for "commercial business," say commercial men, "cannot be carried on if we have to inquire into the title of everybody who comes to us with documents of title such as bills of lading or for the sale of goods." In the words of Lord Justice Bowen: (z) "The practice of merchants is not based on the supposition of possible fraud. The object of mercantile usage is to prevent the risk of insolvency, not of fraud; and any one who attempts to follow and understand the Law Merchant will soon find himself lost, if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings. Mercantile genius consists

(z) *Sanders* v. *McLean*, 11 Q. B. D. at p. 343.

principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud, than it is on the supposition of forgery." You will find an admirable statement of the difficulties which the Common Law thus puts in the way of merchants in the judgment of Mr. Justice Blackburn in *Cole* v. *The North Western Bank.* (*a*)

Now, the first inconvenience of the Common Law rule is found in dealing with sales in a market, and the Law Merchant has met this by the doctrine of sale in "market overt," which is now part of the Common Law, but was introduced by the custom of merchants. If you go back as far as Bracton, you find the man who bought in a market goods which had been stolen did not become entitled to them as he would now; (*b*) the only protection that he obtained was that he was not liable to be criminally convicted for theft, if he could show that he had bought them in a recognised market. By the time you get to Lord Coke you find the Law Merchant has established the present rule, and Coke writes: "Sales and contracts of anything vendible in fairs

(*a*) L. R. 10 C. P. at p. 362.

(*b*) See the historical references in the argument in *Bentley* v. *Vilmont*, 12 App. C. at p. 474.

or markets overt should not be good only between the parties, but should bind those that had right thereunto." (*c*) That is the first exception established by the Law Merchant. The Common Law says: "No man can give what he has not got"; answer by the Law Merchant: "Yes, he can if he sells in a market, because it is for the interest of trade that purchases in markets should be secure even though the person who offers the goods for sale in a market has not a title." (*d*)

Now another rule of the Common Law which is found inconvenient by merchants is the old rule that a "chose in action" is not transferable. A "chose in action" is a right to recover a thing, as distinguished from the thing itself. A bill of lading, as distinguished from the goods it represents, is such a "chose in action." If you had a right to recover property from A., and wanted to assign that right to B., so that B. could recover such property from A., you could not do it by the old Common Law. Equity would have recognised that you had transferred the right to B., but even then B. must bring

(*c*) Coke, Inst. II. 713.

(*d*) For a further example of the working of the Common Law rule see the well-known case of *Barton* v. *L. N. W. R.* 24 Q. B. D. 77. The Rule of Market overt is defeated if the true owner prosecutes the thief, or person who has obtained property by false pretences, to conviction. Cf. *Bentley* v. *Vilmont*, 12 App. C. 471.

his action in the name of A., who had given him the right; he could not sue in his own name. And further, when the "chose in action" was transferred, such a transfer passed no better title than the transferor had. Now the Law Merchant dealt with many "choses in action," and it would have been very inconvenient, for instance, that the man who took a bill of exchange should not be able to sue on it in his own name, but should have to sue in the name of the man whose name was mentioned as payee in the bill of exchange. It would have been highly inconvenient that the indorsee of a bill of exchange should have to inquire into the title of all previous indorsers, to see that there was no defect in any of their titles. As a result the Law Merchant establishes certain instruments or "choses in action," which were transferable by delivery or indorsement, so that the holder could sue in his own name, and which passed a good title to a transferee who took them in good faith, notwithstanding that the transferor or his predecessors had no title. These documents had thus two distinguishing features: they could be sued on by the holder in his own name; and they were not affected by previous lack of title; and instruments of this class are called Negotiable Instruments. (*e*)

(*e*) See the leading case of *Miller* v. *Race*, 1 Smith, L. C. 9th ed. 491, and *per* Bowen, L. J., in *Picker* v. *London and County Bank*, 18 Q. B. D. 519.

To illustrate the general doctrine I have been explaining to you, a bill of exchange is by the custom of merchants transferable either by delivery, if it is to bearer, or by indorsement, if it is to order, and the indorsee or person who takes it can sue in his own name, and is not affected by the fact of previous want of title in an indorser if he was not a party to that defect.

The indorsement of a bill of lading by the custom of merchants passes such property in the goods represented by it as it was intended to pass; (*f*) but it needed a statute, the Bills of Lading Act, (*g*) to get a further effect and allow a holder of a bill of lading to sue in his own name on the contract contained in the bill of lading. Thus the bill of lading obtained a similar position to that of a negotiable instrument by the double effect of the custom of merchants and of the Statute. A policy of insurance does not by assignment pass goods insured under it, although the assignee may by statute sue in his own name, and therefore it is not a complete negotiable instrument. For to make a negotiable instrument you must have two marks; that the holder gets a title, though his transferor had no title, and that the holder can sue in his own name, each of these marks meeting one of the rules of the Common Law already referred to.

(*f*) *Vide post*, p. 153. (*g*) 18 & 19 Vic. c. 111.

The law of negotiable instruments is, with some few exceptions depending on statutes, entirely built upon the custom of merchants, and the history of that law as applied to particular classes of instruments you will find best stated in the judgment of Lord Chief Justice Cockburn in *Goodwin* v. *Robarts*, (*h*) which I recommend to your careful reading. The earliest form of negotiable instrument was the bill of exchange. (*i*) Originally bills of exchange were used solely for the purpose of foreign trade. It was an instrument by which an English merchant contrived to avoid sending money out of the country or bringing money into the country by giving an order on his foreign debtor to pay a third person, or by accepting an order to pay a third person from his foreign creditor. (*j*) It was purely a trade transaction for the purpose of avoiding sending money out of the country, and the French Law has adhered to that idea of a bill of exchange to this day, and treats it merely as a trade transaction. The English Law has treated it as an instrument of credit. Bills of exchange seem to have been introduced into England by the Venetians or Florentines, and there were bills of exchange for foreign trade known to England as

(*h*) L. R. 10 Ex. 346.

(*i*) Defined in Bills of Exchange Act, 1882, § 3, and *post*, pp. 40, 41.

(*j*) See Chalmers, Bills, Pref. p. 46.

early as the reign of Richard II. The first reported case in the English Courts is in the year 1603, (*k*) and the Courts, in developing what was originally simply a bill in a transaction of foreign trade, have followed the custom of merchants. Chief Justice Treby, in the case of *Bromwich* v. *Lloyd*, (*l*) explained the stages by which a bill of exchange was developed. "Bills of exchange," he said, "at first extended only to merchant strangers trafficking with English merchants; and afterwards to inland bills between merchants trafficking the one with the other in England; and afterwards to all traders, and then to all persons whether traders or not; and there was then no need to allege any custom of merchants." So beginning with the necessity to allege an English merchant and a foreign merchant, you dispense with the foreign merchant and allege two English merchants trading; then you dispense with the particular transaction of trade; then you drop the trader, or the allegation that there is any merchant at all, and simply produce the bill. But in a case in 1613 (*m*) there was a plea that an acceptor of a bill of exchange was not a merchant, and it was held a good answer. A bill of exchange could not

(*k*) *Martin* v. *Boure*, Cro. Jac. 6.
(*l*) (1698) 2 Lutwyche's Reports, p. 1585.
(*m*) *Oaste* v. *Taylor*, 1 Cro. Jac. 306.

be made at that time by people who were not merchants. In 1692, however, the Courts had got a little further. (*n*) There was a plea then that the acceptor of a bill of exchange was a gentleman and not a merchant, and the Court of Queen's Bench, following the earlier case, held that a good defence; but the Court of Appeal, the Exchequer Chamber, reversed the decision, "having consideration to the inconvenience that might ensue and the suspicion which might increase among foreign merchants," and they laid down very sensibly that if "gentlemen" took upon themselves to accept bills they ought to pay them. The custom of merchants has gone on developing bills of exchange until the law with regard to them is now all but settled; they pass by indorsement or delivery the right to the indorsee to sue in his own name; they pass title to a *bonâ fide* holder for value though the indorser's title is bad; and it is not necessary to allege any consideration for the bill, for consideration is presumed until the contrary is proved. The only trace of the former history of bills of exchange is the difference between inland and foreign bills of exchange, which is, in the words of Lord Holt, "All the difference between foreign and inland bills is that foreign bills must be protested before a notary before the drawer can be

(*n*) *Sarsfield* v. *Witherby*, Carthew, 82.

charged; but inland bills need no protest," (*o*) notice of dishonour being sufficient.

The next document which obtained the features of negotiability was a promissory note. In a bill of exchange there are, after acceptance, two people who offer security to the holder, the drawer and the acceptor; in a promissory note there is at first only the single security, that of the person who promises in the note to pay. The first case in which promissory notes were recognised by the Courts as negotiable instruments was the case of *Shelden* v. *Hentley*, (*p*) in 1680, where the Court held a promissory note to be a negotiable instrument, expressly saying that "it was the custom of merchants that made that good." That decision for some years afterwards was followed in other cases till Holt became Chief Justice. Lord Holt set his face against the custom of merchants and against promissory notes as negotiable instruments. In the case of *Clarke* v. *Martin* (*q*) the reporter says: "But Holt, C. J., was with all his strength against this action, (on a promissory note), and said that this note could not be a bill of exchange; that the maintaining of these actions upon such notes were innovations upon the rules of Common Law,

(*o*) *Buller* v. *Cripps*, 6 Mod. 29.
(*p*) 2 Showers, p. 160.
(*p*) (1702) 2 Lord Raymond, 758.

and that it amounted to setting up a new sort of specialty unknown to the Common Law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them." It appears that Lombard Street and the merchants therein thought that the "obstinacy and opinionativeness" was upon the side of Lord Holt, for they continued to use these documents and to sue upon them; and in the next year, in another case of *Buller* v. *Crispe*, (*r*) Lord Holt again expressed his opinion in strong terms, and said that these notes were not in the nature of bills of exchange, but were only an invention of the goldsmiths in Lombard Street, who had a mind to make a law to bind all that did deal with them. "At another day Holt, C. J., declared that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill-consequences that it was pretended would ensue by obstructing this form, and they had told him that it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years; that not only notes

(*r*) 6 Modern Reports, p. 29.

but bonds for money were transferred frequently, and endorsed as bills of exchange," and the reporter winds up significantly, "the Court at last took the vacation to consider of it." Parliament stepped in and saved them from considering it any further, for by an Act of the year 1704 (*s*) it was expressly provided that promissory notes should be deemed as negotiable as bills of exchange. The preamble of the Act began: "Whereas it hath been held that promissory notes are not indorsable over, within the custom of merchants, therefore to encourage trade and commerce be it enacted." So in this case also the custom of merchants introduced an innovation into the law of Westminster Hall, although it needed the sanction of Parliament to induce Westminster Hall to recognise it.

The next step in the history was that bankers and goldsmiths who held money on deposit began to issue promissory notes payable on demand, that is to say they began to issue Bank Notes. To these again the custom of merchants very speedily gave negotiability, and in the leading case of *Miller* v. *Race*, (*t*) Lord Mansfield decided that bank notes also were negotiable instruments, holding that it was necessary for the purposes of commerce that their currency should be established and secured. And by the custom

(*s*) 3 & 4 Anne, c. 9.

(*t*) 1 Smith's Leading Cases, 9th ed. p. 490.

of merchants, bank notes have acquired a superior position to promissory notes. They are payable to any holder who may present them without the necessity of his indorsing them. There is a legend that the Bank of England always required persons presenting their bank notes to indorse them, and that on one occasion when the clerk of the Bank behind the counter spoke in rather a cavalier manner to a gentleman who came in, telling him that he could not be paid unless he wrote his name on the back, the gentleman with the note walked out and promptly sued the Bank of England for dishonouring their promissory note, and of course sued them successfully, with the result of altering the custom at the Bank. Bank of England notes are now legal currency and tender, and in the case of country banks their notes may be, under certain circumstances, treated as currency and payment.

The next step was when the banks, besides issuing their promissory notes payable on demand, or bank notes, accepted and honoured bills of exchange drawn on them by their customers, payable on demand; that is to say when the system of *Cheques* came into existence, for a cheque is a bill of exchange drawn on a bank by its customer, payable on demand. (*u*) To cheques, also, the practice of merchants has affixed

(*u*) Bills of Exchange Act (1882), § 73.

certain incidents, as for instance the practice of crossing cheques, which originated partly in the usages of commerce and partly in the Clearing House; and has now been definitely recognised by Act of Parliament. Banks, by the custom of merchants, are also bound to honour cheques if they have funds of the customer in their hands; though a drawee, even though he had funds in his hand, would not be bound to accept a bill of exchange.

So far, the law of negotiable instruments, (bills of exchange, promissory notes, cheques, bank notes), has been codified by Parliament in the Bills of Exchange Act, 1882; "an Act to codify the law relating to bills of exchange, cheques, and promissory notes," (*v*) and on all matter treated on by that Act the Law Merchant is now to be found in its clauses, and not in the cases and customs on which those clauses were founded.

There are, however, other negotiable instruments besides those which have been dealt with by the Act of 1882, and to such instruments the rules of the Common Law and the customs of the Law Merchant are still applicable. Fresh usages may be introduced, or new documents may be proved by the usage of merchants to have the two marks of negotiability already stated. (*w*) The usage that is

(*v*) 45 & 46 Vic. c. 61. (*w*) *Ante*, p. 26.

proved must, however, be a usage of English merchants. In the case of *Picker* v. *The London and County Bank*, (*x*) an attempt was made to treat certain Prussian bonds as negotiable instruments in England; but the only evidence that was offered was that those bonds were negotiable by the custom of Prussian merchants, and the Court unanimously rejected the evidence as insufficient. As it was pointedly put, the fact that in Africa cowries are negotiable instruments does not therefore bind the English Courts to accept cowries as negotiable instruments in England, and the same principle has always been applied in any attempt to prove the negotiability of instruments in England; the usage proved must be a usage of English merchants. It is not necessary that that usage should be from time immemorial. Mr. Justice Blackburn did, indeed, in one case (*y*) lay down that such a usage existing as part of the ancient Law Merchant was necessary; but in the later case, *Goodwin* v. *Robarts*, (*z*) both the Court of Appeal and the House of Lords held that to be too narrow a limitation, deciding that the Law Merchant might be added to by proof of recent usage, and thus

(*x*) 18 Q. B. D. p. 515.

(*y*) *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B. 374, followed on this by Manisty, J., in 20 Q. B. D. at p. 239.

(*z*) L. R. 10 Ex. at p. 355; 1 App. C. at p. 494.

that new negotiable instruments might be from time to time created. We find in the Reports a series of illustrations of these principles of law in the various documents that have been from time to time proved or not proved to be negotiable instruments. For instance, in the case of *Glynn* v. *Baker*, (*a*) East India bonds were held not to be negotiable in the absence of any evidence that they customarily passed by delivery; but the decision in the Courts was immediately remedied by Parliament, who passed an Act giving to East India bonds the character of negotiability. (*b*) In *Dixon* v. *Bovill*, (*c*) a document called an "iron warrant," running, "I will deliver one hundred tons of iron when required after Sept. 18th to the party lodging this document with me," was held by the House of Lords not to be a negotiable instrument, and not therefore to pass by delivery, there being no evidence before the Court of any mercantile usage affecting such documents; it is, however, very probable that if the question of iron warrants came before the Court at the present day, they could be abundantly proved to be negotiable.

To come to more recent cases, in *The Fine Arts Society* v. *The Union Bank*, (*d*) it was held that Post

(*a*) 13 East, 509.
(*b*) 51 Geo. III. c. 64.
(*c*) 3 Macqueen's Reports, p. 1.
(*d*) 17 Q. B. D. 705.

Office orders crossed for collection by a bank were not negotiable instruments; and in *Crouch* v. *The Crédit Foncier*, (*e*) debenture bonds of an English company were held not negotiable because the only proof of usage tendered was one originating in the last twenty years. On the other hand, in *Gorgier* v. *Mieville* (*f*) certain foreign bonds were held to be negotiable instruments on proof that bonds of that description were sold in the English market, and passed from hand to hand daily like Exchequer bills. And that case was followed in *Goodwin* v. *Robarts*, (*g*) in which certain scrip, which on the payment of all instalments due was to be exchanged for bonds, was held a negotiable instrument on proof of usage of the English Stock Exchange. (*h*) There is one other case I wish to mention to you as an illustration of the Common Law maxim I have already reminded you of, that a man cannot give what he has not got, and therefore if he has not got a title cannot give it. The recent case of *Barton* v. *The London and North Western Railway* (*i*) is at the present time exciting very great apprehension in commercial circles. Mr.

(*e*) L. R. 8 Q. B. 374. (*f*) 3 B. & C. 45. (*g*) L. R. 10 Ex.

(*h*) For recent cases in which the question of negotiability was raised see *Lord Sheffield* v. *London Joint Stock Bank*, L. R. 13 App. C. 333, and *Colonial Bank* v. *Williams*, 15 App. C. p. 267.

(*i*) L. R. 24 Q. B. D. 77.

Barton held certain shares in the L. & N. W. Railway which passed to his executors, and one of the executors by forging the signature of the other executor sold those shares some twelve or thirteen years ago. The purchaser took the transfer with the forged signature to the L. & N. W. Railway Company, who registered it, and for the twelve or thirteen years the purchaser has been registered for those shares and has received the dividends. The executrix whose signature was forged—for a lady was concerned—did not find out the absence of these shares for the thirteen years, but on finding it out and on proof of the forgery, the L. & N. W. Company were ordered to replace her name on the register, and the unfortunate purchasers have had to give up their shares, and to pay back the dividends which they have received during the thirteen years. A man cannot give what he has not got. The people who purported to pass these shares had not got them to give. At present agitation, if one may use such a word, is taking place on every English Stock Exchange for an Act which will protect the people whose transfers have been registered by Railway Companies against the rules of the Common Law.

CHAPTER III.

BILLS OF EXCHANGE; PROMISSORY NOTES AND CHEQUES.

For authorities, see the Bills of Exchange Act, 1882 (45 & 46 Vic. c. 61), and Mr. Chalmers' book on Bills of Exchange; 3rd edition, 1887.

FROM the history of negotiable instruments we may now pass to the law as it stands at the present day with regard to the most important classes of negotiable instruments, and especially with regard to bills of exchange. The definition of a bill of exchange is contained in the 3rd Section of the Act of 1882, (*j*) and every word of that definition represents the effect of a series of cases. It reads:—

"A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a certain sum in money to or to the order of a specified person or to bearer." If we consider that again: "A bill of exchange is an

(*j*) 45 & 46 Vic. c. 61, § 3.

unconditional order in writing addressed by one person," who is called the *drawer*, "to another," who is called the *drawee*, "signed by the person giving it"—the drawer—"requiring the drawee to pay a certain sum of money at a time and to a person fixed in the instrument." You can thus shorten the definition a good deal; the time of payment, and the person to whom the payment is to be made, must be fixed in the instrument.

The form which a bill of exchange ordinarily takes is as follows:

£200. London, 1*st March*, 1890.

One month after date pay to my order the sum of Two Hundred Pounds for value received.

JOHN BROWN.

To HENRY WILSON,
Luton.

At the top corner there will be the amount (in figures), £200, and the date and place of drawing, "London, March 1, 1890." Now taking the definition again, "A bill of exchange is an unconditional order in writing"—"*Pay*"—there is the unconditional order. "Addressed by one person," that is *John Brown*, who signs—the drawer—"to another," to *Henry Wilson, Luton*, the drawee. "Signed by the person giving it"—there is the signature of *John Brown*; "requiring the person to whom it is addressed to pay"—"*pay*

on demand or at a fixed and determinable future time"; this is a fixed future time; *one month after date,* and the date is given—"a certain sum of money" —£200—"to or to the order of a specified person or to bearer." This is "*to my order,*" to the order of Henry Wilson. Each part of the definition appears in the bill of exchange.

Now I propose to go through that definition a little more minutely, because the ingenuity of people who draw bills appears never to be exhausted in finding out how unlike the ordinary form they can get a document and yet have it called a bill of exchange. In the first place a bill must be an order in writing. It must not be a mere request. "Please let bearer have £100 and you will much oblige me":—much too polite! *Held* a bad bill of exchange because not an order. (*k*) A certain amount of politeness will be allowed provided you order at the end of it. "Mr. B. will much oblige Mr. A. by paying to the order of C." *Held* a good bill of exchange; (*l*) there is "pay to the order of C.," and the previous politeness was not considered injurious. In fact the common form of a French bill of exchange is:—"Il vous plaira payer":—you will please to pay. A mere authority to pay instead of

(*k*) *Little* v. *Slackford,* 1 M. & M. 171; Chalmers, p. 9.
(*l*) *Ruff* v. *Webb,* 1 Esp. 129.

an order is not a bill of exchange. "We authorise you to pay" has been held to be a bad bill of exchange. (*m*)

In the second place the bill must be an unconditional order; an order to pay on an event which may not happen is not a bill of exchange, because the order is conditional on the happening of the event. (*n*) An order to pay out of a particular fund has been held conditional, because if there is no fund there is no order to pay. And thus an order to "pay out of the money in your hands belonging to the X. Company" has been held no bill of exchange. (*o*) "Out of the money due from X. as soon as you receive it," (*p*) or, "On the sale or produce when sold of the X. hotel": (*q*)—both held bad bills of exchange because conditional. But it does not make a bill bad if, instead of ordering to pay out of a particular fund, the bill merely mentions a fund out of which the payee may repay himself, making the order to pay absolute and suggesting where the payee can get the money from. (*r*) For instance, a bill of exchange "against cotton, per ship *Swallow*," has been held

(*m*) *Hamilton* v. *Spottiswoode*, 4 Exch. 200.
(*n*) Act, § 3, s. 3; § 11.
(*o*) *Jenney* v. *Herle*, 2 Ld. Raymond, 1361.
(*p*) *Dawkes* v. *Lord Deloraine*, 2 W. Bl. 782.
(*q*) *Hill* v. *Halford*, 2 B. & P. 413.
(*r*) Act, § 3, s. 3.

good and not conditional; (*s*) and you will find a series of other cases collected in Mr. Chalmers' book; (*t*) for this part of the definition has been a source of great litigation.

The order to pay in a bill must be addressed by one person who signs it, who is the *drawer*, and who may sign by his mark, if he cannot write, or by his seal, if he is a corporation, or who may sign by his agent. It must be addressed to another person, the *drawee*, who must be either specifically named or must be so described in the bill, that he can be easily found. (*u*) For instance, an instrument which names no drawee, but is payable at 1, Union Street, London, and is accepted by B., who lives at 1, Union Street, London, is a good bill of exchange, because it is supposed to be drawn on a person who lives at 1, Union Street, London, and B. recognises the description by accepting it. (*v*) In the same way an instrument in the form of a bill, drawn "at Messrs. B. & C.'s," is a good bill addressed to Messrs. B. & C. (*w*) But an instrument in the form of a bill addressed to nobody is not a bill, even though some one is kind enough to accept it, for there is no

(*s*) *Inman* v. *Clare*, Johns. 769. (*t*) Pp. 10, 11.

(*u*) Act, § 6.

(*v*) *Gray* v. *Milner*, 8 Taunt. 739. *Quære*, whether before acceptance it can be treated as a good bill.

(*w*) Cf. *Shuttleworth* v. *Stephens*, 1 Camp. 407.

possible means of finding out on the bill who it is meant for. (*x*) A bill may be drawn on two or more drawees, even though they are not partners, but it must not be drawn on them in succession; "A., or if he refuses, B.," will not do, nor will "A. or B." in the alternative suffice. (*y*) The bill must require the person to whom it is addressed—the drawee—to pay money only. A document which requires him to pay and do something else is not a bill. (*z*) For instance, at a time when notes of the Bank of England were not legal tender, a document, "to pay in cash or bank notes" was held a bad bill of exchange. (*a*) So also an order to "pay £100 and deliver up a wharf" was held a bad bill of exchange, because it required the drawee to do something else besides pay money. (*b*) The order must be to pay a certain sum in money. The sum may be made payable with interest, or at a fixed rate of exchange, or by fixed instalments, but if it goes further it will be a bad bill of exchange. (*c*) A bill for £100, payable by instalments, without specifying the instalments, is a bad bill because the payments are not certain. (*d*) A sum payable "by

(*x*) *Peto* v. *Reynolds*, 9 Exch. 410.
(*y*) Act, § 6, s. 2. (*z*) Act, § 3, s. 2.
(*a*) *Ex p. Imeson*, 2 Rose, 225.
(*b*) *Martin* v. *Chauntry*, 2 Stra. 1271.
(*c*) Act, § 9.
(*d*) *Moffatt* v. *Edwards*, Car. & M. 16.

ten equal instalments to cease at my death" invalidates a bill, because it is uncertain how many instalments will become payable. (*e*) An order "to pay C. £100 and all other sums that may be due to him" is bad, because it is uncertain what amount is due to him. (*f*) An order "to pay the balance due to me for building Baptist chapel" is clearly bad; for it is quite uncertain how much was due for building the Baptist chapel. (*g*) It not infrequently happens, owing to the carelessness of human nature, that the amount in figures at the top of the bill differs from the amount in words in the body of the bill, and in that case the statute provides that the words shall prevail, and the figures are treated as if they were a mistake. (*h*)

We come next to the time at which the bill is stated to be payable. "On demand," is the first time mentioned in the definition, and a bill has that effect if it is stated to be payable "on demand" or "at sight" or "on presentation," or if no time for payment is mentioned at all; or if it is accepted and indorsed when overdue, *i.e.* after the time named for payment. (*i*) The second description of time in

(*e*) *Worley* v. *Harrison*, 3 A. & E. 669.

(*f*) *Smith* v. *Nightingale*, 2 Stark. 375.

(*g*) *Crowfoot* v. *Gurney* (1832), 9 Bing. 372. Cf. Chalmers, pp. 23, 24.

(*h*) Act, § 9, s. 2. (*i*) Act, § 10.

the definition is "or at a fixed or determinable future time," that is to say either a fixed period after date or sight, or at a fixed period after the occurrence of an event which must happen, although it is uncertain as to the exact time when it will happen. (*j*) To that extent the time is allowed to be left uncertain; if the event from which it is calculated must happen, then the resulting date is treated as ascertained. For instance, a bill "payable one year after my death" is good, because unfortunately my death is certain to happen; (*k*) but a bill "payable when I marry X." is not a good bill, because unfortunately it is not certain that I shall marry X. (*l*) Still more is a bill "when I am in good circumstances" bad, the contingency being far too uncertain for any Court to take notice of. (*m*) A bill "two months after Her Majesty's ship *Swallow* is paid off" was held good, because it appeared that Her Majesty's ship was paid off whether she went to the bottom or not, and therefore the event was a certain one; (*n*) but a bill "thirty days after arrival of ship *Swallow* at Calcutta" is bad, because the ship may never arrive. (*o*) There is

(*j*) Act, § 11. (*k*) *Clayton* v. *Gosling*, 5 B. & C. 360.
(*l*) *Pearson* v. *Garret*, 4 Mod. 242.
(*m*) *Ex p. Tootell*, 4 Ves. 372.
(*n*) *Coleham* v. *Cooke*, Willes, 393, at p. 399.
(*o*) *Palmer* v. *Pratt*, 2 Bing. 185. For other cases see Chalmers, pp. 27, 28.

one case which has been decided in the Court of Appeal, which is difficult to fit in with any of the definitions. The Court of Appeal have treated a document as a bill of exchange, payable "five years after the opening of the S. Railway." (*p*) That a railway which is projected will ever be opened would appear as uncertain as that a projected company will ever be floated.

