# CHAPTER 10

# Acceptance

## DEFINITION AND REQUISITES OF ACCEPTANCE

### Definition

THE definition and requisites of acceptance are set out in s.17 of the 1882 Act: **10–001**

> **17.—(1) The acceptance[1] of a bill is the signification by the drawee[2] of his assent to the order of the drawer.**
>
> **(2) An acceptance is invalid unless it complies with the following conditions, namely:**
>
> **(a) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.**
>
> **(b) It must not express that the drawee will perform his promise by any other means than the payment of money.**

The acceptance of a bill is, therefore, in plain terms, a written engagement to pay the bill when due, in money and by no other means.[3] A verbal or implied acceptance is not valid.

In England the drawee of a bill is not liable until he has accepted the bill.[4]

In relation to cheques a bank does not usually accept a cheque and consequently does not incur a personal liability to the payee.[5]

Having accepted the bill the party, previously named the drawee, thereafter is called the acceptor. By accepting the bill the drawee/acceptor undertakes to pay the amount due on the bill at maturity.[6] It remains to be decided whether by **10–002**

[1] Unless the context otherwise requires, the word "acceptance" in the 1882 Act means an acceptance completed by delivery or notification (s.2).

[2] As to drawee, see above, para.3–011.

[3] An acceptance to pay by another bill is no acceptance (*Russell v Phillips* (1850) 14 Q.B. 891); an acceptance in the form:"Accepted payable at National Bank of Greece, St. Mary Axe, from External account . . . " was not a promise to pay by "other means than the payment of money" (*Banca Popolare di Novara v John Livanos & Sons Ltd* [1965] 2 Lloyd's Rep. 149).

[4] See s.53 of the 1882 Act, and below, para.17–002.

[5] The bank though may be in breach of mandate to its customer, the drawer of the cheque.

[6] See Ch.17.

accepting a bill, not previously negotiated, but which is not expressed to be payable on a date certain, the acceptor thereby cures the defect previously affecting the instrument.[7]

In order for a bill to be accepted it must be presented to the drawee; acceptance cannot be presumed nor, ordinarily, can there be "deemed acceptance".[8]

The usual mode of accepting a bill is to write the word "accepted" and to subscribe the drawee's name.[9]

The signature of the drawee on the bill is now the only essential requisite.[10]

An instrument, which is not accepted, still constitutes a bill. There must always be a drawer, a payee and a drawee but an unaccepted bill is a negotiable instrument and enforceable by the holder against the drawer and any prior indorsers. The provisions as to acceptance do not apply to promissory notes.[11]

## Who may accept

10–003 **6.—(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty.**[12]

A bill can only be accepted by the drawee: a stranger may not accept, except for honour.[13] Where, therefore, a bill was drawn on the directors of a company, a person, not a director, who accepted as manager was held not to be personally liable.[14] Where indeed the bill was not addressed to anyone, but only indicated the place of payment, the person who accepted was held liable as having admitted himself to be the party pointed out by the place of payment.[15] However, this decision goes to the verge of the law.[16]

Where the name of the drawee is the established trade name of a company, the signature of a director of the company will be treated as acceptance by the company.[17] Section 26(2) of the 1882 Act provides that in determining whether a

[7] In *Hong Kong & Shanghai Banking Corp Ltd v G D Trade Co Ltd* [1998] C.L.C. 238 the Court of Appeal were inclined to the view that such an acceptance did cure the defect, but found it unnecessary to decide the point: see at 243: see also *Novaknit Hellas SA v Kumar Bros International Ltd* [1998] Lloyd's Rep. Bank. 287 at 292.

[8] See *Man v Miyazaki* [1991] 1 Ll. Rep. 154.

[9] For forms of acceptance, see *Encyclopaedia of Forms and Precedents*, 5th edn (2000 Re-issue), Vol.4(1), paras 642 et seq.

[10] As to the meaning of the term "signature", see above para.2–005.

[11] See s.89(3) of the 1882 Act.

[12] See above, para.3–011; *Davis v Clarke* (1844) 13 L.J.Q.B. 305. A mere error of description, the drawee and acceptor being admittedly the same person, will not affect the validity of the acceptance (*Dermatine Co v Ashworth* (1905) 21 T.L.R. 510).

[13] *Polhill v Walter* (1832) 3 B. & Ad. 114; *Eastwood v Bain* (1858) 28 L.J.Ex. 74; *Rabkin and Hoffman v National Bank of South Africa* (1915) 6 C.P.D. 545; see also the 1882 Act, s.65(1), below, para.10–014. The marking of a cheque is not an acceptance in this country or within the Indian Negotiable Instruments Act 1881 (*Bank of Baroda v Punjab National Bank* [1944] A.C. 176).

[14] *Bule v Morrell* (1840) 12 A. & E. 745.

[15] *Gray v Milner* (1819) 8 Taunt. 739.

[16] See *Davis v Clarke* (1844) 13 L.J.Q.B. 305 (Patterson J.); *Peto v Reynolds* (1954) 9 Ex. 410 at 416 (Martin B.). A bill addressed not to a drawee, but to an address might, otherwise than by naming, indicate the drawee within s.6(1).

[17] See *Maxform Spa v Mariana* [1979] 2 Ll. Rep 385; affirmed [1981] 2 Ll. Rep. 54; *Lindholst & Co v Fowler* [1988] B.C.L.C. 166.





signature on a bill is that of a principal or that of an agent the construction most favourable to the validity of the instrument shall be adopted.

