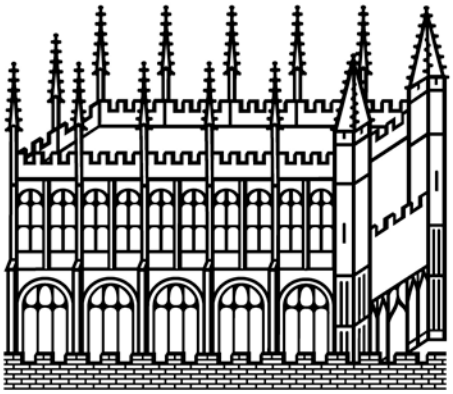

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THE LAW

RELATING TO

TRANSACTIONS

ON THE

STOCK EXCHANGE.

BY

HENRY KEYSER, Esq.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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TO THE

CHAIRMAN AND GENTLEMEN ON THE COMMITTEE OF THE STOCK EXCHANGE.

GENTLEMEN,

I HAVE sought permission to dedicate this work to you, aware as I am that the importance of the subject well merits a far abler pen, because it contains within a small compass, matter relating to your own peculiar branch of commerce, and over which you preside.

I have endeavoured to digest, in such a form as may be of practical utility, the Statute Law and decisions of the Courts relating to transactions in, or arising out of, the Stock Exchange; thereby forming a text-book of easy reference regarding many points that may occur in the daily routine of your business.

And to this legal summary I have prefixed a slight historical sketch, not merely confined to the origin and progress of dealings in stock, but likewise of the laws, opinions, and prejudices which formerly prevailed with respect to such dealings.

As a simple statement of facts concerning an important branch of the commercial history of this country, the narrative might not be altogether devoid of interest to the general reader; but to yourselves more peculiarly it may appear worthy of attention to mark how, by the gradual change in public opinion induced by a more enlightened and more enlarged view of financial matters, the dealings on the Stock Exchange, stigmatized in earlier days as prejudicial to trade and without the pale of fair commercial transactions, are now universally recognized as a most useful and important part of our national industry.

Nor is this general change of opinion exclusively confined to your branch of industry. To select one out of many instances:—During some centuries the taking of interest on pecuniary loans was, owing to the misapprehension of certain passages in Holy Writ and in the Canon Law, as well as of the Civil Law relating to the *Contract of Loan*, very strongly reprobated as amounting to usury: indeed, we find that one of the greatest men of ancient times pronounced the practice of lending at interest an offence of as deep a dye as that of murder.*

And yet this system, formerly prohibited by

* Cum ille, qui quæsierat, dixisset, Quid fœnerari? Tum Cato, Quid hominem, inquit, occidere?—Cic. Off.

statutory enactment*, has become, subject to certain judicious restrictions, the very basis on which the commercial prosperity of the nation is established.

Thus is it with the practice of stock-jobbing as at present carried on. None would now think of imputing to such practice those charges, not only of unfairness, but even of criminality, ascribed to it by a financial writer of the past century.†

Let me therefore venture the hope, that, however feeble my sketch of the fortunes of your profession, it may still merit some little interest from those therein engaged.

Allow me, in conclusion, to express my high sense of the honour you confer on me by your kind acceptance of this dedication of my little work.

I have the honour to be,

GENTLEMEN,

Your obedient servant,

HENRY KEYSER.

1, PLOWDEN BUILDINGS, TEMPLE,
April 8, 1850.

* 5 & 6 Edw. 6, c. 20.
† *Vide supra*, p. 16.

PREFACE.

SINCE the publication, in 1839, of Mr. Wilkinson's valuable book on the Public Funds, no work of a professional nature has appeared upon the subject-matter treated of in the following pages.

The vast increase of business, alike in the Courts of Law and Equity, which has resulted of late years from transactions connected with the Stock Exchange, more particularly since the recent impulse given to the traffic in shares of Railway and other Joint-Stock Companies, induces me to hope that a work comprising the principal cases and decisions thereto relating, presenting them in a collected and digested form, may not prove altogether unacceptable to the Profession.

H. K.

1, PLOWDEN BUILDINGS, TEMPLE,
April 8, 1850.

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STOCK-JOBBING.

CHAPTER I.

ORIGIN AND HISTORY OF STOCK-JOBBING — THE STOCK EXCHANGE, AND MODE IN WHICH BUSINESS IS THERE TRANSACTED.

THE practice of dealing and jobbing in the Government Funds originated in the year 1696.

In the year 1694 the Bank of England received its first charter, which was confirmed by 5 Will. & Mar., c. 20, s. 20; its duration was extended until 1705; and these charters have been renewed from time to time up to the present day.

The original stock of the Bank of England—raised by subscriptions not exceeding 20,000*l.* in one name—was 1,200,000*l.*, which was lent to Government at 8 per cent. interest, and 4000*l.* per annum allowed for management, amounting together to 100,000*l.*

At the close of the war, by the Peace of Ryswick,

in 1697, the national debt was found to amount to 20,000,000*l.*, and the revenue was deficient the sum of 5,000,000*l.*

At this period, from the irregularity with which the interest on the floating debt was paid, Exchequer tallies and orders were at a discount of 40 per cent.; and Government, to redeem the credit of the nation, as well as to provide for the deficiency of the revenue, were obliged to contract a further debt, and to fund a portion of the floating annuities.

Exchequer bills were first issued in 1696, in consequence of the scarcity of specie, occasioned by the re-coinage in that year. They were then made out for sums of 5*l.* and upwards, and bore an interest of 7½ per cent.; but either the interest was not regularly paid, or a great want of confidence in the new Government prevailed among the people, for we find these floating obligations in 1697 at a discount of 40 per cent. In order to remedy this, the Bank was empowered to augment its capital by receiving subscriptions, partly in Exchequer bills, which were held by the corporation as security for the money, and on which they received interest from Government: this had the effect of restoring the bills to their proper value. Since this period Exchequer bills have frequently been at a discount, and the Government have been obliged either to raise the interest, or to convert them into permanent stock.

The following account of the origin and progress of jobbing in the Government securities will be

read with much interest, as evidencing the financial state of the nation prior and subsequent to the incorporation of the Governor and Company of the Bank of England. The passage is extracted from that most valuable work, Macpherson's "Annals of Commerce," &c., vol. ii. pp. 689, 690.

"King William's ministry had flattered themselves, from year to year, with the hope of a speedy peace. Many of the funds, therefore, upon the credit whereof money had, in different years, been granted by Parliament, had by this time been found, or suffered to be, very deficient: the Treasury gentlemen, though otherwise men of abilities, having, in sundry instances of appropriating the duties, judged very wide of the true amount of those duties—as particularly might be instanced with respect to glass bottles, earthenware, tobacco-pipe clay, &c.—the deficiencies of the funds were soon observed by the monied men, who were creditors of the public, and who also took advantage of the remoteness of the courses of payment of the tallies*

* The term "tally" occurs so often in the various Acts of Parliament relating to the Government funds, that it may be as well to explain its meaning, although the word itself has in this sense become obsolete. A "tally" was a cleft piece of wood used to score an account upon by notches, and was given at the Exchequer by those who paid money there upon loans. Another part was called the counterfoil, or counterstock, and was kept by an officer of the Exchequer. The first contractors were authorized to transfer the interest by indorsement on these tallies, and the indorsements were entered in the Bank books. The entries in the books were only to inform the Government to whom the dividends were payable, the right of these persons depending on the tally. They were abolished by the Act of 23 Geo. 3, c. 82.

and orders charged on some other funds. This had, since the Revolution, given rise to a new trade of dealing in Government securities, very much to the damage of the public, as well as of those proprietors of the funds who were obliged to part with them at the discount of from 40 to 50 per cent. D'Avenant, in his "Essay upon Loans," printed in 1710,* justly remarks of those melancholy times, 'that the Government appeared like a distressed debtor, who was daily squeezed to death by the exorbitant greediness of the lender; the citizens began to decline trade, and to turn usurers; foreign commerce, attended with the hazards of war, had infinite discouragement; and people in general drew home their effects to embrace the advantage of lending their money to the Government.' To prevent the ill effects of this unhappy trade, a law was made to restrain the number and ill-practices of brokers and stock-jobbers,† which premises, that sworn brokers were anciently allowed in London for making bargains between merchants and traders for merchandize and bills of exchange; but, of late, divers such have carried on most unjust practices, in selling and discounting tallies, bank stock, bank bills, shares in joint stocks, &c., confederating themselves together to raise or fall, from time to time, the value thereof, as may most suit their own private interest; wherefore, &c., they were now

* The capital stock of the Bank was raised to 2,201,171*l.* 10*s.*; and the dividends were raised from *eight* to *nine* per cent.

† 8 & 9 Will. 3, c. 20.

restrained from acting without a licence from the Lord Mayor and Court of Aldermen. They were also to take an oath of fidelity, to be limited to 100 in number, whose names should be written on the Royal Exchange; to incur a penalty of 200*l.* if they dealt for themselves in any merchandize, or in those tallies, stocks, &c.; to enter into an obligation for their faithful actings, and on failure to forfeit 500*l.*, &c.

"After this account of the ill state of things, we shall conclude the account of the Engrafting Act by observing, that the new subscribers to the Bank were thereby to deliver up to the Governor and Company of the Bank of England their tallies and orders, which were to be paid off in course.* The capital stock of the Bank was thereby to be exempted from any tax. No contract for sale of the Bank stock was to be valid, unless registered within seven days in the Bank books, and actually transferred within fourteen days.† No act of the corporation, nor of its Court of Directors, nor Sub-Committees thereof, should subject the particular share of any member to forfeiture. The shares, however,

* They actually were paid off by annual dividends in a few years, and Bank stock was thereby reduced to its original capital.—A.

† It had been happy for hundreds of families if this salutary clause had been continued in succeeding Acts of Parliament for this and all other joint stocks. But, as if designedly, it was omitted in them all till after the year 1720, when the want of it opened a field of unexampled villany and deception.—A.

were made subject to the payment of all the just debts contracted by the corporation.*

"By this Act it was made felony to counterfeit the common seal of the Bank affixed to their sealed bills, or to alter or erase any sum in, or any indorsement on, their sealed notes, signed by order of the Governor and Company, or to forge or counterfeit their bills or notes. Members of this corporation were not to be liable to bankruptcy, merely by reason of their Bank stock, which stock, moreover, was not liable to foreign attachments. This is all that is essentially necessary to be recited from this long Act of Parliament, so judiciously framed for restoring public credit. Two great points were effected by it, namely, the Exchequer tallies and orders were rescued from the stock-jobbing harpies by being engrafted into this Company, as were also the Bank notes, now cancelled, which had been at 20 per cent. discount, by reason the Government had been greatly deficient in their payments to the Bank; and a good interest was secured for the proprietors of the increased capital."

Reference to the Act relating to brokers will be made in the course of the present chapter: in a subsequent one the Act itself will be more fully considered.

By referring to the history of the period when the Bank of England was first incorporated, it will be

* This clause was, with great propriety, afterwards extended to the other two great companies.—A.

at once seen that the thus contracting a public debt was a matter of imperious necessity. The insufficiency of the revenue to furnish sufficient sums towards carrying on the harassing and expensive war in which we were then engaged, the scarcity of specie, and the general want of credit and circulation which prevailed throughout the nation, sufficiently prove that no other alternative presented itself to the Government. The Tory party vehemently inveighed against the new measure; and Bolingbroke observed, in treating of it, "Thus the method of funding and the trade of stock-jobbing began, and great companies were created—the pretended servants, though in many respects the real masters, of every Administration." Again, the same party asserted, that such measures were only adapted to Republics.

Various branches of the revenue were charged with the payment of the interest; but, as has been seen from the extract above quoted, the taxes reserved for this purpose proved extremely deficient; and the progress of stock-jobbing may be traced to the dealings and speculations in the produce of these reserved taxes.

Jobbing in East-India stock had been practised to a considerable extent as early as the year 1695. About this period the system of dealing in securities for time had attained to what was considered a most alarming prevalence. Speculations on the price of stock, and refusals and puts of stock, were engaged in to a degree endangering both public and private

credit. *Refusal* of stock was a contract for having the option of demanding stock at a fixed price; as the *put* of stock was a contract by which, for a premium paid down, the contractor obliged himself to take a certain quantity of a stock at a future time at a fixed price therein specified.

These cant terms were first introduced by the East-India Company in 1693. In this year the Company had expended vast sums of money in bribes to Members of Parliament, and to any individual whose influence could aught avail them in obtaining their charters. They likewise bought over all those who could in anywise prove prejudicial to their interests. One instance of their lavish prodigality in this respect will suffice. Sir Basil Firebrass, whom they were anxious to conciliate, contracted with them to *put* (or, in other words, to oblige them to receive of him) 60,000*l.* India stock at 150*l.* when the Charter should be granted, although their stock was then only at 100 per cent., and received the difference from the Company, amounting to 30,000*l.* These corrupt practices became the subject of Parliamentary inquiry.*

The Act for enlarging the capital stock of the Bank of England, passed in the 8th and 9th of Will. 3, c. 20, contains a clause evidently intended to suppress the increasing evils of stock-jobbing. By s. 34 of that Act it is enacted, that, "For the preventing of clandestine or fraudulent bargains or

* See Parliamentary Debates and Proceedings of the years 1694, 1695.

dealings in Bank stock for the future, that from and after the said 25th day of March, A.D. 1697, no promise, contract, bargain, covenant, or agreement, made either by word of mouth or in writing, for the buying or selling of any Bank stock, or for the transferring, changing, or altering the property thereof, either in trust or otherwise, however it be, shall be good or valid in law or equity, or adjudged to be either legal, obligatory, or binding, to either or any of the parties making the same, or concerned therein, or for whose use or account the same is or shall be made, unless such promise, contract, bargain, or agreement shall be actually registered in words at length in the book or books of the Bank, by the officer thereunto appointed, within seven days, and actually transferred within fourteen days next after the making of such promise, contract, bargain, covenant, or agreement." Mr. Anderson's opinion as to the beneficial effect of this clause has been already quoted.

It is certain that this system of speculating in the securities provided by Government for the payment of the interest on the public debt occasioned great embarrassment to Ministers, and much evil to the public; for we find, *inter alia*, in the fourth paragraph of the protest of the Lords against the navy debt, November 13th, 1721, "That the navy debt can bring no manner of benefit either to the public or any private person, but to such as, by foreseeing when it is either to be discharged or provided for, may make an excessive advantage to

themselves by buying up the said bills while under a very high discount."

But the practice of stock-jobbing in all its so-called mysteries and iniquities attained its full height in the year 1720, well known as the year of the infamous South-Sea Bubble. Heedless of the lesson read to it by the recent disasters of a neighbouring country, the nation, from the highest to the lowest in the social grade, was absorbed by the one wild hope of glutting in a few days, or rather in a few short hours, the sudden thirst for gain that the nefarious propositions of the Company had awakened within it. All forsook their former pursuits, whose results, if not precarious, were at best but remote and insufficient, to become jobbers in the stock of the Company; and the ardour that was displayed in raising false or exaggerating true reports, or profiting by either, would be to us alike as incredible as it is inconceivable, did not the history of our own times furnish forth a parallel. And when the Bubble burst, and the phrenzied nation was aroused from its delusion to a vivid sense of the ruin such delusion had wrought, the usual consequences incidental to any moral epidemic of the empire ensued; the aid of Government was craved to remedy the evils occasioned by private cupidity, private lack of judgment, foresight, and conduct, and, in many instances, of common honesty. A scape-goat, moreover, was to be selected; and upon whom, it was urged, could the evils that afflicted the nation be more properly charged, than upon

the unhappy stock-brokers and jobbers, whose services had so recently and so frequently been called into requisition by those who now became their accusers. Parliament took up the cry; for we find, in the debates in the Commons on the state of public credit, December 1720, that it was asserted "that the present (South-Sea Bubble) calamity was mainly owing to the vile arts of stock-jobbers, whereby the public funds were wound up far above their real value;" which being assented to, the Committee came to this resolution, namely: "That nothing can tend more to the establishment of public credit, than preventing the infamous practice of stock-jobbing."

The papers and pamphlets of the day teem with accusations against "persons, ill-wishers to the present establishment, who meet designedly at those times when credit is most oppressed, to wound it the more by selling out in the public market vast quantities of stock, more than what they are possessed of, which buying again privately, at convenient opportunities, they make great estates to themselves, to the manifest prejudice of the fair dealer, and the utter ruin of many good and industrious families." And for providing a remedy against such evils, the author of the above extract proceeds to offer suggestions almost identical with the clauses embodied in the celebrated Act of 7 Geo. 2, c. 8. Nor had the pernicious results of the wild speculations in South-Sea stock been totally overlooked by the more discerning of the community.