The order must be to pay to a specified person. (*q*) That person may be the drawer himself, or he may be an entirely imaginary person. The bill may be payable to a person who has no capacity to make a contract, such as a lunatic, and in this case it may be treated as a bill payable to bearer. (*r*) Some curious judge in one of the cases inquired into what would be the effect of a bill drawn on Aldgate Pump as the drawee, and came to the conclusion that it would be treated as a promissory note by the drawer. (*r*) And the Court of Appeal were recently, and now the House of Lords are busily engaged in considering in the now celebrated case of *Vagliano* v. *The Bank of England*, (*t*) whether a firm which has nothing whatever to do with a bill, and never saw it, but whose indorsement has been forged on the

(*p*) *Ex p. Gibson*, L. R. 4 Ch. 662. The point was not taken, but the C. A. treat the document as a good bill.

(*q*) Act, § 7. (*r*) Act, § 7, s. 3.

(*t*) 23 Q. B. D. 243.

bill, is to be treated as a fictitious person where the bill is made payable to that firm, with the result that the bill would be payable to bearer and the forged indorsement might be disregarded.

A bill running simply "Pay X." is treated as a bill to X. or his order; (*u*) the effect will be the same if the bill runs "Pay X." "Pay X. or order," "Pay to the order of X."; all three will have the effect of a bill payable to "X. or order." If the bill appears in the form "Pay —— or order," and the blank is not filled in before the trial, no evidence is admissible at the trial to fill in the blank; but the holder of the bill should fill his name in when he gets the bill. (*v*) A bill may be made payable to two or more payees either jointly or in the alternative, or to the holder of a particular office, as to "the President of the Incorporated Law Society." (*w*)

A document which conforms with the definition as I have explained it is a bill of exchange. If undated it is not invalid (*x*) but irregular, and the date may be filled in by the holder. (*y*) It is not invalid if it abstains from specifying a consideration: although it is usual to insert in a bill the words "value received," it is not necessary, (*z*) for a bill is

(*u*) Act, § 8, s. 4.
(*v*) Chalmers, pp. 19, 44; Act, § 20.
(*w*) Act, § 7, s. 2.
(*x*) Act, § 3, s. 4.
(*y*) Act, §§ 12, 21.
(*z*) Act, § 3, s. 4.

presumed to be for good consideration till the contrary is shown. The bill is not invalid because it does not specify the place where it is drawn or the place where it is payable. (*a*)

Whether a bill is accepted or not, the drawer by drawing and putting it in circulation incurs certain legal liabilities. (*b*) He engages that on due presentment the bill shall be accepted and paid, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken. And he also is precluded from denying to a "holder in due course" (*c*) that the payee exists and has capacity to indorse. If, however, an action is brought against a person who appears on a bill of exchange to be the drawer, there are certain defences open to him. He may allege certain kinds of fraud as a good defence, as that he was told that he was signing another document and not a bill of exchange, and that he acted without negligence. (*d*) He may allege that his name has been forged; (*e*) he may allege that there was no consideration for the bill, except against a holder for value; (*f*) or that it was tainted with fraud, except against a holder in

(*a*) Act, § 3, s. 4.
(*b*) Act, § 55.
(*c*) Act, § 29, *post*, pp. 65–67.
(*d*) Chalmers, p. 258.
(*e*) Act, § 24.
(*f*) Act, § 28, s. 2; Chalmers, p. 79.

due course. (*g*) He may allege that he had no capacity to contract, as that he was a lunatic; (*h*) or that he never delivered the instrument as a bill of exchange, as if one were to amuse one's self by writing a bill of exchange and putting it in one's desk, and it was then stolen and circulated; but this defence would not avail against a holder in due course. (*i*) But otherwise and unless one of those defences is open to him, the drawer of a bill of exchange has put in circulation a document on which until its acceptance he is the person primarily liable.

The next step that usually occurs in the history of a bill of exchange, leaving out for the moment the question of indorsement (*j*), is its presentment to the drawee for his acceptance. Presentment for acceptance is only absolutely necessary in three cases: (*k*) in the first place where the bill is payable a certain time after sight, it must be presented to fix the time of sight and therefore to fix the time when the bill is payable. In the second place it must be presented if there is any express stipulation for presentment in the bill; and in the third place it must be presented if the bill is made payable elsewhere than at the residence or place of business

(*g*) Act, §§ 29, 30.
(*h*) Act, § 22; Chalmers, p. 54.
(*i*) Act, § 21.
(*j*) *Post*, pp. 59–64.
(*k*) Act, § 39.

of the drawee. Otherwise it is not necessary to present till payment is due, though it is usual, and desirable for two reasons: in the first place, to get the additional liability of the drawee, for if he accepts a great change takes place in the relations of the parties who are liable on the bill, and if you do not present the bill for acceptance you do not know till you present it for payment whether you have the security of the acceptor's liability or not; and in the second place presentment for acceptance is desirable in order that, if the drawee refuses to accept, you may obtain immediate recourse to the drawer and any indorsers thereon, instead of having to wait till the time when the bill is payable.

There are a series of rules as to the formalities to be gone through in presenting for acceptance (*l*) with which I do not propose to trouble you, because compliance with them is only important in case of dishonour, *i.e.* refusal to accept. If the bill is accepted, it is quite immaterial that it was not presented for acceptance in the proper way. If the bill is not accepted, it is then necessary to charge the drawer or indorser to show that it was presented in accordance with the rules in Section 41 of the Act.

On presentment for acceptance the object is to obtain the acceptance of the drawee. The acceptance

(*l*) Act, § 41.

of a bill is the signification by a drawee of his assent to the order of the drawer, (*m*) and on signifying that assent he becomes the acceptor of the bill. He is under no duty to accept the bill, even though he has funds of the drawer in his hands, except in the case of that peculiar bill of exchange drawn on one's banker, a cheque. The acceptance must be by the drawee or one of the drawees. A person who is not named in the bill cannot accept, unless in the special case of acceptance for honour. (*n*) For instance, when a bill is addressed to B., but X. writes an acceptance on it, X. is not liable as acceptor; (*o*) the bill was not addressed to him, and his signature is treated as perfectly superfluous. When a bill is addressed "to the Directors of the B. Company, Limited," and is accepted by two directors and the manager, the two directors are liable as acceptors, but not the manager, because the bill was not addressed to him. (*p*) The name or signature of a firm is equivalent to the names, or signatures, of all the partners; thus, if a bill addressed to "B. & Co." is accepted by X., a partner in the firm, in his own name, X. is liable as acceptor, (*q*) because addressing the bill to B. & Co. is equivalent to addressing it

(*m*) Act, § 17, s. 1. (*n*) Act, § 65.
(*o*) *Davis* v. *Clarke*, 6 Q. B. 16.
(*p*) *Bult* v. *Morrell*, 12 A. & E. 745.
(*q*) *Owen* v. *Von Uster*, 10 C. B. 318.

to all the members of the firm, including X.; and therefore one of the drawees has accepted the bill. Or, taking it the other way round, where a bill is addressed to B., who is a partner in the firm of X. & Co., and B. accepts in his firm's name, he is personally liable as acceptor, because the firm's name includes the signature of B. (*r*)

The signification of assent which constitutes an acceptance must be in writing; (*s*) it will not do for the drawee merely to say that he is willing to accept. The writing must be on the bill; (*s*) it is not sufficient to write a letter stating that the drawee accepts and give it to the person presenting the bill for payment. It is sufficient if the drawee write his name on the bill; (*t*) but it is not enough for him merely to write the word "Accepted" without his name; it is probably sufficient if the acceptance is written on the back of the bill. The acceptance must not vary the terms of the bill as to payment, that is to say the bill must not be accepted payable partly in goods. (*u*) A bill may be accepted when it is incomplete owing to the absence of drawer's signature, date, or other formalities; and it may be accepted when overdue or after it has been once dishonoured. (*v*)

(*r*) *Nicholls* v. *Diamond*, 9 Exch. 154. See other cases in Chalmers, p. 37.

(*s*) Act, § 17, s. 2. (*t*) *Ibid.*

(*u*) Act, § 17, s. 2 *b*. (*v*) Act, § 18.

Acceptances on the bill, speaking broadly, are of two kinds. The acceptance may be *general,* assenting without qualification to the order of the drawer; or it may be *qualified.* (*w*) An acceptance which in express terms varies the effect of the bill as drawn is called a "qualified acceptance," but it is necessary that the variation should be in express terms. An acceptor must make it clear that he only accepts in a qualified manner. A very instructive instance of that principle has recently been before the Court of Appeal in the case of *De Croix* v. *Meyer.* (*x*) In that case a bill of exchange was drawn by F. payable "to the order of F." It was presented to the drawees for acceptance; they struck out the words "to the order of" and accepted the bill "in favour of F. only, payable at the Alliance Bank, London." F. indorsed the bill and the indorsee sued the acceptors, who answered:—"We accepted in a qualified way, in such a way as to prevent F. indorsing the bill." The Court of Appeal, in considering the case, said: "In the first place you had no business to alter the bill at all by striking out the words 'to the order of'; secondly, the alteration which you have made had no effect on the bill because the words 'payable to F.' are by the Act (*y*) made equivalent to 'payable to F. or order,' and then by the

(*w*) Act, § 19. (*x*) L. R. 25 Q. B. D. 343.
(*y*) Act, § 8, s. 4.

words you used for your acceptance you left the bill in an ambiguous condition. If you had wished to qualify your acceptance you should have done it in express terms; you have done it in an ambiguous way which must be construed against you, and therefore we hold you liable in the action."

An acceptance which is qualified, or which varies in express terms the effect of the bill, may be one of three or four kinds. (*z*) A "qualified acceptance" may be in the first place *conditional*, as for instance, "Accepted, payable on giving up bills of lading," where the payment by the acceptor is made conditional on the payee's giving up certain bills of lading. (*a*) A "qualified acceptance" may be *partial*, that is to say, it may be only for part of the amount for which the bill is drawn, as for instance if a bill is drawn for £100 and the drawee accepts it for £50 only. A "qualified acceptance" may be *local*, that is to say, to pay only at a particular place, but it is necessary that it should clearly appear that the payment is to be at a particular place only; for instance, "Payable at Union Bank" is not a "qualified acceptance," because it does not restrict the place of payment to the Union Bank. An acceptance "payable at Union Bank only" would be qualified as to place. (*b*) The acceptance may also be

(*z*) Act, § 19.

(*a*) An indorsement cannot be conditional. See p. 61, *post.*

(*b*) *Halstead* v. *Skelton*, 5 Q. B. 86.

qualified as to time; it may vary the time at which the bill is to be paid, as when a bill drawn "three months after sight" or "date" is accepted six months after sight or date; or the acceptance may be qualified as an acceptance by one only of several drawees.

Now in the first place, if a general acceptance is given, the acceptor by such an acceptance engages that he will pay according to the tenor of his acceptance, and is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill. (*c*) For instance, in the very recent case of *Vagliano* v. *The Bank of England*, (*d*) the bills of exchange which were the subject of the action purported to be drawn by a drawer who never had anything to do with the bill, and whose signature was forged; but Messrs. Vagliano had accepted those bills and were therefore precluded from denying to the Bank who had paid them that the signature on the bill was the signature of the drawer, although they were in a better position with regard to the signature of the indorser, the payee, which was also forged. (*e*)

The effect of a general acceptance is this: the acceptor becomes the principal debtor on the bill. Up to the time of acceptance the drawer is the principal debtor; by acceptance the acceptor becomes

(*c*) Act, § 54. (*d*) 23 Q. B. D. 243. (*e*) Act, § 54 *c*.

the principal debtor; the drawer and the respective indorsers assume a position equivalent to sureties for the acceptor. (*f*) If the person who presents for payment obtains a general acceptance he must then wait till the bill becomes due for payment. If he obtains a qualified acceptance, an acceptance which does not accept the bill generally, he may do one of two things: he may treat it as a valid acceptance, in which case unless he has the authority of the drawer and the indorser so to treat it they are discharged from their liability. He may have that authority by their ratification of his act in treating it as a good acceptance; therefore, if the holder proposes to treat the qualified acceptance as a good acceptance, he should at once give notice of his intending to do so to the drawer and each indorser. If he does that, unless they expressly dissent, they are treated as approving his act, so that if he gives them notice of his intending to treat a qualified acceptance as a good acceptance, and they do not reply expressly repudiating, they will continue liable as drawer and indorsers. (*g*) If they reply, repudiating his action, they will be excused from their liability as drawer or indorser, because the payee has taken a qualified and

(*f*) Chalmers, p. 172.

(*g*) Act, § 44. In the case of a partial acceptance, they will be bound, if notice is given, whether they express dissent or not. See subsection 2.

not a general acceptance. But if the holder refuses to take a qualified acceptance, which is the second thing he may do, or if the bill is not accepted at all, the holder obtains an immediate right of recourse against the drawer and indorsers, which, if he gives to them notice of "dishonour by non-acceptance," is converted into an immediate right of action. (*h*) Thus, if a bill is accepted the holder has to wait till the time comes for payment; if the bill is not accepted he may obtain an immediate right of action against the drawer and indorser by giving them notice of dishonour. (*i*)

Between the drawing of a bill and the time for its payment a bill may have passed through many hands, that is to say a bill, which is a negotiable instrument, may be negotiated. The definition of "negotiation" is contained in Section 31 of the Act: "A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill." If the bill is payable to "bearer" it is negotiable by delivery without any indorsement; in the same way, if the bill is payable to a fictitious or non-existent person, such as Aldgate Pump, as one of the judges suggested, the bill is treated as payable to "bearer," for Aldgate

(*h*) Act, § 43; Chalmers, p. 129.

(*i*) For the rules for giving notice of dishonour on non-acceptance, see § 49, *et post*, p. 73.

Pump cannot indorse a bill. If the bill is payable to "order" and not to "bearer" it is negotiated by the indorsement of the holder completed by delivery, the indorsement constituting his order. For instance, in the case of bills which are payable either to "A." or to "A. or order" or "to the order of A.," payment must be to "A." or to "A.'s" order as shown by his indorsement. (*j*) If it is not "A." who presents the bill for payment, "A.'s" indorsement must appear on the bill as his order to the acceptor to pay.

Indorsements may be of two kinds. In the first place the indorsement may be *in blank*, that is to say an indorsement which does not specify any indorsee. For instance, a bill payable to "John Smith or order," indorsed "John Smith," is indorsed in blank; there is an order of John Smith on the bill, but he does not specify any particular person to whom the money is to be paid; he leaves the name of his indorsee in blank. The effect of such an indorsement in blank is to make the bill payable to "bearer." (*k*) Whoever has a bill in his hands, the last indorsement on which is in blank, is the bearer of the bill, and can obtain payment until the bill has been converted again from a bill payable to "bearer" into a bill payable to "order."

A bill once indorsed in blank remains payable

(*j*) Act, § 8, s. 4. (*k*) Act, § 34.

to the bearer until the indorsement in blank is controlled by a special indorsement; (*l*) and where there has been an indorsement in blank which makes a bill payable to "bearer," any transferor or transferee holding it by mere delivery is not liable on the bill when he has parted with it, except to his immediate transferee for value. (*m*)

The other kind of indorsement as opposed to an indorsement in blank is a *special indorsement*, which specifies the person to whom or to whose order the bill is to be payable; for instance, in the case of a bill, "Pay John Smith or order," an indorsement, "Pay D. or order, John Smith," is a special indorsement to D. (*n*) The bill has the same effect if the indorsement is "Pay to D.," omitting the words "or order," or "Pay to the order of D." In each case it is treated as an indorsement to "D." or "order." (*o*)

Other kinds of indorsements are sometimes attempted which may lead to considerable complication. Occasionally a Conditional indorsement is put on the bill, "Pay to the order of C. if he has passed his Final," an indorsement which purports to make payment conditional on C.'s having passed his Final. A conditional indorsement is ineffective: the acceptor

(*l*) Act, § 34, s. 4, *et post.*
(*m*) Act, § 58, ss. 2, 3.
(*n*) Act, § 34, s. 2.
(*o*) Act, § 8, s. 4.

may entirely disregard it and pay C. whether he has been fortunate enough to pass his Final or not. (*p*)

Another variety of indorsement which is valid and which leads to considerable complication, is what is known as a "*restrictive indorsement.*" (*q*) There are two kinds of "restrictive indorsements," both of which are fairly common; there is, first of all, an indorsement which purports to stop the bill being negotiated any further, for instance, "Pay D. only"; and there is, secondly, a species of indorsement which purports to make the payee an agent or trustee of the indorser, as for instance, "Pay D. or order, for my use"; a warning is placed on the bill that the person to whom the bill is indorsed is only an agent for collection, or a trustee for the person who indorses.

Now the effect of an indorsement like either of those is this: it gives D., the person named therein, a right to receive payment of the bill, and it gives him a right to sue any person whom his indorser might sue, that is to say if D. is not paid he may sue. But in the case of an indorsement, "Pay D. only," he has no power to indorse further. Any attempted negotiation by D. will have no effect because there is on the bill a notice that he cannot indorse; in the second case, "Pay D. or order, for my use," where there

(*p*) Act, § 33. (*q*) Act, § 35.

is a restriction of the purpose for which the bill is given to D., any subsequent indorsement will impose on a subsequent indorsee exactly the same liability as D. had. The effect of the bill as a negotiable instrument is destroyed to that extent that such an indorsee will get no better title than D. had, and will be under the same liability, and will hold the proceeds of the bill for the use of the original indorser who put that indorsement on the bill. (*r*)

An indorsement, like an acceptance, must be written on the bill, (*s*) or in the cases of bills drawn in those foreign states which recognise "copies" of the bill, or what are called *allonges*, strips fastened on to the bill, it may be written on the "copy" or *allonge*; (*t*) and sometimes in the case of a foreign bill you may have a long *allonge* with twenty or thirty signatures thereon accompanying the bill. An indorsement, oddly enough, may be on the face of the bill, though you would expect it to be on the back. An indorsement must be of the whole bill, and an attempt to indorse part of a bill to A. and part to B., for instance in a bill for £100 to indorse it for £50 to A. and for £50 to B., is entirely invalid (*u*). If the bill is made payable or is indorsed to two persons,

(*r*) See Act, § 35, ss. 2, 3, and cases in Chalmers, pp. 102, 103.

(*s*) Act, § 32, s. 1. (*t*) *Ibid.* (*u*) Act, § 34, s. 2.

the indorsement of both is necessary to pass a title; the indorsement of one will pass no title, for it is similar to a partial indorsement of the bill, unless the one person who indorses has by partnership or otherwise the authority to sign for both. (*v*) Further, if the payee or indorsee is wrongly described on the bill, *e.g.* if his name is wrongly spelt, he should indorse the name appearing on the bill, the custom being to add underneath such indorsement his name in its correct designation or spelling. (*w*) That you will bear in mind in the case of any cheque made payable to you under a wrong spelling, and which as an "order" cheque it is necessary for you to indorse; you indorse the name of the payee, as it is spelt on the cheque, and you write your true name under that indorsement.

Now the effect of indorsement on the liability of the respective parties to the bill is set out in Section 55 of the Act. As to the indorser of a bill, it transfers the bill from him to the indorsee and it makes him liable to subsequent indorsees. For if the bill is dishonoured each indorser becomes liable to subsequent holders of the bill, having in his turn a right of recourse to previous indorsers and the drawer. As regards the indorsee, indorsement gives him a right to present the bill for payment and to sue on

(*v*) Act, § 32, s. 3. (*w*) Act, § 32, s. 4.

it if dishonoured; while, if a "holder in due course," he is not affected by want of title in previous indorsers. (*x*) It may happen that the bill is transferred for value without being indorsed, and in that case the holder is entitled to claim an indorsement from the person who transferred it to him, to require him to indorse it, but until he gets such an indorsement he has no better rights than his transferor had. (*y*)

It is desirable that the holder of a bill should be a "*holder in due course*," for a "holder in due course" is a specially favoured being. The term "holder in due course" was invented by the Act of 1882. Before that Act the description of such a holder was a long and rather roundabout one; he was a "*bonâ fide* holder for value without notice." That description, which was perhaps a little redundant, was cut down by the draughtsman of the Act of 1882 into "holder in due course," and the "holder in due course" is defined in Section 29 of the Act. "A holder in due course" is a holder who has taken a bill, complete and regular on the face of it, under the following conditions: 1. That he became the holder before it was overdue, and without notice that it had been previously dishonoured, if it had been previously dishonoured. 2. That he took the bill in good faith and

(*x*) Act, § 29. (*y*) Act, § 31, s. 4.

for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of his transferor. Shortly summarised, he is the holder of a regular bill in good faith and for value. Every holder of a bill is presumed to be a "holder in due course"; that is to say, the burden of proof of fraud or absence of value rests upon the persons sued and not upon the holder. (*z*) Once there has been a "holder in due course" in the history of a bill, subsequent holders benefit by his existence whether they have given value or not, provided that they are holders in good faith, *i.e.* without being parties to any fraud or illegality affecting the bill. (*a*) Their good faith is essential, but the value given by the "holder in due course" passes on its beneficial effects to subsequent holders. Now if the "holder in due course" sues on a bill, (and every holder is deemed to be a "holder in due course" until something further is proved); in such an action, if the defendant can give any evidence of fraud or anything affecting the validity of the bill in its origin, the burden of proof will then fall again upon the plaintiff, and it will be necessary for the plaintiff to prove that he is a "holder in due course" by proving the value that has been given for the bill and his good faith; he must prove both. (*b*) But it only becomes necessary

(*z*) Act, § 30, s. 2. (*a*) Act, § 29, s. 3. (*b*) Act, § 30, s. 2.

for him to prove that, if the defendant shows fraud or some other defect at some part of the bill's career. When the defendant has shown that there was fraud connected with a bill somewhere, then the plaintiff is put again upon his proof and must prove the good faith and the value, but having proved that, he is not affected by any previous defect in title. So that a "holder in due course" is not affected by previous defects in title of which he is ignorant, and he is not called upon to prove his ignorance of them or the value given for the bill till the defendant has made a case showing that there is some defect. (*c*) For instance, the plaintiff brings an action against the maker of a note payable to bearer, and gives evidence of the note. The defendant shows that it was stolen from the person to whom he handed it. That puts the burden of proof again on the plaintiff, who must prove that he gave value for the note and did not know of the theft. (*d*)

One of the commonest defences to an action when it is first put before solicitor or counsel is:—"It was an accommodation bill; I accepted it for the accommodation of the drawer; I got nothing out of it, and it is very hard that I should have to pay." Now an

(*c*) For a recent case showing the working of this in practice, see *Tatam* v. *Haslar*, L. R. 23 Q. B. D. 345.

(*d*) Cf. *Smith* v. *Braine*, 16 Q. B. 244; *Berry* v. *Alderman*, 14 C. B. 95; and the cases cited by Chalmers, p. 84.

"accommodation bill" is one in which the acceptor is security for some other person who may or may not be a party to the bill; and an "accommodation party" is a person who has signed a bill as drawer, acceptor, or indorser, without receiving any value therefor, but for the purpose of lending his name to some other person. (*e*) For instance, A. draws a bill on B., and asks B. to accept it in order that he, A., may discount it and get money for temporary difficulties in which he, A., is; and A. always says that he will provide B. with the money when the bill becomes due, and he never does. B. is the "accommodation party," he has accepted the bill for the accommodation of A., the drawer, and has not got any value therefor, and the bill is an "accommodation bill." It is no defence to an acceptor sued by an indorsee to prove that he is an "accommodation party"; it does not even fall upon the indorsee to prove that he gave value for the bill. (*f*) If people accept bills for other persons' accommodation they must pay up, and look to their principals or the people who requested them to put their names on the bill for a recompense. For a person at whose request a man accepts as an "accommodation party"

(*e*) Act, § 28; Chalmers, p. 79. A bill signed by an accommodation party is not an accommodation bill unless that party is the acceptor.

(*f*) Act, § 28, s. 2; § 30; § 27, s. 2.

undertakes that he will provide funds for the payment of the bill at maturity, or that if owing to his failing to do so the "accommodation party" has to pay, he will indemnify him; and consequently the fact that an acceptor is an "accommodation party," though no defence to an action by another person, entitles the acceptor to what he would not usually have, a recourse to the drawer he accommodated. (*g*) You will see, therefore, that the defence of an accommodation bill or accommodation party is very rarely one which gets beyond the solicitor or counsel when they are first consulted, because it is rarely any use to bring such a defence into Court.

The next step in the history of a bill, now that we have dealt with its negotiation by the people into whose hands it comes, is the arrival of the time for its payment. A bill payable "on demand" or "at sight" or "on presentation" or in which no time for payment is named, is payable "on demand" (*h*) and no "days of grace" are allowed; (*i*) that is to say it is payable when the money is demanded and not a certain number of days afterwards. In the case of bills payable at a determinable future time, unless there is a special exclusion of "days of grace" in the bill (as if the words "without grace" appear), certain

(*g*) Chalmers, p. 185. (*h*) Act, § 10.
(*i*) Cf. Act, § 14.

days of grace are always given by the custom of merchants (*j*), though the number of days varies very much in different countries. In England three days of grace are added from the day on which the bill according to its tenor becomes payable; that is to say, a bill which according to its tenor is payable on the 1st of March, would in fact be payable on the 4th of March, three days of grace being added. That calculation is obviously very simple, but there are such things as Sundays and Bank Holidays which have a way of getting in the way of the days of grace, and rules had to be added to provide for the last day of grace being a Sunday or Bank Holiday. If the last day of grace is Sunday, Christmas Day, or Good Friday, Christmas Day and Good Friday being Common Law holidays, the bill is payable on the day before; so that only two days of grace are in fact given instead of three when the last day is Sunday, Christmas Day, or Good Friday. If the last day is a Bank Holiday, such as the August Bank Holiday or Easter Monday, the bill is payable on the day after. If the last day of grace is a Sunday, the bill is payable on the day before; but suppose the day before is Bank Holiday, then of course the ordinary effect would be to make it payable the day after, which is a Sunday, and so you go back again. That ingenious

(*j*) Act, § 14.

trap has been provided for by enacting that if Sunday is the last day and the Bank Holiday is the day before, the bill is payable on the day after the Sunday, making in that case the rule the same as if the last day was a Bank Holiday. There is only one other point with regard to the calculation of days of grace which need be noted, and that is that "month" means "calendar month," and that for instance bills drawn on the 31st August, payable "one month after date," would be payable on the corresponding day of September, namely the 30th. You will see that if you apply that to bills falling due in February, you may have a number of bills drawn at different times all coming due on the 28th of February.

