firm the same notice is requisite, and if due notice be given, yet, if the retiring partner willingly suffers his name to continue in the firm, he will still be holden. A dormant partner may withdraw without giving public notice.

LECTURE XLIV.

OF NEGOTIABLE PAPER.

1. *Are promissory notes and bills of exchange governed by the same rules?*—72, 73.

Yes; the statute of 3d and 4th Anne made promissory notes, payable to a person, or to his order or bearer, negotiable like inland bills, according to the custom of merchants; and by the statutes of 9 and 10 William III., c. 17, and 3 and 4 Anne, inland bills are put upon the footing of foreign bills, except that no protest is requisite. These statutes have been generally adopted in this country, either formally or in effect, and promissory notes are everywhere negotiable. The effect of the statute is to make notes, when negotiated, assume the shape and operation of bills, and to render the analogy between them so strong, that the rules established with respect to the one apply to the other.

2. *What is a bill of exchange?*—74.

It is a written order or request, and a promissory note a written promise, by one person to another, for the payment of money, absolutely and at all events. If A, living in New York, wishes to receive one thousand dollars, which await his order in the hands of B, in London, he applies to C, going from New York to London, to pay him one thousand dollars, and take his draft on B, for that sum payable at sight.

3. *By what terms are the parties known in law?*—75.

A, who draws the bill, is called the *drawer*. B, to whom it

is addressed, is called the *drawee*, and, on acceptance, becomes the *acceptor*. C, to whom the bill is made payable, is called the *payee*. As the bill is made payable to C, or his order, he may, by indorsement, direct the bill to be paid to D, and, in that case, C becomes the indorser, and D, to whom the bill is indorsed, is called the indorsee, or holder.

4. *What is the character of a check?*—75.

It is, in form and effect, a bill of exchange. It is not a direct promise by the drawer to pay, but it is an undertaking, on his part, that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay. A check payable to bearer passes by delivery, and the bearer may sue on it as on an inland bill of exchange.

5. *What are the principal requisites of a bill of exchange?*—75-78.

It is not confined to any set form of words. A promise to *deliver*, or to be *accountable*, or to be responsible for so much money, is a good bill or note; but it must be exclusively and absolutely for the payment of money. In England, negotiable paper must be for the payment of money in specie, and not in bank notes. In this country, it has been held that a note payable in bank bills was a good negotiable note within the statute, if confined to a species of paper universally current as cash. But the doctrine of these cases has been met and denied, and it seems the weight of argument is against them, and in favor of the English rule. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the bill. It is not necessary that the note should be made at home. Foreign, as well as inland notes, are negotiable. The instrument must be made payable to the payee, and to his order or assigns, or to bearer, in order to render it negotiable. It must have negotiable words on its face, showing it to have been the intention of the parties to give it a transferable quality. Without them it is a valid instrument as between the parties, and entitled to the three days of grace. If the name of the payee or indorser be left blank, any *bona fide* holder may insert his own name as payee. The words *value*

received, though usually inserted, are unnecessary. Nor is it necessary that the maker should subscribe his name at the bottom of the note; and it is sufficient if the maker's name be on any part of it, as if it should run, I; *A B, promise to pay C D, or order, one hundred dollars.* A note payable to a fictitious person may be sued on, by an innocent indorsee, as a note payable to bearer; and such bill or note is good against the drawer or maker, and will bind the acceptor, if the fact that the payee was fictitious was known to the acceptor.

6. *What are, principally, the rights of the holder of a bill or note?* —78–80.

Possession is *prima facie* evidence of property in negotiable paper, payable to bearer, or indorsed in blank, and such a holder can recover upon the paper, though it came to him from a person who had stolen it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration, when not overdue, and under circumstances of due caution; and he need not account for his possession of it, unless suspicion be raised. There are but few cases in which a bill, or note is void in the hands of an innocent indorsee for a valuable consideration. They are, for instance, when the consideration in the instrument is money won at play, or it be given for a usurious debt, or where the contract is by statute declared absolutely void.

7. *May the consideration of a bill, note, or check, be inquired into between the original parties?*—80.

Yes; it may be inquired into between the maker and payee, and between the indorser and indorsee. The consideration of the indorsement, also, may be shown, as between the latter, for they are, in this view, treated as original parties.

8. *Within what time must a bill be presented for acceptance?*—82, 83.