If the drawee is fictitious or incompetent to contract, as, e.g., by reason of infancy,[18] the bill may be treated as dishonoured by non-acceptance.

If a bill is drawn upon several persons not in partnership, it should be accepted by all,[19] and, if not, may be treated as dishonoured.[20] Acceptance will, however, be binding upon such of them as do accept.[21] 10–004

There cannot be two or more separate acceptors of the same bill not jointly responsible. This is illustrated by a decision prior to the 1882 Act, *Jackson v Hudson*.[22] The plaintiff refused to supply one Irving with goods, unless the defendant would become his surety. The defendant agreed to do it. Goods to the value of £157 were accordingly sold by the plaintiff to Irving. For the amount the plaintiff drew on Irving, and the bill was accepted both by Irving and the defendant, each writing his name on it. Lord Ellenborough observed:

> "If you had declared that, in consequence of the plaintiff selling the goods to Irving, the defendant undertook that the bill should be paid, you might have fixed him by this evidence. But I know of no custom or usage of merchants according to which, if a bill be drawn upon one man, it may be accepted by two; the acceptance of the defendant is contrary to the usage and custom of merchants. A bill must be accepted by the drawee, or, failing him, by someone for the honour of the drawer. There cannot be a series of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as such."[23]

Although there can be no other acceptor after a general acceptance of the drawee, it was formerly stated that a man might *supra protest* accept for the honour of the drawer a bill already accepted *supra protest* for the honour of an indorser.[24]

## Time for acceptance

As to the time at which a bill may be accepted, the 1882 Act provides: 10–005

> **18. A bill may be accepted:**
> **(1) Before it has been signed by the drawer, or while otherwise incomplete:**
> **(2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment:**
> **(3) When a bill payable after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different**

[18] The 1882 Act, s.41(2)(a), below, para.11–010. The holder may also treat it as a note, in which case the drawer will, as maker, not be entitled to notice of dishonour (ss.5(2), 52(3), and 89).

[19] By s.23, no person is liable as drawer, indorser or acceptor who has not signed as such. As to the liability of partners *inter se*, see above, paras 7–017 et seq.

[20] By s.19(2)(e), (below, para.10–012), the acceptance of one or more of the drawees but not all is a qualified acceptance, and by s.44(1), the holder may treat a qualified acceptance as dishonour of the bill.

[21] Bayley, 6th edn, p.58; cf. *Owen v Van Uster* (1850) 10 C.B. 318, followed in *McDougall v McLean* (1893) 1 Terr.L.R. 450; *Nicholls v Diamond* (1853) 9 Exch. 154.

[22] See below.

[23] *Jackson v Hudson* (1810) 2 Camp. 447; the 1882 Act, ss.6, 56. Where a bill was drawn on a firm in the firm name, and a partner added his own name to such acceptance, he was held not to be personally liable thereon (*Re Barnard* (1886) 32 Ch.D. 447).

[24] Beawes (ed) (1813), Vol.1, para.42. There are no express words in s.65 supporting this view.

**agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance.**

Subsection (1): until the drawer's name is inserted, however, the instrument is not a bill of exchange.[25] As we have seen, the signature of a drawer, maker, or indorser on blank stamped paper, delivered to be filled up as a negotiable instrument, bound them respectively; so an acceptance, written on the paper before the bill is made, and delivered by the acceptor, charged the acceptor to the extent warranted by the stamp.[26] An acceptance for value, before the bill is filled up, is irrevocable.[27] Notice that the acceptance was in blank should put the holder on inquiry.[28]

Subsection (2): this provides that a bill may be accepted after it has matured. A bill accepted when overdue is, by s.10(2), deemed to be payable on demand, so far as the acceptor and any indorser is concerned.[29]

10–006 Subsection (3): as to the date of acceptance of a bill payable after sight which has been previously dishonoured by non-acceptance but is subsequently accepted, the holder is put in the position as if the acceptance occurred when first presented for acceptance, absent any agreement to the contrary.

As already stated, the date on the bill or note, or of the acceptance, making, or indorsement thereon, is prima facie the true date[30] and where the acceptance is not dated, the presumption is that it was accepted before maturity, and within a reasonable time of its date.[31]

## TYPES OF ACCEPTANCE

### General and qualified acceptance

10–007 **19.—(1) An acceptance is either (a) general, or (b) qualified.**

**(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.**

By s.44(1) the holder may refuse to take a qualified acceptance, and may treat the bill as dishonoured by non-acceptance.[32]

[25] See also above, para.2–008; nor when completed as a bill will completion relate back to the time when the acceptance was written on it (*Ex p. Hayward* (1871) L.R. 6 Ch. 546; *McDonald (Gerald) & Co v Nash & Co* [1924] A.C. 625 at 652 (Lord Sumner).

[26] See s.20, above, para.4–001, and cases there dealt with. There is today no stamp duty on bills, notes and cheques.

[27] See the 1882 Act, s.21(1) proviso.

[28] *Hatch v Searles* (1854) 2 Sm. & G. 147 (giving a blank acceptance is only prima facie evidence of authority to fill up); *Hogarth v Latham* (1878) 3 Q.B.D. 643 at 647, per Bramwell B., acceptance by one partner without authority of another.

[29] *Mutford v Walcot* (1700) 1 Ld.Rym. 574; *Christie v Peart* (1841) 7 M. & W. 491; see below, para.17–035.