The time for payment so calculated having arrived, the bill must be presented for payment. The holder must show the bill to the acceptor, and when the bill is paid must deliver it up to him. A bill which is accepted generally without any restriction of place, in strict law need not be presented for payment at all, (*k*) because in strict law it is the duty of the debtor to find out his creditor and to pay him, and not the duty of the creditor to hunt down his debtor. As a matter of fact the bill always is presented for payment, and the practical effect of the rule is that in the case of a general acceptance the acceptor cannot allege

(*k*) Act, § 52.

informalities in presentment for payment, because presentment was not strictly necessary at all. You will find a series of rules for presentment for payment, with the details of which I do not propose to trouble you, in Section 45 of the Act. There are also certain cases in which delay in presentment after the proper time may be excused which are set out—and again I do not propose to trouble you with them—in detail in Section 46 of the Act. In certain cases presentment for payment may even be dispensed with altogether; (*l*) for instance, if the payee is a fictitious person (as if the bill were payable to the "Griffin," when obviously to present the bill to the Griffin for payment would not be much use), there is no need there to present the bill for payment at all in order to charge the drawer of the bill. Or where with reasonable diligence the bill cannot be presented for payment; for instance, where a note is made payable at Guildford, but the person who ought to pay does not live there, it has been decided that it is enough to present it to two banks at Guildford, and if neither bank knows anything about it that dispenses with further presentment. (*m*) It is not, however, sufficient to excuse presentment that the holder knows the bill will be dishonoured; you must go through the formality of presentment even

(*l*) Act, § 46, s. 2.
(*m*) *Hardy* v. *Woodroofe*, 2 Stark. 319.

though you know it is certain to be dishonoured by the acceptor. (*n*)

A bill is dishonoured by non-payment when it has been duly presented and not paid, or when, presentment having been excused for any of the reasons stated, the bill is overdue and unpaid. (*o*) As soon as a bill becomes dishonoured by non-payment the holder has immediate right of recourse to previous indorsers and to the drawer, which he can convert into a right of action by giving notice of dishonour in the case of an inland bill, or where there is a foreign bill, by protesting the bill with a notary in addition. But a protest is only necessary in the case of foreign bills. There are again an elaborate series of rules as to the way in which notice of dishonour is to be given, which are important, inasmuch as failure to give due notice of dishonour may discharge the parties against whom you wish to bring your action, the drawer and previous indorsers, the sureties. Those rules are contained in Section 49 of the Act. The most important rules are the third and fourth, which deal with the effect of giving notice; the fifth, which practically provides that so long as an intelligible notice is given no particular form of notice of dishonour is necessary; the notice may be given in

(*n*) Act, § 46, s. 2 *a*.
(*o*) Act, § 47.

writing or orally, and may be given in any terms which sufficiently identify the bill and intimate that it is dishonoured. The sixth rule makes the common practice of banks simply to return a dishonoured bill sufficient notice of dishonour. The two remaining rules of importance are the twelfth and fourteenth, which provide as to the time within which the notice must be given. If the person who is giving the notice and the person who ought to receive the notice live in the same place, it is enough if the person who is to receive the notice gets it the day after the bill is dishonoured. If these two people live in different places, it is enough if the notice is posted the day after the bill is dishonoured. However long it may take to get in the ordinary course of post to the person who ought to receive it, it is enough if the notice is posted the day after dishonour; or in cases where there are mails to go over the sea and there is no mail leaving on the day, by the first post that leaves after that day.

Under certain circumstances delay in giving notice may be excused or altogether dispensed with, and those circumstances are set out in Section 50 of the Act. One of the grounds which excuses giving notice of dishonour at all is where, after the exercise of reasonable diligence, notice, as required by the Act, cannot be given to or does not reach the person to be

charged; (*p*) thus the loss of a letter in the post does not in any way affect the indorser's or drawer's liability. The fact that he never receives a notice of dishonour will not discharge him if the person who ought to give it proves the due posting of such a letter, because, if reasonable diligence has been exercised in posting and properly addressing the letter, the fact that it has gone astray cannot be imputed to the person who posted it. Therefore if, as is a very common defence under Order 14, you find the drawer or indorser defending on an affidavit that he never received notice of dishonour, such an affidavit will be perfectly immaterial if your client can prove that a properly addressed notice of dishonour was posted within the proper time. It is not necessary to give any notice of dishonour to the acceptor (*q*)—he knows all about it already—or to any guarantor of any party to the bill. (*r*) It is probably necessary to give notice of dishonour to a person who is liable on the consideration for which the bill is given, though he is not liable as a party to the bill itself, but this has not been conclusively established. (*s*) And further, if the bill which you are dealing with, and which has been dishonoured, is a foreign bill, it is necessary to do something further, and besides giving

(*p*) Act, § 50, s. 2 *a*.
(*q*) Act, § 52, s. 3.
(*r*) Chalmers, p. 158.
(*s*) *Ibid.* p. 159.

notice of dishonour, to have the bill protested by a notary. (*t*)

The effect of failure to give notice of dishonour may be considered in conjunction with the effect of notice of dishonour if given. (*u*) If the drawer receives a due notice of dishonour from the holder, such a notice will enable any person who, if he had given a proper notice of dishonour to the drawer, could have sued him, to sue the drawer if necessary; that is to say, a notice given to any party to the bill enures for the benefit of parties subsequent to himself. For instance, if A. draws a bill on B. and indorses for value to C., who indorses for value to D., B. accepts, and D., the holder for value, presents it for payment: the bill is dishonoured. Suppose D. gives notice of dishonour to C., the previous indorser; if nothing more is done at all, C. is liable to D., but A., the drawer, is entirely discharged because he has received no notice of dishonour. D. therefore will have his remedy against C., but neither C. nor D. will have any remedy against A., for neither of them has given A. any notice of dishonour. But if D. instead of giving notice to C., his previous indorser, gives notice of dishonour to A., the drawer; D. will then have his remedy against the drawer,

(*t*) For the rules as to protesting, see Act, § 51.
(*u*) Act, § 49, ss. 3, 4.

but will have no remedy against C., the indorser, because he has given C. no notice. If D. had given notice to C., as well as giving notice to the drawer, C. would have had a remedy against the drawer without giving him notice of dishonour, because there had been a notice given by D. to the drawer, which C., the indorser, might avail himself of. For, in the words of the rule:—"When the notice is given by or on behalf of the holder it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given"; C., as a prior indorser, has a right of recourse against A., the drawer. If a party does not get a regular notice of dishonour he is discharged altogether, except in one of the cases where notice of dishonour has been excused or dispensed with. (*v*) If a party does not give notice of dishonour to one of the prior parties he loses his remedy against that party, unless some one else subsequent to himself has given such a notice, in which case he gets the benefit of it.

A bill is discharged, that is to say all rights of action thereon are extinguished, when it is paid to the holder by, or on behalf of, the drawer or acceptor; (*w*) the fact that an indorser who is sued on it has to pay because of his indorsement of the bill does

(*v*) Act, § 50. (*w*) Act, § 59.

not discharge the bill, for it has not been paid on behalf of the drawer or acceptor; on the contrary the indorser has a further right to sue the drawer or acceptor. It is discharged if paid by the acceptor, because the remedy of an accommodation acceptor, a party who has accepted it for the accommodation of the drawer, is not on the bill but on the personal covenant of the drawer to indemnify him implied in such a case.

The only other provisions in bills of exchange to which I wish to refer you are those dealing with the effect of forgery, which is unfortunately not an infrequent occurrence in connection with bills. The 24th Section of the Act provides that where a signature to a bill is forged the forged signature is wholly inoperative, and no title can be acquired through the forgery by any subsequent party unless as against a person who is prevented from saying it is a forgery through some negligence of his own. There is a very important exception to this in Section 60, which provides that in case of bills payable to order on demand drawn on a banker, or shortly in the case of cheques, the banker paying in good faith has not the duty of inquiring whether each of the indorsers' signatures is forged or not, but is safe in paying even though the indorsements should turn out to be forgeries.

That brings us to the next variety of negotiable instruments, namely cheques. Cheques being, as I have explained, bills of exchange drawn on a banker payable on demand, (*x*) the great majority of the provisions that I have been stating to you apply to them, and there are in addition provisions in the Act specially applicable to cheques. (*y*)

The first distinguishing mark the custom of merchants has attached to cheques, is that cheques are intended for prompt presentment, whereas bills on demand are deemed to be continuing securities. (*z*) The presentment should be made promptly. The demand in a bill payable to demand need not be made for some time. The consequence is that delay in presenting a cheque may have a prejudicial effect on the holder's rights, (*a*) though delay in presenting a bill on demand need not.

Cheques being bills of exchange drawn on bankers, the custom of merchants has defined the relations between bankers and their customers. (*b*) The ordinary relation between a banker and his customer is that of debtor and creditor. The bank has a certain sum of money of the customer's in its hands which it owes to the customer; the customer is

(*x*) Act, § 73. (*y*) Act, §§ 73–82.
(*z*) *Brooks* v. *Mitchell*, 9 M. & W. at p. 18.
(*a*) Act, § 74. (*b*) Cf. Chalmers, p. 234.

entitled to draw cheques on the bank to the extent of the debt, and if the bank having funds of the customer's in its hands does not honour those bills of exchange, or cheques, it is liable to its creditor, the customer, in damages for its default, this being the one case in which a drawee is bound to accept bills of exchange drawn. In the absence of special direction, the bank must pay cheques in the order in which they are presented, and must not appropriate them in another order than that in which they are presented; and in the case of banks having several branches, the rights of the customer are only against the particular branch where he has an account, and not against the other branches of the bank. Whilst that is the relation existing between banker and customer so far as cheques are concerned, the bank is probably not bound to accept or to pay bills of exchange other than cheques, (although the drawing of such a bill on a bank is an authority to the bank to pay it), for the relation of banker and customer only extends to the ordinary cheque, or bill of exchange payable on demand. The protection of the banker in the case of forged indorsements (*c*) does not extend to forged indorsements to bills of exchange other than cheques. The duty and authority of the bank to pay cheques are determined

(*c*) Act, § 60, and p. 78 above.

or ended by, in the first place, countermand of payment, or what is shortly known in mercantile language as "stopping a cheque," which prevents the banker from paying the cheque as against his customer, though it may leave the customer liable on the cheque to a "holder in due course." The authority of the banker is also determined by the death of the customer, and notice to the banker of his death. A cheque drawn before the customer's death, presented to the banker after the death and after the banker knows it, cannot be paid by the bankers as against the customer's estate. And thirdly, the authority of the bank is determined by a notice of a Receiving order against or Act of Bankruptcy by the customer, when all rights in the estate become vested in the trustee or official Receiver.

The most curious mercantile incident attached to cheques has at last been embodied in the statute law of the land, having gone through the usual difficulties that any creation of the Law Merchant undergoes, and that is the operation of crossing cheques. The history of crossing cheques is contained in an admirable judgment of Mr. Baron Parke in the case of *Bellamy* v. *Marjoribanks.* (*d*) The practice of crossing cheques originated in a

(*d*) 7 Exch. at p. 402.

usage of bankers' clerks in the Clearing House. (*e*) Crossing was originally the note of the name of his bank, written on the cheque for the convenience of the clerks of the Clearing House by the clerk of the particular bank who presented the cheque at the Clearing House. That practice was adopted by banks and customers outside the Clearing House, who got in the way of placing the two lines or "crossing" across their cheques, intending originally not to restrict the circulation or negotiability of the cheque, but to provide a means of tracing any lost cheque by compelling the holder to present it through a quarter of known respectability and credit. It acted originally as a caution to bankers not to pay such a cheque except through a banker, and developed into something more than a caution. The Courts of Law struggled for some considerable time against any rigid interpretation of crossing a cheque which affected its negotiability. The Courts said, in the case of cheques which had become payable to bearer by indorsement in blank:—"it is impossible that any direction by crossing in this way can prevent the banker from paying to the 'holder in due course' who presents the cheque, even though he does not present it through any bank at all, or through the

(*e*) For an early account of the Clearing House, see *Boddington* v. *Schlencker*, 4 B. & Ad. 752.

bank on which the cheque is specially crossed." The judgment of Lord Cairns in the case of *Smith* v. *Union Bank* (*f*) sets out the view which the Common Law took of the practice of crossing cheques, and of the effect which the Courts gave to that crossing. Parliament had to step in again in order to ensure that "Lombard Street should give laws to Westminster Hall"; and by a series of Acts, ending in the Crossed Cheques Act of 1878, (*g*) effect was given to the mercantile custom of crossing cheques, and its provisions have been embodied with further alterations in Sections 76 to 82 of the Bills of Exchange Act, 1882. Where a cheque is crossed generally, that is to say has two parallel lines on it with or without the words "and Co." written in, the bank on which it is drawn must pay it only through a banker, and if it does not so pay it is liable to the true owner of the cheque for any damage he has sustained by such a payment. For instance, the holder of a cheque has his cheque stolen; it is presented by the thief although crossed to a banker, and the bank pay it to the thief and not through the banker. The bank will be liable to the true owner of the cheque for the value of the cheque. If the cheque is crossed specially, that is to say if it bears, besides the crossing, the name of a bank, or has the name of the bank

(*f*) L. R. 1 Q. B. D. 33. (*g*) 39 & 40 Vic. c. 81.

written without the crossing, the banker must pay through the particular bank whose name is written on the front of the cheque. A further security was introduced by the Crossed Cheques Act, 1878, (*h*) by which it is provided that the words "not negotiable" may be written across the front of the cheque. The effect of that is incorporated in the Act of 1882 (Section 81), which provides that any person taking a crossed cheque which bears on it the words "not negotiable" shall not have or be entitled to give a better title to the cheque than the person from whom he took it; so that the advantage of negotiable instruments in passing a better title than the transferor had is destroyed where the words "not negotiable" appear on the face of the cheque.

The only negotiable instruments remaining to be dealt with are promissory notes, and these one can also deal with shortly. By Section 89 of the Act, subject to the special provisions contained in the part of the Act relating to promissory notes, which are very few, the rules as to bills of exchange apply, with the necessary modifications, to promissory notes. In applying those provisions, the maker of the note is taken to correspond with the acceptor of the bill; the first indorser of the note to correspond with the drawer of an accepted bill payable

(*h*) 39 & 40 Vic. c. 81.

to drawer's order; and it is provided that certain provisions, especially as to acceptance, shall not apply to promissory notes. (*i*)

A promissory note is defined in Section 83 of the Act. It is "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a certain sum of money, to or to the order of a specified person, or to bearer." In reading that definition you will note its family likeness to the definition of bills of exchange, and many of the cases on the definition of bills of exchange apply equally to promissory notes; *e.g.* the cases as to "unconditional promise," as to the "fixed or determinable future time," the cases as to "specified persons," which I dealt with in the definition of bills of exchange, (*j*) apply equally to promissory notes. The note must, however, be a promise to pay. A bill of exchange, you will remember, must be an order — politeness will not do. A bill of exchange must be a promise—a mere confession of debt will not do. That interesting document known as an I.O.U. is not a promissory note, for though it contains confession in the shape of an acknowledgment of a debt, it does not contain repentance in the shape of a promise to pay. A deposit receipt

(*i*) Act, § 89, s. 3. (*j*) *Ante*, pp. 41–49.

given by a banker is not a promissory note, for though it acknowledges the receipt of money and states that the bank will account on demand, it is obviously on the face of the document not the intention of either party to make it a promissory note. The position of an I.O.U. is that it is evidence of an account stated, not necessarily of money lent; and it may be used for the purposes for which an account stated can be used, but it is not a negotiable instrument.

The liability of the maker of a promissory note is defined in the 88th Section of the Act. He engages that he will pay according to its tenor, and he is precluded or estopped from denying to a "holder in due course" the existence of the payee and his capacity to indorse. Presentment for payment of a promissory note is necessary to make an indorser liable on the note, (*k*) but it is only necessary in order to make the maker liable in cases where the note expressly makes itself payable at a particular place. (*l*) In that case there must be presentment at that place to charge the maker. Further, notes payable "on demand" and indorsed must be presented within a reasonable time. (*m*) With those differences, the law of promissory notes is the same as the law of bills of exchange with which I have been dealing.

(*k*) Act, § 87, s. 2. (*l*) Act, § 87, s. 1. (*m*) Act, § 86, s. 1.

CHAPTER IV.

CHARTER-PARTIES AND BILLS OF LADING.

Authorities.—The students at the lectures were referred to Scrutton on Charter-parties and Bills of Lading (2nd ed.) referred to in the notes as "Charters." See also Carver on Carriage by Sea, of which a second edition is now in the press; Newson's Digest of the Law of Shipping and Marine Insurance (2nd ed.); and Abbott on Shipping.

In passing from bills of exchange to charter-parties and bills of lading, we leave the comparative certainty of the statute law and come to the jungle of the Law Merchant and mercantile usages. A contract of affreightment, or a contract for the carriage of goods by sea, is contained or expressed in two very common mercantile documents, in a charter-party or in a bill of lading. The forms of charter-parties and bills of lading vary with every firm of ship-owners. Each ship-owner adds to his form, whenever there is a decision of the Courts, the words that he thinks will protect him against that decision; and the result is a series of documents

of great importance to commerce, but which raise ever-varying difficulties of construction. The contract of affreightment is a contract to carry goods by sea for a fixed payment, which is called "freight." Where that contract is for the use of the whole ship, it is usually contained in a charter-party, the terms of which are the contract in question. A charter-party is made between two persons: the ship-owner who lets out the ship or contracts to carry, and the charterer who hires the ship or makes a contract for goods to be carried in the ship. A further document may come into existence in connection with the contract of carriage. The ship-owner may not make any contract for the hire or the use of the whole ship, but he may contract with a number of shippers of goods to carry in his ship such goods as each of them furnish, and so one ship on her voyage may be carrying goods under hundreds of contracts. Or the charterer, having hired his ship from the ship-owner, may in turn let out the ship or sublet the ship to a large number of shippers of goods, with each of whom he may have a "contract of affreightment." In each of those cases where either the ship-owner or the charterer makes a number of contracts for carriage of goods in the ship, he is said to put the ship on the berth as a "general ship," and the

contract that is made with each of the shippers of goods is usually evidenced by the bill of lading which is given to each shipper. Even in cases where the charterer charters the whole ship for the carriage of goods, he usually receives a bill of lading when the goods are shipped; so that whenever a ship carries goods not belonging to her owner, there is frequently both a charter-party and bills of lading. The document known as a bill of lading has two sides. It is a "contract of affreightment," it is a contract for the carriage of goods, but it is also a document of title to goods, for the indorsement of the bill of lading may pass the property in the goods it represents, and to that extent the bill of lading is a negotiable instrument. That part of the law relating to the bill of lading as a document of title I postpone until I have finished the law dealing with the "contract of affreightment."

You have before you the printed forms of a charter-party and of a bill of lading, (*n*) which, however, would not usually be found in connection with the same ship. The charter-party is a very common form of coal charter. The bill of lading, as appears at its head, is a form which has been agreed between ship-owners and merchants in the Mediterranean, Black Sea, and Baltic grain trade, and is in very

(*n*) See Appendix.

common use at the present time. Those forms you will see leave blanks in a number of places. As they appear in this form with no blanks filled up, they are called in commercial language a "form of charter," or a "form of bill of lading." Whilst their terms are being negotiated the blanks are filled up with the proposed terms, and the document is called in mercantile language "a *pro formâ* charter"; and when the charter is completed it is "the charter" plain and simple. Each ship-owner usually has his own private form or forms printed thus, and makes each particular contract by filling in the blanks, by writing in the special provisions that are agreed upon, and sometimes, if he is particularly careful, by scratching out such of the printed words as disagree with the written ones that he has inserted, but more usually by omitting to do this. To the peculiar documents concocted in this way, certain principles of construction have been applied by the Courts. In the first place, as it is a very common thing to find the print contradicting the writing, the Courts have said that they will prefer the writing, as it has obviously been expressly intended by the parties, whereas they probably have simply been careless and forgotten to strike out the print which contradicts it, or have not noticed that it is contradictory. So that the first rule of construction will be that you prefer the written part of the

document to the printed one. (*o*) And in the second place, inasmuch as the writing is filled into the printed form it is not necessary in construing the charter or bill of lading to give effect to every word in the printed document. You may assume that the printed document is drafted in wide terms, and possibly some words do not apply to the particular contract which has been effected. It is not necessary to give a meaning to every word in the printed document, though you ought to satisfy every word of the written part. (*p*) Another rule of construction which is frequently acted on by the Courts is that any term of a "contract of affreightment" is to be construed most strongly against the party for whose benefit it is intended; that is to say it is the duty of the party who inserts a term in the "contract of affreightment" for his own benefit to take care that it is clearly expressed, as the words which he may be supposed to have very carefully settled will be construed against him and not in his favour. (*q*)

Another difficulty which occasionally arises, and inevitably does so in the circumstance of maritime commerce, is as to the law by which the contract is to be governed. Should it be the law of the place where

(*o*) *Scrutton* v. *Childs*, 36 L. T. 212.

(*p*) *Per* Brett, J., and other judges in *Gray* v. *Carr*, L. R. 6 Q. B. 522, 536, 550, 557; Charters, § 9.

(*q*) *Per* Bowen, L. J., 12 Q. B. D. 222.

the contract is made, or where the contract has to be carried out by delivery of the goods, or of the nationality to which the ship belongs? For as the laws of maritime nations now vary considerably, it is sometimes necessary for the Court in construing these documents to decide what law they will apply.

The first principle that the Courts will apply to settle the appropriate law is, that if it appears by the document what law the parties intended to be governed by, the Courts will apply that law. Probably also (although a recent decision of the Court of Appeal has rather shaken the proposition that I now want to state to you), in case no clear intention appears on the face of the contract, the law of the ship's flag will be applied; that is to say, a contract of carriage in an English ship will be presumed to be governed by English law, a contract of carriage in a ship flying the French flag will be presumed to be governed by French law. The great case upon which the doctrine of "law of the flag" rests is the case of *Lloyd* v. *Guibert*. (*r*) It is a complicated case, for several nationalities were concerned with the ship in question. A British subject chartered a French ship at a Danish port, for a voyage from Hayti to France or England, and the ship then got into difficulties in a Portuguese port: the problem for the Court was to

(*r*) L. R. 1 Q. B. 115; Charters, § 7.

find out, under those circumstances, whether the English law, or the French law, or the law of Hayti, whatever that might be, or the Portuguese law, or the general law maritime, whatever that might be, was to be applied to the contract, with its resulting rights and duties. The Court held, in the absence of any intention appearing on the charter, that the French law being the law of the ship's flag, was the law to be applied. Some doubt has been thrown upon that as a general principle of construction, by a case which excited some discussion at the time it was decided, and is of considerable importance — the case of *In re Missouri Steamship Company.* (*s*) There was a charter from the United States to England, the ship-owner being an English company, the charterer being a citizen of the United States, and the object of the contract being to carry cattle from the United States to England. The charter contained a clause exempting the ship-owner from liability for negligence of the master. The cattle were lost by negligence of the master. The charterer claimed against the ship-owners, who replied:— "We are exempted by the terms of the charter, which exclude liability for negligence of the master." "But that provision," answered the charterer, "is illegal by United States law; it is null and void. This contract

(*s*) 42 Ch. D. 321.

was made in the United States with a citizen of the United States, the voyage to start from the United States; the provision is void, and if the provision is void you have no defence." Reply by the ship-owner: "We are English, the contract was to be performed in England, and the ship was an English ship." Mr. Justice Chitty held that the ship-owner's contention was right, that, the ship being an English ship, the law of the flag was to govern, and therefore the provision was a valid one. The Court of Appeal decided the case in the same way, but on the ground that in the absence of expressed evidence of intention, the law of the place where a contract was to be performed was to be followed. This is not a decisive authority against the law of the ship's flag, because the law of the ship's flag and the law of the place where the contract was to be performed were in this case the same, and the Court of Appeal does not expressly overrule or indeed refer to Mr. Justice Chitty's decision in favour of the law of the flag; that decision, however, prevents one from stating the law of the ship's flag as the law of construction with such certainty as was previously the case.

A further rule of construction, which is a very general one, is that charters and bills of lading are to be construed by the intention of the parties as evidenced in the nature of the adventure they have

entered into; (*t*) that is to say the Courts are to try and construe the contract from the nature of the contract entered into. Thus a ship was chartered to proceed to a port in a river and there load, the master guaranteeing to carry 3,000 tons dead weight of cargo on a draught of 26 feet of water; that is to say that the ship with 3,000 tons dead weight of cargo on board would draw 26 feet of water and no more. The ship could carry 3,000 tons on a draught of 26 feet in salt water, but could not carry 3,000 tons on a draught of 26 feet in fresh water, the consequence being she could not get up the river, which was fresh water. Action for breach of warranty. Answer: "I complied with the guarantee; the ship did carry 3,000 tons in salt water." *Held* by the Court that it was clear both parties contemplated loading in the river and therefore having a full cargo on board in the river, and that the guarantee must be applied to both fresh and salt water to carry out the intention of the parties, as appeared from the nature of the adventure they had entered into. (*u*)

This principle governs also the introduction of customs to construe charter-parties. (*v*) For instance, if a man contracts to load at a particular port and

(*t*) Charters, § 6. (*u*) The *Norway*, 3 Moore, P. C. N. S. 245.
(*v*) Charters, § 8.

says nothing about the manner of loading, it will be presumed that the parties intended to carry out the loading in the manner customary at that port, and therefore evidence of the custom of the port of loading will be admissible to construe the charter, even though it is not proved that the party affected knew of the custom, indeed though he proved that he was ignorant of it; the answer being, if he sent the ship to load at a particular port and did not say how she was to be loaded, he must be taken to have meant that she should be loaded in the way customary there, and if he did not know what that was he should have inquired before he sent her; and in that way evidence of custom which does not contradict the charter is continually admitted. These are the main rules that one applies to construe these documents.

The next question that arises is, how are you to construe the charter-party and bill of lading in relation to each other, supposing that they contradict each other? For you may have to gather the "contract of affreightment" from the two documents, or a man may present himself claiming on a bill of lading and may be answered:—"But the charter-party says otherwise."

When a client comes to you in these cases, it is usually in connection with one of three matters:

there is either a claim for freight, or a claim for demurrage, or a claim for damage done to the goods carried. In each of these cases it becomes important to see what the contract is under which the goods were carried, and who is the person who is to be sued; and each of these questions will depend upon the relation of the charter-party to the bill of lading. What is the relation of the two documents? (*w*) In the first place there is the case where the charterer receives a bill of lading for the goods that he himself has shipped, and where he retains it in his own hands. In that case the bill of lading is treated as no more than a receipt for the goods, (*x*) a statement of the goods actually shipped, which could not be put into the charter-party because the charter-party is signed before the shipment of the goods commences. Therefore, as between the charterer and the ship-owner you will always look for the contract to the charter-party, and not to the bill of lading, though the bill of lading may contradict the terms of the charter. Then there is the case where the charterer having shipped his goods, and having received a bill of lading for them from the ship-owner, indorses that bill of lading for value to a

(*w*) Charters, § 18.

(*x*) *Rodocanachi* v. *Milburn*, 18 Q. B. D. 67; *Leduc* v. *Ward*, 20 Q. B. D. 47.

third person; and then the question in which of the documents the contract is to be found will depend upon the terms of the bill of lading itself; for the bill of lading, although merely a receipt in the hands of the charterer, is evidence of the contract of affreightment in the hands of an indorsee for value; and the indorsee will not be affected by the terms of the charter-party except in one of two cases. First, if there are words in the bill of lading incorporating the terms of the charter-party; in that case the bill of lading being looked at for evidence of the contract shows that some or all of the terms of the charter-party are incorporated in the contract. That is the more usual case in which an indorsee for value of the bill of lading will be affected by the terms of the charter-party.

The second case, which is more unusual, is where the bill of lading is one which the master could not give because he is precluded from doing so by the terms of the charter-party. It is an unusual case, but it sometimes happens. The master signs a bill of lading which he is expressly forbidden to sign by the terms of the charter-party, and in that case whether the bill of lading in the hands of an indorsee is a contract binding the ship-owner or not depends upon whether the indorsee for value knows the terms of the charter-party. If he knows the terms of the

charter-party he cannot say that a document which contradicts them—a bill of lading which by the terms of the charter-party the master has no authority to sign—is a contract. If he does not know anything of the charter-party which forbids the master to sign such a bill of lading, the bill of lading, if within the master's ordinary authority, will be the contract. So that in the case of bills of lading given to a charterer, they are only a receipt so long as they remain in the charterer's hands; they are evidence of a contract when they come into the hands of an indorsee for value.