There is no precise time fixed by law, in which bills payable at sight, or by a given time, must be presented to the drawee for acceptance. The holder need not take the earliest opportunity. A bill, payable at a given time after date, need not be presented

for acceptance before the day of payment; but if presented, and acceptance is refused, it is dishonored, and notice must then be given to the drawer. A bill payable sixty days after sight, means sixty days after acceptance; and such a bill, as well as a bill payable on demand, must be presented in a reasonable time, or the holder will have to bear the loss proceeding from his default.

9. *How must the acceptance be made?*—83, *n.* (*a*)–85.

It may be by parol, or in writing, and general or special. By the revised statutes of New York, the acceptance must be in writing, signed by the acceptor or his lawful agent. Though a bill comes into the hands of a person with a parol acceptance, and he takes it in ignorance of such an acceptance, he may avail himself of it afterward. If the acceptance be special, it binds the acceptor *sub modo*, and according to the acceptance. A parol promise to accept a bill already drawn, or thereafter to be drawn, is binding, if the bill be taken in consideration of the promise. In New York, an unconditional promise, in writing, to accept a bill, before it is drawn, is an acceptance, in favor of the person who receives the bill on the faith of it, for a valuable consideration. Every act giving credit to the bill amounts to an acceptance. The acceptance may be impliedly, as well as expressly given. It may be inferred from the act of the drawee, in keeping the bill a great length of time, contrary to the usual mode of dealing. Refusal by the drawee to return the bill within twenty-four hours to the holder, is deemed an acceptance under the New York statute.

10. *What is the effect of a conditional acceptance?*—84.

The holder is not bound to receive any acceptance varying from the terms of the bill, but if he does receive it, the acceptor is not liable for more than he has undertaken. If a bill be accepted payable at a particular place, the holder is bound to make demand at that place.

11. *What are the obligations of the acceptor of a bill?*—86.

The acceptance renders him the principal debtor, and the drawer the surety, and nothing will discharge the acceptor but payment or release. He is bound, though he accepted without

consideration, and for the sole accommodation of the drawer. Accommodation paper is now governed by the same rules as other paper. These are the strict obligations of the acceptor in relation to the other parties to the bill, but they do not apply, in all their extent, as between the drawer and the party who indorses, or lends his name to the bill, as surety for the accommodation of the drawer.

12. *What is an acceptance* supra protest?—87.

It is where a third person, after protest for non-acceptance by the drawee, intervenes, and becomes a party to the bill, in a collateral way, by accepting and paying the bill for the honor of the drawer, or of a particular indorser.

13. *What are the obligations and rights of the acceptor* supra protest?—87, 88.

He subjects himself to the same obligations as if the bill had been directed to him; but the bill must be duly presented to the drawee at maturity, and if not paid, it must be duly protested for non-payment, and due notice given to the acceptor *supra protest*, to make his liability as such acceptor absolute. He has his remedy against the person for whose honor he accepted, and against all the parties who stand prior to that person, on giving due notice of the dishonor of the bill. If he takes up the bill for the honor of the indorser, he stands in the light of an indorsee paying full value for the bill, and has the same remedies to which an indorsee would be entitled against all prior parties. There can be no other acceptor after a general acceptance by the drawee. A third person may become liable on his collateral undertaking, as guaranteeing the credit of the drawee, but he will not be liable as acceptor. It is said, however, that when the bill has been accepted *supra protest*, for the honor of one party to the bill, it may, by another individual, be accepted *supra protest*, for the honor of another. The holder is not bound to take an acceptance *supra protest*, but he would be bound to accept an offer to pay *supra protest*. The protest is necessary, and should precede the collateral acceptance or payment; and if the bill, on its face, directs a resort to a third person, in case of

refusal by the drawee, such direction becomes a part of the contract.

14. *What is the rule as to the transfer of bills by indorsement?*—88.

A valid transfer may be made by the payee, or his agent, and the indorsement is an implied contract that the indorser has a good title, that the antecedent names are genuine, that the bill or note shall be duly honored or paid, and if not, that he will, on due protest and notice, take it up.

15. *What is the effect of a blank indorsement?*—89.

A note indorsed in blank is like one payable to bearer, and passes by delivery, and the holder may constitute himself, or any other person, assignee of the bill. Even a bond, payable to bearer, has been held to pass by delivery, in the same manner as a bank-note payable to bearer, or a bill of exchange indorsed in blank. The holder may strike out the indorsement to him, though in full, and all prior indorsements in blank, except the first, and charge the payee or maker.

16. *How may the negotiability of a bill, originally negotiable, be stopped?*—89.

By a special indorsement by the payee, but no subsequent indorsee can restrain the negotiability of the bill. The first indorser is liable to every subsequent *bona fide* holder, even though the bill or note be forged, or fraudulently circulated.