In his speech on the debate upon the Bill for enabling the South-Sea Company to increase their Capital Stock, &c., (March 27, 1720,) Mr. Robert Walpole* most warmly opposed the Bill, on the grounds that it countenanced the pernicious practice of stock-jobbing, by diverting the genius of the nation from trade-industry; that it held out a dangerous lure for decoying the unwary to their ruin by a false prospect of gain, and to part with the gradual profits of their labour for imaginary wealth. He urged, that as the whole success of the scheme must chiefly depend upon the rise of the stock, the great principle of the project was an evil of the first magnitude: it was to raise artificially the value of the stock by exciting and keeping up a general infatuation, and by promising dividends out of funds which would not be adequate to the purpose.†

And already was part of the Cassandra-like prediction of this eminent statesman in the course of being verified; for during the debate on this momentous question, we learn that the stock-jobbers in Exchange Alley were "in a perpetual hurry, being tossed about between hopes and fears upon the different accounts they received almost every minute from their agents and friends in West-

* Smollett, in his sketch of Sir Robert Walpole, observes that he was well acquainted with the nature of the public funds, and understood the whole mystery of stock-jobbing.

† Coxe's Life of Walpole.

minster."* And Lord Cowper, who likewise opposed the Bill, observed that the stocks were kept up to their advanced price by the oblique arts of stock-jobbing.

Whilst the affairs of the Company, and the conduct of their Directors, were undergoing a strict investigation before a Secret Committee of the House, a Bill was presented, and read before it for the first time, (8 February 1721,) "For the better establishment of Public Credit, by preventing for the future the infamous practice of Stock-jobbing." The Bill, however, does not appear to have attained to a third reading. Whilst the House was proceeding with the discussion on the Report of the Secret Committee of Inquiry, petitions flowed in from all parts of the kingdom, praying for justice on the authors of the then existing calamities, and of course not failing to impute the greater share of them to the "cannibals of 'Change Alley, who lick the nation's blood up;" and praying that "honest trade" might be enabled successfully to contend against "its knavish rival, stock-jobbing."†

Mr. Aislabie, charged with being implicated in the nefarious practices of the Directors of the South-Sea Company, observed, in the course of his defence before the House of Lords, that the Bank "entertained a scheme in imitation of the South-Sea, of lending money upon their stock, which,

* Political State.

† This notable effusion emanated from the highly imaginative borough of Leicester.

as it contributed to raise the price of their own stock, so it furnished a supply of cash to the gamesters in the Alley, that at once pushed up the bubbles and the South-Sea to an immoderate height. But as this was intended chiefly to advance their own stock, let the project come from what hand soever, it was founded in the same iniquity as any other bubble, and was of ten times more dangerous consequence.*

It would be foreign to the purpose of this work to enter more at large into the financial difficulties entailed upon the nation by the bursting of the South-Sea Bubble. The subject has merely been adverted to in so far as it is connected with the history of stock-jobbing. Sufficient has been quoted to evince the general feeling that some stringent restrictions should be imposed upon a system the alleged origin of so much ruin and iniquity. Accordingly, we find that in the year 1733 a Bill was brought into the House of Commons to prevent the scandalous practice of stock-jobbing, which passed by a majority of 6 only—the numbers being 55 against 49. But it underwent so many alterations in the Lords, that it was subsequently dropped.

The following year a Bill of a similar nature was presented to the House by Sir John Barnard, one of the Members for the City of London, a person held in high repute on account of his great commercial experience. This Bill passed both Houses,

* Parl. Hist., 7 Geo. 1, 1721.

and received the Royal assent. It is generally known as Sir John Barnard's Act, 7 Geo. 2, c. 8, and is the only Act that exists to regulate the practice of stock-jobbers. It will be found set out *in extenso* in a subsequent chapter, where its provisions and their policy will become the subject of more ample consideration. It was not, however, suffered to become law without undergoing much discussion; and the arguments on either view of the subject will be found of great interest, and some of them sufficiently curious. On the one hand, it was contended that the public creditor was entitled to as free and uncontrolled a liberty of disposing of his property in the public funds as of any other species of property; that in all other branches of trade, persons enjoyed free liberty to insure their stock; that the selling of stock for time, and the giving of money for the put of stock (as it was called in Exchange Alley), was nothing else but a way of insuring the principal money which a man had in the public funds; and the preventing a man's taking that method of securing his property in the funds would be a very great hardship on all the creditors of the public. To this it was answered, that if the practice of giving money for the put of stock were to be called an insurance, it was a very odd sort of one; for by that method a man was to insure, not only his own property in the public funds, but in some measure the whole public funds of England.*

* See the discussion on the Bill in 9 Cobb. Parl. Hist., pp. 49, 68, 514.

Since the passing of this Act, the Legislature, as has been already observed, has not returned to the subject, so that the history of stock-jobbing, and all interference with those employed therein, may here be said to terminate.

Before dismissing the subject, it may not be irrelevant to state the opinion entertained with reference to such practice by a financial writer of great eminence :

" Funding and jobbing too often enrich the worst men and ruin the innocent. It taints men's morals, and defaces all the principles of virtue and fair dealing. It hath changed honest commerce into bubbling, our traders into projectors, industry into trickery, and applause is earned when the pillory is deserved." *

It is not easy to ascertain the precise period when Foreign Powers first contracted loans with the monied interest of this country.

We find, by the debates on the Bill for Prohibiting Loans to Foreign Powers without the Royal Licence under the Privy Seal, that Foreign States had frequently borrowed money from our merchants.

The Bill in question was introduced by Sir Robert Walpole, A.D. 1730, on the occasion of the Emperor's (Charles VI.) wish to borrow 400,000*l.* in London; and it is not difficult to infer, from the speeches of that eminent statesman, that, whilst he

* Britain's Commercial Interest Explained and Improved. By Postlethwayt. Vol. iii., p. 23. Lond. 1757.

was evidently not an advocate for a restrictive principle, he considered that it was, in this particular instance, of the utmost expediency to the peace of Europe that we should withhold from so formidable an enemy the means of prosecuting war. Moreover, the Bill was evidently opposed from factious motives, and a wish to annoy the Administration. Mr. Daniel Pulteney objected, that whilst the Bill restrained our merchants from assisting the Princes and Powers of Europe, it permitted our stock-jobbers to trade in their funds without any interruption; that he knew for whose benefit this complaisance was designed, but that jobbing abroad, in the stocks of foreign nations, was what we should least encourage, and what we ought most to prohibit. A Merchant-Member of the House, who supported the Bill, said, that he could make it appear that the Emperor's agents had been in 'Change Alley; that he knew a particular individual who had been applied to for 30,000*l.*, and others for very large sums, but refused to advance them, as fearing the displeasure of the Government. The Bill was warmly opposed by the well-known Mr., afterwards Sir John Barnard, Member for London. His speech merits the greatest attention, but space can be afforded for one extract only. He said, that he thought it a restraint upon commerce that could not be justified, and such restraints had ever been prejudicial to ourselves; that he remembered a Bill of this sort against Sweden, to prohibit all commerce with that kingdom, yet the consequence was, that

we were forced to enable our merchants to carry it on in Dutch bottoms, which rendered the prohibition useless as well as burdensome before we took it off. Sir William Wyndham followed on the same side; but the weight of Ministerial influence proved too strong, and the Bill was enacted into a Law.* It does not appear that foreign loans were contracted to any extent until after the peace in 1815.†

It must be borne in mind, whilst reading an account of the furious diatribes hurled from every

* 3 Geo. 2, c. 5. 9 Cobb. Parl. Hist., p. 787. The Act, however, was limited in its duration to two years, and has never been renewed.

† After the Peace of Paris in 1814, the French Government contracted a loan with the Messrs. Baring, in order to discharge the indemnities they were compelled to pay to other nations, in pursuance of the provisions of the treaty. The following is a detailed list of the foreign loans contracted in this country up to the year 1825.

	£		
1821.			
Spanish . .	1,500,000.	5 pr.ct. at	56, A. F. Haldiman & Co.
1822.			
Chili . . .	1,000,000.	6 . .	70, Hullett Brothers.
Columbian .	2,000,000.	6 . .	84, Herring, Graham & Co.
Prussian . .	3,500,000.	5 . .	84, N. M. Rothschild.
Peruvian . .	450,000.	6 . .	88, Frys and Chapman.
Russian . .	3,500,000.	5 . .	82, N. M. Rothschild.
1823.			
Austrian . .	2,500,000.	5 . .	82, N. M. Rothschild.
Portuguese .	1,500,000.	5 . .	87, B. A. Goldschmidt.
Spanish . .	1,500,000.	5 . .	30¼, J. Campbell and Co.
1824.			
Brazilian . .	3,200,000.	5 . .	75, T. Wilson and Co.
Buenos Ayres,	1,000,000.	6 . .	85, Baring Brothers.
Columbian .	4,750,000.	6 . .	88½, B. A. Goldschmidt.
Greek . . .	800,000.	5 . .	59, Loughnan.
Mexican . .	3,200,000.	5 . .	58, B. A. Goldschmidt.
Neapolitan .	2,500,000.	5 . .	92½, N. M. Rothschild.
Peruvian . .	750,000.	6 . .	82, Frys and Chapman.

quarter against stock-jobbers, that the class thus designated differed widely from the respectable and useful body now regularly engaged in such transactions. The character of brokers was assumed by most dishonest persons with most dishonest intents, and great frauds and malpractices necessarily ensued.

The first place where such transactions were carried on appears to have been at the Bank. Under the 5 & 6 Will. & Mar., c. 20, s. 20, the rotunda in the Bank of England seems to have been appointed as the *rendezvous* for dealers in public securities;[a] and even in latter days, persons not admitted members of the Stock Exchange were in the habit of meeting there. About the year 1698 the passages and avenues leading to the Bank were so obstructed by those anxious to speculate in the shares of the numerous bubble Companies that abounded, that "the transaction of this airy trade of jobbing was justly removed from off the Royal Exchange into the place called 'Change Alley, and jobbing in the Government funds probably soon followed."*

The Corporation of the City of London were dissatisfied with this change, for we find this express provision in the old form of the London brokers' bond, which remained in force until the year 1818: brokers were not "to presume to meet

[a] Shales *v.* Seignoret, 1 Ld. Raym., 441.

* Mac. Annals of Commerce, p. 703. The new place of meeting was at Jonathan's, now Garraway's, in Exchange Alley.

or assemble in Exchange Alley, or other public places within the city and liberties other than the Royal Exchange, to negotiate their business and affairs of exchange."

This provision, however, became obsolete.

Stock appears to have been sold at the Royal Exchange by sworn brokers, as their proper place, in or about the year 1714.[a]

In the year 1720 stock-brokers frequented 'Change Alley, as we find from the report of a case argued at that time, and which will be mentioned in the subsequent pages.

At length the more respectable brokers resorted to a house in Capel Court, near Threadneedle Street, for the purpose of carrying on their business. To this house any one could gain admittance upon the daily payment of 6*d*. This, however, proved highly inconvenient, as it was found impossible to exclude persons of objectionable character; and accordingly, from the 1st day of March 1801, no person was admitted except by ballot and the annual payment of 10*l*. 10*s*.

In the last-mentioned year the present Stock Exchange was built by subscription among the brokers, who at the same time drew up a most judicious and effective code of laws, by which the mode of conducting business was regulated by a more systematic plan than had theretofore existed, and the utmost precaution enjoined as to the admission of those desirous of becoming members.

[a] Tucker *v.* Wilson, 1 P. Will., 261.

The financial and economical affairs of the Stock Exchange are conducted by Managers chosen from the body of members, whilst its legislative policy, if the expression may be employed, is carried on by a Committee of thirty members, who are elected annually.

This Committee has the power to make bye-laws; to dispense, should they deem fit, with the strict enforcement of any of their existing regulations; and to suspend or expel any member convicted of improper conduct, or of a violation of the regulations of the house.

Every member must be re-elected annually; and the character and circumstances of new candidates for admission into their body are rigidly investigated, and such candidates must be recommended by three sureties to the extent of 300*l.* each.

It is submitted that much of the litigation might be avoided, now of such frequent occurrence between brokers and their clients, if the latter would but avail themselves of a rule of the Stock Exchange, by which the Committee are empowered to entertain a complaint against one of their members, although the complaining party be not himself a member, provided that he shall have employed such member in the capacity of broker.*

Transactions in foreign funds and shares were not carried on in the present Stock Exchange until a comparatively recent period. The brokers and

* *Vide* Book of Regulations, title *Committee*, Rule XVI., p. 20.

merchants engaged in such business were in the habit of frequenting the Royal Exchange, but about fourteen or fifteen years ago they were invited to become members, and a portion of the building was appropriated to their use.

The number of members of the Stock Exchange, including those engaged in the home as well as those in the foreign and share markets, amounts to upwards of nine hundred.

It is now proposed to give a slight outline of the mode of conducting business in the Stock Exchange, together with the signification of the technical terms there employed.

The members of the Stock Exchange consist of two classes, namely, *brokers*, and *dealers* or *jobbers*.

The broker is in most instances a sworn broker, duly qualified to act by admission before the Lord Mayor and Aldermen of the City of London.* His province is, or should be, limited to the transaction of business for his principals. He purchases and sells public securities and shares for those desirous to possess or dispose of them, and he is entitled to brokerage on such dealings; his commission on the sale of stock is *2s. 6d. per cent.* Beyond this commission, he is presumed to have no interest in the transaction.

It is not incumbent on persons not members of the house to employ a broker to conduct their sales or purchases; but as a contrary system would

* See Chapter on Brokers.

obviously entail much inconvenience, such is seldom had recourse to in actual practice.*

The dealer or jobber acts as intermediary party between the broker who buys and the broker who sells; and the advantage he derives is a small difference of price between the two transactions.

Were it not for this intermediary class, who may be looked upon as in some measure retailers of stock, the public would experience great delay and inconvenience in their sales or purchase of stock. For instance, *A* wishing to sell, say £3250 worth of stock, would have to wait until his broker could meet with a party desirous to purchase that precise amount: this disadvantage is entirely obviated by the readiness of the jobber to buy or sell, or, as it is termed, *make a price*, for any amount of stock; and it will presently be seen that the advantages he thus affords are not always attended with profit to himself.

A broker receives a commission from a principal to invest (say) 5000*l.* Consols: there are in the Stock Exchange different spaces appropriated to the markets of the various public securities. He forthwith seeks that space allotted to the dealings

* This practice appears, however, to have prevailed in earlier times, for we find in Mrs. Centlivre's comedy of *A Bold Stroke for a Wife*, Act 4, Scene 1, the following words placed in the mouth of a stockbroker at Jonathan's, in 'Change Alley:—"I would fain bite the spark in the brown coat: he comes very often into the Alley, but never employs a broker." And see also a very quaint, and, at the period it was written, useful work, entitled, *Every Man his Own Broker*, published by one Mortimer, in 1781.

in Consols, and inquires of a jobber the price of Consols.

Now there are always two prices of stock, a buying price and a selling price; the difference between such prices being 1-8th, or *2s.* 6*d.* per cent., and, as will presently appear, it is this difference that constitutes the jobbers' profit. Supposing 92*l.* (for every 100*l.* stock) to be the buying price, and $92\frac{1}{8}l.$, or 92*l.* *2s.* 6*d.* the selling price, the jobber, in reply to the broker, answers, 92*l.* to $92\frac{1}{8}l.$, by which the broker understands that he can sell at 92*l.*, or buy at $92\frac{1}{8}l.$ In the case supposed he buys at $92\frac{1}{8}l.$, mentioning the amount he has to invest; and after calculating the exact amount of stock that the money he has to invest will produce at the above price of $92\frac{1}{8}l.$, allowing 1-8th, or *2s.* 6*d.* per cent. for his commission, he hands over to the jobber a ticket, prepared for the purpose by the Bank of England, on which he writes the amount of stock, and the name, description, and address of his client, who is the purchaser, and into whose name the stock is to be transferred. This ticket, after being properly filled up by the jobber, by inserting his own name, or the name of the party by whom the stock is transferred, is taken over to the Bank of England, and copied into a book which is kept in readiness for the purpose. The jobber, or whoever transfers the stock, signs his name in this book, and also on another paper (previously prepared from the ticket) issued from the Bank, called a receipt, both which signatures are countersigned by the

Bank clerk. The purport of this receipt is to acknowledge the payment of so much money for so much stock, transferred on such a day by the jobber (or any person making the transfer) to the party who is the purchaser. And it is then the duty of the broker to take his client (the party purchasing the stock) over to the Bank, in order that the said client may accept the stock transferred into his name; that is to say, sign his name in the Bank book accepting the transfer, and moreover making the Bank clerks acquainted with his signature, which is a guide to them on future occasions when the party receives his dividends or re-transfers the stock.