[30] See s.13(1), above, para.2–016.

[31] *Roberts v Bethell* (1852) 12 C.B. 778.

[32] See below, para.10–013.





Once a bill is accepted generally, presentment for payment is not necessary to render the acceptor liable.[33] The position will be otherwise if the term of a qualified acceptance requires presentment.[34] Prima facie, in cases of doubt, an acceptance is to be construed as a general rather than a qualified acceptance.[35]

Any alteration in any acceptance contrary to the tenor of the bill as drawn must be in the clearest language.[36]

The 1882 Act recognises five sorts of qualified acceptance.[37] The view has, however, been expressed that this list is not exhaustive, and that there may be other cases of qualified acceptances.[38] The consequences flowing from a qualified acceptance are dealt with in s.44 of the 1882 Act.[39]

### Conditional acceptance

**19.—(2) . . . In particular an acceptance is qualified which is:** 10–008

(a) **conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated:**

Whether an acceptance be conditional or not is a question of law.[40] Acceptance, "to pay as remitted for",[41] "to pay when in cash for the cargo of the ship Thetis",[42] "to pay when goods consigned to him (the drawee) were sold",[43] have respectively been held to be conditional acceptances. The words "accepted payable on giving up a bill of lading" constitute a conditional acceptance, but not a further condition to the acceptor's liability, that the bill of lading shall be given up on the day of the maturity of the bill, for under these circumstances it is not necessary to present the bill on the precise day on which it is due.[44]



[33] 1882 Act s.52(1).

[34] 1882 Act s.52(2).

[35] Bills were drawn in Dutch florins on a London firm, payable in Amsterdam; it was held that the acceptances were general (*Bank Polski v Mulder* [1942] 1 K.B. 497); see s.19(2)(c), below, para.10–010, as to acceptance to pay at a particular place only. This case is almost anticipated in precise terms by *Ex p. Hayward* (1887) 3 T.L.R. 687, per Mackinnon L.J.

[36] *Decroix v Meyer* (1890) 25 Q.B.D. 343 at 347, approved in *Canadian Bank of Commerce v BC Interior Sales* (1957) 9 D.L.R. (2d) 363; *Fanshaw v Peet* (1857) 2 H. & N. 1 at 4 (Martin B). In *Decroix v Meyer*, the words "in favour of F. (the drawer) only" were written above the acceptance, but were held not to qualify the acceptance, meaning that the acceptance is of a bill of which Flipo is the drawer or payee (Lord Esher M.R.); it might have been otherwise if the words had been "payable to F. only"; at 358 (Bowen L.J.); in *Meyer v Decroix* [1891] A.C. 520, the House of Lords by a majority of three to two held that the acceptance was a general acceptance of a negotiable bill (Lord Herschell was of opinion that the words as written were clearly not part of the acceptance).

[37] See s.19(2)(a)–(e).

[38] *Decroix v Meyer* (1890) 25 Q.B.D. 343 at 348 (Lord Esher M.R.) who further seems to be of opinion that there could be a "restrictive acceptance", if properly worded, just as there can be restrictive indorsements and drawings (ss.8 and 35) but that the drawee has no right to alter the tenor of the bill itself; see at 347.

[39] See below, para.10–013.

[40] *Sproat v Mathews* (1786) 1 T.R. 182.

[41] *Banbury v Lissett* (1744) 2 Str. 1211.

[42] *Julian v Shobrooke* (1753) 2 Wils. 9.

[43] *Smith v Abbot* (1741) 2 Str. 1152.

[44] *Smith v Vertue* (1860 30 L.J.C.P. 56, applied in *Humphreys v Taylor* [1921] N.Z.L.R. 343.

# CHAPTER 19

# Consideration

## INTRODUCTION

### History

AS a general principle in order for a promise to be binding, in English law, it must either be made by deed or supported by "consideration".[1] As long ago as 1937 it was possible for the Law Revision Committee, in its sixth Interim Report (Cmd. 5449), to say that the doctrine of consideration was peculiar to the Anglo-American law, that the law of Scotland had always rejected the view that consideration was essential to the formation of a contract; and that the common law of England was alone in the view that a contract should not confer any rights on a stranger even although the sole object was to benefit him. The Committee's recommendations included that an agreement shall be enforceable if the promise or offer has been made in writing by the promisor or his agent, or if it is supported by valuable consideration past or present. The Committee's recommendations never received legislative approval.[2] **19–001**

*The Banking Services: Law and Practice Report* by the Review Committee recommended that the need for consideration as a test of negotiability should be abolished,[3] but again the recommendation has not been put into effect. The position remains, then, that the general law as to consideration applies to bills, except to the extent provided by the 1882 Act. The 1882 Act not only sets out what is meant by consideration, but provides that consideration (1) is presumed unless the contrary is proven, and (2) may be constituted by an antecedent debt or liability.

### The meaning of consideration

Under the 1882 Act consideration is the same thing as value; by s.2 "value means valuable consideration", which, in s.27(1) is stated as constituted by: **19–002**

(a) **any consideration sufficient to support a simple contract;**

[1] See *Chitty on Contracts*, 31st edn (2012), Vol.1, Ch.3, paras 3–001 et seq.

[2] By s.1 of the Contracts (Rights of Third Parties) Act 1999 a contract made between A and B which complies with the requirements set out may confer enforceable rights on C, a non-party. S.6(1) of that Act excludes its operation to bills of exchange, cheques and promissory notes. It may be, nonetheless, that rights conferred by that Act could amount to consideration sufficient to support a claim upon a bill where previously none could have been found.