17. *What if a blank note or check be indorsed?*—89.

It will bind the indorser for any sum, or to any time of payment, which the person to whom he intrusts the paper chooses to insert in it. This only applies to the case in which the body of the instrument is left blank.

18. *What is the rule, where negotiable paper is taken after it is due?*—91.

The presumption is against the validity of the paper, and the purchaser takes it at his peril, and subject to every defense existing against it before it was negotiated.

19. *When is a note, payable on demand, deemed out of time?*—91.

When the facts are ascertained, the reasonableness of the time given is matter of law, and every case will depend on its circumstances. Eighteen months, eight months, seven months, five months, even two and a half, when unexplained by circumstances, have been held an unreasonable delay; and if the demand be not made in a reasonable time, by the holder, the indorser is discharged.

20. *How must the demand for acceptance, and protest, of a bill be made?*—93, 94.

It is usually made by a notary, and, in case of non-acceptance, he protests it, and this notarial protest receives credit in all courts and places, by the law and usages of merchants, without any auxiliary evidence; and it is a requisite step, by the custom of merchants, in a case of a foreign bill, and must be made promptly upon refusal. It must be made at the time, in the manner, by the persons prescribed, and in the place where the bill was payable. Protest of inland bills was not required at common law. Bills drawn in one state, on persons living in another state, are to be treated as foreign bills.

21. *What is the rule as to notice of non-acceptance?*—94, 95.

After the protest for non-acceptance, immediate notice must be given to the drawer and indorser, in order to fix them, and the omission would not be cured by the bill being presented for payment, and subsequent notice of non-payment as well as non-acceptance. The drawer or indorser may be sued forthwith upon the protest for non-acceptance, without waiting until the bill be presented for payment and refused. This is the rule in most of the States, but by the Supreme Court of the United States, and in Pennsylvania, protest for non-payment has been held sufficient.

22. *How must demand of payment be made?*—95–98.

It must be made when the bill falls due, by the holder or his agent, upon the acceptor, at the place appointed for payment, or at his house or residence, or regular known place of his

moneyed business, or upon him personally, if no particular place be appointed, and it can not be made by letter through the post office. The general principle is, that due diligence must be used to find out the party, and make demand; and the inquiry will always be, whether, under the circumstances of the case, due diligence has been used. If the party has absconded, that will as a general rule excuse the demand. If he has changed his residence to some other place, within the same state or jurisdiction, the holder must make endeavors to find it, and make the demand there; though, if he has removed out of the State, subsequently to accepting the bill, presentation at his former place of residence is sufficient. If the person, at whose house the note or bill is made payable, be the holder of the paper, it is sufficient for him, as holder, to examine the accounts, and ascertain that the party who is to pay has no funds deposited.

23. *What if a bill, drawn generally, be accepted specially?*—99, *n.* (*a.*)

It is a qualified acceptance which the holder is not bound to take; but if he does take it, the old rule was that demand must be made at the place appointed and not elsewhere. But the Supreme Court of the United States have recently held,* that when a bill or note was made payable at a specified time or place, it was not necessary to aver in the declaration, or prove at the trial, that a demand for payment was made at the time and place. If the maker or acceptor was ready at the time and place to pay, that was matter of defense. This may now be considered the law on the subject throughout the United States.

24. *What is the rule as to the three days of grace?*—100–103.

That they apply equally, according to the custom of merchants, to foreign and inland bills and to promissory notes, and as between the indorser and the indorsee of a negotiable note; and the acceptor has within a reasonable time of the end of business, or bank hours, of the third day of grace (being the third after the paper falls due), to pay. The three days of grace apply equally to bills payable at sight; but a bill or note paya-

* *Wallace* v. *McConnell*, 13 Peters, 136.

ble on demand, or where no time of payment is expressed, is payable immediately on presentment, and is not entitled to the three days of grace.

25. *What steps are requisite to fix the drawer and indorser of a bill or check?*—104, 105.

The holder must not only show a demand, or due diligence to get the money of the drawee of the bill or check, or of the maker of the note, but he must give reasonable notice of their default to the drawer and indorsers, to entitle himself to a suit against them. An indorser, duly notified, is liable, though the drawer, or a prior indorser be not notified; and it is the business of the indorser, on receiving notice, to give like notice to the drawer and all persons to whom he means to resort. Notice to one of several partners, or to one of several joint drawers or indorsers, is notice to them all. The question of reasonable notice is usually compounded of law and fact, and proper for the decision of a jury under the advice and direction of the court.