Much the same process takes place in the event of the broker's client wishing to sell stock. The broker would then sell the amount of stock to the jobber at 92, and after filling up and taking over to the Bank the aforesaid ticket, would conduct his client to the proper office in the Bank, when he would have to sign his name in the Bank book and also on the prepared receipt; and the broker would then sign his own name in the Bank book as a voucher that the party transferring the stock is the real person represented. The broker would then hand over to his client the proceeds of the sale, either in Bank notes or by cheque on his bankers, deducting therefrom his commission; this amount the broker receives from the jobber. This is the chief part of the broker's business; but there are various other duties he has to perform; such as

borrowing and lending money, taking out powers of attorney, acting as attorney himself, receiving dividends, &c. &c.

The broker's duties include all transactions in shares and foreign stocks.

The jobber remains in the Stock Exchange, or, as it is called, "the Market," during the whole of business hours, which are from eleven to three; and it is his constant endeavour to be aware of all changes that take place in the prices of stocks, so as always to be prepared to make the real and proper price to the broker whenever he is applied to; and as there is, as before stated, always *2s.* 6*d.* per cent. in his favour between the buying and selling price, it would appear that he must invariably make money by every transaction. But such is far from the case, as, owing to the variations in prices, he frequently not only makes no profit out of his transactions, but is at times a heavy loser. For instance, suppose a number of brokers all receive orders to sell stock, the jobbers of course do nothing but buy, and can find no person to buy the stock from them at the 1-8th per cent. profit. They then try to find buyers at the price they themselves have paid for the stock; but failing in this, they are obliged to offer it still cheaper; and more brokers coming in to sell at lower prices, they are often compelled to submit to heavy losses before they find a buyer at all. This more especially happens during times of monetary pressure; but more often still from unfavourable news, which

induce speculators to sell stock far below the original market price in hopes of re-purchasing it at cheaper rates. It is equally unfavourable to the jobber when all are buyers, and the price is therefore much raised.

It is consequently incumbent on the jobber to exercise the greatest caution in his dealings, and neither to buy or sell stock to too large amount, unless he be aware either that brokers wish to buy stock, or that he will be able to re-purchase it of other parties.

This 1-8th, or *2s. 6d.* per cent., is virtually equivalent to a sort of insurance, which pays over a multitude of transactions, though in many instances heavy losses occur.

The mere jobber generally tries to make his account even, to buy as much as he sells, or sell as much as he buys; but there is another class of dealers, termed *speculative* jobbers, and who purchase or sell stock in the market. When, in the exercise of their judgment, they anticipate a rise or fall in the price of stock, they do not wait to obtain what is designated as the *turn of the market*, but operate at once, when they consider the opportunity favourable.

As has been explained, when a party has made a *speculative* sale of stock, not having such stock to deliver, he must find some one willing to *give upon it*; which means, to deliver the stock for him and give him interest for the use of the money. He then buys this stock for money of the party and sells it to him again for the account. This is termed

taking in stock, the reverse operation being *continuation*, or *giving* upon stock. The *givers* are called *Bulls*, being purchasers of stock they cannot pay for, whilst the *takers-in* are termed *Bears*, being sellers of stock which they cannot deliver: hence, when the *continuation*, or interest in stock is high, it is styled a *Bull* account; when low and stock is in demand, a *Bear* account.*

* See, from Mortimer's work already alluded to, and entitled *Every Man his own Broker; or a Guide to Exchange Alley;* by Philanthropos; 12mo. London, 1756; the following definition of these terms:

"A *Bull* is the name by which the gentlemen of 'Change Alley choose to call all persons who contract to buy any quantity of Government securities, without an intention, or ability, to pay for it, and who consequently are obliged to sell it again, either at a profit or a loss, before the time comes when they have contracted to take it. Thus, a man who in March buys in the Alley 40,000*l.* Four-per-cent. Annuities 1760, for the rescounters in May, and at the same time is not worth 10*l.* in the world, or, which is the same thing, has his money employed in trade, and cannot really take the Annuities so contracted for, is a *Bull*, till such time as he can discharge himself of his heavy burden, by selling it to another person, and so adjusting the account, which, if the whole house be *Bulls*, he will be obliged to do at a considerable loss; and in the interim, while he is betwixt hope and fear, and is watching every opportunity to ease himself of his load on advantageous terms, or when the fatal day is approaching that he must sell, let the price be what it will, he goes lowering up and down the house, and from office to office; and if he is asked a civil question, he answers with a surly look; and by his dejected gloomy aspect and moroseness he not badly represents the animal he is named after.

"A *Bull* is likewise a person who has bought, and actually paid for, a large quantity of any new fund, commonly called *subscription*, while there is no more than one or two payments made on it, but who is unable to pay in the whole of the sum, and consequently is obliged to part with it again before the next pay day.

"A *Bear*, in the language of 'Change Alley, is a person who

Continuation, however, is often given or taken by those who are not necessarily *Bulls* or *Bears*. Bankers, bill-brokers, merchants, and others holding stock, or having funds to employ, will often raise or lend money on the Stock Exchange by giving a low continuation, or taking in at a high one when the opportunity offers.

The term *Backwardation* is employed when stock is more in demand than money, and a premium is given to obtain the loan of stock against its value in money. This premium is termed a

has agreed to sell any quantity of any of the public funds more than he is possessed of, and often without being possessed of any at all, which he is obliged to deliver against a certain time. Before this time arrives, he is continually going up and down seeking whom, or, which is the same thing, whose property he can devour.* You will find him in a continual hurry; always with alarm, surprise, and eagerness painted on his countenance; greedily swallowing the least report of bad news; rejoicing in mischief, or any misfortune that may bring about the wished-for change of falling the *stocks*, that he may buy in low, and so settle his account to advantage. He is easily distinguished from the *Bull*, who is sulky and heavy, and sits in some corner in a gloomy melancholy posture; whereas the *Bear*, with meagre, haggard looks, and a voracious fierceness in his countenance, is continually on the watch, seizes on all who enter the Alley, and by his terrific weapons of groundless fears, and false rumours, frightens all around him out of that property he wants to buy; and is as much a monster in nature as his brother brute in the woods. The Author hopes this, and the foregoing note, will be carefully attended to, as he will often have occasion to mention these two brutes in human form, and shall not give any further description of them, as he hopes this will be sufficient, not only for the understanding this little treatise, but likewise fully to describe them and the difference between them, to all tolerable judges of physiognomy who may hereafter meet with them in their walks through 'Change Alley."

Backwardation. This occurs more frequently in dealing in shares than in Government securities; as, from the much more limited amount of any particular share capital and the expense of stamps upon transfers, any large speculation for the fall of the price of shares would shortly cause a scarcity in them; and the greater the scarcity, the higher is the *Backwardation.*

Purchases or sales for the account are made by brokers for the succeeding settling day, which settling day occurs monthly. These days were formerly termed *rescounter* days. This word was adopted from the Dutch merchants, who were in the practice of giving a receipt at the bottom of bills of parcels or invoices thus: *solvit per rescounter, i. e.* the value of the invoice has been adjusted in account current.*

A person unable or unwilling to pay his losses, is termed a *lame Duck,* or defaulter.

Should such a person have acted dishonourably, the Committee directs his name to be inscribed on a black board suspended in the Stock Exchange.

The following sketch of the mode of transacting business on the Stock Exchange is extracted from Dr. Hamilton's interesting and valuable work on the National Debt, 3d edit., pp. 314—317, but it must be premised that it is not to be relied on in every particular.

"The business of speculating in the stocks is

* See Mortimer, p. 48.

founded on the variation of the price of stock, which it probably tends in some measure to support. It consists in buying or selling stock according to the views entertained by those who engage in this business of the probability of the value rising or falling.

"This business is partly conducted by persons who have property in the funds; but a practice also prevails among those who have no such property of contracting for the sale of stock on a future day at a price agreed on. For example; *A* may agree to sell *B* 10,000*l.* of three-per-cent. stock, to be transferred in 20 days, for 6000*l.* *A* has in fact no such stock, but if the price on the day appointed for the transfer be only 58, he may purchase as much as will enable him to fulfil his bargain for 5800*l.*, and thus gain 200*l.* by the transaction: on the other hand, if the price of that stock should rise to 62*l.* he will lose 200*l.* The business is generally settled without any actual purchase or transfer, *A* paying to *B*, or receiving from him, the difference of the price of stock on the day of settlement and the price agreed on.

"This practice, which amounts to nothing else than a wager concerning the price of stock, is not sanctioned by law,* yet it is carried on to a great extent; and as neither party can be compelled by law to implement these bargains, their sense of honour, and the disgrace attending a breach of con-

* It is strictly prohibited, under forfeiture of a penalty of 500*l.*, by 7 Geo. 2, c. 8, s. 4.

tract, are the principles by which the business is supported. In the language of the Stock Exchange, the buyer is called a *Bull*, and the seller a *Bear*, and the person who refuses [or is unable] to pay his loss is called a *lame Duck*; and the names of these defaulters are exhibited in the Stock Exchange, where they dare not appear afterwards.

"These bargains are usually made for certain days fixed by a Committee of the Stock Exchange, called *settling days*, of which there are about eight in the year, viz. one in each of the months of January, February, April, May, July, August, October, November, and they are always on Tuesday, Wednesday, Thursday, or Friday, being the days on which the Commissioners for the reduction of the National Debt make purchases.* The settling days in January and July are always the first days of the opening of the Bank books for public transfer, and these days are notified at the Bank when the Consols are shut to prepare for the dividend. The price at which stock is sold to be transferred on the next settling day is called the price *on account*. Sometimes, instead of closing the account on the settling day the stock is carried on to a future day on such terms as the party agree on. This is called a *continuation*.

"All the business, however, which is done in the stocks *for time*, is not of a gambling nature. In a place of so extensive commerce as London, opulent

* Not the case at the present day.

merchants who possess property in the funds and are unwilling to part with it have frequently occasion to raise money for a short time. Their resource in this case is to sell for money and to buy for account; and although the money raised in this manner costs more than the legal interest,* it affords an important accommodation, and it may be rendered strictly legal and recoverable." †

* Written before the alteration in the Usury Laws.

† In addition to the authorities already quoted, the following works have been consulted during the course of the present Chapter:

Sinclair's History of the Public Revenue. Lond. 1785. Fortune's History of the Bank of England. Lond. 1797. The History of our National Debt and Taxes, from 1688 to 1751. Lond. 1753. Fenn's Compendium of the English and Foreign Funds. Lond. 1837. Fortune's Epitome of the Stocks and Public Funds. Lond. 1796. Montefiore's Commercial Dictionary. Lond. 1803. M'Culloch's Dictionary, Lord Mahon's History of England, &c. &c.

CHAPTER II.

STOCK—DEFINITION OF—DIFFERENT KINDS OF—ACTS RELATING TO—HOW CONSIDERED BY COURTS OF LAW AND EQUITY—LEGACIES OF—BANK OF ENGLAND, ACTIONS AGAINST, AND ACTS RELATING TO—DISTRINGAS UPON—CONTRACTS RELATING TO, WHETHER WITHIN STATUTE OF FRAUDS.

THE term *Stock* implies, according to its ordinary signification, those sums of money contributed towards raising a fund whereby certain objects, as of trade or commerce, may be effected. It has received an improper extension, by being employed with reference to the moneys advanced to Government which constitute a part of the National Debt, whereupon a certain amount of interest is payable.

It is according to the latter application, or rather, mis-application of the term, that the subject of Stock will be treated of in the following pages.

Since the introduction of the system of borrowing upon interminable annuities, the meaning attached to the word *Fund* or *Stock* has been gradually changed; and instead of signifying the security upon which loans were advanced, it has for a long time signified the principal of the loans themselves.

Subjoined is given some account of the different stocks or funds forming the Public or National Debt.

I. *Funds bearing interest at 3 per cent.*

1. *South-Sea Debt and Annuities.*—This portion of the Debt, amounting, on the 5th of January 1849*, to 9,500,000*l.*, is all that now remains of the capital of this Company. They have long since ceased to trade; and the functions of the Directors are limited to the transfer of stock and payment of the dividends, which are performed at the South-Sea House and not at the Bank. Dividends payable on the old South-Sea Annuities, on the 5th of April and 10th of October; on the rest of the stock, on the 5th of January and 5th of July.

2. *Debt due to the Bank of England* consists of 11,015,100*l.**, lent by the Bank to the Government at 3 per cent. It must not be confounded with the Bank capital of 14,553,000*l.* on which the stockholders divide. Under the provisions of the 3 & 4 Will. 4, c. 98, renewing the Bank Charter, one-fourth of the above debt was to be repaid, which has been accomplished by the Bank agreeing to accept in lieu thereof 4,080,000*l.* Three-per-cent. Reduced Annuities. See 4 & 5 Will. 4, c. 40.

3. *Bank Annuities.*—These were created in 1726, for the purpose of cancelling Exchequer bills that had been issued to defray the arrear of

* See Finance Accounts for the year 1848, ended 5th of January 1849.

the Civil List. The capital is irredeemable; and being small in comparison with the other public funds and a stock in which little is done on speculation, the price is generally at least 1 per cent. lower than the Three-per-cent. Consols.*

4. *Three-per-cent. Consols, or Consolidated Annuities.*—This stock forms by much the largest portion of the Public Debt. It commenced in 1731. In 1751 the Consolidated (*unde nomen*) Act was passed (25 Geo. 2, c. 27), whereby several separate stocks bearing interest at 3 per-cent. were consolidated into one general stock. Many additional loans and portions of loans have since been funded in this stock.

The Consolidated Annuities are distinguished from the Three-per-cent. Reduced Annuities from the circumstance of the interest upon them never having been varied, and by the dividends becoming due at different periods. Dividends payable on the 5th of January and 5th of July.

5. *Three-per-cent. Reduced Annuities.*—This fund was established in 1757. It consisted, as the name implies, of several funds which had been previously borrowed at a higher rate of interest; but by an Act passed in 1749, it was declared that such holders of the funds in question as did not choose to accept in future of a reduced interest of 3 per cent. should be paid off. Dividends payable on the 5th of April and 10th of November.

* Fairman on the Funds, p. 40, Cohen's edit.

II. *Funds bearing more than 3 per cent. interest.*

1. *Three-and-a-quarter-per-cent. Annuities.*—By the 7 & 8 Vict., c. 4, the hitherto existing Three-and-a-half Annuities were transferred into annuities of Three-and-a-quarter. These Annuities continue until the 10th of October 1854, and are then to carry interest at 3 per cent. only; and these new Three-per-Cents. are redeemable after the 10th of October 1874. Dividends payable on the 5th of April and 10th of October.

2. *New Five-per-cent. Annuities.* — These were created by the Act 11 Geo. 4, c. 13, by which Four-per-cent. Annuities were transferred to this fund. They amount to upwards of 430,000*l.*, and are redeemable after the 5th of January 1873. Dividends payable 5th of January and 5th of July.

III. *Annuities.*

1. *Long Annuities.*—These Annuities were created at different periods, but they all expire together in 1860. They were chiefly granted by way of premiums or douceurs to the subscribers to loans. Payable on the 5th of April and 10th of October.

2. *Annuity under 4 Geo. 4, c. 22.* — This Annuity is payable to the Bank of England and is commonly known by the name of the "Dead Weight Annuity." It expires in 1867. It is equivalent to a perpetual annuity of 470,317*l.* 10*s.*

3. *Annuities under 48 Geo. 3, c. 142, and 10 Geo. 4, c. 24.*—The 48 Geo. 3, c. 142, was the first Act that authorized the granting of life annui-

ties; and that Act was followed by various others, whereby its provisions were amended and extended, all of which were repealed by the 9 Geo. 4, c. 16; but this latter Act did not affect annuities that had then been granted. Annuities for terms of years are payable on the 5th of January and 5th of July; those for lives on the 5th of April and 10th of October. See also 2 & 3 Will. 4, c. 59, and 3 & 4 Will. 4, c. 24.

IV. *Exchequer Bills*

Are bills of credit issued by authority of Parliament. They are for various sums and bear interest according to the usual rate at the time. (These compose the greater portion of the Unfunded Debt.)