[3] Cm.622 (1989), recommendation 8(4).

(b) **an antecedent debt or liability whether the bill is payable on demand or at a future time.**[4]

## Presumption as to consideration

19–003 If a man seeks to enforce a simple contract the onus lies on him to establish that there was good consideration. However to this rule bills and notes are an exception. In the case of simple contracts, the law presumes that there was no consideration until a consideration appears; in the case of contracts on bills or notes, a consideration is presumed till the contrary appears, or at least appears probable,[5] for the 1882 Act provides:

> **30.—(1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.**

Strictly a claimant in pleading his statement of case, when suing on a bill, need not allege the consideration relied upon. It is suggested though that under the Civil Procedure Rules it is preferable to state the consideration given and essential where it is known that it is disputed.[6]

## Presumption as to holder in due course

19–004 The 1882 Act goes further than providing that there is a presumption as to value, for it provides:

> **30.—(2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.**[7]

Subsection (2) settles and possibly alters the law. Before the 1882 Act it was not clear whether the onus was shifted both as to value and good faith on proof of fraud or illegality.[8] In *Tatam v Haslar*[9] Denman J. said:

[4] See above, paras 2–018 and 2–019.

[5] In *Jones v Thomas* (1837) 2 Y. & C. 498, the action was between attorney and client, and as between the parties themselves it was held that the attorney must prove the consideration for a note received by him from the client in circumstances of great suspicion.

[6] See Bullen & Leake & Jacob's *Precedents of Pleading*, 17th edn (2011), Vol.1, para.7–16.

[7] In *Thambirajah v Mahesvari* (1961) Ceylon N.L.R. 519, the Supreme Court held that to claim the presumption, the plaintiff must first show that he is a holder, and, as the notes in question were not payable to bearer, he must show a valid indorsement to him.

[8] *Jones v Gordon* (1877) 2 App.Cas. 616 at 628 (Lord Blackburn), see also *Bailey v Bidwell* (1844) 13 M. & W. 73 at 76.

[9] (1889) 23 Q.B.D. 345.





> "That was the old law as stated in *Hall v. Featherstone*[10] which has not, I think, been altered by this Act. The words 'if it is admitted or proved' mean no more than that some evidence of circumstances in the nature of fraud must be given sufficient to be left to the jury";

but the 1882 Act has now clearly settled that the onus is so shifted.[11]

## Good faith

"In good faith" means honestly, whether negligently or not (s.90).[12] Proof of full value having been given is not absolutely inconsistent with want of good faith[13]; but where the person relied on as having given value in good faith is dead or cannot be called, proof of full value having been given by him would be strong evidence of good faith.[14] It is further clear that a holder with notice, being a transferee from a holder in due course, is not prejudiced by the fact of notice as he stands in the shoes of his transferor.[15] 19–005

## Fraud, duress and illegality

The issues of fraud and other defects in title are dealt with in Ch.18. Though negligence is not constructive notice of fraud, etc. "wilfully shutting one's eyes to the means of knowledge" may be.[16] The defendant must still prove, not only the fraud or illegality, but also the claimant's knowledge of it. If the holder establishes that he is a holder in due course, having taken the bill in accordance with the conditions laid down in s.29, then s.30(2) has no application.[17] 19–006

[10] (1858) 3 H. & N. 284.

[11] *Tatam v Haslar* (1889) 23 Q.B.D. 345; *Brown v Israelstam* (1909) 7 Transvaal H. 22. It is interesting that Brannan points out, (p.143), that the language of subs.(2) "is not quite correct; for the holder may be a holder in due course though the fraud or illegality was in the transfer to him". The same applies to a payee holder for value. Cowen, (p.82), says: "It is now well settled that consideration in the sense of English law is foreign to the conception of a contract under Roman-Dutch law." In Ceylon, something less than is required by English law is normally adequate to support a simple contract, but in regard to bills of exchange s.27(1) of the Bills of Exchange Ordinance provides that valuable consideration may be constituted by "any consideration sufficient by the law of England". This is anomalous in view of the fact that the common law of Ceylon is Roman-Dutch.

[12] See above, para.18–007.

[13] *Raphael v Bank of England* (1855) 17 C.B. 161 at 172 (Cresswell J.); *Harris v Aldous* (1899) 18 N.Z.L.R. 499.

[14] Lord Esher M.R. favoured the editors of the 15th edn of this book with the following opinion on this subject: "If the plaintiff (or party giving the value relied on) can be called, no jury would, I think, be satisfied unless he is called to say that he had no knowledge of the fraud. But if he be dead, or cannot be called, proof of his having given full value would of itself by strong evidence of bona fides and ignorance of the fraud, there being no evidence of any suspicious circumstances." See also *Oakley v Boulton, Maynard & Co* (1888) 5 T.L.R. 60; *Noble v Boothby* (1912) 22 W.L.R. (Can.) 232.

[15] See s.29(3), see above, para.18–011.

[16] *May v Chapman* (1847) 16 M. & W. 355 at 361 (Parke B.), approved in *Raphael v Bank of England* (1855) 17 C.B. 161 at 174 (Willes J.). In South Africa "constructive notice" is not the equivalent of bad faith, *per* Cowen in the *Law of Negotiable Instruments in South Africa*, 4th edn (1966), citing *John Bell & Co v Esselen* (1954) (1) S.A. 147, AD.