A further case occurs where the charterer does not ship the goods himself, but where, having chartered the ship, he in turn sublets it to a number of shippers, who each put on board their goods and receive a bill of lading for them, signed by the master, or frequently, as in the case of steamships in London nowadays, by the broker. In that case two questions arise. In the first place, whom did the shipper contract with? and in the second place, what are the terms of his contract? The question what are the terms of his contract will again depend upon whether the bill of lading incorporates in express terms the terms of the charter-party. (*y*) If it does not he will not be bound by the charter-party though he knows of its existence;

(*y*) Charters, Art. 19, and *post*, p. 101.

while if the bill of lading does incorporate the terms of the charter-party he will be bound by those terms. The question with whom the shipper has contracted depends upon whether he knows of the charter-party or not. (*z*) If he does not know of the existence of the charter-party he is taken to have contracted with the ship-owner, and can sue the ship-owner though the ship may be under charter. The authority for that you will find in the leading case of *Sandeman* v. *Scurr*. (*a*) There a ship was chartered to load from the charterer's agent, the master to sign bills of lading for the goods as presented by the charterer. The goods were shipped by people who knew nothing about the charter-party, but who received bills of lading for their goods signed by the master. It was held that they could sue the ship-owner for damage to the goods, inasmuch as they knew nothing of the charter-party, and must therefore be taken to have contracted with the ship-owner, the master signing as the ship-owner's agent. If, on the other hand, the shipper of goods knows of the existence of the charter-party, he is taken to have contracted with the charterer, and can sue the charterer, and not the ship-owner, upon the contract evidenced in the bill of lading. If the bill of lading so given comes into the hands of an indorsee for value his position is the

(*z*) Charters, Art. 18. (*a*) L. R. 2 Q. B. 86.

same; he is not bound by the terms of the charter-party unless they are incorporated in the bill of lading.

If you will look at the bill of lading I gave you last time (*b*) you will find very wide words expressly incorporating the charter-party. The goods are to be delivered unto A. or to his or their assigns; "he or they paying freight and demurrage, if any, for the said goods, and *all conditions and exceptions of the charter-party are incorporated herewith.*" Those words are about the widest that are ever used in a bill of lading. A very usual clause, one which has given rise to a great deal of litigation and which has lately been again under the consideration of the Court of Appeal, is a clause which omits the words "and exceptions," and which reads "all conditions as *per* charter-party." (*c*) The Court of Appeal, in a series of cases on this clause, have decided that it incorporates into the bill of lading all conditions in the charter-party applicable to and consistent with the character of the bill of lading, but not inapplicable or insensible conditions, (conditions which would make nonsense of the bill of lading), or clauses which would contradict the express stipulations of the bill of lading. (*d*) The further question which came before the Court

(*b*) See Appendix. (*c*) Charters, Art. 19.
(*d*) *Porteus* v. *Watney*, L. R. 3 Q. B. D. 534.

of Appeal was whether those words "all conditions as per charter-party" also incorporated the exceptions—the excepted perils in the charter-party, or whether they only referred to things to be done, conditions to be performed, by the consignee. (*e*) Mr. Baron Huddleston had decided that the words "all conditions as per charter-party" did not incorporate the excepted perils in the charter-party; the Court of Appeal have upheld his decision, and their previous *dicta* must be read in the light of this decision.

Having ascertained what the contract appears to be on the face of the bill of lading, a further question may arise, as to whether the master had authority to bind the ship-owner by such a bill of lading; for in some cases though the master has signed the bill of lading, the ship-owner may not be bound by it, as being beyond the authority of the master. (*f*) The case which most often occurs in practice, in which a ship-owner is held not bound by a bill of lading signed by a master, is where the master has signed a bill of lading for goods which were not shipped. (*g*) Suppose, for example, that the master has signed a bill of lading for 100 tons of iron, and it turns out that only 80 tons were ever shipped, the ship-owner is not bound by the signature of the master

(*e*) *Serraino* v. *Campbell* (1891), 1 Q. B. 283.

(*f*) Charters, Art. 30. (*g*) *Grant* v. *Norway*, 10 C. B. 665.

for the surplus 20 tons, because it has been held by the Courts that a master has no authority to make a contract or to profess to make a contract for the carriage of goods which were never in fact carried. (*h*) Mistakes constantly occur in tallying goods into ships, and consequently the amount appearing in the bill of lading may differ from the amount actually delivered. The only protection that the shipper, or an indorsee from the shipper, has in such cases is that it lies upon the ship-owner to prove that he has delivered all the goods that were shipped; but when he has proved that, though the unfortunate indorsee may have advanced money on the representation of the bill of lading that such an amount of goods were shipped, he has no remedy against the ship-owner who says:—"My master has no authority to sign bills of lading for goods not shipped." The only remedy of a shipper in that case is the remedy given by the Bills of Lading Act, (*i*) which makes such a bill of lading conclusive evidence against the person actually signing it; and therefore the indorsee for value, or the shipper, has his remedy against the master who signs the bill of lading, who is not allowed to say: "True, I signed for a hundred tons, but as a matter of fact only eighty were shipped."

(*h*) *Grant* v. *Norway*, 10 C. B. 665.
(*i*) Charters, Art. 21; 18 & 19 Vic. c. 111, § 3.

But inasmuch as the master is not generally a man of vast wealth, this remedy is better on paper than it is when put into practice. When, however, the bill of lading varies from the express instructions of the master, but is within the master's ordinary authority, the ship-owner will be bound by it if he adopts it at all. (*j*) If he recognises the contract of carriage at all, he must adopt all its terms, provided that it was within the ordinary authority of a master, and that the shipper did not know of any express instructions to the contrary given to the master by charter-party or otherwise. The ship-owner may however bind himself, and at the present day he often does bind himself, to accept the quantity stated in the bill of lading. (*k*) For an instance of a case where the ship-owner has succeeded in escaping from a bill of lading on the ground that it was not within the ordinary authority of the master to make the statements appearing therein, you may refer to the recent case of *Cox* v. *Bruce*. (*l*) There the master was alleged to have certified the mercantile quality of the goods shipped—to state that certain bales of jute were of a particular quality; and it was held that the authority of the master did not extend to

(*j*) Charters, Art. 20, § II.
(*k*) *Lishmann* v. *Christie*, 19 Q. B. D. 333.
(*l*) 18 Q. B. D. 147.

certifying the quality of goods shipped, and that therefore the ship-owner could not be bound by any representations he had made as to their quality.

So much for the relation of these two documents as they stand. Before, however, we come to the actual performance of the contract one very important question of construction remains, namely, which of the terms of the contract of affreightment are conditions precedent? This question is a difficult one, and it is rendered more obscure by the use of the term "warranty," about which it is safe to say that no two judges use it in the same sense in two judgments together; and therefore I do not propose at first to use it at all. (*m*) Of the terms of a contract, some are of such vital importance to the contract that if they are untrue the contract may be treated as at an end; such terms may be called conditions precedent. (*n*) Some of these are express; they actually appear on the face of the charter-party or the bill of lading. Some of them are implied, or form part of every contract of affreightment, unless there are express words in the contract excluding them. Whether any particular term of the contract is a condition precedent the untruth of which entitles the other party to repudiate the contract, or

(*m*) *Vide post*, pp. 185, 199.

(*n*) Charters, Art. 23; *Behn* v. *Burness*, 3 B. & S. 751.

whether it is a mere term of the contract the breach of which gives rise to an action for damages only, is a matter to be settled by the judge; but he may obtain information from the jury as to the facts surrounding the particular contract from which he can infer whether it was a condition precedent or not. The whole law as to the principles of conditions precedent and other terms of the contract is laid down in the leading case (not only on this branch of the law but on all branches of the law of contract) of *Behn* v. *Burness*. (*o*) If you will look at the charter-party which was given you,(*p*) you will find a blank left in the first two or three lines: "The good screw steamer called . . . now at . . . " and in the case of *Behn* v. *Burness* (*o*) that blank was filled up "in the Port of Amsterdam," and the ship was chartered "with all possible despatch to proceed to Newport and there load." The charter-party was dated October 19th; which amounted therefore to a statement that on October 19th the ship was "in the port of Amsterdam." Four days before, on October 15th, the ship was, as a fact, at a place called Neuw Dieppe, within sixty miles of Amsterdam, and she could, if the wind had been favourable, have reached Amsterdam in twelve hours; but the wind being adverse, she did not arrive till the 23rd, four days after the charter-party was dated. She

(*o*) 3 Best & Smith, 751. (*p*) Appendix.

was not therefore in the port of Amsterdam on the 19th, and the charterers declined to load. They said: "The truth of the statement 'now in the port of Amsterdam' was vital to the contract; it was untrue, and we have a right to repudiate the contract." The shipowner replied: "Any damage you have suffered is amply compensated by a claim for damages." It was held, that the statement as to the ship's position at the time of making the contract, being of vital importance to the charterer in order that he might know when he would be able to load, was a condition precedent, and that its untruth entitled the charterer to throw up the contract. In the judgment in that case you will find, laid down at great length, the general principles on which documents such as these will be construed with regard to conditions precedent. The particular case, of course, establishes that statements in the charter-party as to the position of the ship are in practice almost always conditions precedent which must be literally true. If you look at the close of the charter-party given to you, (*q*) you will see that the parties here have gone further than that; they have expressly stated what would otherwise be the law without their statement: "If any misrepresentation be made respecting the size, position, or state of the steamer, or should the steamer not have

(*q*) Appendix.

arrived at the particular port and be ready to load at or before noon on (a certain day), the freighters are to have the option of cancelling the charter." The latter part of the clause is known as a "cancelling clause," giving the option of cancelling on the non-arrival of the ship by a particular day; and it gives definiteness to the covenant of reasonable diligence otherwise implied. There are a series of decisions, (*r*) with which I do not propose to trouble you, as to particular statements which have been held to be conditions precedent, such as the ship's class on the register, the ship's name and her national character under certain circumstances, the whereabouts of the ship, and her time of sailing. Those statements may also exist as conditions precedent, in the bill of lading, although it rarely happens that disputes arise as to conditions precedent on a bill of lading. (*s*)

Those are express conditions precedent. But there are other terms of the contract which, unless expressly excluded, are implied in every charter; implied conditions precedent, more usually known, to use the objectionable word, as implied "warranties." Those implied warranties are, as far as the shipowner is concerned, three. (*t*) He impliedly undertakes, firstly, that the ship is seaworthy; secondly,

(*r*) Charters, Arts. 24-27. (*s*) See Charters, p. 56.
(*t*) Charters, Art. 28.

that he will commence and carry out the voyage with reasonable diligence; and thirdly, that he will carry out the voyage without unnecessary deviation from the ordinary course. If any of these implied contracts is broken, the other party has the option of throwing up the charter-party—that is, if the ship is not seaworthy, if it does not proceed on the voyage with reasonable diligence, or if it deviates from the course of the voyage, unless there are any express words in the charter-party or bill of lading which modify the warranties otherwise implied.

Taking the implied warranties in order, the seaworthiness required varies with each particular adventure. (*u*) The ship is to be fit for the particular adventure undertaken. Seaworthiness for a summer voyage is less than seaworthiness for a winter voyage; and seaworthiness for a river is less than seaworthiness for the sea. The ordinary time at which the warranty of seaworthiness is to be complied with is when the ship starts on her voyage. She must be fit to take in her cargo; and she must be seaworthy at the time she sails on her voyage with her cargo on board. Also the warranty of seaworthiness is absolute. It is not that the ship-owner has used reasonable diligence; it is a warranty that the ship is absolutely fit for sea, even though the owner could

(*u*) Charters, Art. 29.

not by reasonable diligence find out the defect complained of. (*v*) There is one variety of the warranty of seaworthiness which is of considerable importance in practice sometimes, and in regard to the cargo to be carried; besides warranting that the ship shall be fit to encounter the perils of the voyage she is undertaking, the warranty is further that she shall be fit to carry the cargo she has contracted to carry. Besides being seaworthy she must be cargo-worthy, if one may coin the phrase. There are two cases which turn upon that. One is the case of *Tattersall* v. *The National Steamship Co.* (*w*). In that case the ship was chartered to carry cattle. She was perfectly seaworthy for the voyage, but she had on a previous voyage carried cattle which had the foot and mouth disease, and she had not been properly disinfected. There was a clause in the bill of lading which would have exempted the shipowner from liability for cattle dying from disease, but it was held that this exception did not apply because the ship was not seaworthy at the time of starting; she was not fit to carry the cargo of cattle that she had contracted to carry, in that she had not been properly disinfected. The other case,

(*v*) *Steel* v. *State Line*, L. R. 3 App. C. 86; *The Glenfruin*, L. R. 10 P. D. 103.

(*w*) 12 Q. B. D. 297.

rather an extreme case as showing the extent of the warranty, is *Stanton* v. *Richardson.* (*x*) There a ship was chartered to carry a cargo of wet sugar, which is a very difficult cargo to carry, because it leaks to an unusual extent. She was perfectly fit to encounter the voyage, and fit for every cargo but wet sugar; but the pumps were not of sufficient capacity to drain off the leakage of the wet sugar. It was held that she was not seaworthy because, it being clear on the charter-party that she was to carry wet sugar, there was an implied warranty that she was fit to carry that particular cargo. That is the first of the implied warranties.

If you will refer to the bill of lading (*y*) you will find that, as is often the case now, the warranty of seaworthiness has been slightly altered by its terms. You will see at the end these words: "All the above exceptions are conditional on the vessel being seaworthy when she sails on the voyage" (that was the law before, so that there was no need to put it in); "but any latent defects to hull and machinery shall not be considered unseaworthiness, provided the same do not result from the want of due diligence on the part of the owner or manager." That, you will see, converts the undertaking from an absolute undertaking of seaworthiness, whether the defects

(*x*) 45 L. J. H. L. 78. (*y*) Appendix.

could be discovered by due diligence or not, into a warranty merely that the owner has used due diligence; and it therefore lessens the extent of the warranty. A similar clause is now common in bills of lading, especially at Liverpool.

The second implied warranty is the undertaking of the ship-owner that he will start on and carry out his voyage with reasonable despatch. (*z*) The time within which a commercial adventure or undertaking can be reasonably carried out was considered in the leading case of *Jackson* v. *The Union Marine Insurance Co.* (*a*) There a vessel was chartered in November to proceed with all possible despatch from Liverpool to Newport, and there load iron for San Francisco. She started from Liverpool for Newport on January 2nd, but stranded on the Welsh coast on January 3rd, and sustained such damage that she was not ready to proceed on her voyage until August in that year. Meanwhile, in the middle of February, the charterers had thrown up the charter. They said, in effect:—"We claim to repudiate; the delay is longer than in a commercial sense we are justified in waiting." The jury found that the delay was such as to put an end to the commercial speculation entered into in the charter; and it was held that the charterer was justified, on that finding, in throw-

(*z*) Charters, Art. 30. (*a*) L. R. 10 C. P. 125.

ing up the charter-party. Therefore the question in each case is whether the delay is such as to put an end to the commercial speculation. If it is not, there is only an action for damages, unless the delay is caused by excepted perils; if it is, the charterer can throw up the charter.

The third warranty of deviation one can deal with best in dealing with the course of the voyage. (*b*)

There is a further implied undertaking by the cargo-owner, that he will not ship dangerous goods without notice of their character. Goods which the ship-owner could not reasonably know were dangerous are not to be shipped by the cargo-owner without notice to the ship-owner. (*c*)

We have now considered what is the contract, how it is to be collected from the two documents which evidence it, and how those documents are to be construed, and we can come to the performance of the contract. If you will look at the charter-party (*d*) it runs thus: "*It is agreed between . . . owners and . . . charterers, of the good steamer called*" (such and such a name, probably a condition precedent), "*of the burden of*" (so many tons, which may be a condition precedent), "*now at*" (so and so, a condition precedent) "*guaranteed by the owners to be tight, staunch, and*

(*b*) Charters, Arts. 99, 100, *et post*, p. 131.
(*c*) *Ibid.*, Art. 31. (*d*) Appendix

strong" (that is an antique form of expressing a warranty of seaworthiness), "*in every way fitted for the voyage, shall forthwith proceed to . . . and there load in a customary manner.*" That is the first thing to be done: to proceed to the port of loading and there load according to the stipulations of the charter-party; and, in consequence of the warranty, to proceed with reasonable diligence; (*e*) it is necessary that that should be carried out within such a time as not to frustrate the commercial adventure entered into. In all contracts the ship must proceed to the port of loading within a reasonable time. More frequently the implied warranty is made express by the statement, such as you find in the form given to you, that unless the ship is ready to load on or before a particular day the charterers are to have the option of cancelling the charter-party. That converts the implied warranty into an express warranty contained in the "Cancelling Clause." The effect of it is that if the words were "ready to load on or before noon of July 1st," and if the ship was not ready to load till one hour after noon on that day, the charterer would be justified in throwing up the charter; and as dropping freights sometimes render it convenient for a charterer to throw up his charter, the Cancelling Clause is frequently used.

(*e*) *Ante*, p. 112.

"*To proceed to the port of loading and there load.*" The question which constantly arises is, when has the ship got to that place in the port of loading where she is entitled to say:—"I have fulfilled that obligation"? for a ship is nearly always allowed a certain number of lay-days, or a certain amount of time in which to load; and after that time has elapsed she may claim damages from the charterer for detaining her longer than is stipulated in the charter. Those damages are known as *demurrage*. But in order to ascertain whether the lay-days have expired, and the time for paying demurrage has arrived, it is necessary to know when the time allowed for loading began. The time for loading begins when three conditions are performed: (*f*) firstly, when the vessel is at the place where her carrying voyage is to begin, that is, where she is to receive her cargo; (*g*) secondly, when she is ready to load (for instance, if she has brought another cargo into port and has to discharge it, she must have discharged it completely); (*h*) and thirdly, when she has given the charterer notice that she is ready to load. (*i*) When those three conditions are performed the lay-days begin.

The charter-party frequently runs, "*to proceed to*" a certain port, "*or so near as she can safely get.*" (*j*)

(*f*) Charters, Art. 38. (*g*) Article 39. (*h*) Article 40.
(*i*) Article 41. (*j*) Article 36.

That clause has given rise to a good deal of litigation, and it is a very important clause in a charter. It may happen that through low tides, or through ice, or through an embargo, or through the crowded state of the docks, or other circumstances, the ship would have to wait some time before she could get to the place where she ought to load, and the clause "or so near as she can safely get" is inserted to protect her to some extent against that delay. The clause has been considered by the House of Lords in the leading case of *Dahl* v. *Nelson*. (*k*) There a ship was chartered to proceed to the Surrey Commercial Docks "or so near as she can safely get." She got to the dock gates on August 4th, but the docks were so full that she must have waited five weeks to enter; and she claimed therefore under the clause to discharge her cargo outside the docks into lighters. The House of Lords held that the ship-owner was bound to wait a reasonable time to see whether he could overcome whatever obstacles were in the way of his reaching the place of loading. If it was low tide he was bound to wait a reasonable time for spring tides. If he was chartered to go to a port likely to be ice-bound, it must be taken that the parties intended that he should wait till the ice broke up. In the case of going into crowded docks, the question in each case

(*k*) L. R. 6 App. C. 36.

must be considered whether the time the ship would have to wait before entering was a reasonable one for the purposes of the adventure, and the House of Lords held that the delay of five weeks in this case was unreasonable, and that therefore the ship-owner was entitled under the clause "so near as she can safely get" to require the charterer to take delivery of the cargo (or in other cases to load) outside the dock. The clause is one constantly inserted to protect the ship-owner; and it does protect him to that limited extent, though not against such cases as waiting for tides or waiting for ice to break up.

Having arrived at the port of loading, it becomes of importance, as I said, to ascertain when the lay-days begin for the purposes of demurrage. Demurrage, in the strict legal sense, is an agreed sum to be paid if the ship takes more than an agreed time to load or discharge. (*l*) For instance, a ship may be chartered to load in ten days, or to pay demurrage at the rate of £10 a day. There you have all the elements of demurrage fixed in the charter-party: "ten days to load," a fixed number of lay-days, and "£10 a day if the ship is more than ten days in loading"; a fixed amount for demurrage after the lay-days have expired. It may be that the amount is not fixed. The charter might run simply, "Ten

(*l*) Charters, Art. 128.

days to load," saying nothing about the amount to be paid afterwards; in which case, though in the commercial sense "demurrage" would be payable, in the strict legal sense the ship-owner would only be entitled to recover "damages for detention." In the strict legal sense of the term, "demurrage" is confined to cases where the amount is fixed or liquidated in the charter-party. Where it is not fixed, but you are left to recover such damages as a jury will give, unliquidated damages must be claimed as "damages for detention."

The place where the carrying voyage is to begin depends on the terms of the particular charter-party. (*m*) If it runs, as in this case, (*n*) "shall proceed to the port of X. and there load," the charterer's duty is completed when he has got to the usual place of loading in the port. (*o*) If it says, "shall proceed to a dock and there load," the ship must get into the dock, (*p*) unless she is protected by the clause "or so near as she can safely get," when she would only be required to wait a reasonable time for that purpose. Her lay-days will not begin until she has entered the dock, though she may be outside. If the ship is to proceed

(*m*) Charters, Art. 39. (*n*) Appendix.
(*o*) Charters, p. 87.
(*p*) *Tapscott* v. *Balfour*, L. R. 8 C. P. 46.

to a particular place in the dock, or a particular quay or wharf, the ship-owner must get to that particular place, or that particular quay or wharf. (*q*) When the ship is at the place where the carrying voyage is to begin and ready to load, the charterers must furnish a cargo for her, (*r*) unless the operation of exceptions in the charter-party excuses them from delivering the cargo; but unless the charter-party expressly so states, the charterer will not be excused by matters which prevent him bringing a cargo to the ship, but only from matters which prevent him from loading a cargo which is already at the place of loading. That in practice is a very important point, because it used constantly to happen —although now the difficulty is less frequent in consequence of the express words which are being inserted—that strikes at collieries, or sometimes ice in canals, prevented the charterer from bringing a cargo down to the ship; and he endeavoured to rely in several cases on exceptions in the charter-party, such as "strikes"; but the House of Lords decided in the leading case of *Coverdale* v. *Grant*, (*s*) that unless it was expressly made clear in the charter-party, such exceptions did not apply to causes

(*q*) *Tapscott* v. *Balfour*, L. R. 8 C. P. 46; *Murphy* v. *Coffin*, 12 Q. B. D. 87; but see *The Carisbrooke*, 15 P. D. 98.

(*r*) Charters, Art. 42.

(*s*) L. R. 9 App. C. 470.

preventing the charterer from bringing a cargo down to the ship. In that particular case the exception was held not to apply to ice in canals which prevented the charterer from bringing a cargo into Cardiff Docks.

It being the duty of the ship-owner to get to the place fixed for loading, and the duty of the charterer to supply a cargo there, the question then arises, within what time the ship must be loaded. There are three ordinary forms of charter-party as to loading and discharging which are continually being construed in cases as to demurrage. The first and a very common form, is to load or unload in a fixed number of days—to load in ten days, for instance; (*t*) that is an absolute undertaking by the charterer to load the ship in that time, unless he is prevented by the actual default of the ship-owner, or is protected by the express exceptions in the charter-party. (*u*) A recent case has emphasized that proposition again, (*v*) in which a ship going to Bristol to discharge in ten days was prevented from discharging by a strike of the labourers in the port, which prevented the ship-owner from getting men to do his part of the discharging, and the charterer from doing his part. There was an action by the shipowner for demurrage. Defence: "You were not ready and willing to do your part of the

(*t*) Charters, Art. 131. (*u*) Cf. *Thiis* v. *Byers*, 1 Q. B. D. 244.
(*v*) *Budgett* v. *Binnington* (1891), 1 Q. B. 33.

work." Answer: "You have absolutely contracted that the ship shall be discharged in ten days; my not being ready did not prevent you, because you could not have done anything if I had been ready." This was held by the Court a good answer, and charterers were made liable to pay demurrage because they had absolutely contracted to discharge the ship in ten days. In this charter (*w*) the words would have protected the charterer: "Demurrage, 16*s.* 8*d.* per hour, except in case of riot or commotion by pitmen, lock-out, strike, or stoppage at any collieries with or upon which the freighters may have arranged for shipment of the cargo or a portion thereof." Those words are framed on decided cases, and are wide enough to protect the charterer in such a case.

A second form of demurrage stipulation is "to load or unload in a reasonable time"; no express time is fixed, but no time at all is named in the charter-party. In that case the law implies a covenant to load or discharge in a reasonable time, and the circumstances then existing are taken into account. (*x*) The fact that neither party could have got workmen through a strike would probably be considered in estimating what is reasonable.

(*w*) Appendix.

(*x*) Charters, Art. 132. *Ford* v. *Cotesworth*, L. R. 4 Q. B. at p. 137.

A third form is a form which you will see in this charter-party, "to load in the customary manner," and there the whole custom or practice of the particular port has to be taken into account in considering whether the customary time at that port has been taken. (*y*)

Before the ship starts on its voyage we may consider a question important to both parties concerned, namely, the liability of the ship-owner or carrier for the goods entrusted to his care. If you look at the charter-party and bill of lading which I handed you (*z*), you will find that the carrier has introduced a number of stipulations for the purpose of protecting himself. In the charter-party, after the ship-owner has contracted to receive the goods and to deliver them, he inserts a clause:—"The act of God, the Queen's enemies, fires and all dangers and accidents on seas, rivers, errors of or negligent navigation during the said voyage always excepted." And in the bill of lading (*a*) you will find a long clause of similar nature, beginning with "The act of God" and continuing for several lines. Those clauses are known as the "exceptions" or "excepted perils" in the contract of affreightment. But there are cases where goods are

(*y*) Charters, Art. 133 ; cf. *Postlethwaite* v. *Freeland*, L. R. 5 App. C. 608.

(*z*) Appendix. (*a*) *Ibid.*

carried without a charter-party or bill of lading, as for instance in coasting vessels occasionally, and also in lighters or barges on the river, and in that case the question has arisen:—"What is the liability of the carrier, there being no contract in writing?"

In the first place, if the person carrying is a common carrier, or is bound to carry goods for any person who brings them to him, his liability is the same as that of common carriers by land, and he is absolutely liable for the safety of the goods committed to his charge, unless he can show that the damage to them results either from what is shortly called "the act of God" (which may be translated into more intelligible language as "unavoidable accidents") or "the Queen's enemies," meaning hostile powers. The leading authority for that you will find in the important case of *Nugent* v. *Smith*. (*b*) There a coasting steamer running from London to Aberdeen received a mare to be carried for a particular shipper, and on the voyage, partly apparently by rough weather, partly by the mare herself getting frightened and kicking, she was injured. The owner of the mare sued the ship-owner, who replied that though he was not carrying by land, he had the liability of a common carrier, and that the damage which had happened to the mare was damage partly from the storm, being an "act of

(*b*) L. R. 1 C. P. D. pp. 19, 423.

God" which he had no control over, and partly from the vice of the mare herself. Proving those facts, he succeeded in his defence, and was held not to be liable for the injury.