V. *India Stock and India Bonds*

Are also quoted in the lists of the prices of the public funds. The stock on which the East-India Company divide is 6,000,000*l.*, the dividend on which has been, since the year 1793, 10½ per cent. (See the provisions for its payment under 3 & 4 Will. 4, c. 85.) India Bonds are generally for 100*l.* each, and bear at present 4½ per cent. interest, payable 31st of March and 30th of September.

In addition to the above amounts, there are 41,500,000*l.* of these stocks held in Ireland.

Of all these funds, the most important is the Three-per-cent. Consols. It is in this stock that the Courts of Equity invariably direct any funds under their control to be invested; and it is the duty

of trustees, although no direction be given in the instrument creating the trust, to invest the trust-moneys in this security, and they will be personally liable for the neglect of such duty.[a] It has also been laid down, that it is incumbent on executors to transfer into the Three-per-Cents. any funds which they may find invested in other than Government stocks, inclusive even of Bank or India stock.[b]

In the case of *Hancom* v. *Allen*[c] trust-money had been laid out by trustees in funds which sunk in their value without any *mala fides;* but the same not being laid out in the fund in which the Court directs trust-money to be invested, the trustees were ordered to account for the principal and to pay it into the Bank, and then that it should be laid out in Bank Three-per-cent. Annuities.

Lord Eldon, C., speaks of the practice of directing trust-money to be invested in the Three-per-cent. Consols as a long-established principle. "There is a great difference," he observes, in his judgment in *Howe* v. *Countess* of *Aylesbury*[d], "between Bank stock and Government securities. Bank stock is as safe, I trust and believe, as any Government security; but it is not Government security, and therefore this Court does not lay out or leave the

[a] Lyse *v.* Kingdom, 1 Coll. 184; Trafford *v.* Boehm, 3 Atk. 440; Adie *v.* Fennilitteau, Peat *v.* Crane, 2 Dick. 499.

[b] Holland *v.* Hughes, 16 Ves. 114; and Howe *v.* E. of Dartmouth, 7 Ves. 150.

[c] 2 Dick. 498; *et vide* Clough *v.* Bond, 3 M. & Cr. 496.

[d] 7 Ves. 150, & cases cited in note [a]; *et vide* Chambers *v.* Minchin, *ibid.* p. 193. Preston *v.* Melville, 15 Sim. 35.

property in Bank stock; and what the Court will decree it expects from executors and trustees."

Nor will the Court, in laying out money in the funds, attend to the difference in the price of stock; for in the last-cited case Lord Eldon continues: "You can learn the price at which it might be converted on any day; and the moment the Court was ordered by the legislature to lay out its funds in stock, it necessarily held that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor that it should be thrown into a lasting fund and is equal to all the parties interested. As to Bank stock, the Court has ordered Four-per-Cents. and Five-per-Cents. to be sold and converted into Three-per-Cents. upon this ground, that, however likely or not that they may be redeemed, the Court looks upon them as a fund that is not permanent, though it may remain for ever; and considers that from that quality there is an advantage to the present holder, who gets more interest because they are liable to be redeemed."

It seems, by Lord Eldon's judgment in the last case, to have been doubted, before Lord Kenyon sat in the Rolls, whether an executor could lay out property in the Three-per-Cents.; but Lord Kenyon established the affirmative in the case of Mr. Champion an executor, and produced a *dictum* of Lord Northington, that the Court would protect an executor in doing what it would order him to do.

But in *Caldecott* v. *Caldecott*[a], the Court

[a] 4 Madd. 189.

ordered trust-money to be laid out in the Three-per-cent Reduced, as the will directed the dividends to be paid to the tenant for life in January and July, so that the trusts of the will would not be conveniently executed if the money were to be laid out in the Three-per-cent. Consols.

So, where a testator bequeathed, *inter alia*, Bank stock to trustees, the Court ordered it to be sold and the proceeds to be invested in the Three-per-Cents.; and that, not because Bank stock is not a permanent fund, but because it depends on the will of the Directors of the Bank whether the casual profits (which are full as valuable as the ordinary profits) shall go to tenants for life, or form part of the capital of the stock; and the Court will not allow the interests of tenants for life and of remaindermen to depend on the directions that the Bank may think proper to give respecting bonuses.[a]

A trustee who has invested in the Three-per-Cents., is, of course, not liable for any fall in the price of that stock[b], albeit he is liable for the fluctuations of any unauthorized fund.[c]

An investment in South-Sea stock, or Bank, or India stock, though actually as safe as any Government security, is not regarded by the Court

[a] Mills *v.* Mills, 7 Sim. 501.

[b] Peat *v.* Crane, 2 Dick. 499 n.; Clough *v.* Bond, 3 M. & Cr. 496; Jackson *v.* Jackson, 1 Atk. 513; *Ex parte* Champion, 3 Bro. C.C. 434: *et vide* Franklin *v.* Frith, cited in the case last quoted.

[c] Hancom *v.* Allen, 2 Dick. 498; Howe *v.* E. of Dartmouth, 7 Ves. 150; Clough *v.* Bond, 3 M. & Cr. 496.

of Chancery as a proper disposition of trust-funds; and upon acquiring judicial cognizance that trust-funds have been invested therein, they will order them to be sold and the proceeds to be invested in the Three-per-Cents.[a]

One of the strongest illustrations of the principle according to which trustees are rendered liable, should they neglect to invest the trust-funds in the stock directed by the Court, is afforded in the case of *Dimes* v. *Scott*.[b] There a testator gave the residue of his personal estate to trustees, directing them to convert it into money and invest the proceeds in Government or real securities, of which they were to stand possessed upon trust for *A* during her life, and after her death for *B*. The trustees permitted a share which the testator had in an Indian loan bearing interest at 10 per cent., to remain for several years on that security; during which time they paid to *A* the yearly interest. The loan being afterwards paid off, they invested the money in the Three-per-Cents., at a time when the funds were so low that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death. *B* filed a bill against the trustees for an account of the testator's assets. The bill charged that the testator's interest in the decennial loan ought, as being a beneficial property, to have been

[a] Trafford *v.* Boehm, 3 Atk. 444; Howe *v.* E. of Dartmouth, 7 Ves. 150; Powell *v.* Cleaver, *ibid.* 142 n.

[b] 4 Russ. 195.

sold, or otherwise the interest ought to have been invested as principal money for the benefit of the testator's estate; and Lord Lyndhurst, C., held (affirming the decree of Lord Gifford, M. R.) that the tenant for life was not entitled to the actual interest which the money yielded while it remained on the Indian security, but only to the dividends of so much Three-per-cent. stock as would have been purchased with it at the end of a year from the testator's death; and that the trustees ought to be charged with the whole of the stock actually purchased and all the sums actually received in respect of the Indian rate of interest; and that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends if the money had been transferred from the Indian security and invested in the Three-per-Cents., at the end of a year from the testator's death.

It is now proposed to consider the construction that our Courts have placed upon stock, its incidents, and the various Acts thereto relating.

By the statute 8 & 9 Will. 3, c. 20, s. 33, intituled "An Act for Making Good the Deficiencies of several Funds therein mentioned, and for Enlarging the Capital Stock of the Bank of England, and for Raising the Public Credit," it is enacted, that Bank stock shall be a personal and not a real estate, and shall go to the executors and administrators and not to the heirs of the person or persons

dying possessed thereof or entitled thereunto. And, by s. 34, it is enacted, "That no contract, covenant, bargain, or agreement, either by parol or in writing, for the buying or selling of any Bank stock, or for the transferring, changing, or altering the property thereof, either in trust or otherwise, however it be, shall be good or valid in law or equity, or adjudged to be legal, obligatory, or binding, unless such promise, contract, bargain, covenant, or agreement shall be actually registered in words at length in the book or books of the Bank by the officer thereunto appointed within seven days and actually transferred within fourteen days next after the making of such promise, contract," &c.

By the 47th section it is enacted, "That no member of the said Corporation (Governor and Company of the Bank of England) shall be or be adjudged liable to be a Bankrupt, within the intent and meaning of all or any the Statutes made against or concerning Bankrupts, for or by reason of their stock or interest in the said Corporation; and that no stock in the said Corporation shall be subject or liable to any foreign attachment by the customs of London, or otherwise."

The 58th section enacts, "That no Assignment of orders or tallies* shall be good and effectual for assigning or transferring the same, unless made in writing, and signed by the party making the same.

The 20th section of the statute 2 & 3 Anne, c. 3, intituled "An Act for granting an Aid to Her

* See p. 3 for explanation of the term *tally*.

Majesty for carrying on the War, and other Her Majesty's occasions, by Selling Annuities at several Rates, and for such respective Terms or Estates as are therein mentioned," enacts, "That it shall and may be lawful to and for any contributor (for Government annuities), his or her executors, administrators, or assigns, at any time or times during the continuance of his or her term and estate, or interest of or in any annuity to be purchased upon this Act, by any writing under hand and seal, or by his or her last will in writing, to assign or devise such annuity and annuities, or any part thereof, or any interest therein, to any person or persons whatsoever, and so *toties quoties;* and no such assignment to be revocable, so as an entry or memorandum of such assignment or will be made in books to be kept for that purpose in the said Office of the Auditor of the Receipt within the space of two months after such assignment or death of the devisor; and that upon the producing such assignment or will, or probate thereof, in the said Office of Receipt, to be entered as aforesaid, the party so producing the same shall bring therewith an affidavit taken before some person authorized to take affidavits in causes depending in any the courts at Westminster, of the due execution of the said assignment or will: which affidavits shall be severally filed in the said Office; which said entry or memorandum the said officers, in the said Receipt of the Exchequer, are hereby required to make accordingly, and to file the said affidavits; and in default

of such assignment or devise, by deed or will, the interest of such contributor (not being such as to determine by his or her death) shall go to his or her executors or administrators."

Section 21 enacts, "That every estate of and in any annuity to be purchased upon this Act shall be deemed a personal estate, and (if the same be not such annuity as is to depend upon the contributor's own life) shall go to his executors and administrators, and not be descendible to the heir."

And the Act 3 & 4 Anne, c. 2, intituled "An Act for raising Moneys by Sale of Annuities for carrying on the present War," contains (s. 10) a clause employing the same terms as are used in the one just quoted, empowering contributors to assign or devise annuities; which clause is again repeated by the 4 Anne, c. 6, s. 28; and again by the 5 Anne, c. 19, s. 22.

The management of the public stocks or annuities was first intrusted to the Bank of England by the 6 Geo. 1, stat. 2, c. 19, s. 90. Stock was thereby declared to be personal estate, and the 12th section rendered it devisable by will in writing, attested by two or more credible witnesses; but that the devisee of such stock should not be entitled thereto, until that part of the will making such devise should be entered in the proper office at the Bank.

The clauses in the Acts relating to the Bank that bear more immediately on the nature and incidents of stock having been thus set out, the discussion of the subject requires no preliminary

beyond the mere enumeration, in passing, of the various statutes concerning the Bank and its Charters: these are, 5 & 6 Will. & Mar., c. 20; 8 & 9 Will. 3, c. 20; 6 Anne, c. 32; 7 Anne, c. 7; 3 Geo. 1, c. 8; 15 Geo. 2, c. 13; 24 Geo. 2, c. 4; 7 Geo. 4, c. 7; 3 & 4 Will. 4, c. 98.*

Bank stock is the capital stock of the Governor and Company of the Bank of England, and according to the manner of its employment is its value greater or less in the market.

Omnium is a term used to express the aggregate value of the different stocks in which a loan is now usually funded.†

Government stocks, or funds, are nothing more than perpetual annuities, the principal of which can

* Some idea may be formed of the multitude and variety of the Acts relating to stock by reference to Fauntleroy's case: in the indictment against him mention is made of forty-nine statutes concerning Three-per-cent. Consols. — 1 Car. & P. 422.

† It may not be uninteresting to state how stock, shares, &c., are considered by the law of France.

Les meubles par la détermination de la loi sont:

1°. Les obligations et actions qui ont pour objet des sommes exigibles ou des effets mobiliers. (Art. du Code Civil, 529.)

2°. Les actions ou intérêts dans les compagnies de finance, de commerce ou d'industrie, encore que des immeubles dépendant de ces entreprises appartienment aux compagnies.

Ces actions ou intérêts sont reputés meubles à l'égard de chaque associé seulement tant que dure la société.

3°. Les rentes, soit viagères, soit perpétuelles, de quelque manière qu'elles aient été constituées, soit à prix d'argent ou ce qui est la même chose, pour le prix de la vente d'un immeuble soit comme condition de transport ou de la concession d'un fonds immobilier. (Art. du Code Civil, 529, 530.) —3 Toullier, Droit Civil, p. 14.

never be recalled by the holder from Government, though redeemable at the pleasure of the latter; nor are they liable to be rated for the relief of the poor.[a]

Stock is a *chose in action*, and cannot therefore be recovered in an action for money had and received.

In the case of *Nightingale* v. *Divisme*[b], which was an action of assumpsit, brought by the assignees of a bankrupt to recover 500*l.* East-India stock from the defendant, Lord Mansfield said, in his judgment, that stock was a new species of property arisen within the compass of a few years[c]; that it was not money, and that an action for money had and received to the use of the plaintiff would not lie to recover it.

Nor will stock pass under the term "money" in a will, unless the will contain some explanatory context. This was decided, after a full review of the authorities (cited in the case), by Leach, M.R., in *Gosden* v. *Dotterill.*[d]

It was formerly held that stock was not liable to the payment of debts in any way except under a commission of bankruptcy[e]; but the law is now altered in this respect by the 1 & 2 Vict., c. 110,

[a] The King *v.* the Churchwardens, &c., of St. John, Madder Market, Norwich, 6 East, 182; and see *ibid.* 184, for a definition of the term *Stock.*

[b] 5 Burr., 2589.

[c] This case was tried A.D. 1770.

[d] 1 Myl. and K., 56.

[e] Bank of England *v.* Lunn, 15 Ves., 577.

s. 14, which Act, as far as it relates to the subject under discussion, will be more fully considered in a subsequent chapter.

Many cases have arisen, and more particularly in the courts of equity, where the incidents attached to stock, and the character and definition to be attributed to this novel, and, as it appeared to our courts, somewhat anomalous species of property, have undergone considerable discussion.

Thus it has been held, that stock transferred into the name of a married woman as next of kin of an intestate, for her sole and separate use, her husband having never exercised any control over it, becomes at his death her own absolute property and does not pass to the husband's representatives.[a]

Sir W. Grant, M.R., observed in his judgment in this case, that stock was a species of property grown up since the divers distinctions of property had been settled by our law; that there was a great difference between a transfer of stock and a payment of money; that the interest in stock is properly nothing but a right to receive a perpetual annuity subject to redemption: a mere right, therefore, and the circumstance that Government is the debtor makes no difference.

And in an earlier case Sir Richard Pepper Arden, M.R., observed, in speaking of stock, that "there is a very untechnical expression used with regard to stock. There is literally no such thing as 100*l.*

[a] Wildman *v.* Wildman, 9 Ves. 174.

stock. The Three-per-Cents. are only perpetual annuities granted for ever, redeemable by the public upon the payment of a certain sum of money."[a]

Stock it has been held will not pass by a Royal grant of a liberty to have *bona et catalla felonum*, as being merely a *chose in action* and not a thing tangible of which corporal possession can be taken; and such grant extends only to goods in possession.

Sir R. Richard, L.C.B., in his judgment in the case where the above principle was established, remarked, "It is certainly not easy to define precisely the meaning of 'stock.' It is not an ancient subject of property, or known to the common law. It is, however, a hereditament. It is an annuity, and treated as such by Act of Parliament; and it is made personal estate by statute. . . . . For some purposes, however, it has a locality, as certain specialties have. One of those purposes is that of probate and administration, for giving effect to which it is supposed to lie within the Archbishopric of Canterbury."[b] Stock, therefore, is subject to probate and legacy duty.

That stock is not considered by our Courts as money was recognised by Lord Kenyon in the case of *Jones* v. *Brindley*[c], which was an action brought on a special agreement. The defendant had pro-

[a] Kirby *v.* Potter, 4 Ves. 751.

[b] The King *v.* Capper and others, 5 Price, 217; Scarth *v.* Bishop of London, 1 Hagg. 625.

[c] 3 Esp. 205; 1 East, 1. (Lord Kenyon animadverted in strong terms upon the immorality of such bargains as the one in question).

mised the plaintiff a certain per-centage on all moneys he should receive through information supplied him by the plaintiff: in consequence of such information the defendant recovered stock. It was held that the plaintiff had alleged in his declaration that he had enabled the defendant to recover a sum of *money*, whereas the evidence was, not of money, but of *stock*; that such allegation was a variance, and that the action could not be maintained.