[17] *Barclays Bank v Astley Industrial Trust* [1970] 2 Q.B. 527. Section 30 was also considered in *Mansavri v Singh* [1986] 1 W.L.R. 1393, in relation to its possible conflict with the Bretton Woods Agreement Order 1946 (SR & O 36).

The 1882 Act does not include within the instances where the burden of proof is shifted, the case of the defendant's proving that the bill has been lost, but it may be included under the general heading "illegality", since the finder of a lost bill or note acquires no property therein. There does not appear to be any direct authority on the subject.[18] Similarly the subsection does not advert to bills being given under undue influence; but it is suggested that undue influence may be covered by "illegality" or "duress".[19]

### Position of the payee

19–007 Subsection (2) does not apply to any case in which the holder, who is seeking to enforce a negotiable instrument, is the person to whom the instrument was originally delivered and in whose possession it remains.[20]

### Accommodation bill

19–008 It was once held that the defendant, by showing the bill to be an accommodation bill, or that he received no value, could call on the plaintiff to prove consideration.[21] However it was subsequently settled that mere absence of consideration received by the defendant will not entitle him to call on the plaintiff to prove the consideration which the plaintiff gave. "There is, indeed", says Lord Abinger:

> "a substantial distinction between them (*viz.* bills given for accommodation only, and cases of fraud), inasmuch as in the former case it is to be presumed that money has been obtained upon the bill. If a man comes into court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value.
>
> The proof of its being an accommodation bill is no evidence of the want of consideration in the holder. If the defendant says, "I lent my name to the drawer for the purpose of his raising money upon the bill", the probability is that money was obtained upon the bill. Unless, therefore, the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen, in which case the holder must show that he gave value in good faith for it, the *onus probandi* is cast upon the defendant."[22]

[18] In *Paterson v Hardacre* (1811) 4 Taunt. 114 it was treated as settled law that when a bill had been lost or fraudulently obtained, consideration must be proved; see also *Mills v Barber* (1836) 1 M. & W. 425 at 431. On the other hand, in *King v Milsom* (1809) 2 Camp. 5, where the plaintiff sought to maintain trover for a lost note, it was held by Lord Ellenborough C.J. that the onus of proving consideration in good faith was not shifted to the defendant in the absence of "strong evidence of fraud". A distinction may perhaps be taken between the case of an instrument which has been lost in circumstances that may not constitute the keeping of it larceny by the finder, and that of one taken from the true owner by felony; the case of, e.g. a banknote which had been lost in a public place, it may be that the onus does not lie upon the holder to prove himself a holder in due course. But where it is proved that the note was stolen or improperly obtained the onus is clearly shifted to the holder (*De la Chaumette v Bank of England* (1829) 9 B. & C. 208). As to larceny and felony, see the Theft Act 1968, s.32(1)(a) by which the offence of larceny was abolished; and the Criminal Law Act 1967 s.1, by which all distinctions between felony and misdemeanour were abolished.

[19] See above, paras 6–014 and 18–024.

[20] *Talbot v Von Boris* [1911] 1 K.B. 854, citing *Watson v Russell* (1862) 3 B. & S. 34; (1864) 5 B. & S. 968.

[21] See *Heath v Sansom* (1831) 2 B. & Ad. 291; *Thomas v Newton* (1827) 2 C. & P. 606.





### Adequacy of consideration

"The courts do not normally concern themselves with the adequacy of consideration. But inadequacy of consideration may be evidence of bad faith or fraud".[23] 19–009

The cases cited do not take the matter very far, so much depending upon the circumstances. It seems clear beyond question, however, that if there is any question of fraud on the part of the claimant, he may not recover. Perhaps the best statement of the position is to be found in Lord Blackburn's judgment in *Jones v Gordon*[24]:

> "... I think it right to say that I consider it to be fully and thoroughly established that if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action on a bill of exchange. I take it that in order to make such a defence, whether in the case of a party who is solvent and *sui juris*, or when it is sought to be proved against the estate of a bankrupt, it is necessary to show that the person who gave the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was."

This is not a pure instance of inadequacy. A closer instance is to be found in the case of *Simons v Cridland*[25] in which it was held that where a holder of a long overdue acceptance sues for payment, having given only a nominal sum for it, an injunction would be granted restraining the defendant from further proceeding, on the terms that the plaintiff gives judgment at law, to be dealt with as the court should direct. The defendant had taken a note subject to the equities and the plaintiff had a right to have an account taken. The American decision[26] referred to by Chalmers states the position in the words of Hunt J. to the effect that the argument of the plaintiff is that negotiable paper may be sold for such sum as the parties may agree upon and that whether such sum is large or small the title to the entire paper passes to the purchaser. This is true; and if the plaintiff had bought the notes of $500 before maturity and without notice of any defence and paid that sum the authorities show that the whole interest in the notes would have passed to him and he could have recovered the full amount due upon them.

[22] *Mills v Barber* (1836) 1 M.& W. 425, where it was stated that the judges who decided *Heath v Sansom*, above, had withdrawn the opinions, they had there expressed, views which had indeed already been dissented from: see *Whittaker v Edmunds* (1834) 1 Moo. & R. 366; *Jacob v Hungate* (1834) 1 Moo. & R. 445.

[23] See *Chalmers & Guest on Bills of Exchange and Cheques*, 17th edn (2009), para.4–011.