A more difficult question arises in the case of the numerous vessels and lighters which are not "common carriers" in the strict sense of the word, because they are not bound to carry goods for every person who brings them. For instance, a lighterman in London, who lets out his barges to any person who has goods to take from wharf to ship or from ship to wharf, is not bound to let the barges to anybody who comes to him, and therefore is not a "common carrier" in the strict sense of the word; and the question has arisen: What is the liability, on such a contract of carriage, in the absence of any express printed terms? The leading case on the point, although I cannot say it leaves the question finally settled, is the case of *Liver Alkali Co.* v. *Johnson.* (*c*) There the Court held, its members agreeing in the result, though for very different reasons, that, though not a "common carrier," such a carrier by water had the same liability as a "common carrier," and therefore was absolutely liable for injury to goods unless he could show that the damage resulted from unavoidable accidents, the "act of God," or from "the Queen's enemies." Injuries

(*c*) L. R. 7 Ex. 267; 9 Ex. 338.

from the action of the Queen's enemies rarely happen. An attempt was made five or six years ago to prove that a fire resulted from a Fenian plot, and was therefore the act of "the Queen's enemies"; it failed in the outset from the difficulty of proof that the fire was so brought about, but had it been proved, the exception would probably have been held only to apply to recognised foreign states at war with the sovereign. (*d*)

The far more numerous class of cases comprise cases where the owner of goods sues for damage done to his goods, or for their non-delivery, and the ship-owner sets up by way of defence one of the "excepted perils" in the charter-party or bill of lading, and such cases are constantly coming before the Courts. Two recent cases in the House of Lords render it possible to state fairly authoritatively what the proper construction of the general provision as to "excepted perils" is. (*e*) The contract of a ship-owner who has entered into a charter-party or bill of lading is threefold, or in three stages. In the first place he absolutely contracts to deliver; that is to say he is not merely liable to use reasonable care in the carriage of goods, but his liability, to start with, is absolute. This absolute liability exists unless he can show that the damage complained of is caused by one of the

(*d*) Charters, Art. 81. (*e*) *Ibid.* Art. 79.

excepted perils; and even then he is only exempted provided that he or his servants could not by reasonable care have avoided the operation of that peril. He is an absolute insurer, unless protected by the "excepted perils," and provided he could not have avoided those perils by due diligence on the part of himself or his servants; whilst in considering whether damage is caused by an "excepted peril," the immediate and not the remote cause of the damage is to be looked at. That last proposition has been shortly summarised in a maxim which is constantly used in the cases:—"*causa proxima non remota spectatur*," the proximate and not the remote cause is looked to. The best way to illustrate that maxim will be to refer to one of the recent decisions of the House of Lords, which caused great discussion in shipping circles, the case familiarly known as the "rat case," though the more orthodox way to cite it in Court is *Hamilton* v. *Pandorf*. (*f*) The particular rat in that case deserves great credit; he succeeded in raising a very ingenious question. He was on board a ship laden with rice, and being thirsty, he went, as rats do under those circumstances, to the nearest running water he heard, which happened to be in a lead bath pipe communicating with the outside salt water. The rat gnawed through the pipe

(*f*) L. R. 12 App. C. 518.

and must have been horribly disappointed when he got to the salt water. Having reached the salt water he did not stop up the hole after him, but left, and the salt water came through and seriously damaged the cargo. As a result, when the ship arrived, there was delivery of a large quantity of rice damaged by salt water which had entered through this bath pipe. Action by the owner of the rice against the ship for delivery of damaged cargo. Answer by the ship-owner:—"Damaged by perils of the sea," for it had been damaged by salt water, which is a "peril of the sea." Further answer to that by the cargo-owner: "The real cause of the damage was not the salt water but the rat; rats are not 'perils of the sea,' but are peculiar to all elements"; and the case went up to the House of Lords. The House of Lords expounded the whole nature of the contract as stated above, and saying that the immediate and not the remote cause must be looked to, they argued in effect: "The immediate cause of this damage is the salt water; it seems immaterial to us how the salt water got into the ship, whether through a rat or by any other means, so long as it did not enter the ship through the negligence of the ship-owner and his servants"; and as there was no finding by the jury of negligence or that due diligence would have kept the rat off the bath pipe, the House of Lords held that the ship-

owners were exempted from liability by the exception. They had before them at the same time another case which raised a similar question, which they decided in the same way. (*g*) There the goods were lost through a collision occasioned by the negligence of another ship, the ship that carried the goods being free from blame. Again an action was brought by the cargo-owner for non-delivery of the goods. Answer by the ship-owner: "They were lost by perils of the sea, the salt water which entered the ship through the hole made in collision." Answer by the goods-owner: "The real cause of the loss was the negligence of the crew of the other ship, and the negligence of men is not a peril peculiar to the sea." Judgment was given by the House of Lords on the same lines as in the "rat case":—"You must look at the immediate cause of the damage, which was the entry of salt water, and the fact that the salt water entered the ship by reason of the negligence of men of another ship is immaterial, so long as the negligence of the ship-owner or his servants had no part in the collision." Those two cases are now the leading cases of the whole question of "excepted perils," and to them I refer you for wider discussion of the principle.

Into the details of the meaning of each exception I do not propose to go. (*h*) Every line of steamers

(*g*) *The Xantho*, 12 App. C. 503. (*h*) Charters, Arts. 80–90.

has its own bill of lading with its own large and varying number of "excepted perils." But I wish to say a word on the burden of proof in an action for loss or damage to cargo. If the ship arrives and the goods do not, that throws upon the ship-owner the burden of proving how he lost them. (*i*) To excuse himself from non-delivery of the goods though his ship has arrived, he must show either that they were never shipped, or that they have been lost through one of the "excepted perils." But a more usual case is where the goods arrive, but arrive damaged. His liability then depends on the exact clauses of the bill of lading. (*j*) If you look at the bill of lading (*k*) you will see it begins, "Shipped in good order and condition . . . to be delivered in the like good order and condition," and it concludes with words in large print, "weight, quantity, and quality unknown," which of course contradict to a considerable extent the formal receipt at the beginning for "goods in good condition." The way in which those two clauses have been reconciled is by holding that the words "shipped in good condition" only apply to the external appearance of the package; they show that externally there did not appear to be anything the matter with the goods when they were

(*i*) Charters, Art. 91. (*j*) *Ibid.* Art. 51.
(*k*) Appendix.

shipped. If then the goods are delivered damaged the shipper must support his case by giving *primâ facie* evidence—very slight evidence will do—that the goods were shipped in good condition internally, or that they have been damaged from some external cause, as for instance if they appear dirty and wet on the outside. When the shipper has given such proof, the owner has thrown upon him the burden of bringing the case within one of the exceptions. That is the way in which the burden of proof works with regard to all actions of damage to cargo.

That being the liability of the ship-owner, we may start on our voyage. The first duty of the master on the voyage is to carry out his contract of carriage without deviation from the ordinary commercial route of the voyage, and without unnecessary delay, those being, as you will remember, two of the implied warranties in every contract of affreightment. (*l*)

If the ship deviates without justification from the ordinary commercial route on the voyage, the ship-owner will be liable for any damage to the goods on the voyage, for it is always impossible to prove that the damage would have happened, even if the ship had continued on its ordinary course. The latest case on that point is the case of *Le Duc* v.

(*l*) Charters, §§ 99, 100.

Ward. (*m*) There goods were shipped under a bill of lading, describing the ship as "now lying at Trieste, and bound for London." The ship went from Trieste to London by way of Glasgow for her owner's private purposes, and was lost while on the way to Glasgow. Glasgow was not on the ordinary commercial route from the Adriatic to London. It was held that the ship-owner was liable for the damage to the goods, though caused by perils of the sea, the statement in the bill of lading amounting to an implied warranty that the ship should proceed without deviation, by the ordinary commercial route. Deviation from such a route will be allowed, even in the absence of express stipulation in the bill of lading, either to avoid imminent danger, (*n*) or to save life and to save life only. (*o*) To save property, which is another word for getting salvage, will not be considered as justifying a deviation. The master will also be justified in delaying his voyage, or in deviating from the course of it, if he receives information of some imminent peril awaiting his ship on the ordinary course of the voyage, such as for instance, to take the case which generally occurs, the case of hostile capture; the whole doctrine has been discussed in

(*m*) 20 Q. B. D. 475.
(*n*) *The Teutonia*, L. R. 4 P. C. 171.
(*o*) *Scaramanga* v. *Stamp*, 5 C. P. D. 295.

the leading case of *The Teutonia.* (*p*) That was one of the many cases which occurred at the time of the Franco-German war, when German ships coming home from America to French ports found that war had broken out, or was just on the eve of breaking out. This particular German ship received orders to proceed to Dunkirk, and on arriving off that port was told by a pilot that he thought there was war; sooner than go into the French ports and run the chance of being confiscated, she went to Dover to inquire. The question arose whether she had the right to make that deviation, and it was held by the Court that she was perfectly justified in doing it to avoid imminent danger of capture, although Dover was out of the ordinary voyage to Dunkirk. That then is the first duty of the master, to proceed without unreasonable delay or deviation on the voyage he has contracted to carry out.

His second duty, as representing the ship-owner, is to take care of the goods that are entrusted to him; if, therefore, on the voyage the goods sustain damage and the master by taking reasonable measures can save them from incurring further damage, it is his duty as representing the ship-owner to take those measures. (*q*) That duty you will find laid down in the leading case on this particular point, *Notara* v.

(*p*) L. R. 4 P. C. 171. (*q*) Charters, Art. 101.

Henderson. (*r*) A vessel carrying beans came into collision, and the beans were damaged by salt water. It was proved that at the port to which the master put in to repair the damage caused to his ship, he might have taken measures that would have stopped further damage to the beans; he did not, but took them on in their damaged state, with the result that they sustained further damage; and in an action against the ship-owner by the owners of the cargo for delivering their beans in this state, it was held that the ship-owner by his master should have taken reasonable steps to cure the damage at the intermediate port.

Those are the ordinary duties of the master, but unexpected incidents on the voyage may impose further duties upon him. Both the duties that I have mentioned are imposed on him as representing the ship-owner, but he may under certain circumstances be turned into an agent of the cargo-owner and be empowered to bind the cargo by his action; for instance, he may have the power and the duty as against the cargo-owner to sell the cargo instead of carrying it on; (*s*) he may have power to tranship it into another vessel; (*t*) he may have power to raise money upon it for the purpose of repairing his ship to carry the cargo on. (*u*) Those, you will see, are

(*r*) L. R. 7 Q. B. 225.
(*s*) Charters, Art. 102.
(*t*) Article 103.
(*u*) Articles 104, 105.

extraordinary powers outside the contract of carriage. In order that the master should have those powers two conditions must be present; (*v*) firstly, the action that he takes must be necessary, that is to say apparently the best course for a prudent man to take in the interests of the cargo. (*w*) It will not be enough that he acts in good faith, he must further act reasonably; he must take what would be the best course for a prudent man to take; the first justification for his action is that it is necessary. The second is that he has no power of communicating with the cargo-owners. (*x*) If he has the power of communicating with the cargo-owners in time to receive an answer from them before action he must do it; he cannot then act without consulting them; it must be (owing to the place where he is and the necessity of immediate action) impossible for him to communicate with the cargo-owners in time to receive an answer, before he is entitled to act. But if those two conditions concur he has, as I said, power to sell the cargo if it is in such a state that it cannot be carried on as a merchantable article either at all or without greater expense than it is worth. (*y*) He has power under certain circumstances to tranship the cargo into another vessel. (*z*) If his own vessel is hindered

(*v*) Charters, Art. 96. (*w*) Article 97. (*x*) Article 98.
(*y*) Article 102. (*z*) Article 103.

from going on by "excepted perils," he is not bound to carry the cargo on as agent of the ship-owner, but it may be his duty to look after it as agent of the cargo-owner, and under those circumstances it may be his duty, and he may have power, to make another contract of carriage for the cargo-owner in another ship, which is known as transhipping the cargo. If his vessel is not hindered from going on by "excepted perils," it is, of course, his duty to carry the cargo on as representing the ship-owner, for otherwise he would be liable to an action for failure to deliver and would have no defence. In the same way he might have power to raise money on the cargo, to bind the cargo as security for a loan obtained in order to carry on the adventure. (*a*) That is frequently done by a document known as a "*bottomry bond*," under which a loan is made on the security of the cargo or ship, to be repaid only if the ship and cargo arrive safe, and that is the meaning of the ordinary phrase, "raising money on bottomry";—on the security of the ship and cargo which are to be benefited. (*b*) Further he may have authority in cases where it is necessary for the safety of the adventure to *jettison* part of the cargo, that is to throw it overboard. Of course, in case of jettison he is usually unable to

(*a*) Article 104. (*b*) Articles 105, 106.

communicate with the owners, except in the cases where a ship has stranded in an accessible position, and it is necessary to lighten it. Obviously, while at sea in a storm the master cannot communicate with the owners, and therefore he has only to show that what he did was necessary.

Further, liability to pay money on account of the cargo may arise on the voyage under one of two heads. The cargo-owners may become liable to pay money in respect of "*general average,*" or they may become liable to pay money in respect to "*salvage.*" The question of "general average" is almost entirely in the hands of average adjusters, and I only propose therefore to explain to you the meaning of the term. When one of the interests in the adventure, the cargo-owner or the ship-owner, has to pay a sum of money, or to make some sacrifice for the benefit of the whole adventure, the owner of the part sacrificed is entitled to be recouped his loss or part of it from the other interests in the adventure. (*c*) What is paid for the whole adventure is to be repaid by the whole adventure. A loss suffered in the interests of the whole adventure is called a "general average loss," the repayment of that loss by the interests which have been benefited is called a "general average contribution" or payment; the amount of the pay-

(*c*) Articles 108 *et seq.*

ment to be made by each interest in the adventure is contained in a "general average statement," which is made up by an "average adjuster." To illustrate the working of this, take a ship at sea, carrying cargo under a charter-party. A storm arises; to save the ship and cargo it becomes necessary to throw some of the cargo overboard, and to cut away one of the masts of the ship. The cargo thrown overboard and the mast cut away are general average sacrifices, they are sacrifices made for the benefit of the whole adventure to get the ship and the rest of the cargo safe home. The owners of the ship suffer the general average loss of the mast, and the owners of the cargo thrown overboard suffer a general average loss of the cargo which has gone to the bottom; they are therefore entitled to call upon the other interests, which have reached home safely in consequence of the mast cut away and the cargo thrown overboard, for a "general average contribution" to replace their share of the loss; so that the loss which otherwise would have fallen on the owner of the ship which had lost its mast, and on the owners of the particular cargo which was thrown overboard, is spread over the whole adventure.

Instead of the ship being saved by the sacrifice of something on board it may be saved by services rendered by persons outside the ship. Another ship

may appear to tow a disabled ship into port; friendly inhabitants of an island on which the ship is wrecked may render service in discharging the cargo, and either the inhabitants or the other steamer will be entitled to a reward for saving what has been saved. They may have agreed the reward beforehand, for the captain may have the power under those circumstances to bind the cargo or the ship to pay salvage. These sums claimed by way of salvage form a very profitable part of the business of the Admiralty Division, in actions for salvage either by steamers or fishing smacks, who have rendered assistance to vessels in distress, or others who have landed the cargo, or anybody else who has helped the adventure.

Those are matters which arise on the voyage; when the ship gets to port again there arise all the questions about demurrage that we have already considered in dealing with loading. (*d*) The law as to demurrage at the port of discharge is the same as that at the port of loading with one exception; it is necessary at the port of loading, in order that your lay-days should begin, that you should have given notice to the charterer that your ship is ready to load; at the port of discharge it is not necessary that you should give such a notice, for the consignee is supposed to look out for himself. (*e*) With that difference the

(*d*) *Ante*, p. 115 *et seq.* (*e*) Article 123.

law of demurrage is the same whether it be the port of loading or the port of discharge. The duty of the master as to discharge has been provided for in England by a series of statutory provisions. (*f*) It is often also regulated by a custom of the port of discharge, and there are very frequently express provisions in the bill of lading or charter. In the absence of any of those provisions the master must give the consignee a reasonable time to take his goods; (*g*) he cannot simply turn them out on to the wharf as soon as he gets there and say:—"I have done with them." The question to what person the master is entitled to deliver depends rather on the meaning of the bill of lading as a document of title. (*h*) If no bill of lading is produced and no consignee claims the goods, the master is not bound to wait there for ever with them; he can land the goods and warehouse them, still preserving his lien for freight; (*i*) and under some circumstances, if there is no possibility of warehousing them safely, he may take them back to the place whence he came and charge freight for the back voyage; (*j*) but as a general rule in England his liabilities are settled by the statute to which I have referred. (*f*)

(*f*) 25 & 26 Vic. c. 63, §§ 66–78.
(*g*) Article 125. (*h*) *Post*, p. 163. (*i*) *Post*, p. 144.
(*j*) Charters, Art. 138; *Cargo ex Argos*, L. R. 5 P. C. 134.

When the master is ready to deliver the goods, one of the most important obligations under the contract of carriage arises, the obligation of the consignee to pay freight. The term "freight" has obtained a well-recognised mercantile meaning which can only be varied by express words in the bill of lading or charter. "Freight" in its ordinary mercantile sense has to be paid on delivery of the goods, and is not due unless the goods are delivered. (*l*) On goods shipped from India to the United Kingdom and lost at the mouth of the Thames no freight is payable, for no freight is due unless the goods are delivered. Further, by mercantile usage, the shipowner or master has a lien on the goods that he carries for the freight due for their carriage, and can refuse to give the goods up till the freight is paid. (*m*) Those are the two mercantile incidents of "freight"; it is only due on delivery, and a lien on the goods exists till the freight is paid. One may illustrate that by the case of *Krall* v. *Burnett*. (*n*) Goods were shipped under a bill of lading containing the words "freight payable in London." The ship started from London, and it was attempted to prove a custom of the port of London that those words meant "freight payable in advance in London," that is to say freight

(*l*) Charters, Art. 136. (*m*) Article 150.
(*n*) 25 W. R. 305.

payable not on delivery of the goods, but on the sailing of the ship. It was held that the term "freight" had such a well-recognised mercantile meaning, that no evidence was admissible to contradict the mercantile meaning of the word, and that therefore the freight was payable in London, but only on the safe delivery of the goods at the other end of the voyage.

That is the meaning of "freight" in the ordinary sense; but it has become exceedingly common now to pay "freight" on the sailing of the ship, or within a certain number of days after the sailing of the ship. That description of payment is known as "advance freight"; but the Courts adhered so closely to the mercantile definition of "freight," that they would not recognise "advance freight" as a payment for the carriage of the goods, but treated it as a payment for taking the goods on board ship, and would give no lien for it if, although due, it was not paid, in the absence of an express agreement that there should be such a lien. If you look at the form of charter which has been given to you, (*o*) you will see there that part of the freight is to be paid in advance, "freight to be paid at the rate of as follows: one-third of the estimated freight to captain on signing bills of lading" (one-third in advance), "and the rest

o) Appendix. Cf. *Smith* v. *Pyman* (1891), 1 Q. B. 42.

to be payable on delivery," which is a very usual form for payment of freight nowadays.

Another usual form in which the word "freight" occurs is "dead freight"; this is not really freight at all, but is damages for not loading a full cargo. (*p*) If there is a stipulation that the charterer shall load a full cargo and he only loads half the cargo, the damages that would be obtained for that breach of contract are called "dead freight"; and that is the explanation of the clause which you will find in nearly every charter giving a lien for "dead freight" and "demurrage."

Another form of "freight" frequently used is "lump freight." You will find charters headed at the top "*lumpsum charters.*" That is where one sum is to be paid, say £3,000; the freight is not made payable at so much per ton shipped, or so much per measure, but is one lump sum for the whole ship, and that is called "lump freight." There is one other phrase connected with freight before I deal with the circumstances under which freight becomes payable, and that is *pro ratâ* freight, which is freight which may become payable in proportion when only part of the voyage is accomplished (*q*) or when only part of the cargo is delivered. (*r*)

(*p*) Charters, Art. 161. (*q*) *Ibid.* Art. 143.
(*r*) Article 142.

A ship-owner is entitled to the full freight (*s*) where he delivers the goods at the port of destination; or is ready to deliver them, for the fact that the consignee does not appear to take them cannot make a difference to his right to freight. Where he has transhipped the goods, having a right to do so, and has brought the goods to their destination on another vessel, he is still entitled to the whole original freight. (*t*) In strict law also he is entitled to full freight though he has delivered the goods damaged; (*u*) for the remedy of the owner of goods so damaged is not by making deductions from the freight but by counter-claim, the only question as to freight being:—"has the ship-owner in substance delivered the goods he contracted to deliver?" (*v*) If they are so damaged as to be utterly unlike the same goods, for instance as in the case where a cargo of cement is delivered as a solid mass, (*v*) freight would not be payable. It is possible nowadays that a case which previously decided that the delivery of a cargo of bricks as brick-dust would do would be overruled, (*w*) but as a general rule the remedy of the freighter is not by deducting from the freight but by counter-claim.

The ship-owner would only be entitled to claim

(*s*) Articles 139, 141. (*t*) Article 139. (*u*) Article 141.
(*v*) *Dakin* v. *Oxley*, 15 C. B. N. S. 646.
(*w*) *Melhuish* v. *Garrett*, 4 Jur. N. S. 943.

freight *pro ratâ* or for delivery short of the place of destination for such a delivery under an express or implied agreement to pay a proportionate freight. (*x*) The mere fact of his delivery of goods to their owner at an intermediate port will not entitle him to any freight; he has not delivered at the place where he contracted to deliver. The fact that he has delivered at some place short of the place of destination will not entitle him to any payment *pro ratâ* or proportionally, unless he can prove an agreement by the goods-owner to pay such freight. The only other form of freight you should notice is this, that in charters which are made not for a voyage (known as "voyage charters") but for a certain time (known as "time charters"), the freight is not usually payable on the delivery of the goods, but at the expiration of certain periods, as so much every month; and in that case express provisions as to payment of freight are always contained in the charter itself.

The master is entitled to keep the goods till certain debts are paid him, that is to say he has a *lien* on the goods. At Common Law he has a lien on the goods for three matters: a lien on the goods for freight; (*y*) a lien on the goods for general average contributions, that is to say for sums due from the cargo to repay general average sacrifices; (*z*)

(*x*) Article 143. (*y*) Article 150. (*z*) Articles 117–120.

and a lien on the goods for any amount that he spent in protecting and preserving the goods. (*a*) In the absence of express agreement, there is no lien by Common Law for "advance freight," or for demurrage, or for dead freight, *i.e.* for damages for not shipping a full cargo, or for *pro ratâ* freight in the absence of express agreement; but a lien for all those matters may be given, if it is expressly stipulated in the charter or contract of affreightment. So that even without a stipulation in the charter there will be Common Law liens; with stipulations in the charter there may be liens to the extent of the stipulations.

The rule of damages for breach of the contract of affreightment is the general rule of damages for the breach of all contracts, the celebrated rule which has been laid down in *Hadley* v. *Baxendale*. Damages for a breach of contract, according to the rule in *Hadley* v. *Baxendale*, (*b*) are such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach thereof. As in ordinary mercantile life people when they make a contract do not contemplate its being broken, that rule does not carry one very far, but the practical effect is this. A ship-owner agrees to

(*a*) Articles 101, 121. (*b*) 9 Exch. 341.

charter his ship to a charterer; for some reason he breaks his contract, and the charterer then says: "Oh, if I had got this ship under my charter I should have made an enormous profit, for I happened to have a special contract with somebody or other to pay a much higher rate than the market rate." The rule of *Hadley* v. *Baxendale* applies there; and if the ship-owner did not know at the time he made the contract that the ship was wanted for the purpose of fulfilling this very profitable contract, the charterer cannot recover those damages against the ship, for they would not have been in the contemplation of the parties at the time they made the contract. (*c*)

That concludes the nautical side of the contract of affreightment, and in the next lecture I propose to deal with the mercantile side in treating of the bill of lading as a document of title to the goods.

(*c*) See further, Articles 158–160.

CHAPTER V.

THE BILL OF LADING AS A DOCUMENT OF TITLE.

Authorities. — Scrutton on Charter-parties, Section V.; Chalmers on Sale, Articles 19–72; Benjamin on Sale, 4th ed. pp. 345–372, 754–898.

In the last lecture, we finished the consideration of the contract of carriage, or the contract of affreightment, expressed in charter-parties and bills of lading. But the bill of lading has by the custom of merchants acquired another and a very important side; besides being very good evidence of the contract of carriage it is also a document of title, dealings with which may pass the property in the goods for which the bill appears on its face to be a receipt, and therefore in a large number of mercantile cases it becomes important to consider the way in which a bill of lading has been dealt with by the parties to it as affecting the property in the goods.

Before the bill of lading is signed by the shipowner at the beginning of the voyage, and after

it has been handed back discharged to the ship-owner at the end of the voyage by the consignee, there are certain other documents to which with varying success the custom of merchants has attempted to give an effect similar to bills of lading; and therefore in considering the bill of lading as a document of title, we must also consider the analogous documents which come in existence before the bill of lading is signed, or after the bill of lading is given up.

The course of business as to the signature of a bill of lading is usually this. Some merchant has 100 tons of iron to ship to a particular port; he goes into the office of a ship-owner who has a line of ships running to that port, and says: "I shall have 100 tons of iron for your next steamer." Sometimes he knows what the freight will be, and sometimes he asks what it will be. Sometimes there is no memorandum of the contract in writing at all; sometimes the ship-owners give him one of their shipping cards for the particular steamer, with a note "100 tons iron" written on the back. The ship comes into dock; the merchant finds on the shipping card the last day on which he is to send goods down to her, and he sends down 100 tons of iron, sometimes by barge, sometimes by cart, to the docks: whichever way they come, a document called a "*mate's receipt*" is signed

by the mate or some representative of the ship, and this acts as a receipt for the iron delivered on board. (*d*) That is a document relating to the goods, which comes into existence before the bill of lading is signed, and attempts have been made to give to the mate's receipt a similar effect to the bill of lading, in passing property in goods. (*e*) The result of the cases is this; the ship-owner will be justified in giving bills of lading to any person who produces the mate's receipt unless he has notice that somebody else claims the goods, in which case he must inquire into the question of property and cannot simply deliver to the mate's receipt. Further, as the mate's receipt usually contains the name of the person from whom the goods have been received, the ship-owner may deliver to the person named in the mate's receipt though such person does not produce the mate's receipt, if he has no notice of any other claim. In the absence of any other claim the ship-owner will be entitled to deliver either to the mate's receipt or to the person named in the mate's receipt. But the mere fact that the mate's receipt has been indorsed to somebody or transferred to somebody without any notice to the ship-owner passes no property in the

(*d*) This is not strictly accurate as to the practice of the port of London. See Charters, Appendix II.

(*e*) Charters, Art. 51.

goods, and an attempt to prove a custom to that effect has been held to fail, even if the custom was proved. (*f*) Thus the mate's receipt has but a very limited effect as a document of title, and its mere indorsement will pass no property whatever.

When the goods have been shipped, and the ship's agent at the dock has sent up the ship's tally-book to the broker's office, the shipper of the 100 tons of iron gets a form of bill of lading. For instance, if it is a Black Sea cargo, he would get the particular form you have; (*g*) he could buy it at any stationer's; he would fill in the particulars of the 100 tons and the name of the consignee, and would take the bill thus filled up into the ship-owner's office and ask him to sign it; the ship-owner would look at the tally-book, and if the goods were found there, would usually give him the bill of lading without any question. Obviously this practice opens a wide door to fraud, if people want to be fraudulent; but the answer of ship-owners is, that in the hurry in which bills of lading have to be signed to send them off by the mails to foreign consignees, they take their chance, and in practice fraud so rarely happens as to justify their disregarding it. That is the way in which the bill of lading is signed; brought in usually

(*f*) *Hathesing* v. *Laing*, L. R. 17 Eq. 92.
(*g*) Appendix.

by the shipper after the goods have been shipped, and signed in London by the ship-owner, for in foreign ports it is usually signed by the master.

Having received the bill of lading signed, you have a document to which the custom of merchants for centuries has attached a very particular signification. In the great case of *Lickbarrow* v. *Mason* (*h*) (a case dealing with stoppage *in transitu*), a special jury found the custom of merchants with regard to bills of lading; *Lickbarrow* v. *Mason* had a very chequered and lengthy career, and went through a large number of Courts, but it has been the leading case ever since on the subject. The jury found in that case that by the custom of merchants, "bills of lading are after the shipment and before the voyage performed negotiable and transferable by the shipper's indorsement and delivery; and that by such indorsement and delivery the property in such goods is transferred."