Indebitatus assumpsit will not lie to recover foreign money, unless there be a reasonable presumption that the holder had an opportunity of converting the same into British money.[a]

It has been held that the words "Government security or securities" do not apply to Exchequer bills.[b]

South-Sea annuities are, by Act of Parliament, considered merely as such, and are exactly in the case of a common annuity payable half yearly where the annuitant dies before the half year is completed; so that the purchaser of a life interest in such annuities is not entitled to receive the half-yearly dividend payable on them if the annuitant die before the dividend becomes payable.[a]

Neither South-Sea stock nor Bank stock are considered as good security, because it depends

[a] M'Lachlan *v.* Evans, 1 You. & J. 380; Nightingale *v.* Divisme, 5 Burr. 2589.

[b] *Ex parte* Chaplin, in the matter of Public Undertakings' Moneys' Custody Act, 3 You. & C. 397. Overruled in *ex parte* S. E. R. Company, 9. Jurist, 650.

[c] Pearly *v.* Smith, 3 Atk. 260.

upon the management of the Governors and Directors and is subject to losses; and a trustee with power to invest money in Government funds or other good securities is not at liberty to invest such money in the purchase of South-Sea or Bank stock.

But South-Sea annuities and Bank annuities are of a different consideration, the Directors having nothing to do with the principal, and are only to pay the dividends and interest till such time as the Government pay off the capital; and it is not in their power to bring any loss upon them. Such alone can be considered good security.[a]

In the case of *King* v. *Ennis*,[b] the Court observed that it had been always held that the South-Sea loans were advanced on the credit of the stock, without inquiring after the ability of the borrower.

Specific performance of an agreement to transfer stock will not be decreed by the courts of equity, unless the legal remedy be inadequate or defective,[c] on the principle that those courts will not generally decree performance of a contract for the sale of stock or goods; not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy for the purchaser as the

[a] Trafford *v.* Boehm, 3 Atk. 440.

[b] 3 P. Wms. 361.

[c] Mason *v.* Armitage, 13 Ves. 37; Flint *v.* Brandon, 8 Ves. 159; Nutbrown *v.* Thornton, 10 Ves. 161; and cases enumerated in 5 Vin. Abrid., title Contract and Agreement p. 541, 2d edit.

delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quantity of the like stock or goods.[a] Specific performance of a written agreement for the transfer of South-Sea stock at a certain price and within a certain time, was decreed by Sir Joseph Jekyll, M. R., but that decree was afterwards reversed by Parker, C.[b]

Where the vendor of an annuity payable out of the dividends of stock standing in the name of the Accountant-General filed a bill for the specific performance of the agreement, upon demurrer to the bill the Vice-Chancellor held, that there could be no doubt that the defendant, who was the purchaser of the annuity, might have filed a bill for the specific performance of the agreement for the sale to him, because a court of law could not give him the subject of his contract, and the remedy in equity must be mutual for purchaser and vendor.[c]

So a bill may be filed for the specific performance of a contract for the purchase of Government stock, where it prays for the delivery of certificates which give the legal title to the stock, because a court of law could not give the property but only a remedy in damages, the beneficial effect of which

[a] Adderley *v.* Dixon, 1 Sim. & St. 610, per Sir J. Leach, V.C.; Buxton *v.* Lister, 3 Atk. 384. As to decreeing specific performance of contracts relating to shares, see *infra*, Chap. 5.

[b] Cuddee *v.* Rutter, 5 Vin. Abrid. 540, 2d edit.; 2 P. Wms. 570.

[c] Withy *v.* Cottle, 1 Sim. & St. 174.

must depend upon the personal responsibility of the party.[a]

Buying and selling stock, the parties not being brokers, will not make a person a bankrupt: and where one Wolfstenholme had been declared a bankrupt, as having East-India stock, his bankruptcy was reversed by an Act of Parliament (13 Car. 2, c. 24), declaring that neither he nor any other person should be liable to bankruptcy in respect of their having East-India stock.[b]

Stock is personal property and as such devisible by will according to the statutes already adverted to; and in bequests of stock questions frequently arise as to what expressions in a will render such bequest specific or general.

A legacy of "all my stock that I may be possessed of at my decease," no particular stock being referred to, is not rendered specific by the pronoun "my."[c]

The words "of my stock," or "in my stock," or "part of my stock," render a legacy specific.

Many cases have established the principle that the word "my" suffices to render a legacy of stock specific.[d]

It would, however, be foreign to the purpose of this treatise to enter into a discussion of the very numerous cases decided in the courts of equity as to

[a] Doloret *v.* Rothschild, 1 Sim. & St. 590.
[b] Colt *v.* Nettervill, 2 P. Wms. 304.
[c] Parrott *v.* Worsfold, 1 Jac. & Walk. 594.
[d] 2 Bro. C. C. 708; 5 Ves. 461; 2 Madd. 280; 1 Jac. & Walk. 102.

what expressions in a will render legacies of stock specific or otherwise. For more ample information upon this point the reader is referred to the edition by Mr. Hopley White of "Roper on Legacies," p. 179.

An indefinite bequest of the dividends confers the absolute possession of the stock on which they are payable.[a]

Stock in the funds held in trust for the wife for life, with remainder as the husband should appoint, and in default to his executors, administrators, or assigns, does not pass under the will of the husband by the words "money he might have in the books of the Governor and Company of the Bank of England."[b]

Whether stock in the public funds will or will not pass under the expression of "securities for money," depends upon the context of the will; and if there be nothing in the will to control the force of that expression, public stock would so pass.[c]

Legatees of stock are entitled to have the value of the stock estimated according to its market price at the end of a year from the testator's death, when it ought to have been transferred.[d]

It had been a mooted point before the passing of the 8 & 9 Vict., c. 97, whether the Bank were bound to transfer stock that had been devised to

[a] Page *v.* Leapingwell, 18 Ves. 463.
[b] Howell *v.* Gayler, 5 Beav. 157.
[c] Bescoby *v.* Pack, 1 Sim. & St. 500; Avelyn *v.* Ward, 1 Ves. sen. 425.
[d] Morley *v.* Bird, 3 Ves. 628.

the legatee, or how far they were justified in resisting an executor's claim to the stock so devised.

The difficulty on this point most probably arose from the fact of the word *devise* being employed in the various statutes relating to stock. This term is usually employed solely with reference to real property, and it might thence be inferred that the legislature intended that a devise of stock should take effect and pass as would a devise of land.

The earliest case in which the point arose appears to be that of *Parsons* v. *Bank of England.*[a]

In that case stock had been bequeathed to the plaintiff for life, he being also appointed executor to the will, and after his decease to one *W* absolutely. *W* subsequently sold all his interest in the stock to the plaintiff; on application to the Bank they refused to transfer the stock to the plaintiff, whereupon a bill was filed against them by the plaintiff and *W*. It was contended on behalf of the Bank that stock could only be properly made over to another party either by a transfer *inter vivos*, or by devise by a will executed according to the provisions of the Acts relating to stock; and that the Bank would not incur the responsibility of deciding as to the results of private transactions between parties interested in the stock; and that should such parties deal with their stock in any other manner than that prescribed by the Acts, the Bank would refuse to act unless under a decree of

[a] 2 Bro. C. C. 529; 2 Cox, 175, S. C.

the proper courts. Lord Thurlow was of opinion that the Bank were strictly justified in their practice, as the devise of stock was, under the Acts in question, in the nature of a Parliamentary appointment, and did not require the assent of the executors.

The courts of equity adhered to this principle in subsequent cases involving the same point.[a]

But where the Bank filed a bill to restrain an action brought by the executor in consequence of their refusal to permit the transfer of stock alleged to be specifically bequeathed, Lord Eldon, C., allowed a demurrer to the bill, on the ground that if the executor could not maintain an action at law the plaintiffs did not want the protection of the Court; and that if the action could be maintained, then the true construction of the Act of Parliament authorized or did not prevent that action, and if so there was no equity.[b]

Although the Bank are bound to allow the transfer to or by the executor of stock specifically bequeathed if the executor have not assented to the legacy, yet it does not follow that if he have assented to the legacy the Bank are bound to transfer it to the legatee.[c]

In *Hartga* v. *Bank of England*[d] Lord Eldon C. dismissed a bill filed by a legatee of stock against

[a] Marryatt *v.* Bank of England, Aynsworth *v.* Bank of England, 8 Ves. 524, n. *b.*; Austin *v.* Bank of England, *ibid.* 522.

[b] Bank of England *v.* Lunn, 15 Ves. 569.

[c] Humberstone *v.* Chase, 2 You. & C. 209.

[d] 3 Ves. 55.

the Bank, observing that the consequences would be exceedingly alarming if, in all cases where there is a legacy in trust, the Bank is to take notice of the execution of the trust.

An executor has a right of action against the Bank for not permitting the transfer of stock by him, although the testator may have made a specific bequest of it.[a] And the Court of King's Bench will not grant a *mandamus* to compel the Bank to transfer stock, because an action will lie for complete satisfaction, which is equivalent to a specific relief.[b] But the question as relates to the right of executors to insist on the Bank transferring to them stock bequeathed by their testator was set at rest by the passing of the 8 & 9 Vict., c. 97, intituled "An Act to amend the law respecting Testamentary Dispositions of Property in the Public Funds, and to authorize the Payment of Dividends on Letters of Attorney in certain cases."

By s. 1 of this Act, after reciting the 1 Geo. 1, c. 19, relating to devises of stock, and that doubts had arisen as to the true construction of the provisions in the said Act, and further reciting the practice of the Governor and Company of the Bank of England with regard to executors, it is enacted: "That all the share or interest in any public stocks now standing in the books of the Governor and Company of the Bank of England in the name of

[a] Franklin *v.* Bank of England, 9 B. & C. 156.
[b] The King *v.* the Bank of England, 2 Doug, 524.

any deceased person, and all the share and interest of any person who shall hereafter die possessed of any such stocks standing in his name as aforesaid, shall and may be assigned and transferred by the executors or administrators of such person, notwithstanding any specific bequest or disposition thereof in the will of such person contained: provided always, that the said Governor and Company of the Bank of England shall not be required to permit or allow the executors or administrators of any such person to transfer any such stocks, or to receive any dividend thereon, until the probate of the will or the letters of administration of the goods, chattels, and credits of such person shall have been first left at the Bank of England for registration thereof; and that it shall be lawful for the said Governor and Company to require all the executors who shall have proved the will of any deceased person in whose name any such stocks are now or at any time hereafter may be standing to join and concur in every transfer thereof, or of any part thereof."

And by s. 2 it is enacted, "That so much and such respective parts of any and every Act now in force as require all or any part of any will or codicil devising or bequeathing or purporting to devise or bequeath any estate, property, or interest in any public stocks, or in any dividends arising therefrom, to be entered or registered in the office of the Chief Accountant of the Governor and Company of the Bank of England, or in any other office, or in

any book of the Governor and Company of the Bank of England, shall be and the same are hereby respectively repealed; and that from and after the passing of this Act it shall be sufficient for the said Governor and Company, before permitting the transfer of any stocks, or the receipt of any dividends upon any stocks standing in the name of any deceased person, to register the names of the deceased party, and of his executors or administrators respectively, as the case may be."

And by s. 3 it is enacted, "That whenever it shall happen that any stock shall be standing in the name of any infant or person of unsound mind, jointly with any person not under any legal disability to act, it shall be lawful to and for such last-mentioned person, by letter of attorney under his hand and seal, attested by two or more credible witnesses, to authorize some other person to receive the dividends due and to accrue due on such stock; and the payment of any such dividend to any person so appointed shall discharge the said Governor and Company of the Bank of England in respect thereof: provided always, that it shall be lawful for the said Governor and Company, before acting on any such letter of attorney, to require proof to the satisfaction of the said Governor and Company of the age of such infant, or of the unsoundness of mind of such person, by the declaration of competent persons, to be made in pursuance of the Act passed in the sixth year of the reign of His late Majesty authorizing the sub-

stitution of a declaration in lieu of an oath in certain cases."

A bill of discovery will lie against the Bank to discover what sum an executrix had transferred into her own name; but where the Bank were made parties to such bill the suit need not be brought on to a hearing, and the plaintiffs would be ordered to pay their costs.[a]

Where upon a bill filed for discovery of stock standing in the name of the plaintiff's father, and for an inspection of the Bank books containing the entries of such stock, the Bank refused to produce their books, but gave an account of the stock, it was held that they were bound to produce them.[b]

And where the Cashier of the South-Sea Company having received money for a subscription omitted to enter the subscriber's name in his book, the latter was held entitled to recover against the Company.[c]

Where a bankrupt had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the Court of Exchequer (equity side) ordered the Bank to erase from their books the fictitious name and insert that of the bankrupt.[d]

In the case of *How* v. *Best and Hare*[e], a demurrer by an officer of the Bank was allowed, on

[a] Williams *v.* Williams, 2 Bro., C. C. 87.
[b] Heslop *v.* Bank of England, 6 Sim. 192.
[c] South-Sea Company *v.* Carson, 2 Bro. P. C. 442.
[d] Green *v.* Bank of England, 3 You. & C. 722.
[e] 2 Madd. 19.

the ground that as to the discovery sought from him he was merely a witness.

Where the question was, whether a plaintiff in a suit had a lien upon certain stock, and the defendant applied to the Court to order the Bank to permit a transfer, they having refused such permission, the Court rejected the application, holding that it was in fact requiring a decree in the cause by an interlocutory order, and that the stakeholder could not be called on to quit the stakes, which were the main object of dispute in the cause.

A bill in Chancery to redeem stock, bonds, plate, or other securities or personal property, has frequently been sustained.[b]

In order to obviate the inconvenience of making, as had hitherto been the practice, the Bank of England and the East-India and South-Sea Companies parties to suits relating to public stock standing in their respective books, the statute 39 & 40 Geo. 3, c. 36, was passed, whereby it was enacted that such Companies need not be made parties to such suits in any court of equity, but that the courts (s. 1) may order them to suffer a transfer of stock, although they were not parties to the suit, and may compel the Bank to pay dividends; and by the same section they are empowered to issue an injunction to restrain the transfer of stock.

Although the Act does not expressly prohibit

[a] Birch *v.* Corbyn, 1 Bro. C.C. 572.

[b] See cases hereon collected in Hart *v.* Ten Eyck, 2 John, C.C. 100.

suitors from making the Bank of England a party to a bill filed, yet the courts have held that they ought not to be made parties thereto.[a] The provisions of this Act were limited to public stock.

By the statute 5 Vict., c. 5, intituled "An Act to make further Provisions for the Administration of Justice," whereby the jurisdiction of the Court of Exchequer as a court of equity, &c., was abolished and transferred to the Court of Chancery, the powers given to that Court by the 39 & 40 Geo. 3, c. 36, were extended to the stock or shares and the dividends due or to become due in any public company.

Section 4 enacts, "That it shall be lawful for the said Court of Chancery, upon the application of any party interested, by motion or petition, in a summary way without bill filed, to restrain the Governor and Company of the Bank of England, or any other public company whether incorporated or not, from permitting the transfer of any stock in the public funds, or any stock or shares in any public company, which may be standing in the name or names of any person or persons or body politic or corporate, in the books of the Governor and Company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon; and every order of the said Court of Chancery, upon such motion or petition as aforesaid, shall specify the amount of the stock or the particular

[a] Perkins *v.* Bradley, 1 Hare, 232.

shares to be affected thereby, and the name or names of the person or persons, body politic or corporate, in which the same shall be standing; provided always that the said Court of Chancery shall have full power, upon the application of any party interested, to discharge or vary such order, and to award such costs upon such application as to the said Court shall seem fit."

This section enables a party to restrain by summary process the transfer of stock in any public company. No bill need be filed or suit instituted. The Court will, upon motion or petition supported by sufficient affidavits, grant such restraint, which may be looked upon as a species of injunction.

Such affidavits should be expressed in positive terms.[a]

And by the 5th section a writ of *distringas* is to issue from the Court of Chancery. The writ of *distringas* is prepared by the solicitor of the party by whom it is issued, and is sealed at the Subpœna Office, upon presentment of a proper affidavit in conformity with the following orders of Court:

"*Distringas on Stock.*

"ORDER OF COURT.

"*Wednesday the 17th day of November*, 1841.