26. *What is held to be reasonable notice?*—106, 107.

According to the modern doctrine, the notice must be given by the first direct and regular conveyance. This means the first mail that goes the next day after the third day of grace. Reasonable diligence and attention is all that the law enacts; and it seems to be now settled, that each party, into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice; and putting the notice by letter into the post office is sufficient, though the letter should miscarry. But it is not necessary to send by the public mail. The notice may be sent by a private conveyance, or special messenger, and it would be a good notice, though it should happen to arrive on the same day a little behind the mail. The notice, in all cases, is good, if left at the dwelling-house of the party, in a way reasonably calculated to bring the knowledge of it home to him; and if the house be shut up by a temporary absence, still notice may be left there. If the parties live in different towns, the letter must be forwarded to the post office nearest to the party.

27. *What is necessary to be expressed in the notice?*—108–110.

It is sufficient that it state the fact of non-payment, and it is not necessary that it state expressly, when it may be justly implied, that the holder looks to the indorser. It is sufficient for the agent to give notice to his principal of the dishonor of a bill, and it then becomes necessary for the principal to give the requisite notice, with due diligence, to the parties to be fixed.

28. *In what cases is notice not required?*—109–111.

If the party be absent, or has absconded, or his place of residence be unknown, and due and diligent inquiry be made, or he have no residence, or giving notice be physically or morally impossible, the want of notice will be dispensed with; but it must be given as soon as the impediment is removed.

If the drawee refuse to accept, because he has no effects of the drawer in his hands, notice to the drawer is not necessary. This exception to the general rule is confined strictly to want of effects, and to cases in which the drawer had no right to expect that his bill would be honored. Notice is required if the want of it would produce detriment; and the exception applies only to the drawer. Neither the insolvency of the drawer, or drawee, or acceptor, or the fact that the drawee had absconded, does away with the necessity of demand of payment, and notice to the drawer and endorser. If a bank check be taken in the ordinary course of business, it is not an absolute payment, but only the means to procure the money, and the holder is bound to present it for payment with ordinary diligence, and the next day will be in season. But if the bank be totally prohibited, by process of law, from the exercise of its functions, before the check can, with due diligence, be presented, no demand need be made, or notice given; and the holder may waive the check altogether, and resort to his original demand. So, if the maker of the check has no funds at the bank, at the date of the check, it need not be presented for payment previous to a suit upon it.

29. *What if delay be given to the drawee of a bill, or maker of a note?*—111, 112.

It will discharge the other parties; but the agreement for delay must be one having a sufficient consideration, and bind-

ing in law upon the parties; mere indulgence will work no prejudice. Simply forbearing to sue the acceptor, or taking collateral security from him, is no discharge; but giving him new credit and time, or accepting a composition in discharge of the acceptor, will produce that result. The holder must do nothing, to impair the right, which the drawer and indorser have, to resort by suit to the acceptor for indemnity, or which would amount to a breach of faith in him toward the acceptor.

30. *What is the above rule, as to delay, understood to require?*—112.

That the holder shall not so deal with the acceptor of the bill, or maker of the note, by giving time, or compounding, or giving credit, as to prejudice the right of the other parties to the bill, without their assent. The holder may give time to an immediate indorser, and proceed against the parties behind him. A prior party to a bill is not discharged by a release of a subsequent party. But the holder can not reverse this order.

31. *What acts of the indorser or drawer will amount to a waiver of notice?*—113.

A subsequent promise to pay, by the party entitled to notice, provided the promise was made clearly and unequivocally, and even under a mistake of the law, if it was with full knowledge of the fact of want of due diligence on the part of the holder. So, if the indorser has protected himself from loss by taking sufficient collateral security.

32. *What if an indorser comes again in possession of the bill?*—114.

He will be regarded *prima facie* as the owner, and may sue and recover, as against prior parties, though there be on it subsequent indorsements, and no receipt or indorsement back to him; and he may strike out the subsequent names.

33. *What will discharge the acceptor?*—114.

Nothing short of the statute of limitations, or payment, or a release, or an express declaration of the holder. He is bound, like the maker of a note, as a principal debtor. His acceptance is evidence that the value of the bill was in his hands, or had

been received by him from the drawer. He is liable to the payee, to the drawer, and to every indorser. He is liable to an innocent holder, though the drawer's hand be forged; and, in the suit against him, it is not necessary to prove any hand but that of the first indorser.

34. *What is the usual course, in Europe, pursued by the holder of a protested bill, in order to procure indemnity?*—115.