I shall have to deal more in detail with the various forms of indorsement that may be made by the custom of merchants to transfer the property in the goods; but that may be the first effect of indorsement. Secondly, by statute, the indorsement of a bill of lading may transfer to the indorsee the contract of carriage contained in the bill of lading.

(*h*) 5 T. R. 683; 1 Smith L. C.

That is the result of the "Bills of Lading Act," 1855; (*i*) the property may be passed by the custom of merchants; the contract may be passed by the effect of the statute. And further, the Admiralty Jurisdiction Act of 1861, (*j*) provides that the indorsement of a bill of lading may give the indorsee the right to proceed against the carrying ship in the Court of Admiralty, to proceed *in rem* against the ship in distinction from the action *in personam* against the ship-owner on the contract.

The custom of merchants found by the jury in *Lickbarrow* v. *Mason* (*k*) has been, after great conflict in the Courts, finally and authoritatively explained by the House of Lords in the case of *Sewell* v. *Burdick*. (*l*) Previously to that decision there were a number of *dicta* of very eminent judges, notably of Lord Esher, (*m*) that indorsement of the bill of lading always passed the whole property in the goods, and that you could not look into the circumstances of the indorsement to ask what was the intention of the parties in indorsing it. In *Sewell* v. *Burdick* the House of Lords held, overruling Lord Esher and the Court of Appeal, that the verdict in *Lickbarrow* v. *Mason*:—"the property is transferred by

(*i*) 18 & 19 Vic. c. 111.
(*j*) 24 Vic. c. 10.
(*k*) 5 T. R. 683.
(*l*) L. R. 10 App. C. 74.
(*m*) Cf. 13 Q. B. D. at p. 67; and 6 Q. B. D. at p. 480.

indorsement," must be read, "the property which it is the intention to transfer is transferred," thus differing from the previous view that indorsing the bill of lading passed the whole property in the goods. The chief commercial effect is this: it is extremely common to deposit bills of lading with a bank for security for advances. On the authority of the previous *dicta* of the judges, such a deposit and indorsement—for the bills were always indorsed to the bank—passed the whole property in the goods to the bank. In consequence of the decision in *Sewell* v. *Burdick* it is always possible to consider what was the intention of the parties, and as the intention of the parties nearly always is to pledge the goods and not to pass the whole of the property therein, banks which had been previously treated as owners of the goods must now be treated as pawnees or pledgees. In *Sewell* v. *Burdick* a bank successfully resisted an attempt to make it liable on the contract contained in the bill of lading on the plea that the property had passed to it by indorsement, by showing that the goods-owner only pledged the goods to it, and therefore that the whole property did not pass so as to bring the bank within the Bills of Lading Act; for by that Act rights and liabilities under the contract contained in a bill of lading are only passed by an indorsement which passes the property.

As a consequence, in every case one has to look at the facts to see what property was intended by the parties to pass. (*n*) It may be the intention of the person indorsing to absolutely transfer the property in the goods; (*o*) it may be his intention to transfer the property conditionally on the bills of exchange, which accompany the bill of lading, being accepted; (*p*) he may mean to mortgage or pledge the goods, retaining for himself the right of redemption; (*q*) or he may intend to pass no property in the goods at all, but simply to give his agent the means of dealing with the goods by placing an indorsed bill of lading in his hands. (*r*) Now the effect of dealings with a bill of lading as a document of title is usually important in connection with the rights of that unfortunate person the unpaid vendor, and the forms of commercial business of which I now want to speak are all forms of protection invented to assist the unpaid vendor.

A seller of goods who has not been paid may be in one of four positions, and according to his particular relation to the goods, so will the nature of his remedies vary. In the first place he may have both the property in the goods and the possession of them, as where he

(*n*) Charters, Art. 58.
(*o*) Article 59.
(*p*) Article 62.
(*q*) Articles 72, 73.
(*r*) Article 74, but cf. Factors' Act, *post*, pp 171–177.

has entered into an agreement to sell goods in his possession, but that agreement has not yet been carried out. Obviously in that case he does not want any protection except that given by his right of action on the agreement to sell. He has the property in the goods, he has not parted with that yet; he has also the possession of the goods, so that he can protect himself against being deprived of them. That is his first and most fortunate position.

Secondly, he may have possession of the goods but have parted with the property. The terms of the contract of sale may be such that the property has passed to the purchaser, though the vendor still retains possession. In that case he is protected by the unpaid vendor's lien. (*s*) That is rather more than an ordinary Common Law lien. A lien by Common Law, I need hardly say, is the right, to put it forcibly, to sit on the goods till you are paid. The unpaid vendor's lien is rather more than that. A lien at Common Law gives no right to sell the goods in any event; you will find a very good illustration of that by referring to the case of *Mulliner* v. *Florence*. (*t*) There an innkeeper had a guest who departed without paying his bill, but left a horse of uncertain value; the innkeeper, after trying the experiment of keeping the horse for some time, while his guest did not come

(*s*) Chalmers on Sale, Art. 42. (*t*) L. R. 3 Q. B. D. 484.

back, came to the conclusion that it was an expensive luxury, and proposed to sell the horse, on which by Common Law he had a lien for the unpaid bill of the guest; but on action brought the Courts held that such a lien at Common Law gave no power to sell, with the result that a Statute was passed to protect innkeepers in that respect. (*u*) The unpaid vendor's lien is rather more than that. (*v*) The unpaid vendor has a power to sell if the price is not paid; his right is very similar to the right of a pledgee or pawnee at Common Law with a power to sell. That is the protection of the unpaid vendor so long as he has the possession of, though not the property in, the goods.

Neither of these cases applies to a vendor who has shipped his goods and taken a bill of lading for them, because in this case he has lost possession of the goods, which has passed to the master of the ship as carrier, and so we come to the third position of an unpaid vendor; he may have the property but not the possession. He may have lost the possession by delivery to the master of the ship as carrier for the purchaser, but he may still, and frequently does, retain the property. He usually attains that result in one of two ways, which have each a technical name.

(*u*) 41 & 42 Vic. c. 38.
(*v*) Chalmers, Arts. 42–49.

The vendor may either reserve the *jus disponendi*, which sounds rather a formidable operation, or he may conditionally indorse the bill of lading. Those are the two methods of protection open to the vendor where he has lost the possession but still retains the property in the goods. The first is to reserve the *jus disponendi*, (*w*) which put into commercial English amounts simply to the vendor's saying:—"I will keep the property in the goods"; and the vendor effects that result by making the goods deliverable under the bill of lading to his own order. If you look at the bill of lading which you have, (*x*) you will find that the goods which are shipped in good order and condition are to be "delivered in like good order and condition at the aforesaid port of . . . unto . . . or to his or their assigns." If the vendor fills in that blank by writing his own name, he still preserves the property in the goods, for no one can get delivery of the goods at the port of discharge without the bill of lading, whilst the person who is according to the bill of lading the person to receive them is the vendor himself or his assignee; and thus only the vendor or persons to whom he has indorsed the bill can obtain the goods. Filling in the bill of lading in that form, making the goods deliverable

(*w*) Charters, Art. 61; Chalmers, Art. 22.
(*x*) Appendix.

to the vendor or his assigns, is known as reserving the *jus disponendi*, or reserving the right of disposition, and therefore it becomes important whenever a question of property in goods at sea arises, to see to whom the bill of lading makes them deliverable. That is the first security the unpaid vendor may take.

But he may take another. He may indorse the bill of lading, which makes the goods deliverable to himself, to the purchaser, and may send it or present it through a bank, to the purchaser, accompanied by a bill of exchange for the price of the goods. (*y*) In that case the purchaser cannot keep the bill of lading unless he accepts the bill of exchange, and the vendor has the security of *conditional indorsement*—the transfer of property by indorsement is conditional upon acceptance of the bill of exchange by the purchaser. That is a form of vendor's protection which is common in commercial transactions; and the leading case in which the rights and duties following from such a conditional indorsement have been dealt with is *Shepherd* v. *Harrison*. (*z*) By these two forms of protection, reserving the *jus disponendi* and conditional indorsement, the unpaid vendor, though by shipping his

(*y*) Charters, Art. 62; Chalmers, p. 34.
(*z*) L. R. 5 H. L. p. 116.

goods he loses possession, yet ships them in such a way as to keep the property in himself. In the last case, conditional indorsement, he is not completely protected, for he must take the risk of the bill of exchange if accepted being dishonoured when it comes due, and therefore he is not so fully protected as if he were paid in cash for the bill of lading.

Next there comes a fourth and a very important position of the unpaid vendor, and one which gives rise to a great deal of litigation. In the first case I referred to (*a*) he has got both the possession and the property; in the second case (*b*) he has got the possession but lost the property; in the third case (*c*) he has got the property but lost the possession; and now in the last case he may have lost both the property and the possession, as where he has shipped goods which by the bill of lading are deliverable to the purchaser, so that the vendor has lost the property, and the possession has passed into the master of the ship as carrier. The vendor's remedy in that case, which only arises in particular circumstances, is known as "*stoppage in transitu*," a remedy which does not apply, of course, only to carriers at sea, but is available in every case where goods are in the possession of a carrier in course of transit from vendor to purchaser.

The right of stoppage *in transitu* differs from the

(*a*) *Ante*, p. 154. (*b*) *Ante*, p. 155. (*c*) *Ante*, p. 156.

unpaid vendor's lien (*d*) in two ways. The lien exists so long as the buyer is in default in payment; the right of stoppage only comes into existence if the buyer is insolvent as well as in default. Further, the right only comes into existence when the vendor has lost his lien by parting with the possession of the goods. The right of stoppage *in transitu* depends upon the existence of the following conditions. (*e*) There must be an unpaid vendor or others in a similar position: (*f*) the fact that a man has been paid in bills of exchange which have not matured will not prevent his being considered as an unpaid vendor, unless, which very rarely happens, he took the bills as absolute payment, whether they were honoured or not. The right can be exercised by an unpaid vendor on the bankruptcy or insolvency of the vendee, for the purchaser must be insolvent to give the right to stop *in transitu*. (*g*) It may be exercised against the vendee and all persons claiming under him with one exception, the person whom one may shortly describe as an indorsee in good faith without notice. If, before the vendor claims to stop the goods in transit, the purchaser has indorsed the bill of lading for value to a person who takes it without notice of

(*d*) *Ante*, p. 156.
(*e*) Charters, Arts. 63–70; Chalmers, Arts. 46–48.
(*f*) Charters, Art. 64. (*g*) *Ibid.* Art. 65.

the insolvency or of any fraud, that person's rights cannot be affected by the stoppage *in transitu*, (*h*) for the Courts will only protect the vendor against an insolvent purchaser, so far as they can do so without injuring the rights of persons who have given value for the goods in ignorance of the vendor's position. The only remaining point is one on which there has already been much litigation, and on which, as every case differs in its facts, there is likely to be much more, and that is the question up to what time the right to stop *in transitu* can be exercised. To state it very shortly, but in a way which does not answer the question, stoppage *in transitu* can take place during the transit and not after the transit has ended; and the transit is considered by the Courts to have ended when the goods reach the possession of the vendee, or some agent of his other than a carrier. So long as the goods are in the possession of the carrier, they are in transit; but when they get to the end of the carriage, or to a place where they will wait till further directions from the vendee are received, the transit is over and the right to stop is gone. (*i*) One of the most recent cases in which the question has been discussed is the case of *Bethell* v. *Clarke*, (*j*) which is a very good illustration of

(*h*) Charters, Arts. 66, 67; *Lickbarrow* v. *Mason*, 1 Smith L. C.

(*i*) *Ibid.* Art. 69; Chalmers, Art. 47.

(*j*) 20 Q. B. D. 615.

the questions which arise in discussing the problems of stoppage *in transitu.* The bill of lading representing goods may be indorsed by its holder, and the indorsement is effected, with one important exception, in a very similar way to that of bills of exchange. (*k*) A bill of lading may, like a bill of exchange, be indorsed in blank, by simply writing on the back the name of the consignee or holder. (*l*) The effect of such an indorsement is the same as that of an indorsement in blank on a bill of exchange; the goods become deliverable to bearer. The holder may also indorse specially, as in the case of bills of exchange, or in full, by writing on the back, "Deliver to A. B., C. D." The point in which a bill of lading differs from a bill of exchange in its indorsement is that there is no implication in the indorsement of the words "or order." You will remember a bill of exchange made payable "to A." or indorsed "to A.," is treated as payable "to A. or order." (*m*) There is no such implication in bills of lading, and it is probable, although it has not been finally decided, that a bill of lading which does not contain on its face or indorsement the words "or assigns" or "order," is restricted in its negotiation. (*n*)

(*k*) *Ante*, p. 60. (*l*) Charters, Art. 56. (*m*) *Ante*, pp. 49, 61.
(*n*) *Henderson* v. *Comptoir d'Escompte*, L. R. 5 P. C. 253, at p. 260.

At the end of the voyage the master or ship-owner who has signed this document of title to the goods has cast upon him the responsibility of deciding to whom he shall deliver. For the convenience of commerce and by long-established practice, ship-owners are not content with signing one bill of lading but always sign three and sometimes four, each of which bears words to the effect that one of these being accomplished the others are to be void. Obviously you can conceive a case in which all these four bills of lading get by indorsement into the hands of four different people, who all appear and claim the goods; and this might put upon the master in a distant port the problem of settling a difficult question of law as to which of the four was the rightful owner of the goods. This practice of signing sets of bills of lading has brought at least two cases to the House of Lords, (*o*) which have with some degree of certainty defined the position of the master.

The first point that has been settled is this: the master must not deliver to the consignee named in the bill of lading unless the consignee produces the bill of lading. It is not, as in the case of the mate's receipt, (*p*) sufficient to say, "A. B. is the person

(*o*) *Glyn Mills* v. *East and West India Docks*, 7 App. C. 511; *Meyerstein* v. *Barber*, L. R. 4 H. L. 317.

(*p*) *Ante*, p. 149.

named as consignee in the bill of lading", (for the captain always has a copy), "and therefore I will deliver to him although he has not got the bill." That has been recently decided, although it probably has been law for a long time, in the case of *The Stettin*, (*q*) where the master did deliver to the consignee named in the bill of lading, without his producing the bill of lading, and it turned out that somebody else had the bill of lading and ought to have had the goods.

The second point that has been settled is that the ship-owner or master is entitled to deliver the goods to the first person presenting a bill of lading if he has no notice of any other claim, and there is nothing to raise suspicion of anything being wrong. That was settled by the House of Lords a few years ago in a case which was the subject of universal discussion in the City at the time, the case of *Glyn Mills & Co.* v. *The East and West India Dock Co.* (*r*) In that case goods were shipped, consigned to G. in London, under three bills of lading marked "First," "Second," and "Third," as was the ordinary custom. G., as the consignee, indorsed the first bill of lading to a bank, Glyn Mills & Co., as security for a loan. When the goods reached London they were put by the master into the warehouses of the East and West India Dock under a stop for freight—

(*q*) 14 P. D. 144. (*r*) L. R. 7 App. C. 591.

that is to secure the payment of freight for their carriage. G., the consignee, went to the East and West India Dock with the second bill unindorsed, and presented it to them, whereupon they entered him in their books as the owner of the goods. G. then paid the freight due, and gave a delivery order to a third person, who obtained the goods on that order; after which the bank woke up and presented their bill, the first bill of lading indorsed to them, only to find that the goods had gone. The bank sued the East and West India Dock Company as representing the ship, saying: "You had presented to you a bill of lading marked 'Second,' and that of itself was sufficient to put you on inquiry as to where the 'First' bill of lading was. If you had required its production this fraud would have been exposed; you did not, and we claim that we shall not suffer for your carelessness." The House of Lords, in answer to that claim, laid down the law that the master, or the Dock Company or warehouseman representing him, were justified in delivering, without notice of any other claim, to any bill of lading presented, and that the mere fact that the bill of lading presented was marked "Second" was quite insufficient in commercial usage to put the Dock Company on inquiry. That case has settled the liability of the captain or the warehouseman where a bill of lading is presented and no other claim is made or

suspected. It makes no difference to the master that the man who first presents a bill of lading has in fact no property whatever, though it does to the person presenting it, for when property in goods has once been passed by the indorsement of a bill of lading, a dealing with another copy of the bill afterwards cannot give the person who gets such a copy any property in the goods. (*s*)

It only further remains to deal with the position of the master when two or more claims are made on him. If only one bill of lading is presented and he has no notice of another claim, he may deliver to the bill. But if two people appear with bills of lading or claims on the goods, his practical remedy is to take the advantage of the legal proceeding known as "interpleader," by which he says: "I as the stake-holder have no interest in these goods except to give them to the right man. I do not and cannot know which of you two is the right man; fight it out among yourselves, and then I will give up to the one who is proved to be right." That is his practical remedy; but if he takes it upon himself to consider the question who is the right man, and delivers to one of them, he does so at his risk. He must, if he takes upon himself to decide the question, take the risk of giving the right answer of the riddle whatever it may be, and he will be

(*s*) *Barber* v. *Meyerstein*, L. R. 4 H. L. 317.

liable if he does not deliver it to the true owner. Another way in which the master sometimes gets out of the difficulty, short of an interpleader, is where, if one of the persons claiming is a fairly substantial man, the master delivers to him under an indemnity against any claim by the other claimant; for in that case, if he takes care to have his indemnity wide enough, he or his ship-owner will not be hurt; one of the claimants will get the goods at once without the delay of an interpleader, and then the two claimants can fight it out among themselves by an action in which the master will not suffer, because he is indemnified by the person who has got the goods.

There are also documents which come into existence at the end of the transit while the bill of lading is, so to speak, dying out. You have at the beginning of the transit "the mate's receipt"; (*t*) at the end of the transit you have "delivery orders" and "dock warrants," or "wharfinger's certificates," and the condition of these documents has been altered materially by the set of Acts known as the Factors' Acts, and particularly by the Factors' Act, 1889. (*u*) There are a great many difficulties in the matter, and I am not going to perplex you with one-tenth of them, but before the Factors' Acts it was fairly well settled what the position of delivery orders

(*t*) *Ante*, p. 149. (*u*) 52 & 53 Vic. c. 45, *post*, p. 172.

and dock warrants was. A delivery order would be an order to the person who held the goods, given by the consignee or the person claiming to be entitled to them, running, "Deliver my goods to A. B."; that would be a very short form. Assuming that the goods on arriving had been warehoused by the master, the consignee might give a delivery order to any person, who would then take it to the warehouse and get himself entered on the books of the warehouse as the owner, by virtue of the delivery order which he presented. He might simply leave it in that way, being entered on the books of the warehouse as the owner, and take no further steps. But he might get a document from the warehouse-keeper stating that he was the owner, an acknowledgment or receipt that they held so many goods of his; and that document was called a dock warrant, when given by the docks; a wharfinger's certificate or warrant, when given by a wharf. It was frequently issued in the case of wine and a large number of other goods which are always warehoused at the docks. But until the holder of a delivery order presented his order he gained no benefit from it; that was the law before the Factors' Act. (*v*) The mere fact that he had such an order was perfectly immaterial unless there had been an attorn-

(*v*) Charters, p. 140.

ment to him, a recognition of his title by the warehouseman. Now for some time at the beginning of the century, and indeed pretty late in the century, the City took the view that delivery orders and dock warrants were documents of title, and was continually trying to prove a custom that indorsing them or negotiating them passed the property in the goods they referred to; and during that time the Courts took the view that they were not "documents of title," but "tokens of an authority to receive possession," and the judges declined to recognise that indorsement of a dock warrant or of a delivery order had the same effect as in the case of a bill of lading in defeating stoppage *in transitu*. They declined to give the same effect to delivery orders and dock warrants that they did to bills of lading in dealing with stoppage *in transitu*; and as far as my information goes, this persistence of the Courts all but succeeded in convincing the City that these documents were not documents of title, and banks were reluctant to have anything to do with mere delivery orders as being sufficient security for advances, although they always looked more favourably upon dock warrants. (*w*) And then came the Factors' Act, which made these documents documents of title, with

(*w*) Some of the private acts of the London Dock Companies gave to indorsement of dock warrants the effect of passing the property.

the result that at present in a good many cases documents which the City used to treat as documents of title, without recognition by the Courts, are now treated as documents of title by the Courts, and distrusted by the City. The fourth subsection of the first clause of the Factors' Act of 1889 defines "documents of title" as "any bill of lading, dock warrant, warehouse-keeper's certificate, or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods." The ninth and tenth Sections of the Factors' Act, 1889, appear to give—I only say "appear" because it is still doubtful what they mean, and especially what the difference between the ninth and tenth Sections is—appear to give to "documents of title" so defined the same effect as bills of lading in defeating stoppage *in transitu* or the vendor's lien. So that now delivery orders and dock warrants have apparently by the Factors' Act got into the position of documents of title, dealings with which may affect the property in goods, but they have derived that position from the Statute and not from the Common Law, inasmuch as the Courts always refused to recognise them as such documents of title.

CHAPTER VI.

THE FACTORS' ACTS; AND NOTES ON THE CONTRACT OF SALE.

Authorities. — Carter and Neish on the Factors' Acts; Chalmers' Digest of the Law of Sale; for fuller information on the subject, see Benjamin on Sale, 4th ed.; Blackburn on Sale, 2nd ed. by Graham.

BEFORE referring to a few points in connection with the contract of sale, I propose to deal with the leading features of the Factors' Acts, a class of Acts of considerable importance in the mercantile world and of considerable complexity. The necessity for any legislation in the nature of the Factors' Acts arises from the Common Law rule that I mentioned to you in the first lecture, (*x*) that one man cannot give to another a better title than he himself had: *nemo potest dare quod non habet.* Consequently the merchant in the City who dealt with an agent whom he found in possession of goods or documents of title, was liable under the old Common Law rule to have his

(*x*) *Ante*, p. 22.

transactions with such an agent upset, because it turned out that the agent had no authority from his principal to deal with the goods or the documents of title in the way that he did. It was the universal experience of commercial men that in matters of business it was almost impossible to inquire into the exact authority of every person who came to them professing to be able to deal with goods; they invariably offended their client or their customer to begin with, and they very frequently were not able to discover the real truth. Now that is the substantial difficulty which has been met by the Legislature very grudgingly by a series of Factors' Acts. The Legislature has passed a remedial Act; but the Law Courts have then had to reconcile that Act with the old Common Law rule; and the Courts have never interpreted the Factors' Acts in any liberal spirit, but have always preserved as far as possible the old Common Law, with the result that a series of Factors' Acts has been necessary, each aimed at remedying some one or more specific decisions of the Courts. The Factors' Acts in consequence form a system of legislation of great complexity and intricacy, which even yet does not satisfactorily meet all mercantile difficulties. The first Factors' Act was passed in 1824; (*y*) there were others in 1826, 1842, and

(*y*) 4 Geo. IV. c. 83.

1877, (*z*) and now there has been passed (what is the last for the time), the Factors' Act of 1889, (*a*) which repeals all the previous Acts and re-enacts them with some variations to meet cases which have been decided between 1877 and 1889.

The only Common Law protection that a merchant dealing with an agent had enjoyed prior to the Factors' Acts was in the case where the principal had clothed his agent with apparent authority to deal with the goods, for if the principal had put an agent in such a position that the agent had apparent authority to deal with the goods in the way he did, the principal might be estopped or prevented from alleging that the agent had no authority. That was some slight help to persons who dealt with agents, but inasmuch as the Courts always treated the mere fact that an agent was in possession of goods as no evidence of apparent authority to bind his principal, the security did not go very far. The question the Legislature had to answer in the Factors' Acts was this: "How far shall we sacrifice the Common Law rights of the true owner of goods in order to enable the ordinary business of buying from agents and advancing money to agents to be carried on with reasonable security?" And the general

(*z*) 6 Geo. IV. c. 94; 5 & 6 Vic. c. 39; 40 & 41 Vic. c. 39.
(*a*) 52 & 53 Vic. c. 45.

answer that has been given to that question by the Legislature is this: they have said that where the agent is one ordinarily entrusted with the powers he then exercises, the true owner shall be bound by the agent's act as against persons dealing in good faith with such an agent.

Now in that answer there are several points, each of which is embodied in some part of the Factors' Act of 1889. In the first place, in the definition clause, which is the first clause of the Act of 1889, the qualities an agent is to have are defined. "The expression 'mercantile agent' shall mean an agent having in the customary course of his business as such agent authority" to do a number of things which are there stated, such as to sell goods and to consign goods for sale. That you should obtain protection, the man with whom you are dealing must be acting in a manner ordinary to his class, he must be doing the thing which you would ordinarily expect such an agent to do. That is the first condition, the agent must be a mercantile agent who in the ordinary course of his business has authority to deal with goods. Secondly, he must be in possession of the goods or of documents of title to the goods with which he professes to deal—that is, either in actual possession or some one must hold them subject to his control. That you will find defined also in the second

subsection of the first Section of the Act. Thirdly, he must in the particular transaction be acting in the ordinary course of business of a mercantile agent of his class; and fourthly, the person taking from him must take in good faith and without notice of any want of authority in the agent. There is yet one difficulty in that; if the agent is in possession of goods without the consent of their owner, the Legislature has not gone so far as to protect the person dealing with him. But it has protected a person who deals in good faith with such an agent, to a limited extent; it has protected him if the owner once gave his consent to the agent but has withdrawn it; (*b*) it has protected him if the agent had possession of goods or documents of title with the owner's consent, and by means of that possession obtained other goods or documents of title without the owner's consent—that is, if the owner put into the agent's hands the power of getting the goods that he professed to deal with. (*c*) And thirdly, the Legislature has said that the agent shall always be deemed to have authority until the principal proves that he has not; it has put upon the principal the burden of proving that the agent was acting without his consent. (*d*)

That is the substance of the Factors' Act so far

(*b*) Act, § 2, s. 2. (*c*) Act, § 2, s. 3.
(*d*) Act, § 2, s. 4.

as it relates to factors or agents. (*e*) The object of this part of the Act is to protect persons, who deal with agents acting in the ordinary course of their business, from too strict an enforcement of the Common Law rights of the true owner.

Another portion of the Factors' Acts deals with the matters to which I am just about to come, and effects some alteration in the law of sale. In the case of sale from a vendor to a purchaser, the possession may be in one of them while the property is in the other. The property may be still in the vendor but the purchaser by some means may have got possession; or though the property may have passed to the purchaser the vendor may retain possession. And in either of these cases the man who only has the possession may profess to sell the goods to a person who is ignorant of his vendor's true position. In this case the man who really has the property in the goods sold may find himself apparently deprived of his property by the action of the man who has been left in possession, who, presuming on the evidence of authority the possession of goods gives him, has sold the goods as if they were his own although the property in them is in somebody else. But according to the strict Common Law rule, (*f*) the man with only the possession could pass no property for he had not any property to

(*e*) See especially § 2. (*f*) *Ante*, pp. 22, 170.

pass, and consequently a merchant dealing in good faith and innocently with such a person might find himself mulcted in the loss of his money and the loss of his goods, one man having bolted with the money and the other man having come forward and claimed the goods. The second part of the Factors' Act is designed to protect people who deal with persons having the possession of goods under those circumstances, and if you refer to the eighth, ninth, and tenth Sections of the Act you will find that protection set out. The principle the Legislature has acted upon has been to protect a person buying in good faith and without notice of any defect of title from the man who has had the possession but not the property; the reason suggested being this, that if the man with the property chooses to leave his goods in the hands of somebody else, he gives that other person the opportunity of committing a fraud on an innocent purchaser, and if so, as between the two people innocent of the fraud, the innocent purchaser and the innocent owner, the Legislature will cause to suffer the man who has enabled the fraud to be committed.