"The Right Hon. John Singleton Lord Lyndhurst, Lord High Chancellor of Great Britain; by

[a] *Ex parte* Field, 1 You. & C. 1; *re* Marquis of Hertford, 1 Hare, 584.

and with the advice and assistance of the Right Hon. Henry Lord Langdale, Master of the Rolls; the Right Hon. Sir Lancelot Shadwell, Vice-Chancellor of England; the Hon. the Vice-Chancellor James Lewis Knight Bruce; and the Hon. the Vice-Chancellor James Wigram; and in pursuance of an Act passed in the fifth year of the reign of Her present Majesty, intituled 'An Act to make further Provisions for the Administration of Justice,' doth hereby order and direct in manner following, that is to say:

"I. That any person or persons claiming to be interested in any stock transferable at the Bank of England, standing in the name or names of any other person or persons, or body politic or corporate, in the books of the Governor and Company of the Bank of England, may, by his or their solicitor, prepare a writ of *distringas* pursuant to the said Act, in the form set out in the first schedule to the said Act, and may present the same for sealing at the Subpœna Office.

"II. That upon the presentment of such writ for sealing, and on leaving with the Patentee of the Subpœna Office an affidavit duly sworn by the person, or one of the persons, applying for such writ, or his solicitor, before one of the Masters or Masters Extraordinary of this Court, in the form set out at the foot of these orders, the same writ shall (in conformity with the orders of this Court for issuing and sealing writs of *subpœna*) be forthwith sealed with the seal of the Subpœna Office;

and such writ when sealed shall have the same force and validity as the writ of *distringas* heretofore issued out of the Court of Exchequer.

"III. That such writ of *distringas* and all process thereunder may, at any time, be discharged by the order of this Court, to be obtained, as of course, upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application by motion or notice, or by petition, duly served, of any other person claiming to be interested in the stock sought to be affected by such writ; and that upon or after such application, such costs thereof, and in relation thereto, and to the said writ, as to this Court shall seem just, may, if this Court shall think fit, be awarded, and ordered to be paid by the person or persons who obtained such *distringas*, or upon an application by any other person or persons, by such person or persons.

"IV. That the Governor and Company of the Bank of England having been served with such writ of *distringas*, and a notice not to permit the transfer of the stock in such notice and in the said affidavit specified, or not to pay the dividends thereon, and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer, or to pay such dividends, shall not by force or in consequence of such *distringas* be authorized, without the order of this Court, to

refuse to permit such transfer to be made, or to withhold payment of such dividends for more than eight days after the date of such request.

"V. That upon leaving such affidavit as aforesaid with the Patentee of the Subpœna Office, there shall be paid to such Patentee the sum of one shilling for filing such affidavit; and that within twenty-four hours from the time when such affidavit shall be so left, the said Patentee shall pay the said sum of one shilling to the Clerk of the Affidavits, and cause such affidavit to be filed and registered at the office of such Clerk.

"VI. That upon the sealing of such writ of *distringas* the sum of five shillings and sixpence shall be paid to the Patentee of the Subpœna Office; and that out of such sum the said Patentee shall pay the sum of four shillings to the Accountant-General, to be by him placed to the credit of the account entitled 'The Suitors' Fee Fund Account.'

"VII. That for and in respect of the preparation and service of such writ of *distringas* and the *præcipe*, and attendance in respect thereof, such costs shall be allowed as by the rules and practice of this Court are allowed for the preparation and service and attendance in respect of a writ of *subpœna* to answer a bill.

"LYNDHURST, C.
"LANGDALE, M.R.
"LANCELOT SHADWELL, V.C.
"J. L. KNIGHT BRUCE, V.C.
"JAMES WIGRAM, V.C."

The following are the forms of the prescribed affidavit and of the writ which issues in consequence:

"A. B. *against* The Governor and Company of the Bank of England.

" of in the of do solemnly swear, that according to the best of knowledge, information and belief, beneficially interested in the stock hereinafter particularly described; that is to say:

"Sworn at in the of this day of one thousand eight hundred and

" Before me ."

" *Distringas* on Stock.

" VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the Sheriffs of London, greeting; We command you, that you omit not by reason of any Liberty, but that you enter the same and distrain the Governor and Company of the Bank of England by all their lands and chattels in your Bailiwick, so that they or any of them do not intermeddle therewith, until we otherwise command you, and that you answer us the issues of the said

lands so that they do appear before us in our High Court of Chancery, on the day of to answer a certain bill of complaint, lately exhibited against them and other defendants before us in our said Court of Chancery, by complainant ; and further to do and receive what our said Court shall then and there order in the premises, and that you then have there this writ. Witness, Ourself, at Westminster, the day of in the year of our Reign.

DEVON."

A copy of this writ, together with the following notice, is then served upon the Governor and Company of the Bank of England:

" In Chancery.

" A. B. *against* The Governor and Company of the Bank of England.

" Take notice that the writ of *distringas* served herewith is for the purpose of restraining, and you are hereby required not to permit the transfer of the stock or sum of standing in the name of in

" And also to restrain the payment of, and you are hereby required not to pay, the dividends now due or at any time hereafter to become due thereon.

" Dated this day of one thousand eight hundred and

" Yours, &c.

" To ."

A person who has obtained a *distringas* under s. 5 of this Act may, notwithstanding, if the circumstances of the case appear to justify it, obtain a restraining order under s. 4, as the remedies under ss. 4 & 5 are cumulative.

An order under the 4th section continues in force until it is discharged after a bill has been filed for the same purpose.[a]

The remedies given by the 4th and 5th sections of the 5 Vict., c. 5, are in substitution of the writ of *distringas* under the former practice in the Exchequer; and therefore where a party had put a *distringas* upon a sum of stock before the passing of that Act, and that *distringas* had been removed upon the usual notice, it was held that it was not competent to him after the passing of the Act to apply for an injunction under the 4th section.[b]

By the 56 Geo. 3, c. 60, all stock upon which dividends have been unclaimed for ten years is to be transferred to the account of the Commissioners for the Reduction of the National Debt, in the books of the Governor and Company of the Bank of England; and by the 5th section, the Bank is authorized to re-transfer the stock to any person who shall shew to the satisfaction of the Governor, his right or title thereto: but in case the Governor shall not be satisfied of the legality of such claim, the Courts of Chancery or Exchequer[c]

[a] *Re* Marquis of Hertford, 1 Hare, 585; 1 Phil. 129, 203.
[b] *Ex parte* Amyot, 1 Phil. 130 n.
[c] But since the passing of the 5 Vict., c. 5, the Court of Exchequer has no longer any equitable jurisdiction. (See, for Act *in extenso*, Chap. 5.)

may, upon the petition of such claimant, verified by affidavit, make such order for the re-transfer of the stock or otherwise as shall appear to be just.

Under the provisions of this statute it is not necessary for the petitioners to shew that they are beneficially entitled; it is sufficient if they prove their legal claim.[a] And where stock had been transferred to the Commissioners according to the provisions of this Act, the dividends upon it not having been claimed for ten years, a person subsequently making out a legal title to it upon which, but for the lapse of the ten years, a re-transfer of the stock would have been made to him, is not entitled as a matter of course to have an order for a transfer, but it will be referred to the Master to inquire who is entitled to the stock, with liberty to state special circumstances.[b]

Where a solicitor has a lien on a fund in court for his costs of suit, the court will protect him by a stop order[c], as such restrictive orders are termed.

By the 34th section of the 8 & 9 Will. 3, c. 20, for preventing fraudulent or clandestine dealings in stock, it is enacted, that all contracts, &c., relating to stock, whether made by word of mouth or in writing, should within a certain time be registered in the Bank books.

This clause soon gave rise to the question as to

[a] *In re* Bigg, 1 You. & C. 245.
[b] *Ex parte* Ram, 3 Myl. & Cr. 25.
[c] Hobson *v.* Shearwood, 8 Beav. 486.

the circumstances were such as to render it doubtful as to who was the lawful proprietor of such stock; and this injunction would issue as well *pendente lite* as generally.

Thus an injunction issued to restrain a transfer during a litigation in the Ecclesiastical Court upon a will [a], and likewise to restrain a transfer of stock standing in the name of a steward who had become possessed of it by breach of trust.[b]

In the case of *Small* v. *Attwood*,[c] where a bill had been filed for rescinding a sale of iron-works on the ground of fraudulent misrepresentation on the part of the vendor, who, pending the suit, had transferred the purchase-money arising from such sale into the name of his mother, an injunction issued to restrain the transfer. It would appear that in this case the value of stock transferred into the name of the vendor's mother exactly coincided with the amount of purchase-money received from the plaintiffs.

A writ of *distringas* formerly issued from the courts of equity, generally from the equity side of the Exchequer, to restrain the Bank from permitting a transfer of stock; but such *distringas* would be discharged unless followed up by a bill filed within a reasonable time in the court whence such writ issued.[d]

[a] King *v.* King, 6 Ves. 172.
[b] Lord Chedworth *v.* Edwards, 8 Ves. 46; Cox *v.* Paxton, 16 Ves. 329; 2 Car. & P. 41.
[c] 1 Younge, 507.
[d] Williams *v.* Bank of England, 2 Young & C. 265.

Where a party who had purchased a reversionary share in certain stock caused a *distringas* to be laid upon it and afterwards filed a bill in Chancery to have his interest in the stock ascertained, alleging conflicting claims, the *distringas* was discharged, not having been followed up by any suit in the court whence it issued.[a]

The Bank stands in relation to stock as a depositary of goods in relation to the goods. The Bank therefore can only be made responsible for a transfer of stock after distinct notice given to them of an existing claim upon such stock. In many cases where bills were filed against the Bank, or on applications for an injunction to restrain transfer, it was frequently contended that the Bank of England were to be considered in the light of trustees; but that argument was definitively settled by Lord Abinger, C. B., in his judgment in *Humberstone* v. *Chase*.[b]

His Lordship thus expressed himself on the point in delivering the judgment of the Court: "The Bank does not profess to hold money in trust for any body. There is nothing in their Act or Charter constituting them trustees for that purpose. If the Bank voluntarily enters in its own books a trustee's account, it may, under certain circumstances, become liable for the obligation of

[a] Argent *v.* Bank of England, 1 You. & C. 557; Scott *v.* Bank of England, 2 You. & J. 327; Fellows *v.* Bank of England, 1 Younge, 385.

[b] 2 You. & C. 209.

those trusts. But the Bank is merely a public servant, and is generally under the obligation to transfer the fund to the person in whom it is vested. Therefore, unless the Bank choose to involve themselves in any transaction, there is nothing to implicate them. The only way in which they can be affected, is by giving them distinct notice of a liability to which the stock is made subject. That happens by a proceeding from this Court or the Court of Chancery, where you have a sort of lien placed on stock so as to prevent the transfer of it."

For further information respecting the practice that existed with regard to restraining transfers prior to the passing of the 1 & 2 Vict., c. 110, the reader is referred to the elaborate chapter thereon, in Mr. Wilkinson's valuable work on the "Public Funds:" enough has been cited on the subject as far as regards all practical purposes. It now remains to consider the salutary alterations effected by that most important Act.

Until the passing of the 1 & 2 Vict., c. 110 (the Act abolishing arrest on mesne process), stock (as has been shewn) could only be made liable to the holder's debts under a commission of bankruptcy[a]; nor would a court of equity give relief to a judgment creditor as against the money of the debtor in the public funds[b]; nor could stock be taken in execution under a writ of *fieri facias*.[c]

[a] Bank of England *v.* Lunn, 115 Ves. 577.
[b] Dundas *v.* Dutens, 2 Cox, 235.
[c] Horn *v.* Horn, Amb. 79; Rider *v.* Kidder, 10 Ves. 369.

By the statute 1 & 2 Vict., c. 110, s. 14, it is enacted, "That if any person against whom any judgment shall have been entered up in any of Her Majesty's superior courts at Westminster, shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

And by s. 15 it is provided, that "In order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities, or shares, hereby authorized to be charged for the benefit of the judgment creditor under an order of a Judge, be it further enacted, that every order of a Judge charging any Government stock, funds, or annuities, or any stock or shares in any public company,

under this Act, shall be made in the first instance *ex parte* and without any notice to the judgment debtor, and shall be an order to shew cause only; and such order, if any Government stock, funds, or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the mean time, and until such order shall be made absolute or discharged. And if any stock or shares of or in any public company, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or, in case of corporations, to any authorized agent of such corporation; and before the same order shall be discharged or made absolute, such corporation or person or persons shall permit any such transfer to be made, then and in such case the corporation or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the mean time shall be valid or effectual as against the judgment creditor. And further, that

unless the judgment debtor shall, within a time to be mentioned in such order, shew to a Judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such Judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit."

By the 16th section it is enacted, that "If any judgment creditor who, under the powers of this Act, shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged and secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly."

By the 18th section all decrees and orders of courts of equity, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, shall have the effect of judgments. And by the 21st section the powers of this Act are made applicable to the Courts of Lancaster and Durham.

The mode of practice followed under this Act is similar to that pursued on applications made to Judges upon special affidavit.

The plaintiff's attorney obtains upon affidavit of the facts an order *nisi* from a Judge in chambers (who need not be a Judge in the court in which the action has been brought, although perhaps it is advisable that application should be made to such Judge), provisionally charging the stock with the payment of the amount of the judgment debt and interest, unless cause be shewn to the contrary before a day named.

The order is then served upon the solicitor to the Bank, who, if the amount of stock and the description of the holder be correctly stated—and it is of the last importance that the amount of stock standing in the debtor's name should be accurately and precisely set forth—will serve the order on the Bank Secretary, who will then put a stop on the stock.

Such order acts as a restraint upon the Bank for the transfer of the stock charged thereby.

The order is then, if not varied or discharged, made absolute on the day named in the order *nisi*; and the effect of such order absolute is to entitle the judgment creditor to all such remedies as he would have been entitled to if the charge had been made in his favour by the judgment debtor. The charge will be good against bankruptcy and insolvency, after a stop is put upon the stock and before sale or discharge.[a]

[a] Lush on the stat. 1 & 2 Vict., c. 110, p. 53.

A court of equity has no jurisdiction under the 14th section of this Act to order moneys invested in the name of the Accountant-General to stand charged with a judgment debt recovered at law against the party entitled to such funds.[a]

It was the intention of the legislature upon the passing of the Act under consideration, that any order which should have the effect of making a charge on stock standing in the name of the Accountant-General should be made by a Judge of the courts of law and not of the courts of equity; and Judges of the courts of common law may make orders which are to charge stock standing in the name of the Accountant-General in which the party sought to be charged has an interest. Any doubt that might have arisen upon this point is removed by the subsequent Act of 3 & 4 Vict., c. 82, which defines and declares what shall be the construction of the former Act.

That Act, after reciting the 1 & 2 Vict., c. 110, enacts, "That the aforesaid provisions of the said Act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stock, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares; and whenever any such judgment debtor shall have any estate, right, title, or

[a] Miles *v.* Presland, *in re* Coe, 2 Beav. 300.

interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such Judge to make any order as to such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any Judge as to any stock, funds, annuities, or shares standing in the name of the Accountant-General of the Court of Chancery or the Accountant-General of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interest, dividends, or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order."

In a case where the Accountant-General holds a

fund in trust for *A* and others, he is a trustee for *A* and such other persons; and if *A*'s interest in the fund be subject to a charge, an order may be made under the Act to charge the fund.

The second Act is a statutory explanation of the first, and if it declare that the first Act shall be deemed and taken to have extended to a particular subject, it must be deemed and taken to have extended to that subject from the time when the first Act was passed; and the true meaning of such first Act was, that it should apply to stock standing in the name of the Accountant-General.

A court of equity will make a stop-order as auxiliary to the charging order.

A party intending to apply for a stop-order must give notice of his application to all other persons having like orders on the funds.[a]

On a petition by a judgment creditor of a party to a suit who had obtained a charging order on a fund in court to which the party was entitled, the Court will not order the fund to be paid to the petitioner without the party's consent: all that the Court will do would be to make a stop-order on the usual terms.[b]

It has been decided that property held by a party in right of a lien cannot be taken in execution under the 1 & 2 Vict., c. 110.[c]

[a] Hulkes *v.* Day, Hulkes *v.* Newton, 10 Sim. 41.
[b] Whitfield *v.* Prickett, *ex parte* Brookes, 13 Sim. 259.
[c] Legg *v.* Evans, 6 M. & W. 36; Rogers *v.* Kennay, 9 Q. B. 592.