[24] (1877) 2 App.Cas. 616 at 628; and, at 631, he said: "that since the repeal of the Usury laws we can never inquire into the question as to how much was given for a bill ... ".

[25] (1862) 5 L.T. (N.S.) 523.

[26] *Dresser v Missouri Co* (1876) 3 Otto 92, US Sup. Ct.; see also *Allen v Davis* (1850) 20 L.J. Ch. 44, in which an inference of fraud was drawn.

> "... it is elementary that as between the immediate parties to a bill of exchange, which is treated in international commerce as the equivalent of cash, the fact that the Defendant may have a counterclaim for unliquidated damages arising out of the same transaction forms no sort of defence to an action on a bill of exchange and no ground upon which he should be granted a stay of execution of the judgment in the action for the proceeds of the bill of exchange."[77]

**26–024** As to the Mareva point Bridge L.J. continued[78]:

> "I am far from saying that in no circumstances whatever could such an injunction as was granted by Jupp J. in (this) case be granted to restrain a Plaintiff from dealing with the fruits of a judgment in this type of situation ... [It] seems to me that the basis of the Mareva injunction is that there has to be a real reason to apprehend that if the injunction is not made, the intending Plaintiff in this country may be deprived of a remedy against the foreign Defendant whom he seeks to sue .... Certainly no case has been cited to us in which such an injunction was granted when there was not every reason to apprehend that without such injunction the Plaintiff creditor would be defeated."

In other words a freezing injunction will not be granted merely to prevent a claimant from enjoying the fruits of judgment pending the hearing of a counterclaim. Equally, a stay will not be granted on the sole basis that a claimant has no assets in the jurisdiction with which to satisfy a potential counterclaim.[79]

### Insolvency

**26–025** An unliquidated claim for damages may nonetheless be raised as a cross-claim in answer to a statutory demand.[80] Similarly it may be set up in opposition to a winding-up petition.[81] Such a claim will fall to be dealt with in accordance with the statutory provisions for insolvency set-off where they apply.[82] In *Isover Contracts Limited (In administration) v ABB Building Technologies Limited*[83] a stay of execution was refused in respect of the claimant company's judgment upon a dishonoured cheque; the company was in administration, not liquidation, and the effect of granting a stay would have been to extend the effect of insolvency set-off under r.4.90 of the Insolvency Rules to circumstances in which it expressly did not apply.

[77] per Bridge L.J. at 1183.
[78] At 1183–1184.
[79] *Cebora SNC v SIP (Industrial Products) Ltd* [1976] 1 Lloyd's Rep. 271 at 280, per Sir Eric Sachs.
[80] *Hofer v Strawson* [1999] 2 B.C.L.C. 336; *The Times*, April 17, 1999, applying r.6.5(4) of the Insolvency Rules 1986. Similarly in *Ahmed v Landstone Leisure Ltd* [2009] EWHC 125 (Ch) the court set aside a statutory demand based upon a dishonoured cheque which had arguably been procured by misrepresentation.
[81] *Marchands Associates LLP v The Thompson Partnership LLP* [2004] EWCA Civ 878; applying *ReBayoil SA* [1999] 1 W.L.R. 147; and citing by way of illustration *Re LHF Wools Ltd* [1970] Ch. 27
[82] See r.4.90 of the Insolvency Rules 1986 (companies in liquidation) and s.323 of the Insolvency Act 1986 (bankruptcy).
[83] [2002] 1 B.C.L.C. 390.



# CHAPTER 27

# Procedure—II:

## PLEADING AND EVIDENCE

### Forum

**27–001** ACTIONS may be brought in the High Court or County Court.[1] Claims relating to bills or cheques may fall within the subject matter of the specialist lists established under CPR Pt 49.

### Commencement

**27–002** Proceedings are commenced by the issue of the claim form.[2] Generally proceedings may not be commenced until there is a cause of action upon the bill, which will not be until its maturity even if the acceptor has refused payment.[3] Under CPR 16 PD para.3.1 parties are encouraged to serve particulars of claim together with the claim form; service of them is generally[4] necessary for any judgment to be obtained. There is no necessity for a prior demand on the maker of a note unless it is specified to be payable at a particular place (in which case a conforming presentment for payment is required), the commencement of proceedings being sufficient,[5] but a party issuing a claim form without demand could expect, if the note was then paid, to be penalised in costs.[6]

[1] The Civil Procedure Rules apply to both. An action may not be commenced in the High Court unless it is for a sum exceeding £15,000. A description of the rules is beyond the scope of this work and reference should be made to the Civil Procedure Rules. See also Bullen, Leake & Jacob's *Precedents of Pleading*.
[2] In accordance generally with CPR Pt 7 or CPR Pt 8 where that procedure is appropriate.
[3] *Wells v Giles* (1836) 2 Gale 209; *Kennedy v Thomas* [1894] 2 Q.B. 759; *Gelmini v Morriggia* [1913] 2 K.B. 549 at 552; (cf. *Westaway v Stewart* (1908) 8 W.L.R. 907; *Thibeault v Gauthier* (1928) 34 R. du Jur. 190) though notice of dishonour might be given. A claim might perhaps be allowed to include a claim for payment of a bill which has not yet matured where it is one of a series of claims which are brought together, or where injunctive or other relief is sought prior to maturity.
[4] Practice in the Commercial Court is different.
[5] *Rumball v Ball* (1711) 10 Mod. 38; *Norton v Ellam* (1837) 2 M. & W. 461.
[6] *Macintosh v Haydon* (1826) Ry. & M. 362, but particularly under modern practice.