These are all the provisions of the Factors' Act with which I propose to trouble you, and I now come to what few remarks I have to make on the commercial aspect of the contract of sale. For as Mr. Benjamin has succeeded in filling a large book on

the law of sale, it is obvious that I can only deal in one lecture with a very few of its leading commercial aspects.

The first matter I want to deal with is the nature of the very common mercantile transaction when a broker acts as a go-between between the vendor and the purchaser, and when the transaction is recorded in "Bought and Sold notes." In order to simplify the illustration, perhaps you will allow me to name my vendor as V., my purchaser as P., and my broker in the middle as B. It is usual for the broker when he effects a sale between V. and P. to send what is called a "sold note" to the vendor, and a "bought note" to the purchaser recording the transaction. There are four common forms of sold or bought notes in use in the City and in every mercantile town in England, each of which has now its well-known effect.

The practice of sold and bought notes seems to have sprung up from the legislation with regard to London brokers. Until very recently all brokers carrying on business in the City of London were under the control of the Corporation of London; (*g*) and until 1870, all brokers by the Act which put them under the control of the Corporation, were required to keep a broker's book, and therein "truly

(*g*) Benjamin on Sale, 4th ed. p. 249.

and fairly enter all such contracts, bargains, and agreements on the day of the making thereof, together with the christian and surname at full length of both buyer and seller," and a number of other particulars. The broker having by statute been compelled to make that entry in his broker's book, usually made a sort of abstract or note of it, which he sent on to each of the parties concerned, the sold note to the vendor, the bought note to the purchaser; so that one really had or might have three records of the transaction—the note in the broker's book, the note sent to the vendor, and the note sent to the purchaser. Obviously if all three differed, as they sometimes did, there was every material for a good lawsuit.

Now the first common form of sold and bought notes runs in this way: the sold note would run, "Sold for V. to P., (signed) B.," and the bought note would run, "Bought for P. from V., (signed) B." There the names of all the parties appear on each note; and the effect of sending a note like that to either party would be that he would have notice that B., acting as his agent, had in the one case sold for him to P., in the other case bought for him from V. And if the person receiving that sold or bought note did not return it or object to it he would be bound to recognise the broker as his agent; for he would

have received a statement that the broker had acted for him, making a sale or a purchase, and would have been bound by the recognition of authority implied in his not objecting in any way to that sale or purchase. Now in the form of note I have given the principal's name is mentioned:—"Sold for V. to P.", "Bought for P. from V." Sometimes it runs "to" or "for my principal," in which case it only appears on the note that the agent had a principal; it does not appear who that principal is. In that case, if a usage of trade to that effect is proved, the broker may be held personally liable as principal on the contract, unless he names his principal within a time which varies according to the particular trade. If you will refer to the case of *Pike* v. *Ongley*, (*h*) you will find a case where such a custom was proved and sustained by the Court of Appeal. The note ran, "Sold by Ongley & Thornton to Messrs. Pike & Sons for and on account of owners"; not naming the principal. Evidence was tendered that by the custom of the hop trade, brokers who did not disclose the name of their principal at the time of making the contract were personally liable on it as principal, although they contracted as brokers for the principal. It was held that such a custom gave a remedy against the brokers, as well as against the principals. So

(*h*) 18 Q. B. D. 709.

that in such a case, by proof of usage, you can make the broker personally liable as principal. Without such a usage you cannot do so, for the broker professes on the note to act as an agent, and that has been decided in the leading case of *Southwell* v. *Bowditch*. (*i*) One may further add that where the broker sends notes in the form I have just given you —"Sold for V. to P.," "Bought for P. from V."— supposing V. as a matter of fact had given B. no authority to make such a contract, so that the broker represented he had the authority of a named principal, who in fact had given him no authority, the other party's remedy against the broker is not on the contract, but is on the breach of the broker's implied warranty that he has an authority from his principal. (*j*) For every person contracting as agent for another impliedly warrants that he has the authority he professes to have.

The second form of bought and sold note runs in this way. The sold note would run, "Sold for V., (signed) B."; the bought note would run, "Bought for P., (signed) B." Neither of these notes states all the parties to the contract, for neither of them states who is the other principal; it suggests that there is a principal, for the broker professes to have sold for

(*i*) L. R. 1 C. P. D. 374.
(*j*) *Collen* v. *Wright*, 8 E. & B. 647.

the vendor or to have bought for the purchaser, implying that there is some one else with whom he had the transaction. And in this case, though no one note shows all the parties, any person receiving such a note without objection admits the authority of the broker to make on his behalf the contract therein stated, for the broker represents to such a person that he is acting on that person's authority; and if the person receiving the note does not repudiate it he admits the authority of the broker so to act.

The third form of note runs in this way: the sold note, "Bought from you by me, B."; the bought note, "Sold to you by me, B." There the broker represents himself to each party as the principal; though in fact he is making a contract as a go-between between two persons, he represents to each person that he is the principal; and though in fact he may be agent in each case for an undisclosed principal, he is in form the principal and in law is liable as the principal. (*k*) So that if having sent the sold note, "Bought by you from me, B.," the broker then says to the vendor, "I had an undisclosed principal, P.," though the vendor may make P., the undisclosed principal, liable on the contract,

(*k*) *Higgins* v. *Senior*, 8 M. and W. 834, *per* Baron Parke.

he has also a remedy against the broker as principal. That is the third form of bought and sold notes.

The fourth and last ordinary form is where the bought note runs, "Bought for your account, B.," and there is no sold note, for the reason that B., who represents himself as having bought as agent for the purchaser, is in reality the principal and the vendor. In that case there is no contract at all. The agent was in fact the principal, but the purchaser only knew him as his agent, and from the form of bought note it is clear that the purchaser never intended to enter into such a transaction of purchase from his own agent. The only way in which the purchaser can be made liable in such a case is if a trade usage to that effect can be proved, and if the purchaser is shown to know of it. (*l*)

Now those being the forms of bought and sold notes, a number of cases have been decided as to the effects of the different documents, and the result of the authorities comes shortly to this. (*m*) The broker's signed entry in his broker's book constitutes (*n*) the contract, if authority is proved from the principals to the broker to act for them. The

(*l*) *Robinson* v. *Mollett*, L. R. 7 H. L. 802.

(*m*) Benjamin on Sale, 4th ed. p. 268.

(*n*) Mr. Benjamin uses this word (4th ed. p. 268), which probably means "is the best evidence of"; but the expression is ambiguous. Cf. Blackburn on Sale, 2nd ed. p. 114.

bought and sold notes do not constitute the contract, that is to say, the entry in the broker's book is much better evidence of the contract than the bought and sold notes; but if the bought and sold notes contain all the terms of the contract, they may be used as evidence to satisfy the Statute of Frauds (*o*) without the broker's book being produced; in the same way either the bought or sold note may satisfy the Statute of Frauds if it contains all the terms of the contract as it does in the first form of bought and sold notes I referred you to. (*p*) If only one bought or sold note is put in evidence, the other side may put in the other note to show that the notes differ, with a view of upsetting the evidence of the contract. If these notes and the broker's book do differ, the result is this: (*q*) where there is a signed entry in the book, but the bought and sold notes differ from it and from each other, the signed entry prevails. If the bought and sold notes agree, but differ from the entry in the book, they may be used as evidence of a new contract, varying the entry in the broker's book, as may also agreements in letters outside the bought and sold notes. If there is no signed entry and the bought and sold notes differ, there is no valid contract. Those,

(*o*) 29 Car. II. c. 3, § 4. (*p*) *Ante*, p. 179.
(*q*) Benjamin, 4th ed. p. 269.

I think, are the leading difficulties which have arisen in the transaction of purchasing goods through brokers and by bought and sold notes, of which it is no exaggeration to say there are thousands every day in London and the great mercantile centres.

The next matter I want to deal with in connection with the contract of sale is the result of the authorities as to the terms implied in the contract of sale. You remember the terms of a contract may be either such that their truth is essential to the validity of the contract, or they may be such that their untruth or a breach of them may only justify an action for damages. They may be conditions precedent, or simply terms of the contract; further, in selling a thing, the question frequently arises how far a description given of it by the seller at the time of the sale is part of the terms of the contract; that is to say, supposing the description given of the thing sold by the seller at the time of the sale turns out to be untrue, has the buyer a right to rescind the contract, or has he merely a right to claim damages because the statements of the vendor are not complied with? That question gives rise to endless litigation as to "warranties," because though with charter-parties and policies of insurance the term "warranty" is appropriated to conditions precedent, in the contract of sale it is

applied to express terms in the contract which are not conditions precedent, though it is also used for implied terms which are conditions precedent, (*r*) which adds greatly to the confusion; and all the disputes which arise whether a horse has been warranted sound, and whether a picture has been warranted as by Canaletti or Turner, all turn upon the question whether the vendor intended to make it a term of the contract that his statement as to the thing he was selling should be true. These statements, you see, are all express warranties; the term is expressed in the contract.

But there are certain terms implied in every contract of sale unless they are expressly excluded by the wording of the contract. These "implied warranties" have gradually grown up in the Law Merchant; very gradually, for they are not settled yet. The Common Law and the Law Merchant originally stated the whole law of sale on this point in two words, "*caveat emptor*"—the purchaser must look after himself; for nearly every sale took place in market overt, and the Court in effect said to the purchaser: "Here you see the thing, and having seen it you buy it at your risk, and if you were fool enough not to discover its faults on the view, you must take your chance." Subsequent case law has

(*r*) See Chalmers, p. 95.

been devoted to whittling away the maxim of "*caveat emptor*" until there are only the most tattered rags of that venerable institution left, and at present the law begins by stating there is no implied warranty on a certain point, but goes on to make exceptions, which leave practically nothing of the original rule remaining.

The first implied warranty in a contract of sale, unless clearly excluded, is a warranty that the vendor has a title to sell. "By a contract of sale the seller impliedly warrants his right to sell the goods unless the circumstances of the sale or agreement to sell are such as to show that the seller is transferring only such property as he may have in the goods." (*s*) When I tell you about fifty years ago the law would have been stated thus, "On a sale of specific goods there is no implied warranty of title", you will see that case law has succeeded in getting the maxim very much altered in its application. The leading case at present which decides that is the case of *Eichholz* v. *Bannister*. (*t*) There the plaintiff went into the warehouse of a Manchester warehouseman and bought a lot of goods. Nothing was said as to the ownership in the goods; but it turned out that the goods were stolen, and the buyer was compelled to restore them to the true owner, whereupon

(*s*) Chalmers, § 15. (*t*) 17 C. B. N. S. 708.

he sued the vendor on the ground that he had warranted the goods were his, and the Court after discussion of all the authorities held that there was such an implied warranty in such a sale.

The second implied warranty in the sale of goods is this: where the goods sold are not specific goods seen by the vendor, but where they are sold by description, there is a warranty that they correspond with the description. (*u*) For instance, to put it shortly, if you contract to sell beans you cannot deliver peas; there is a warranty that the goods which you are selling by description correspond with the description under which you are selling. For instance, in the case of *Josling* v. *Kingsford* (*v*) there was a contract to buy "oxalic acid," and the article tendered was oxalic acid adulterated with sulphate of magnesia, so that in a commercial sense it was not oxalic acid; there was a good deal of oxalic acid in the article, but there was a lot of sulphate of magnesia as well. An action on the implied warranty that the goods should answer the description under which they were sold was successful. If the sale as well as being by description is also by sample, the goods must correspond with both the sample and the description. (*w*)

(*u*) Chalmers, § 17. (*v*) 13 C. B. N. S. 447.
(*w*) Chalmers, § 16; Benjamin, 4th ed. 640.

The next warranty one has to state in a very unsatisfactory way, owing to the whittling away of the strict old rules. It is laid down that "there is no implied warranty in a contract of sale of the quality, fitness, or condition of goods sold except"—and then come a whole string of exceptions. You will find them stated in Article 17 of Mr. Chalmers' book thus: (1) by the usage of trade there may be such a warranty; (2) where the goods are ordered by the buyer from a seller who may be expected to supply suitable goods for a particular purpose known to the seller, there is an implied warranty that they are fit for that purpose; (3) where goods are ordered by description from a seller who deals in goods of that description, if the buyer has no opportunity of examining them there is an implied warranty that they are of a merchantable quality; and lastly, where the contract is for the sale of goods by a manufacturer, there is an implied warranty that the goods he sells are of his own manufacture; he is not allowed to go and buy somebody else's goods and sell them without stating that they are not of his own manufacture. The whole law on this subject, which was first systematically dealt with in the case of *Jones* v. *Just*, (*x*) has also been exhaustively considered by the House of Lords in the case of *Drummond* v. *Van*

(*x*) L. R. 3 Q. B. 197.

Ingen. (*y*) That was a complicated case of a latent defect in a sample which rendered the cloths sold unfit for the purpose for which the vendors knew they were being sold. The buyer saw the sample, and the sample corresponded with the goods, but the nature of the defect was such that the goods were unfit for the purpose for which they were sold. It was held that there was an implied warranty that the goods should be fit for use in the manner in which goods of the same quality and general character ordinarily would be used, and the judgment of Lord Herschell in that case in particular is well worth your study. Lastly, in a contract of sale by sample there is an implied warranty that the bulk of the goods sold corresponds with the sample in quality and condition, that the buyer should have a reasonable opportunity of comparing the bulk with the sample, and that the bulk shall be free from any latent defect which would not appear on an examination of the sample. (*z*) While the purchaser must judge of the goods by the sample he sees, he is not bound to take them if they have a defect which could not be found out by examining the sample that he sees. So much for the warranties that are implied in every contract

(*y*) L. R. 13 App. C. 284; cf. *Jones* v. *Padgett*, 24 Q. B. D. 650.

(*z*) Chalmers, § 18.

of sale, and you will readily see that they may be very important in considering the effect of any mercantile transactions.

The only other matter I wish to deal with, and I can only do so slightly, is the question of when the property passes under a contract of sale. (*a*) In the first place we may clear off the case where there is a contract for the sale of goods which are not ascertained at the time of the contract. In such a case the property never passes until the goods are ascertained, so that we may deal only with the case of a sale of ascertained goods. Until the goods are ascertained the property does not pass. (*b*) And when there is a contract for the sale of specific or ascertained goods, the guiding note as to the time when the property passes is the intention of the parties as gathered from the contract. (*c*) But as the parties do not always take the trouble to express their intention, the Courts have had to invent a number of rules as to what their intention shall be presumed to be if they have not expressed it. (*d*) In the first place the judges have said that if the contract is for the sale of specific goods fit to be delivered, the property in the goods passes when the contract is made, although the payment for delivery may be postponed. Thus in

(*a*) Cf. *ante*, p. 154 *et seq.*
(*b*) Chalmers, § 19.
(*c*) *Ibid.* § 20.
(*d*) See Chalmers, § 21.

a contract to sell a ship now on a voyage, payment three months after her arrival, the property in the ship passes at once (subject to the requirements of the Merchant Shipping Act), although the payment will not be made until three months after the ship gets home, and although possession of the ship cannot be delivered till she comes in from sea.

Where the contract is for the sale of specific goods to which the seller is to do something before they are delivered, the property does not pass until he has done what he has to do to them. If they are clothes which have to be altered by the seller, the property will pass when he has done what is necessary to make them fit to deliver. And in the same way, if the goods are fit to deliver but something must be done by the seller to fix the price, if for instance he has to measure the quantity that is being sold, to weigh it, or to take some other step to ascertain the price, the property will not pass until such measuring or weighing or ascertaining has taken place. That you see practically resolves itself into two propositions : where specific goods are ready to deliver, the property passes at once ; where there are goods specified but not ready to deliver till something is done, the property passes when that thing has been done. In the case of goods sent " on sale or return " the property passes when the would-be purchaser, the person who holds them on

sale or return, signifies that he intends to keep them, or having kept them for a reasonable time does not repudiate them. When there is a contract for the sale of goods not yet ascertained, goods which are part of a large quantity, as of a ton of sugar, there being 100 tons in the warehouse, the property will pass when the vendor appropriates a ton of sugar to the particular contract and the buyer assents to that appropriation. Appropriation with the assent of both parties concerned is required, and as an ordinary rule the seller by delivering to a carrier is taken to have appropriated the goods to the contract, unless he reserves the *jus disponendi*, (*e*) by dealing with the bill of lading. The risk usually follows the property; when the property has passed, the goods are at the risk of the person in whom the property is, and that proposition is very often used in the converse way when one endeavours to find whether the property has passed by finding at whose risk it was supposed to be; for it is often a test in commercial transactions as to the time when the property passes, to find out who has insured the goods, because the person who has insured the goods is usually the person who thinks that he has to bear the risk, and the person who thinks he has to bear the risk is usually the person who has the property at the time. Obviously there is a great deal

(*e*) *Ante*, p. 157.

more one might say about the contract of sale, and equally obviously I cannot say it in three-quarters of an hour, and I must therefore refer you to the works of Mr. Benjamin and Mr. Chalmers for your further studies.

CHAPTER VII.

THE POLICY OF MARINE INSURANCE.

Authorities.—Lowndes on Marine Insurance, 2nd ed. For more detailed information see Arnould on Marine Insurance, 6th ed., 1887; and the American work, Phillips on Marine Insurance.

You have been supplied with a very ordinary policy of marine insurance, (*f*) and in the transaction which that, or any, policy embodies, there will be two parties, the insurer and the insured. The insurer may be, as in this policy, a company—"The Corporation of the Royal Exchange Assurance." A number of private insurers at Lloyd's may "underwrite" the policy, or put their names at the bottom, getting the name of the "underwriters"; or it may be that a large number of ship-owners join together in a mutual insurance club, and produce a very complicated association in which everybody is both an

(*f*) Appendix, p. 230.

insurer and an insured. (*g*) On the other hand there is the insured who may act through an insurance broker.

The nature of a policy of marine insurance in English law is twofold. On the part of the underwriter or the insurer it is really a bet or wager; the underwriter, who was not previously interested in the subject insured, bets so much that a loss to the subject insured will not happen from the perils insured against. If the loss happens, the underwriter is to pay the amount of the loss; if it does not happen, the insured pays him the amount which has been estimated by the underwriter as a safe amount to risk in the transaction. So that on the side of the underwriter it is a gaming or wagering transaction. But on the side of the insured there must be a real interest at stake in the thing insured; some interest arising from property or contract which will be

(*g*) The ship-owner endeavours in commercial practice to cover every risk to which his ship may be exposed at sea by a series of policies. Besides the ordinary risks insured by a "Lloyd's policy" similar to the form in the Appendix, which may be underwritten by either private underwriters at Lloyd's, or by one of the large Companies, or may be insured in a Protecting Association, or Mutual Insurance Club, the ship-owner will protect himself in a Protecting Association against risks not covered by a Lloyd's policy, and also in a Small Damage Club, against petty claims not covered by either of the above forms of policy.

affected by the peril insured against, and which is called an "insurable interest." Unless such an interest exists at the time of a loss, the insured cannot recover for the loss; but if it does exist he can recover what will in effect be an indemnity to him against the loss which he has sustained by the peril against which he is insured. As a matter of fact in English law the amount recovered may be more than an indemnity, owing to the English rules as to the insurance of freight and other matters; but the substantial difference between the two parties to the contract is that while the underwriter is practically betting on the safety of a thing in which apart from the policy he has no interest, the insured must have a real interest in the property which is at risk by perils insured against.

Before we come to the terms of the policy, certain requisites are necessary for its validity. It is a contract in which extreme good faith is required. Obviously the person who comes to insure a ship, or goods or freight on a ship, knows far more about the particular undertaking that he wishes to insure than the underwriter to whom he comes, and who is only acquainted with the general nature of the trade, and the general nature of the risks to which a vessel in that trade will be exposed. Consequently the law has

required extreme good faith from the insured. He must tell the "whole truth," that is to say he must not conceal anything from the underwriter which might be material to the underwriter's estimation of the risk, and which the underwriter is not expected by the course of business to know. Any concealment of a material fact which is known to the assured, or to one of his agents who ought to have communicated it to the assured, may entirely invalidate the policy. If an underwriter is able to come when an action is brought on the policy and to prove that a fact, which the assured knew and which would have affected the judgment of a reasonable underwriter in settling the premium he would take the risk at, has been concealed from him, the policy will be null and void. The insured must speak the "whole truth" to the underwriter. Further, the insured must tell the underwriter "nothing but the truth;" it must be the "whole truth and nothing but the truth"; and therefore if in the statements which he makes to the underwriter he misrepresents any material fact, however innocently he may do it, again the policy will be null and void. The temptations which the insured has to conceal facts and to misrepresent facts, the risks which the underwriter runs through not being told of all the facts which the assured knows, are so great that the most extreme penalty is imposed on

any detected case of concealment or misrepresentation. Observe that in neither of these cases does the thing concealed or the thing misrepresented form a part of the contract. It is a statement made or a statement suppressed at the time the contract is entered into; and a misrepresentation, though innocent, though made in good faith, though not a term of the contract, may yet invalidate the policy. This is a great distinction between policies of marine insurance, where the strictest good faith is required, and ordinary contracts; for in ordinary contracts it is required that the misrepresentation to avoid the contract shall be "fraudulent," or made without good faith.

While that is so with matters which are not terms of the policy, certain terms of the contract may be conditions precedent, conditions upon whose truth the validity of the policy depends, and those conditions precedent here as in the contract of affreightment are called "warranties." (*h*) The warranties again may be express, stated in the policy, or they may be implied, to be read in any policy unless there are words expressly excluding them. And just as there are in contracts of affreightment a series of cases about the class of statements that have been held to

(*h*) A warranty must be literally true; a representation need only be substantially so.

be express warranties, such as the time of sailing, or the condition of a ship, (*i*) so in policies of assurance there are a large number of cases as to the statements which are held to be "express warranties," the truth of which is essential to the validity of the contract. Sometimes these express warranties are statements of present fact, as of the class of the vessel. Sometimes they are promises for the future, statements that the ship will not sail beyond certain limits, as for instance that the ship will not navigate the Gulf of the St. Lawrence River in the winter months when the navigation is dangerous, or as it is shortly put, "Warranted no St. Lawrence between October and May." But beside these express warranties, which must turn on the terms of each policy, there are also important implied warranties; for just as in the contract of affreightment there is an implied warranty of the seaworthiness of the ship which is to carry the goods, so in a policy of insurance there is a warranty of the seaworthiness of the ship in which the interest assured is exposed to risk. If the insurance is on ship, the warranty is that the ship is seaworthy or fit to encounter the perils that might be reasonably expected on a voyage of the class she is undertaking. If the insurance is on goods, there is a warranty that the ship which is

(*i*) *Ante*, p. 108.

going to carry the goods is seaworthy, and if that ship is not seaworthy the policy may be void, although the unfortunate goods-owner has no control over the seaworthiness of the ship. Or if the policy is on freight, which is the third ordinary form of policy, it may be void if the ship which is to earn the freight is unseaworthy. That must be taken with one great exception which does not exist in contracts of affreightment, in charter-parties, or bills of lading. It is quite immaterial to the warranty whether a charter is for a voyage or for time; whether the charter is one for twelve months or whether it is for a voyage from London to Australia is absolutely immaterial to the warranty of seaworthiness in a contract of affreightment. But the warranty of seaworthiness in a policy of insurance only applies to voyage policies. In a time policy, a policy on a ship for twelve months, there is no warranty of seaworthiness, (*j*) the suggested reason being that the time policy may expire and be renewed when the ship is in the middle of her voyage, and when it is obviously impossible that any ship-owner can guarantee that she is seaworthy, for he does not even know whether she is in existence.

The other warranty which exists in a policy is

(*j*) *Gibson* v. *Small*, 4 H. L. C. 420; *Dudgeon* v. *Pembroke*, L. R. 2 App. C. 284.

the warranty that the ship will proceed on the voyage specified, in the ordinary course of that voyage and without unreasonable delay, that is to say the warranty against deviation; but the practice of the present day very frequently affords a partial provision against a breach of that warranty by what is known as the "*deviation clause*," which provides that in the event of the ship deviating from the voyage insured the policy is to be extended at a premium to be agreed upon. That clause has the effect of preventing the policy from becoming void by a deviation, and in cases of deviation in good faith, it enables the underwriter to cover the deviation by agreeing a premium with the insured whose ship has deviated. Those then are conditions for the validity of the policy; the assured must have spoken the "whole truth"; he must have spoken "nothing but the truth"; he must literally and exactly comply with any express warranties in the policy; and he must comply with the implied warranties contained in every policy. Failure in any of these respects will invalidate the policy.

Before, however, we come to the policy itself, there is a document of great importance in commerce which is the origin of the policy, a little document called the "slip." The "slip" is the document in which the agreement for a policy is in fact made between

business men, and I venture to say if a "slip" was put before any of you gentlemen here, unless you happen to have special experience in the matter, you would find it entirely unintelligible. The leading terms of the policy to be effected are put on the "slip" in a series of underwriters' hieroglyphics in which few words are of more than one letter, and on which sometimes there is dispute even amongst the underwriters themselves as to what the particular hieroglyphics mean. (*k*) The Slip cannot be given in evidence in any Court, for every policy of insurance requires a stamp, and the "slip" is never stamped; it is nevertheless an undertaking of the most absolute honour among underwriters and business men that the "slip" shall be considered as equivalent to a policy, and if the ship is lost the day after a "slip" has been granted, and long before any policy can come into existence, the underwriter always honours the "slip." To such extent is the binding character of the "slip" in honour carried in commercial circles, that the insured is not bound to communicate with the underwriter any material fact which comes to his knowledge after the slip is signed. Though it comes to his knowledge long

(*k*) In a recent Nisi Prius case, a number of underwriters gave conflicting evidence as to the meaning of an abbreviation fairly common in slips.

before the policy is effected, a binding engagement is created once the "slip" has been signed, and no assured is bound to communicate material facts after that date to the underwriters, because, as has been quaintly said, "no one is bound to lead his neighbour into temptation."

The form of policy before you (*l*) is a document of very respectable antiquity. The most recent clause in this policy is, I believe, the last, the one which begins, "Free from all average on Corn, Flour, Fish, Salt, Fruit, and Seed," etc. That clause was introduced in the year 1745, and is comparatively a modern innovation. For the rest of the policy, with some slight improvements that have been introduced, is some five hundred or six hundred years old, and is probably very nearly in the same form as when the Lombard merchants first brought policies of insurance into England, and when a clause in every policy ran that it shall be "of as much force as every policy that has been effected now in Lombard Street."

The policy falls into three parts. There is an undertaking by the underwriter to assure a certain interest, whatever it may be, named in the policy against certain perils. That takes up about two-thirds of the policy. Then there comes what is

(*l*) Appendix, p. 230.

called "*the Sue and Labour Clause,*" which runs: "And in case of any Loss or Misfortune it shall be lawful to the Assured their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the said Goods and Merchandises and Ship etc. (or any part thereof) without Prejudice to this Assurance, to the charges whereof the said Corporation will contribute according to the rate and quantity of the sum herein assured." That amounts to an undertaking by the underwriter to pay expenses legitimately incurred by the insured in protecting the property insured. By the first part of the policy he will pay damage to the goods by perils insured; in the Sue and Labour Clause he will pay expenses incurred in protecting the goods by preventing the consequences of the perils insured against to goods or ship or freight as may be. And in the last place the innovation of 1745, the "*memorandum*" as it is always called, provides that certain partial loss on goods, loss which does not amount to more than a certain percentage of the whole amount insured, shall not fall upon the underwriter. Thus while in the first two parts of the policy the underwriter is rendered liable for damage and for expenses incurred to prevent damage, in the last part he is freed from what you may call petty damage to the interest assured.