Where a creditor has obtained an order under the 15th section of the 1 & 2 Vict., c. 110, charging the interest of his debtor in stock standing in the name of trustees, the Bank will still pay them the dividends.[a]

By this Act the power of making orders for charging stock is expressly given to the Judge and not to the Court: such order may be set aside by the Court, but it has no original jurisdiction to make the order. If the Judge be desirous of referring the question to the Court, his course is to make the rule absolute, and then the party against whom it is made may move to set it aside.[b]

And where a Judge at chambers had made an order *nisi* for a *distringas*, but, some difficulty arising, he was anxious to take the opinion of the Court, and directed the parties to apply to the Court *in banco* to make the order absolute, the Court held that they had no original jurisdiction in matters of that nature, whatever they might possibly have to review the Judge's final order.[c]

A person possessed of stock bequeathed a certain interest in a portion of it. A judgment having been obtained against the legatee, the judgment creditor procured a Judge's order under the 14th and 15th

[a] Bristed *v.* Wilkins, 3 Hare, 235; *et vide* Bank of England *v.* Moffat, 3 Bro. C. C., 260.

[b] Brown *v.* Bamford, 9 M. & W. 42; Fowler *v.* Churchill, 11, *ibid.* 57.

[c] Baldwin *v.* Timbrell, 8 Jur. 488, Exch. (This case does not appear to have been mentioned in the Exchequer Reports).

sections of the Act, charging the sum bequeathed with the judgment debt, which upon cause shewn was made absolute as to so much of the dividends payable to the use of the legatee. These orders were served on the Bank of England, who in consequence refused payment to the executors of the dividends due upon the whole amount of the testator's stock. The executors brought an action against the Bank to recover the dividends; and it was held, upon an application by the Bank for a stay of proceedings upon payment of a portion of the dividends, that there was no ground or necessity for such application, the Bank being bound to pay the dividends to the legal owners, the executors, who were answerable for their proper application; for the Bank has nothing to do with questions between the parties, but is bound to pay over the dividends to the legal owner.[a]

Courts of equity will carry into effect their orders and decrees for costs by charging the stock of those who should pay such costs under this Act; and where the plaintiff in a suit on the equity side of the Exchequer had made a motion which had been refused with costs, which costs had been taxed by the Master, and a *subpœna* for them had been issued, but not served in consequence of the plaintiff's absenting himself, the Court granted an order for charging the Government stock of the plaintiff, under the provisions of the Act, with the

[a] Churchill *v.* Bank of England, 11 M. & W. 323.

amount of the taxed costs; nor is it necessary to serve the party with notice of process.[a]

Money deposited in the hands of a third party to be paid to the defendant for the purchase of lands sold by him to a public company cannot be attached under the Act; for such purchase-money is not a part of the funds of the company, and therefore not within the 14th section, nor yet within the 12th, for that only applies to money in the hands of the debtor and not in the hands of a third party as trustee for him.[b]

By s. 17 it is enacted, that every judgment debt shall carry interest at the rate of 4 per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this Act, in cases of judgments then entered up, and not carrying interest, until the same shall be satisfied; and such interest may be levied under a writ of execution on such judgment.

This enactment is not confined to the subject-matter of the action but extends to judgments for costs; and the right to interest accrues from the day on which the judgment was signed by entering an *incipitur* in the Master's book, and not from the time of the formal entry on the judgment-roll.[c]

Writs of execution upon decrees and orders of

[a] Blake *v.* White, 3 You. & C. 434.

[b] Robinson *v.* Peace, 7 Dowl. 93. (As to amendment of judgment, see 1 Archbold's Q.B. Pract. by Chitty, p. 473, 8th edit.

[c] Pitcher *v.* Roberts, 2 Dowl. N. S. 394; Fisher *v.* Dudding, 3 M. & Gr. 238; Newton *v.* Grand Junction Company, 16 M. & W. 139.

courts of equity under the 18th section of the Act, must issue out of the court in which such decrees and orders are made, and cannot be awarded by a court of common law.[a]

This section does not apply to the usual decree made against executors directing a sale of the real estate should the personalty prove insufficient, and registered under that section.[b]

The courts have refused to discharge a Judge's order made under the 14th section of the Act, to charge stock standing in the names of trustees for the defendant.

The stock in question had been transferred into the names of the trustees by a deed of settlement made pursuant to an order of the Court of Chancery; and should it appear that such stock had been improperly charged, the Court of Chancery would be the proper tribunal wherein to seek for a remedy; for the Act gives no appeal from the Judge's order to the common-law courts.[c]

A pension granted by the East-India Company cannot be charged with a judgment debt by a Judge's order under the 14th and 15th sections of the Act; and where such an order had been made it was rescinded by the Court.[d]

In the case referred to the order rescinded was an order *nisi*; and it was objected on the authority

[a] Stanford *v.* Robinson, 3 M. & Gr. 407; Gibbs *v.* Pike, 8 M. & W. 283; 9 *ibid.* 351.
[b] Harrison *v.* Heathorn, 6 M. & Gr. 140.
[c] Rogers *v.* Holloway, 5 M. & Gr. 292.
[d] Morris *v.* Manesty, 7 Q. B. 674.

of *Brown* v. *Bamford*[a] that the application was premature, when Mr. Justice Patteson observed that he doubted whether *Brown* v. *Bamford* were accurately reported.

The Court gave no grounds for their judgment in this case, but it is presumed that they held that a pension cannot be deemed to be either stock, funds, annuities, or shares, under the 14th section of the Act.[b]

By the statute 7 & 8 Geo. 4, c. 29, s. 5, it is made felony to steal any tally*, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, as well of any foreign state as of the United Kingdom, &c.

In indictments under this Act, the bill or other security must be of the description specified in the Act.[c]

By the 9 Geo. 1, c. 12, s. 4, the forgery of orders, receipts, &c. relating to the payment of annuities payable at the Exchequer, as set forth in the Act, is made a capital felony.

By the 10 Geo. 4, c. 50, s. 124, the forgery of any power of attorney for the sale or transfer of any stock, or any draft, instrument, or writing for the receiving any money in the Bank of England or Ireland, &c., is made a felony.

By the 1 Will. 4, c. 66, s. 5, the making false entries in the books in which the accounts of

[a] *Supra*, p. 86 *n. b.*
[b] Wells *v.* Foster, 8 M. & W. 149.
* See for explanation of the term "tally," *supra*, p. 3.
[c] R. *v.* Craven, R. & R. 14.

public stock are kept, or transfer of public stock in any other name than the true owner's, is made punishable by death.

It is likewise punishable by death, by s. 6, to forge a transfer of any public stock, or of the stock of the South-Sea Company, or other body or company corporate, or to forge or alter any power of attorney, or other authority, to transfer such stock or to receive dividends thereon, or to receive dividends by false personation.

By the 7th section the personation of any owner of any public and other stock, and thereby endeavouring to transfer or receive the dividends, is punishable by transportation or imprisonment.

By s. 8 a similar punishment is reserved to persons forging the attestation to any power of attorney for the transfer of stock, &c.

The 2 & 3 Will. 4, c. 123, took away the punishment of death in all cases of forgery, except the forgery of wills, &c., and powers of attorney for the transfer of stock.

By the 1 Vict., c. 84, the punishment of death in all cases of forgery is abolished, and that of transportation or imprisonment substituted in its stead.

Each of the various Acts under which loans have been raised contains sections making it a capital offence to forge certificates and other documents recited therein.[a]

[a] The Acts relating to loans are 37 Geo. 3, c. 46; 41 Geo. 3, c. 3; 42 Geo. 3, c. 8; 42 Geo. 3, c. 58; 44 Geo. 3, c. 47; 44 Geo. 3, c. 48; 45 Geo. 3, c. 12; 46 Geo. 3, c. 33; 58 Geo. 3, c. 23; 5 Geo. 4, c. 53.

By the 5 Vict., c. 8, forgery of Exchequer bills is made punishable by transportation or imprisonment.

Where a prisoner was indicted for forgery of a transfer of stock, it was held by the Judges that the fact of the stock not having been accepted by the person in whose name it stood, or that the transfer was not attested in the manner prescribed by the Bank, did not vitiate the indictment.[a]

It was held in Fauntleroy's case[b] that a power of attorney to transfer Government stock, signed, sealed, and delivered, was a deed within the 2 Geo. 2, c. 25, s. 1.

This Act has been repealed, and the forgery of such power of attorney is made an offence by the 6th section of 1 Will. 4, c. 66.

A scrip receipt, not filled up with the name of the subscriber, is not a receipt for money within the statutes against forgery.[c]

Upon the trial of a prisoner for uttering a forged power of attorney for the sale of stock standing in the joint names of the prisoner and *J. C.*, it was held that *J. C.* was a competent witness to prove the forgery.[d]

If the Bank suffer a transfer of stock to be made by virtue of a forged instrument, they are liable to

[a] Gade's case, 2 East, P. C. c. 19, s. 9, p. 874; 2 Leach, 732.

[b] R. & M. C. C. R. 52.

[c] Lyon's case, 2 Leach, C. C. 597; and Reeves' case, *ibid.* 808.

[d] Rex *v.* Wait, 1 Bing. 121.

the proprietor of the stock, unless he could be shewn to have been guilty of gross negligence or laches.

Where the South-Sea Company permitted a transfer of stock to be made under a forged letter of attorney to an innocent party, the Court adjudged the company to take the stock from the transferee and restore it to the true proprietor; and, moreover, decreed that the transferee and not the company should pay back the dividend which he had received on such stock, holding that the latter should have exercised greater caution.[a]

The holder of stock which has been sold under a forged power of attorney may sustain an action for money had and received against the party holding the proceeds of such sale.[b]

So, where an agent entrusted by a holder of stock to receive the dividends thereon made a fraudulent sale thereof by means of a fictitious power of attorney, the proprietor, in an action against the vendor, was considered entitled to recover the original price first paid for the stock.

Where the Bank agreed to replace certain stock sold out under a forged power of attorney, on condition that the claimants would make good their demand by proof under a commission of bankruptcy,

[a] Hildyard *v.* S. S. Company & Keate, 2 P. Wms. 76.

[b] Marsh *v.* Keating, 1 Bing. N. C. 198 (decided in the House of Lords).

[c] Monk *v.* Graham, 8 Mod. Rep. 9. Here the vendor had re-sold the stock after notice of the fraud. The plaintiff had paid more for it than the sum awarded.

it was held, that until they had performed their part of the stipulation they could not maintain an action against the Bank.[a]

Where a joint-stock company permitted a transfer of stock under a forged letter of attorney, Lord Northington held that the company and not the innocent purchaser must sustain the loss.[b]

In the case of *Davis* v. *the Bank of England*[c], the liability of the Bank to pay dividends upon stock sold out under a forged power of attorney, underwent considerable argument. The declaration contained four counts; the first stating the plaintiff to be entitled to a certain amount of Three-per cent. Consols standing in his name in the Bank books, which stock the defendants had permitted to be transferred out of the plaintiff's name without his authority; the third count was the same as the first, but related to other stock; the second and fourth counts averred the refusal of the defendants to pay the dividends on the different stock. The cause was twice tried, and on both occasions the defendants had a verdict. The facts were subsequently ordered by the Court to be turned into a special case. It must be observed that the plaintiff had been aware for some months that the stock had been transferred under a

[a] Stracy *v.* Bank of England, 6 Bing. 754, confirming the point decided in Longridge *v.* Dorville, 5 B. & Ald. 117; and see Stone *v.* Marsh, 6 B. & C. 551; *ex parte* Bolland, 1 Mount. & M'A. 315.

[b] Ashby *v.* Blackwell, 2 Eden, 299.

[c] 2 Bing. 393.

forged power of attorney. It was held that the plaintiff's property in the funds not having been transferred by his authority, he was still the legal owner of such funds and entitled to the dividends payable thereon; and judgment was ordered to be entered for him on the second and fourth counts for the amount of the dividends claimed from the defendants.

Upon this judgment a writ of error was brought and the judgment in the court below was reversed, on the ground that there was no allegation in the declaration that the Bank had ever received the dividends from Government; nor was there any fact found by the jury to cure the want of such allegation.[a]

Prior to the passing of the 9 Geo. 4, c. 32, it was a rule universally acted upon by our courts, that a party who had an interest in setting aside an instrument alleged to be forged was an incompetent witness to prove its forgery; so that a person whose name was to a forged power of attorney for the transfer of stock was held incompetent to prove the forgery[b]: but by the 2d section of the Act, no person shall be deemed to be an incompetent witness to prove such forgery by respect of

[a] 5 B. & C. 185. But see Shadwell's, V.C., comments on the judgment herein in Sloman *v.* Bank of England, 14 Sim. 485, *infra*, Chapter 6.

[b] Rex *v.* Rhodes, 2 Str. 728; Caffy's case, East, P. C. 995; Co. Litt. 352; 2 Inst. 39; Rex *v.* Russell, Leach, 8; Shank *v.* Payne, 1 Str., 633; Rex *v.* Dodd, Leach, 184; 3d edit. Hard. 332, pl. 7.

any interest he may have, or be supposed to have, in respect of such instrument.

It was held, in *Jones* v. *Ryde*[a], that a person who discounts a forged navy bill for another, who passed it to him without knowledge of the forgery, might recover back the money as had and received to his use, upon failure of the consideration.

Gibbs, C. J., laid down, in his judgment in the case cited, that "The party negotiating forged bank notes is not and does not profess to be answerable that the Bank of England shall pay the notes, but he is answerable for the bills being such as they purport to be."

All frauds are cognizable in equity as well as at law, and a bill lies to recover back money lent on a bubble[b]; and where the bill charges a fraud, the defendant will not be allowed to plead the Statute of Limitations; but then it should be charged by the bill that the fraud was discovered six years prior to filing the bill.[c]

By the 11th section of 7 Geo. 2, c. 8, it is enacted, "That nothing in this Act contained shall extend, or be construed to extend, to hinder or prevent any person or persons from lending any sum or sums of money on any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement being made

[a] 5 Taunt. 488.
[b] Coll *v.* Woollaston, 2 P. Wms. 154.
[c] South Sea Company *v.* Wymondsell, 3 P. Wms. 143.

and entered into for the re-delivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the repayment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest."

It was formerly doubted whether a loan of stock was not prohibited by the 8th section of the Act, which enacts, "That all contracts and agreements whatsoever, which shall, from and after the said 1st day of June 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, or transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and persons whatsoever contracting or agreeing, or on whose behalf and with whose consent any contract or agreement shall be made, to

sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own name or names, or in the name or names of a trustee or trustees, to their use or their own right, as aforesaid, shall forfeit and pay the sum of 500*l.*, to be recovered by action of debt, bill, plaint, or information in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same; and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making or procuring to be made any such contract or agreement, as aforesaid, and shall know that the person or persons by whom or on whose behalf such contract or agreement shall be made, is or are not possessed of or entitled unto the stock or security concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for their use or right, shall for every such offence forfeit and pay the sum of 100*l.*, to be recovered by action of debt, bill, plaint, or information in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection,

or wager of law, or more than one imparlance, shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same." And this point arose in the case of *Sanders* v. *Kentish* and *Hawksley*.[a]

In that case the plaintiff, a clergyman, lent the defendant, a stock-jobber, 3000*l*. Four-per-Cent. Annuities, to be re-transferred to the plaintiff on a certain day. On an action for breach of contract to re-transfer, the defendants contended that the transaction was within the prohibition of the last-cited section of the Act, but the Court held it to be within the saving of the 11th section.

Thus stock may become the subject of a loan, or it may itself be security for the repayment of money.

Mortgages of stock were formerly far more frequent than at present, owing to the low price of stock and the high rate of interest.

In mortgages of stock it is not material whether the stock were actually transferred to the mortgagor, or whether he have only received the net produce arising from the sale of such stock to another party.[b]

Where a bond was given by the borrower of a sum of stock to secure the replacement of the stock, and payment in the meantime of sums equal to the interest and dividends, and a *bonus* was afterwards declared upon the stock, the lender was held to

[a] 8 T. R. 162.
[b] Tate *v.* Wellings, 3 T. R. 531.

have an equity to be placed in the same situation as if the stock had remained in his name, and was consequently entitled to the replacement of the original stock increased by the amount of the *bonus*, and to dividends in the meantime, as well upon the *bonus* as upon the original stock.[a]

An agreement between two persons, whereby one agrees to transfer within a given time to the other, to whom he is indebted in a sum of money, so much stock as the amount of the debt would have purchased on the day of the agreement, and in the meantime to pay dividends, is a lawful and valid agreement.[b]

In transactions of this nature the question frequently arose, prior to the recent alterations in the law of usury, as appears by the case just referred to, as to how far the contract had been vitiated by usury.

The decisions in cases arising out of such transactions are somewhat conflicting, but the general principle deducible therefrom would seem to establish the doctrine that loans are held tainted with usury where the money lent is not jeopardized and the creditor may obtain an advantage exceeding legal interest.