The general law merchant authorizes the holder to re-draw, from the place where the bill was payable, on the drawer or indorser, in order to reimburse himself for the principal of the bill protested, the contingent expenses attending it, and the new exchange which he pays.

35. *What is the rule of allowance, upon protested paper, in this country?*—117, *n.* (*a.*)

The proper rule, in cases of debt payable in a foreign country, in England for instance, and sued in the United States, is to allow that sum, in the currency of the country, which approximates most nearly to the amount to which the party is entitled in the country where the debt was payable, and calculated by the established par of exchange. But the creditor is, also, entitled to have an amount, equal to what he must pay in order to *remit* it to the place where it was payable. He ought to have just as much allowed him, where he sues, as he would have had if the contract had been duly performed.

36. *What is the rate of damages on bills drawn and payable within the United States, or other parts of North America?*—117, 118.

The New York Revised Statutes provide, that, upon bills drawn or negotiated within the State, upon any person, at any place within the six States east of New York, or in New Jersey, Pennsylvania, Ohio, Delaware, Maryland, Virginia, or the District of Columbia, the damages, upon the usual protest for non-acceptance or non-payment, shall be three per cent. upon the principal sum specified in the bill; and, upon any person within the States of North Carolina, South Carolina, Georgia, Kentucky, and Tennessee, five per cent.; and, upon any person in any other State or Territory of the United States, or at any

other place on, or adjacent to this continent, and north of the equator, or in any British or foreign possessions in the West Indies, or elsewhere in the western Atlantic Ocean, or Europe, ten per cent. The damages are to be in lieu of interest, charges of protest, and all other charges incurred previously to and at the time of giving notice of non-acceptance or non-payment.

The laws and usages of the other States vary essentially on this subject. In some the result is nearly similar, while, in other States, the damages allowed vary from four and a half to fifteen per cent.

37. *What is a mercantile guaranty?*—121.

It is a promise to answer for the payment of some debt or duty, in case of the failure of another person who is in the first instance liable.

38. *What is the principal legal rule governing a mercantile guaranty?*—121, 122.

The English statute of frauds, which has been adopted throughout this country, requires, that "upon any special promise to answer for the debt, default, or miscarriage of another person, the agreement, or some memorandum thereof, must be in writing and signed by the party, to be charged therewith, or some other person thereunto by him lawfully authorized." An agreement to become a guarantor is within the statute; and if it be a guaranty for the subsisting debt or engagement of another person, not only the engagement, but the consideration, must, according to the English decisions, be in writing. The English construction of the statute, in this respect, has been adopted in New York and South Carolina, and rejected in several other States. The decisions have all turned on the force of the word *agreement;* and where by statute the word *promise* has been introduced, as in Virginia, Tennessee, and Mississippi, the construction has not been so strict, and the consideration of the promise need not be in writing.

39. *What are some of the principal rights and duties of the respective parties to a mercantile guaranty?*—123, 124.

The doctrine in the case of negotiable paper, as to demand

and notice, has a feeble and qualified application to the guarantor. Thus it has been held, that the guarantor of a note could be discharged by the laches of the holder, as by neglect to make demand of payment of the maker, and to give notice of non-payment to the guarantor, provided the maker was solvent when the note fell due, and became insolvent afterwards. And, in the case of the absolute guaranty of the payment of a note, no demand or notice is requisite to fix the guarantor. The claim against a surety is *strictissimi juris;* and the surety, who pays the debt of his principal, will, in a clear case, in equity, be entitled to all the liens held by the creditor, who is bound to preserve them unimpaired when he intends to look to the surety for payment.

LECTURE XLV.

OF THE TITLE TO MERCHANT VESSELS.

1. *How may the law of shipping be arranged?*—129.

It may be conveniently arranged under the three following heads, viz.: 1. Of the title to vessels; 2. Of the persons employed in the navigation of merchant ships; and 3. Of the contract of affreightment.

2. *What are the requisites to a title to a ship?*—130–132.

A bill of sale is the true and proper muniment of title, and one which the maritime courts of all nations will look for, and, in their ordinary practice, require. In Scotland, a written conveyance of property in ships has, by custom, become essential; and, in England, it is made absolutely necessary by statute, as to British subjects. Possession of a ship and acts of ownership will, in this, as in other cases of property, be presumptive evidence of title, without the aid of documentary proof, and will stand good until that presumption be destroyed by contrary proof; and a sale and delivery of a ship, without a bill of sale, writing, or instrument, will be good at law, as between the parties.