## Statements of case—general

27–003 There are under the Civil Procedure Rules no prescribed forms for statements of case, which are required to be a "concise statement of the facts". The substantial volume of old case law dealing with technical requirements of pleading, and the matters which might be proved under various averments, is now obsolete.[7]

The formal requirements for the contents of statements of case are set out in CPR Pt 16 and the Practice Direction supplementing that Part. Where a claim is brought in specialist proceedings under CPR Pt 49 reference should also be made to the relevant practice guide. In general terms, if the statement of case sets out properly the facts relied on, the claim will not be defeated by a technical objection to the form. Where under the approach favoured by the CPR the parties have clearly identified their positions, and the matters in dispute, it is sensible for the claimant to set out his case upon those issues in detail. It is suggested that this course is appropriate even in respect of those matters which, by virtue of a presumption arising under the Act, are presumed in his favour or in respect of which the burden is upon the defendant. If a matter is denied, reasons must be given.

Statements of case must be verified by a statement of truth in accordance with CPR Pt 38. Provided they are so verified they may stand as evidence in interlocutory proceedings.

## Presumptions—general

27–004 The 1882 Act contains a number of statutory presumptions, some of which will be referred to below. Prima facie presumptions may be displaced by evidence; their effect is to shift the onus of proof. In some cases matters are conclusively presumed in favour of a holder in due course; and a defence which purports to deny them without also denying (giving proper reasons) the claimant's status as such a holder would be liable to be struck out.[8] In other cases a party is absolutely precluded from denying a matter, and consequently any attempt to do so could be struck out as a matter of law.

## Particulars of bill

27–005 The particulars of claim should state the date, amount and parties to the bill.[9]

[7] Indeed much of it has for some time not reflected practice. References to that case law are not maintained in this edition save where relevant to a matter which remains good practice. Similarly previous editions have considered many decisions relating to rules of evidence which are no longer relevant and these too are omitted. It should be noted that while, generally, the previous rules were more technical and restrictive, they include cases in which parties were allowed under a general averment or denial to establish by evidence facts which now (and for some time) ought to be specifically pleaded, and which they would not be allowed to raise without amendment or proper notice to the other side.

[8] Under CPR Pt 3, or in practical terms judgment could be entered upon the claim, or issue, pursuant to CPR Pt 24.

[9] *Walker v Hicks* (1877) 3 Q.B.D. 8; *Manchester Advance Co Ltd v Walton* (1892) 62 L.J.Q.B.158.





Where a bill is payable at usance, this should be specifically stated.[10] CPR PD 16 para.8.3 requires a party relying on a written contract to attach or serve with his particulars of claim a copy of the contract. Doing so avoids the need to transcribe the terms of the instrument (which may be highly material if the proper construction or effect is in dispute), as well as providing all the material for an application for summary judgment should one follow.

It has been said that a claim on a foreign bill should state it to be so, because of the presumption that a bill is an inland bill until the contrary is shown, and that the claimant might otherwise be obliged to amend if the defendant denies the acceptance of it as an inland bill,[11] but if the circumstances of the bill appeared from the face of the pleading (or its face) and/or the question is not material, then this may no longer be considered important.

## Amount and interest

27–006 The amount claimed, which may be in foreign currency,[12] should be stated. Particulars of the interest claimed should be set out in accordance with CPR 16.4(2).[13] The damages and interest or other compensation payable upon a bill are a matter for the substantive law governing the relevant obligation and may differ from the measure under English law,[14] or vary between parties to the bill.

## Status of claimant

27–007 The claimant should state the capacity in which he sues. It was held in *Arab Bank v Ross*14 that a pleading in which the plaintiff claimed as a holder in due course was sufficient to enable him to succeed as a holder for value.[15]

By s.30(2) of the 1882 Act every holder is presumed to be a holder in due course, unless one of the factors mentioned there is shown, in which case the burden shifts to the claimant to show that value has subsequently been given in good faith for the bill.[16]

## Capacity of parties to the bill

27–008 Evidence may be given to explain the capacity or circumstances in which persons have become parties to a bill, even where this is contrary to the appearance of the instrument:

[10] *Meggadow v Holt* (1691) 12 Mod. 15; *Buckley v Campbell* (1708) 1 Salk. 131. A usance must be proved and will not be judicially noticed.

[11] *Armani v Castrique* (1844) 13 M. & W. 443; cf. Bullen and Leake, *Precedents*.

[12] *Barclays Bank International v Levin Bros (Bradford)* [1977] Q.B. 270, and see below, Ch.28. The information required by CPR PD 16 para.10 must be provided.

[13] [1952] 2 Q.B. 216.

[14] See for example *Karafarin Bank v Mansoury-Dara* [2009] EWHC 3265; [2010] 1 Lloyd's Rep. 236, para.25-026 above.

[15] Romer L.J. expressed the view that a party intending to rely in the alternative on his status as a holder for value should specifically say so. It is respectfully suggested that this is redundant.

[16] *Siffman v Grydy* [1909] T.S. 568 is to the effect that fraud must be proved "up to the hilt". This seems to reflect no more than the generally high civil burden for such an allegation, which must be specifically alleged and proved. A properly formulated allegation of fraud is sufficient to displace the onus: see the cases cited above, at para.26–015.