The policy begins with the name of the person assured. The broker who is effecting the policy usually puts in his own name, for the policy goes on, "as well in his own name as for and in the name and names of all and every other person or persons to whom the same doth may or shall appertain in part or in all Doth make Assurance"—so that under that clause the agent can bring in his principals, whoever they may be, as interested in the policy—"and causeth . . . them and every of them to be assured lost or not lost." The words "lost or not lost" will enable the policy to attach though the interest assured may have been lost at the date of the policy, so long as the assured does not know of the loss. For in insuring an interest at sea it is quite possible that the ship or goods may have been lost before the policy is effected, and these words "lost or not lost" throw upon the underwriter the risk of that, so long as no suggestion of concealment or misrepresentation can be made against the person effecting the policy. "At and from"—and then there follows in a voyage policy the description of the voyage insured, which is set out sometimes simply with the place of sailing and the place of arriving, sometimes with more minuteness; sometimes as simply "voyaging between," leaving a wide liberty of choice. Sometimes the policy is not for a voyage at all but is for a certain

time, and time policies are becoming more and more usual every year as a way of insuring steamers on regular lines. Owing to the Stamp Act, however, no time policy for longer than a year can be effected.

Then after one or two immaterial clauses come the words, "upon any kind of Goods and Merchandises whatsoever loaden or to be loaden And also upon the Body Tackle Apparel Ordnance Munition Artillery Boat and other Furniture of and in the Good Ship or Vessel called the" (whatever the name may be). The name of the ship is a very essential part of the policy, for the underwriter must have an accurate name in order to turn to his Lloyd's Register and see the character of the ship which he is assuring. Now that form, "Ordnance Munition Artillery Boat," runs in every policy but nobody pays the slightest attention to it, for after all the rigmarole about the "Artillery" and the "Boat" there is written into the policy what the parties really mean to insure, simply "goods" or "ship" or "freight," whichever it may be; and in that, which is the subject matter of the insurance, the insured must have an *insurable interest* at the date of the loss. If he has at the date of the loss an interest in the goods insured, either from property or from contract, which will be injured by the loss, it is sufficient to give him a claim on the policy, although he may have had no such interest at the time when

the policy was effected, even if his interest only accrued the day before the loss; but he must have some interest of a legal nature in the matter insured. A mere moral expectation not based upon any legal right will not suffice. There is a case which is always known as the "Orchella Weed" case which illustrates the extent to which that is carried. (*m*) A ship was loading orchella weed in one of the Cape de Verde Islands; the Governor had a large quantity of weed ready to ship, and if everything had gone on in the usual way the ship would have received a full cargo of orchella weed. The insurance was on freight, but there was no binding contract to ship the orchella weed or pay freight for it; although it was a matter of tolerable certainty that a full cargo would have been shipped if the ship had remained there, there was no contract on which any action could have been brought binding the Governor to ship a cargo of orchella weed; and before more than twenty or thirty tons had been got on board the ship was blown out to sea and lost by perils of the sea. The insured claimed the freight of the orchella weed from the underwriters, alleging it had been lost by the perils insured against—perils of the sea. It was answered and held by the Court that insomuch as the insured had no legal right to have the orchella weed shipped

(*m*) *Patrick* v. *Eames*, 3 Camp. 441.

they had no insurable interest in freight, however great might have been the moral certainty that the orchella weed would have been shipped in spite of the absence of a binding contract. And in one of the other cases Lord Mansfield summarised the doctrine of insuring expectations, then attempted to be pushed to a considerable extent, by saying that the contention would lead to insuring a £20,000 prize in a lottery without having taken a ticket. The law has always required that there should be at the bottom of your expectations of gain or profit some legal right to either the whole property or part of the property or an interest under some contract, such for instance as the risk which a carrier runs with regard to goods in his care. A carrier is under contractual liability with regard to the goods that he is carrying, and therefore may insure the risk he runs in carrying them. (*n*)

Instead of the name of the ship in the policy you will sometimes find "ship or ships" inserted, and in that case there is an obligation upon the insured to declare the name of the ship which he proposes to put at risk under the policy as soon as it comes to his knowledge. A man may not know by what ship goods are coming forward and he may insure £10,000

(*n*) For a specimen of the cases on insurable interest, which are very complicated, see *Anderson* v. *Morice*, L. R. 1 App. C. 713, where the Lords were equally divided.

on goods in "ship or ships." As soon as he knows the ship on which his goods are going forward he may "declare," "in the ship so-and-so £2,000 of goods are at risk, and in the ship so-and-so £2,000 of goods are at risk," until he has exhausted the amount which he has insured on his policy on goods in "ship or ships." The policy continues: "Beginning the Adventure upon the said Goods and Merchandise from and immediately following the loading thereof on board the said Ship." That may be varied to include the risk of lighters or craft bringing goods from the shore, and it also depends upon the insured having an insurable interest. If the insured has not an interest in the goods at the time when the goods are loaded, the policy will not attach to the goods as far as he is concerned until he has such an interest. "And so shall continue and endure during her abode there Upon the said Ship etc. and further until the said Ship with all her Ordnance Tackle Apparel etc. and Goods and Merchandise whatsoever shall be arrived at"—the place of destination—"Upon the said Ship etc. until she hath there moored at anchor Twenty-four hours in safety." There is, you see, a sort of time policy tacked on to the end of the voyage policy, and the ship is required to be in good safety for twenty-four hours after her arrival before the policy lapses, and any loss during those twenty-four hours

will be covered by the policy. The policy proceeds: "And it shall be lawful for the said Ship etc. in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever without Prejudice to this assurance." That liberty of course is limited to places in the course of the voyage; it does not give unlimited license to go to the North Pole or any other place the ship chooses to go to; "the said Ship etc. *in this Voyage* is at liberty to proceed and sail to and touch and stay." Then the policy states that the said ship, goods, and merchandise shall be rated and valued at so much. This particular policy is a *valued* policy. The usage originally was to have what were called "*open policies*" in which no value was stated; and in the event of a loss of the interest insured, it became necessary to set to work and prove exactly what was the value of the interest which had been lost, and there arose a series of complicated rules as to the deductions which were to be made for old material, wear and tear, and in estimating the values of particular interests. This was found so intolerable in commerce to men who wanted to get their money quickly, that underwriters introduced the "*valued policy*" as it was called, in which the insured stated the value at which his interest was to stand. And when that was done, in the case of a total loss the

valuation was conclusive in the absence of evidence of fraud. You can reopen the valuation by showing a grossly fraudulent over-valuation, but the fact that the value is slightly more than what might be ascertained to be the true value of the goods will be quite immaterial. For purposes of commercial business the underwriter takes his risk, and is repaid by the increased amount of premium that he gets on the larger valuation inserted in the policy.

No such stipulation, however, can excuse the assured from proving that he had an insurable interest. Policies are sometimes made with a clause, "No proof of interest in the policy," or what are called in the abbreviated language of underwriters P.P.I. Policies. (*o*) These are only honour policies; they could never be sued on because they are gaming or wagering transactions. If the insured has apart from the policy no interest in the subject insured, he is simply making a bet on its safe arrival, and consequently he comes within the provisions of the statutes against wagering policies; (*p*) and thus any policy which contains similar clauses to a P.P.I. policy is only an honour policy. An underwriter who has taken a premium on such a policy would not be justified by commercial feeling in taking the

(*o*) "Policy Proof of Interest."
(*p*) 19 Geo. II. c. 37; 8 & 9 Vic. c. 109, § 18.

objection that it was a P.P.I. policy, unless in the presence of very gross fraud indeed, and even then probably a great outcry would be made against that defence being raised.

Next in the policy there comes an enumeration of "perils assured against," which is of immemorial antiquity: "Touching the Adventures and Perils which the said Corporation are contented to bear and do take upon them in this Voyage They are of the Seas Men of War Fire Enemies Pirates Rovers Jettizons Thieves Letters of Mart and Countermart" (you see how far this policy goes back) "Surprizals Taking at Sea Arrests Restraints and Detainments of all Kings Princes and People of what nation condition or quality soever Barratry" (and then come what are called the "general words") "and of all other Perils Losses and Misfortunes that have or shall come to the hurt detriment or damage of the said Goods Merchandises and Ship etc. or any part thereof." Of course if these words were taken literally they would effect an insurance against everything, nothing would be too far-fetched to come under those general words; but in consequence the Courts have adopted a rule of construction that the general words shall be limited to perils of the same nature as one of the previous perils specifically named, or perils *ejusdem generis*. To bring the loss within

the "general words" you must show that it is closely similar to one of the named perils. To show how strictly that has been applied I may refer to the recent case of *Thames and Mersey Insurance Co.* v. *Hamilton, Fraser & Co.* (*q*) A donkey-engine at sea burst its air-chamber owing to somebody's carelessness in closing a valve, and the underwriters were sued for damage to the donkey-pump, on the ground first of all that it was a peril of the sea because it happened on a ship at sea, and if it was not a peril of the sea it was so like a peril of the sea that it would come under the "general words." The case went to the House of Lords, because there had been a previous case which created some difficulty, (*r*) and the House of Lords laid down authoritatively the rule for construing these "general words," and held that such a peril was not sufficiently like any peril named to be recovered under the "general words." The maxim specially applied to decide whether a loss is occasioned by these perils within the meaning of the policy is the one which I have already referred to: (*s*)—*causa proxima non remota spectatur*: you are to look at the immediate and not at the remote cause. If sea water enters the ship it is immaterial by what its entry is caused, for you look at

(*q*) 12 App. C. 484.

(*r*) *West India Co.* v. *Home and Colonial Insurance Co.*, 6 Q. B. D. 51.

(*s*) *Ante*, p. 126.

the immediate and not at the remote cause. The immediate cause of damage is the sea water coming into the ship, the remote cause may be the negligence of the crew or of another ship; but in no case you will look at the remote cause; the only exception is that the assured cannot recover for anything that arises from his own personal fault. That exception you will see is very much narrower than the undertaking of the carrier in the contract of affreightment; for there the assured cannot recover for anything which arises from his own personal fault or that of his servants. The assured in a policy of insurance is not affected by the carelessness or negligence of his servants provided that he himself used proper care in selecting them, so that no fault can be ascribed to him in the manning and equipment of the ship. Thus, the chief distinction in construing these perils under a policy and under a charter-party or contract of affreightment, is that in the contract of affreightment the carrier has contracted, in the absence of an exception, that reasonable diligence shall be used by himself and his servants; in the policy of insurance it is only against his own personal default that he holds himself responsible.

Those being the perils against which the interest is insured, if there is a loss the underwriter must pay. Now a loss may be of two kinds; it may be

a total, or a partial loss, a loss of the whole interest assured, or a loss of part of the interest assured. Some insurances are against total loss only, which are called in the hieroglyphics of underwriters, "policies F.P.A.," free of particular average, particular average being the name for partial loss. An F.P.A. policy is one in which the underwriter only insures against the total loss of the interest insured. This total loss may be of two kinds; it may be an absolute total loss, or it may be a constructive total loss. An absolute or actual total loss happens in a case in which it is physically impossible to restore the thing insured to the condition in which it was before the loss. In the case of a constructive total loss, it is commercially unreasonable to restore the thing to the condition in which it was before the loss; it can be done by expenditure of money, but it is not worth while commercially to do it. A ship which is broken up in a storm and goes to bits all over the sea is an actual total loss; a ship which is stranded and seriously damaged on a desert island where there are no shipbuilding appliances, and is in such a condition that it would take more to repair it than the ship would be worth when it was repaired, is a constructive total loss. The difference between the two kinds of loss for practical purposes is this: in an actual loss it follows,

as a matter of course, that the underwriter takes what if anything is left of the thing lost; he has the "benefit of the salvage," as it is called; if there are a few planks left of the ship which has been wrecked, they belong to the underwriter without any further proceeding. But in a constructive total loss, something more is necessary before the assured can recover; he must give *notice of abandonment* to the underwriter within a reasonable time. Opinions of what is commercially possible and expedient may differ, and if the insured means to say that the ship or the goods are a constructive total loss, and in such a state that commercially it would cost more to repair them than they are worth, he must give the underwriter a chance of forming his own opinion upon that, and himself repairing the loss if he thinks it worth while. In an actual total loss, therefore, you need not give notice of abandonment to the underwriter; in a constructive total loss you must if you intend to claim for a total loss, and you must give that notice with reasonable promptness, so that the underwriter may not be affected by your delay.

These being the divisions of total loss, partial injury to the subject insured is known as "particular average" or "partial loss," which must be distinguished from "general average." "Particular average" is partial loss, "general average" is loss which falls

upon the whole adventure. As you will see if you compare the two expressions, the term "average" can hardly be used in the same sense in both those terms. But "particular average" does not apply to every kind of partial loss. It does not apply to any sums which have to be paid under the Sue and Labour Clause, although they may be less than the whole value of the interest insured. Such a payment, though smaller than the value insured, is not called a "particular average"; neither are general average payments, though smaller than the amount insured.

The underwriter's liability for "particular average" is limited by the Memorandum at the end of the policy, which is a remarkably ungrammatical and incoherent production, but has received from the Courts, by a series of cases, an explanation. "Free from all average on Corn Flour Fish Salt Fruit and Seed, unless General or the Ship be stranded. Free from Average on Sugar Rum Hides Skins Hemp Flax Rice and Tobacco under Five per Cent., and on all other Goods, the Ship and Freight under Three per Cent. unless General or the Ship be stranded, sunk, or burnt." Any person set down to make out by the light of nature what that meant might find considerable difficulty in understanding it. The meaning which the Courts have attached to it is this, that underwriters are free from all average on

corn, etc., which is not general average, "unless the ship be stranded." If the ship be stranded they at once become liable for particular average, although the stranding has nothing to do with the particular loss which is claimed as particular average. As to the last part of the clause, the effect is that unless the ship is stranded the underwriter is not liable for a loss which is under five per cent. of the whole value on the first head of goods enumerated, or under three per cent. on the ship or freight. If the ship is "stranded, sunk, or burnt," the underwriter at once becomes liable for all such losses under five per cent. or three per cent., though such losses may not have been caused by the stranding, or the sinking, or the burning. The memorandum practically frees the underwriter from liabilities for small losses unless something serious has happened to the ship, such as stranding, or sinking, or burning; and then presumably the idea is, something serious having happened, too minute a line will not be drawn as to the consequences of that stranding, sinking, or burning.

Two principles have been laid down in construing the Sue and Labour Clause to which I have already referred you. The underwriters under the Sue and Labour Clause are to be liable for expenses incurred by the assured on two conditions. In the first place

those expenses must have been incurred to protect the matter insured from a peril for which the underwriter was liable. If the peril in protection against which the expenses were incurred was one which would not have affected the underwriters, they are not bound to contribute to any expenses incurred by the insured, because it was perfectly immaterial to them whether the insured incurred those expenses or not; if the goods had been damaged by such a peril, the underwriter would not have had to pay for them. And secondly, the expenses incurred under the Sue and Labour Clause must be incurred by the insured or his agents. Expenses incurred by some perfectly independent salvor, some ship that goes to the rescue of a ship in distress, cannot be recovered from the underwriters under the Sue and Labour Clause; the payments must be expressly incurred by the agents of the assured, or the assured themselves.

In the same way the underwriter by commercial custom is liable for general average contributions falling upon the interest which he insures, and consequently when any question arises on the general average statement you generally find it is being fought out between different sets of underwriters. The underwriters of freight and cargo of the ship dispute as to the relative proportions in which their

interests should bear on the matter which is to be settled.

There is only one other matter I want to mention with regard to the policy, and that is that it has become common lately to add a new liability for the underwriter in the shape of a *Collision Clause,* which provides that the underwriter shall bear three-fourths of the amount that the ship-owner has to pay for any damage done by his ship in collision. Damage done to the ship insured can be recovered usually under "perils of the sea," but the liabilities for damage done by the ship insured are or may be very heavy. Commercial men have wished to insure against them, and they constantly and frequently insure such risks in the ordinary form of policy by a collision clause, by which the underwriter undertakes to bear three-fourths of the amount which the insured has to pay, the insured being supposed to bear the remaining one-fourth as a premium on his carefulness. And commercial practice further insures the remaining fourth of such risks in an Indemnity and Protection Association, for merchants desire to equalise losses by averaging all such risks by the means of insurance.

APPENDIX.

_____FLAG

Charter Party.

_____18

IT IS THIS DAY AGREED BETWEEN
Owners, and
Freighters; that the good Screw Steamer called the
of the burthen of Tons, exclusive of Bunkers, now
at hereby guaranteed
by the Owners tight, staunch, strong, efficiently ventilated,
and every way fitted for
the voyage, shall forthwith proceed to

and there load in the customary manner, from the Factors of the said Freighters; a full and complete Cargo of Coal, not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions, and Furniture (including all and sufficient Coal for Steamer's use, which is to be supplied by Freighters at current price), and being so loaded, shall, without delay, proceed to (Steamer having liberty to tow, be towed, and assist Vessels in distress), and there deliver the same

alongside any Vessel or Wharf, or into Lighters, where she may deliver afloat, as ordered. In consideration thereof Freight to be paid at and after the rate of
Shillings and pence per ton of 20 Cwt., or 1,015 Kilogrammes ascertained there on delivery, thus:—One third of the estimated Freight to Captain on signing Bills of Lading, in cash less three per cent. discount, and the remainder (less cash for ordinary disbursements at Port of Discharge, which is to be advanced at the exchange of 25 francs per £ sterling), on the right and true delivery of the Cargo, by Bill on Freighters, at three months' date, or by like Bill on Paris payable in London at Merchants' option. All charges incurred under this Charter by Steamer at Port of Loading, are to be considered as Cash advanced on account of Freight, and may be deducted from any payment of same. Should no advance be taken, the amount of such charges may be endorsed on Bills of Lading as Freight advanced. The Steamer to be consigned to the Receivers of the Cargo, paying them 2 per cent. Address Commission; and their Broker, free of Commission, but paying latter the usual charge for doing the Steamer's business.

Captain or Agents to sign Freighters' Bills of Lading as presented, and without qualification, in accordance with the weight of the Dock or Railway Company, which the Captain is to ascertain and control by all the means at his command.

The Steamer to pay Harbour Tolls and Dock Wharfage on Cargo as Customary, Trimming, Consulages on Ship and Cargo, Lights, Pilotages, and all other Port Charges whatsoever, but the Cargo to be taken from alongside free of expense and risk to the Steamer. (The Act of God, the Queen's Enemies, Fire, and all Dangers and Accidents of

the Seas, Rivers, errors of and/or negligent navigation during the said Voyage always excepted.

Cargo to be loaded in hours, from and during the time Steamer is ready to load; which time is not to count until receipt by Freighters of written notice, between the hours of 9 a.m. and 5 p.m. (from 5 p.m. Saturdays until 7 a.m. Mondays, Custom House, Colliers, Bank, or other Holidays excepted), and time not to count after 5 p.m. on the day previous to a Bank, Colliers or Custom House Holiday, and not to commence again until 7 a.m. the day after such Holiday, but Charterers to be at liberty to load Cargo or bunkers into the Steamer during these excepted hours, the time used in Shipping Cargo to count as loading hours, and if sooner despatched, Steamer to pay Eight Shillings and Fourpence for every hour saved on the time allowed for loading. Steamer to be discharged at the rate of 400 tons per working day from and during the time she is ready to discharge. Demurrage over and above the said lying time, at Sixteen Shillings and Eightpence per like hour, except in case of riot, or commotion by pitmen, lockout, strike, or stoppage at any collieries with or from which the Freighters may have arranged for the shipment of the Cargo or a portion thereof; occasioned by any dispute between masters and men, stoppage, strike, or lockout of trimmers, or any hands employed in loading or discharging the Cargo; frosts, floods, or any other occurrence beyond the control of the Freighters or Receivers, by which they are prevented from getting the coal to or from the Steamer. Freighters to be at liberty to appoint trimmers for stowing the Cargo at the usual tariff, it being understood that Freighters shall not be responsible for their acts or defaults, nor shall the Trimmers be deemed Freighters' Servants or Agents.

The Receivers of the Cargo to have the option of appointing the Stevedore to discharge the Steamer at current rate, steam appliances, shovels, and baskets to be provided by the Steamer.

Freighters to be kept advised of Steamer's probable date of readiness to load, and also of her sailing for

Should Steamer arrive and be ready to load at

without this advice to Freighters, they to be allowed an extra twenty-four hours for loading.

In case of average, the same to be settled in England according to custom at Lloyd's.

Should the Steamer put into any Port or Ports, leaky or with damage, the Captain shall without delay inform the Freighters thereof, and in event of the Cargo or any portion thereof having to be discharged, the Freighters to have the option of Shipping in substitution of the whole or any portion of the original Cargo so discharged an equivalent quantity of other Coals, but any additional expense occasioned by such substitution to be borne by Freighters. Should a new Cargo or part Cargo be shipped, no further advance of Freight beyond the one-third above mentioned shall be due or payable.

If any misrepresentation be made respecting the size, position, or state of the Steamer, or should the Steamer not have arrived at and be ready to load on or before noon of the Freighters to have the option of cancelling this Charter Party.

It is agreed that for each breach of this Contract not otherwise specially provided for, the party breaking the Contract shall pay to the other party, by way of liquidated damages, the sum of Three Hundred Pounds.

It is agreed that all liability of the Freighters under this

Charter, in every respect, except as regards Advance Freight and loading Demurrage, if any, shall cease as soon as the Cargo is shipped, the Captain accepting his lien on the Cargo for Freight and Demurrage in lieu thereof.

A true copy of the original Charter.

The Commission of 5 per cent. on the amount of Freight and Primage is due on the signment of this Charter, Steamer lost or not lost and the Captain to clear with.

Mediterranean, Black Sea and Baltic Grain Cargo Steamer Bill of Lading, 1890.

Shipped, in good order and condition, by_____
_____
in and upon the good Steam-ship called the_____
under_____Flag whereof_____
is Master for this present voyage, now lying in_____
_____and bound for_____
with liberty to call at any ports on the way for coaling or other necessary purposes, to sail without Pilots and to tow and assist Vessels in distress, and to deviate for the purpose of saving life;

_____

_____

_____

and to be delivered in the like good order and condition at the aforesaid port of_____
unto_____or to his or their assigns, he or they paying freight and/or demurrage, if any, for the said goods and all conditions and exceptions of the Charter Party, dated_____
are incorporated herewith. The Act of God, Perils, Dangers, and Accidents of the Sea or other Waters of what nature and kind soever; Fire from any cause on Land or on Water, Barratry of the Master and Crew, Enemies, Pirates and Robbers, Arrests and Restraints of Princes, Rulers and People, Explosions, Bursting of Boilers, Breakage of Shafts, or any latent defect in the Hull, and/or Machinery, Strandings, Collisions, and all other Accidents of Navigation, and all Losses and Damages caused thereby are excepted, even when occasioned by negligence, default or

error in judgment of the Pilot, Master, Mariners, or other Servants of the Shipowners, but, unless stranded, sunk or burnt, nothing herein contained shall exempt the Shipowner from liability to pay for Damage to Cargo occasioned by bad Stowage, by improper or insufficient Dunnage, or absence of customary Ventilation, or by improper opening of Valves, Sluices and Ports, or by causes other than those above excepted, and all the above exceptions are conditional on the Vessel being Seaworthy when she sails on the Voyage, but any Latent Defects in the Hull and/or Machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the Owners, or any of them, or by the Ship's Husband or Manager.

General Average payable according to York-Antwerp Rules, 1890.

_____laying days have been used at the ports of Loading.

In Witness whereof, the Master of the said Ship hath affirmed to three Bills of Lading, all of this tenor and date, one of which Bills being accomplished, the others to stand void.

Dated in_____this_____day of_____189

Weight, Quantity and Quality unknown.

We certify that the within is the agreed form of the Mediterranean, Black Sea and Baltic Grain Cargo Steamer Bill of Lading, 1890.

(*Signed*)

Chairman.

(*Signed*)

Hon. Sec.

No. £ Payable at

BY THE CORPORATION OF THE ROYAL EXCHANGE ASSURANCE.

In the Name of God *Amen.*

as well in own name as for and in the name and names of all and every other person or persons to whom the same doth may or shall appertain in part or in all Doth make Assurance and causeth and them and every of them to be assured lost or not lost at and from

With leave to touch at all Ports and Places on either side of and at the Cape of Good Hope for all purposes.

Including Risk of Craft to and from the Ship. Warranted free of Capture, Seizure, and Detention, and the consequences thereof or any attempt thereat, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

upon any kind of Goods and Merchandises whatsoever loaden or to be loaden And also upon the Body Tackle Apparel Ordnance Munition Artillery Boat and other Furniture of and in the Good Ship or Vessel called the Burthen or thereabouts Whereof is Master (under GOD) for this present Voyage or whosoever else shall go for Master in the said Ship or by whatsoever other name or names the same Ship or the Master thereof is or shall be named or called, Beginning the Adventure upon the said Goods and Merchandises from and immediately following the loading thereof on board the said Ship And upon the said Ship etc. and so shall continue

and endure during her abode there Upon the said Ship etc. And further until the said Ship with all her Ordnance Tackle Apparel etc. and Goods and Merchandises whatsoever shall be arrived at Upon the said Ship etc. until she hath there moored at anchor Twenty-four hours in good safety, And upon the Goods and Merchandises until the same be there discharged and safely landed: And it shall be lawful for the said Ship etc. in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever without Prejudice to this Assurance. The said Ship etc. Goods and Merchandises etc. for so much as concerns the Assureds (by Agreement made between the Assureds and the said Corporation in this Policy) are and shall be rated and valued at Sterling, without further Account to be given by the Assureds for the same.

Touching the Adventures and Perils which the said Corporation are contented to bear and do take upon them in this Voyage They are of the Seas Men of War Fire Enemies Pirates Rovers Thieves Jettizons Letters of Mart and Countermart Surprizals Taking at Sea Arrests Restraints and Detainments of all Kings Princes and People of what nation condition or quality soever Barratry of the Master and Mariners and of all other Perils Losses and Misfortunes that have or shall come to the hurt detriment or damage of the said Goods and Merchandises and Ship etc. or any part thereof: And in case of any Loss or Misfortune it shall be lawful to the Assureds their Factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Recovery of the said Goods and Merchandises and Ship etc. (or any part thereof) without Prejudice to this Assurance, to the charges whereof the said Corporation will contribute according to the rate and quantity of the sum herein assured. It is expressly

declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. And it is agreed by the said Corporation that this Writing or Policy of Assurance shall be of as much force and effect as the surest Writing or Policy of Assurance heretofore made in *Lombard Street* or in the *Royal Exchange* or elsewhere in *London*. And so the said Corporation are contented and do hereby promise and bind themselves and their Successors to the Assureds their Executors Administrators and Assigns for the true performance of the premises, confessing themselves paid the Consideration due unto them for this Assurance by
at and after the Rate of *per Cent.*

In Witness *whereof the said Corporation have caused their* COMMON SEAL *to be hereunto affixed and the Sum or Sums by them assured to be hereunder written at their Office in the Royal Exchange of* LONDON *this day of in the Year of Our Lord One Thousand Eight Hundred and*

The said Corporation are content with this Assurance for

Free from all Average on Corn Flour Fish Salt Fruit and Seed, unless General or the Ship be stranded. Free from Average on Sugar Rum Hides Skins Hemp Flax Rice and Tobacco under Five *per Cent.* and on all other Goods, the Ship and Freight under Three *per Cent.* unless General or the Ship be stranded, sunk, or burnt.

By Order of the Court of Directors,

Secretary.

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