> "[I]t is a well established rule oflaw that thewhole facts and circumstances attendant upon themaking, issuing and transference ofa bill may legitimately bereferred tofor the purpose ofascertaining the true relation toeach other ofthe parties who put their signature upon it, either as makers or indorsers, and that reasonable inferences derived from these facts and circumstances areadmitted to theeffect ofqualifying, altering or even converting the relative liabilities which the law merchant would otherwise assign to them."[17]

### Principal and surety

**27–009** In the case of a note on its face joint or joint and several, the introduction of equitable principles since the Judicature Acts now enables a surety in all cases[18] to give evidence to show that the creditor was affected with knowledge that he was but a surety and in consequence to set up any defence arising out of the law of principal and surety.[19] Where the question arises between the principal debtor and sureties, or between the sureties *inter se* in an action for indemnity or contribution, such evidence has always been admissible.[20]

### Delivery

**27–010** No contract upon a bill is complete until it has been delivered,[21] nonetheless delivery by all prior parties is conclusively presumed in favour of a holder in due course.[22] Against a party other than a holder in due course, there is a prima facie presumption of delivery, but this may be rebutted by evidence. If delivery is denied, then proper reasons should now be given. Evidence may be adduced to dispute valid delivery or to show that delivery was without authority, subject to a condition, or for a special and limited purpose other than the transfer of property in the instrument.[23]

### Consideration

**27–011** By s.30(1) of 1882 Act there is a rebuttable presumption that any party signing a bill became a party to it for value, and it is not therefore strictly necessary to plead consideration. It is nonetheless sensible to state the consideration where this is practicable, and especially when it is known to be in dispute.

[17] per Lord Watson in *Macdonald v Whitfield* (1883) 8 App.Cas. 733. As to whether evidence may now be given to contradict the terms of a bill see para.26–021 dealing with parol evidence.
[18] Formerly it was otherwise: *Price v Edmunds* (1830) 10 B. & C. 578; *Strong v Foster* (1855) 17 C.B. 201.
[19] See below, Ch.33. Early examples include *Hollier v Eyre* (1842) 9 Cl. & F. 1 at 45; *Davies v Stainbank* (1855) 6 De G.M. & G. 679; *Greenough v M'Clelland* (1860) 30 L.J.Q.B. 15; *Overend, Gurney & Co v Oriental Finance Co* (1874) L.R. 7 H.L. 348.
[20] *Reynolds v Wheeler* (1861) 30 L.J.C.P. 350; *Godsell v Lloyd* (1911) 27 T.L.R. 383.
[21] 1882 Act s.21(1).
[22] 1882 Act s.21(3). For an illustration of reliance on the presumption see *Surrey Asset Finance Ltd v Nat West Bank* [2001] EWCA Civ 60.
[23] 1882 Act s.21(2).





Conversely, if the defendant wishes to deny that consideration was given for the bill[24] then he should properly set out the reasons.

### Indorsements

**27–012** It is not strictly necessary to set out each indorsement appearing on a bill, but it is sensible to set them out, certainly if the manner in which the claimant acquired title is in issue.

Indorsements are deemed to have been placed on the bill in the order in which they appear,[25] and to have been made before the bill was overdue,[26] but in each case subject to proof to the contrary.

A defendant has a right at the trial to call on the plaintiff to read any indorsements that may be on the bill.[27]

### Presentment

**27–013** In a claim for dishonour by non-acceptance, the fact and circumstances of presentment for acceptance (or alternatively the matters dispensing with it) should be set out. In a claim following dishonour by non-payment against the drawer or an indorser, and (whether or not strictly necessary) against the acceptor, the presentment and subsequent dishonour (or the circumstances dispensing with presentment) should likewise, as material facts, be set out.

### Proceedings on dishonour

**27–014** Notice of dishonour (and where required noting and protest), is a constituent of the cause of action against a drawer or indorser, so in an action against such a party the particulars of claim should set out the giving of such notice, or alternatively plead the facts by which notice was dispensed with.[28]

Notice of dishonour may be proved by inference from other matters. After the bill is due a promise to pay, or a part payment,[29] or the offer of it,[30] or any

[24] Note that the action can be maintained if value has at any time between the parties been given for the bill (1882 Act s.27(2)), and it is no defence for an accommodation party to allege its absence (s.28(2)). The presumption was referred to in *Vectra Software Corp Ltd v Despec Supplies Ltd* [2004] EWHC 3151.
[25] 1882 Act s.32(5).
[26] 1882 Act s.32(6).
[27] *Richards v Frankum* (1840) 9 C. & P. 221. As to agreements by clerks in fraud of their employers, see *Bosanquet v Foster* (1841) 9 C. & P. 659; *Bosanquet v Corser* (1841) 9 C. & P. 664. A holder may strike out indorsements which are not necessary to his title, and a series of indorse- ments in blank may be so irrelevant. However it has been held that at trial indorsements not pleaded or relied on should be struck out (*Mayer v Jadis* (1836) 1 M. & Rob. 247) in which case the remedy against the indorsers is lost. Whether or not that remains good, it is preferable to plead the indorsements thereby preserving rights against all parties.
[28] *Fruhauf v Grosvenor* (1892) 61 L.J.Q.B. 717; *May v Chidley* [1894] 1 Q.B. 451; *Roberts v Plant* [1895] 1 Q.B. 597.
[29] *Horford v Wilson* (1807) 1 Taunt. 12.
[30] *Dixon v Elliott* (1832) 5 C. & P. 437.