E, in the year 1766, lent to *F* 8000*l.* Old South Sea Annuities, valued at the time of the transfer at 7170*l.* To secure repayment of this stock *F* gave *E* a bond, of which the condition was to re-transfer

[a] Vaughan *v.* Wood, 1 Myl. & K. 403.
[b] Maddock *v.* Rumball, 8 East, 304.

the 8000*l.* stock at the expiration of six months, and pay 5*l.* per cent. interest on the 7170*l.* No such re-transfer was effected; but after a long lapse of time part of the principal was discharged, and a considerable arrear of interest was due on the residue. Upon the death of *F* a bill was filed by his executors against *E*. It was directed by the Court that the balance due to *E* should be paid, and that the master should take an account of the money due. In the year 1798 the master reported 6500*l.* to be due for principal and a considerable sum for interest. The executors objected that the master ought to have reported that so much was due as would purchase 8000*l.* South Sea Annuities, when the same might be purchased at some given time, after deducting the several sums already paid upon the bond: on the other hand it was contended that *E* was entitled to the residue of the 7170*l.* Sir W. Grant, M.R., overruled the exception, and held that the obligee was entitled to the value of the stock at the time of the transfer, with interest at 5*l.* per cent. to the date of the report, and credit to be given for the payments made on account of the principal.[a]

But where 10,000*l.* had become due on bond, and the agreement was to transfer to the creditor on a given day so much stock as upon the then last 12th day of February could have been purchased with 10,000*l.*, on which day the sum secured by bond became due, *or* to pay the said sum of

[a] Forrest *v.* Elwes, 4 Ves. 492.

10,000*l.* at the option of the creditor, and also to pay in the mean time interest at 5 per cent. on the 10,000*l.*, such agreement was held usurious; for as the principal money was never in hazard, and the creditor was in every event assured of receiving that with lawful interest and had the chance of an advantage in case of a rise in stock, it was a usurious contract to stipulate for such chance.[a]

This point was again discussed in the case of *Tate* v. *Wellings*[b]; and from what fell from Ashhurst and Buller, JJ., it would seem that a contract to repay money raised by the sale of stock would not be deemed usurious if the rate of interest did not exceed the dividends of the stock sold, and that the lender ran the risk of the stock rising after the year. This reasoning, however, might apply to any loan of money raised by the sale of stock.

The circumstances of the case were these: The defendant applied to the plaintiff's testator for an advance of a sum of money, which was agreed to; but the testator stipulated for the same interest he received in the Short Annuities, viz. 8*l.* 10*s.* per cent. This was assented to, and the money was raised by the testator by the sale of Short Annuities, and the agreement was that the defendant should replace the stock by the 1st day of September 1785, and in default thereof that he should repay the money raised on the 1st January 1786, and in the mean time should pay such interest as the stock

[a] Barnard *v.* Young, 17 Ves. 44; and see White *v.* Wright, 3 B. & C. 272., Powney *v.* Blomberg, 14 Sim. 179.

[b] 3 T. R. 537.

would have produced. Lord Kenyon left it to the jury to consider whether this was intended as a *bonâ fide* loan of stock to be replaced at a subsequent time or repaid in money, or whether it was intended to be a loan of money, and the present device but a mere colour for reserving more than legal interest. The jury found for the plaintiff, holding the transaction to be fair and honest and a mere loan of stock. On application for a rule to shew cause why the verdict should not be set aside and a new trial granted on the ground of usury, Lord Kenyon held, that as the transaction was legal during the first year there was nothing superadded to make it usurious, and that the whole appeared to have been a fair transaction.

Stock transferred as a security for a floating balance and under an agreement to continue it transferred, and re-transferred by the creditor by way of loan, has been considered by the courts of equity to amount to a sale.[a]

An agreement to lend money on mortgage was held usurious where it appeared that stock was sold under par and the money advanced by such sale, and that security was taken for the nominal sum sold, together with interest.[b]

Where stock is made the security for money lent and the day appointed for payment has expired, the mortgagee is at liberty to sell the stock and repay himself the principal and interest, without any

[a] *Ex parte* Denison, 3 Ves. 552.
[b] Moore *v.* Battie, Amb. 371.

authority from the mortgagor, and without filing a bill of foreclosure, but the mortgagee will be decreed to account for the surplus.[a]

There is a very early case reported on this point, laying down the principle, that where a statute inflicts a penalty for doing an act, though the act be not prohibited yet the thing is unlawful; and if such thing appear in the declaration, or upon the pleadings, the agreement to such thing is void; but *secus* where nothing appears in the declaration against law; as where in an action on a promise couched in these words—"If you will procure 15,000*l.* to be paid into the Exchequer upon the aid of 12*d.* in the pound, in my name, or in the name of such person as I shall direct, I will give you 600*l.*," it was suggested that this was brocage and a promise against law; but the Court declared that nothing appeared in the declaration against law, for the borrower does not pay brocage nor the lender receive it; but the agreement was between two persons not concerned but only in the procuring the money.[b]

A indebted to *B* in the sum of 1000*l.*, agreed to transfer within a given time 100*l.* per annum Long Annuities at the then price, and in the mean time to pay the dividends to *B*, and that the debt of 1000*l.* should constitute part of the purchase-money. The stock was not purchased at the time and there

a Tucker *v.* Wilson, 1 P. Wms. 261; Lockwood *v.* Ewer, 2 Atk. 303; Harrison *v.* Hart, Comyns, 393.

b Bartlett *v.* Viner, Skin 323; Jones *v.* Jones, Hob. 187.

was a rise in the price of the stocks. *A* filed a bill against *B*, praying that a bill given by him to *B* might be declared usurious, illegal and void, and contended that the original agreement was corrupt and usurious; but the Vice-Chancellor held, that to lend money on such a contract as the one in question was not usury and that it clearly was no stock-jobbing transaction; that it was that kind of contract which, if there be no premium or *bonus*, any party might make: it was not a time bargain, nor were there any differences to be adjusted.[a]

But the following transactions were held to be "a shift within the statute of usury," and that equity would relieve, although the money had been paid. *A* agreed to lend *B* 1000*l.*, and for that purpose sold 1000*l.* stock, which being under par produced only 923*l.*; afterwards he advanced a further sum of 1400*l.*, part of which being sold out produced but 1132 . 5*l.*, and took mortgages for the two sums at 5 per cent.; in the former case with a covenant to reduce the interest to 4 per cent. if paid within one year; in the latter, with a power to the borrower to replace the stock within two years: and on a bill brought by *A* for a foreclosure, the whole money having been allowed in the account by the master, it was held that the plaintiff was entitled to relief.[b]

[a] Clarke *v.* Giraud, 1 Madd. 511.
[b] Moore *v.* Battie, 1 Eden, 273.

It has been laid down as a rule of law that contingency in the thing purchased is incompatible with the idea of usury, in which the principal must always be certain.

An agreement for the purchase of stock to be transferred at a future day at a price below the then value, is not usurious, at least in the courts of common law, on the ground of the contingency however improbable, that the stock agreed to be transferred must have suffered some extraordinary depreciation in value.[a]

In contracts relating to stock, computation of time must be by lunar months, notwithstanding any usage to the contrary.[b]

[a] Pike *v.* Ledwell, 5 Esp. 164.
[b] Jocelyn *v.* Hawkins, 1 Str. 446.

CHAPTER IV.

TRANSFER OF STOCK — MODE OF EFFECTING — ACTIONS RELATING TO — CONTRACTS FOR SALE OR PURCHASE OF — DAYS OF TRANSFER — POWERS OF ATTORNEY.

A PERSON who has advanced money to Government, or, in other words, is a holder of stock, stands in a position differing widely from that of a private creditor: he cannot compel repayment of the sum so advanced by him; and if he wish to obtain back his principal, he must find some party who is desirous of purchasing the same amount of stock that he is anxious to sell; this, by the assistance of the Stock Exchange, he is always enabled to effect.

By the various Acts relating to stock, all transfers thereof must be in writing.

No stamp duty is now payable in respect of transfers of stock, nor is there any charge made by the Bank for entering and registering such transfers.

Although a party wishing to effect a transfer of stock standing in his name may do so without the intervention of a broker; yet in practice such is never done, owing to the vast increase of trouble and inconvenience that would result from a contrary system.

The courts of equity, in passing executors' accounts, will allow them the amount of commission paid to brokers on effecting transfers.[a]

The following is the method by which a person desirous of purchasing stock becomes possessed of it. His broker hands over to the jobber, through whose medium the purchase is to be effected, a printed ticket with blanks prepared for the purpose by the Bank of England; these blanks he fills up with the amount of stock required and the name, address and description of the purchaser. The jobber then inserts on the ticket his own name or the name of the party by whom the stock is transferred. This ticket so filled up, is then taken to the Bank and copied into a book provided for the purpose. This entry is signed either by the jobber, supposing him to be the transferor, or by the actual transferor himself; at the same time the jobber or transferor affixes his signature to another document previously prepared from the ticket. This document which is issued from the Bank, is termed a receipt. These respective signatures are countersigned by the Bank clerk. The purport of the receipt is to evidence the payment of so much money for so much stock transferred on such a day by the jobber or other transferor to the purchaser. The broker then conducts his principal to the Bank, where the latter signs his name in the Bank-

[a] Jones *v.* Powell, 6 Beav. 488; Davenport *v.* Powell, 14 Sim. 275.

book and thereby acknowledges and accepts the transfer.

By the statute 8 & 9 Will. 3, c. 20, § 34, no contract for the buying, selling, or transferring stock shall be good or valid until registered in the Bank-books.

It is competent evidence for the purpose of proving the identity of the party accepting stock, to shew that the entry in the books of the Bank was in the hand-writing of such party; nor is it necessary, on the score of public convenience, to produce the books themselves.[a]

Where in an action to recover the price of stock the declaration alleged an acceptance of stock from the plaintiff by the defendant, such allegation was held sufficiently shewn, although the acceptance was made through the medium of another party.[b]

It is now an established rule that no action can be maintained for the breach of a contract to purchase stock, unless it be clearly averred in the pleadings, either that the plaintiff effected a transfer, or was ready at the proper time and place to effect such transfer: moreover, the declaration must shew the manner of transferring stock as well as the

[a] Mortimer *v.* M'Allan, 6 M. & W. 58.

[b] *Ibid.* It is very rarely the practice for the transferee of stock to accept such transfer, nor will such non-acceptance interfere with his receipt of the dividends; but on his first application for his dividends he must be identified as the legal holder of the stock.

time and place, these being matters of which the courts cannot take judicial notice.[a]

The principal cases relating to such actions and the evidence necessary to support them, will be found collected in the following pages.

It is, as has been observed in the very learned and elaborate note by the editors of *Saunders' Reports* in the case of *Pordage* v. *Cole*[b], extremely difficult, if not impracticable, to deduce any fixed principle that shall decide what covenants are independent and what dependent, and when it is necessary to aver performance in the declaration and when not. Where there are several covenants, promises or agreements which are independent of each other, one party may bring an action against the other for a breach of his covenants &c. without averring a performance of the covenants &c. on his the plaintiff's part; and it is no excuse for the defendant to allege in his plea a breach of the covenants, &c. on the part of the plaintiff, according to Justinian's rule in the civil law—*Qui actionem habet ad rem recuperandam, ipsam rem habere videtur.*[c]

But where the covenants &c. are *dependent*, it is necessary for the plaintiff to aver and prove a performance of the covenants &c., to entitle himself to an action for the breach of the covenants on the part of the defendant.

[a] Stapleton *v.* Lord Shelburne, 1 Bro. P. C. 217.
[b] Saunders' Reports, 6th edit. p. 320[a], n. 4.
[c] Justin. de Regulis Juris, 361.

If a day be appointed for the payment of money or part of it, or doing any other act, and the day *is* to happen, or *may* happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money or for not doing such other act before performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for the performance of that which is the consideration of the money or other act.

But when a day is appointed for the payment of money &c., and the day is to happen *after* the thing which is the consideration of the money &c. is to be performed, no action can be maintained for the money &c. before performance.[a]

For the very numerous cases on this point, the reader is referred to the note from which we have quoted, and which the limits of this work do not admit of our citing. We shall merely examine the cases that bear more immediately on our peculiar subject.[b]

If an obligor undertake for the act of a third person who is a stranger to the obligee, it is incumbent upon the obligor to procure the act to be done, unless there was at the time of entering into the bond an impossibility of doing the act, or unless the

[a] Thorpe *v.* Thorpe, Salk. 171.

[b] See cases collected in Wynn *v.* Wynn, 2 M & Gr. 8; Glaholm *v.* Hays, *ibid.* p. 257; Judson *v.* Bowden, 1 Exch. Rep. 162; Jowett *v.* Spencer, *ibid.* 647; Oliver *v.* Booker, *ibid.* 416; Oliver *v.* Fielden, 18 L. J. N. S. Exch. p. 353.

doing thereof have been since rendered impossible by the act of God or by the act of law.[a]

Where there are mutual covenants between two parties, the one covenanting to pay another a sum of money, and the other to transfer to him the produce of certain annuities, it is not necessary to aver a tender of such stock, for if no such tender were made the other party had his remedy against him.[b]

By reference to the judgment of the Court in the case of *Thorpe* v. *Thorpe*, as reported by Sir Edward Lutwyche, page 77[c], the reader will perceive how conflicting were the authorities, and how great the difficulty experienced by our earlier Judges in laying down any decided principle whereby to determine what covenants were dependent or independent, or where it was necessary to aver performance of a condition precedent.

In *Callonel* v. *Briggs*[d] the agreement was, that the defendant should pay so much money six months after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying the sum agreed upon. Per Holt, C. J.: "If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not

[a] Hesketh *v.* Gray, Sayer, 187.

[b] Dawson *v.* Myer, 1 Str. 712; Smith *v.* Shelbury, 2 Leach's Mod. Rep., 34; overruled by Holt, J., in Thorpe *v.* Thorpe, 1 Salk. 171; Callonel *v.* Briggs, Salk. 112; Wyvil *v.* Stapleton, 1 Str. 615.

[c] 1 Lutwyche, 249; same case, Ld. Raym. 662; Salk. 171.

[d] Salk. 113; Holt, 663.

transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender for transferring, as the first bargain was a condition precedent; and though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred unless a certain day be appointed for performance. If I sell you my horse for 10*l.*, if you will have the horse, I must have the money, or if I will have the money, you must have the horse." The plaintiff was obliged either to prove a transfer or a tender and refusal within the six months.

To entitle a plaintiff to recover in an action for breach of contract to accept stock, he must aver in his declaration a refusal to accept as well as a tender, and must show that he came at the last time of the day appointed for doing the act.[a]

The Court will not take notice that Bank stock is assignable only at one place: such should have appeared by the pleadings.[b]

The case of *Lancashire* v. *Killingworth* was argued before Holt, C. J., who, in the course of his elaborate judgment, affirmed the principle, that when a man has agreed to do a thing he ought to use his utmost endeavour to do it, and if it be not done, he ought to shew why it is not done. "Now here the plaintiff says that he offered to do it

[a] Lancashire *v.* Killingworth, 1 Ld. Raym, 686; Shales *v.* Seignoret, *ibid.* 440; and see the very early case of Hall *v.* Cupper, Skin. 391.

[b] Shales *v.* Seignoret, 1 Ld. Raym. 440.

(transfer the stock); why then was it not done? He ought to shew, either that the testator refused, or that he did not come to the place where &c. at the last time when it was appointed by the law. And this is agreeable to the reason of the law in other cases."

In *Thornton* v. *Moulton*[a] it appeared that at the opening of the books the two brokers met, and the selling party told the other he was ready to transfer: the other alleged it was usual to indulge the buyer for two or three days and that he would find his principal in that time; which the other not disagreeing to, nothing further was done. And for want of having the buyer called at the books the first day of the opening, the Chief Justice ruled it not a good tender and the plaintiff was nonsuited.

In *Dorriens* v. *Hutchinson*[b], an action for not accepting stock, it was held, that if the plaintiff tender the stock on the day required for making the transfer, and the defendant refuse to accept it, that it is not incumbent on the plaintiff to wait until the end of the day, but he may dispose of the stock immediately after such tender and refusal.

And it has been adjudged, that if the plaintiff do not set forth in his declaration that he was at the South Sea House &c. on the day agreed at such a time, and staid till the last hour of the day to transfer his stock, he cannot maintain his action.[c]

In *Blackwell* v. *Nash*[d], an action in debt for a

[a] 1 Str. 533.
[b] 1 Smith, 420.
[c] Mod. cases, L. & E. 219.
[d] 1 Str. 535.

penalty, the plaintiff declared that he covenanted to transfer to the defendant so much stock on or before such a day, and that the defendant *in consideratione præmissorum* covenanted and accepted to pay *for it*, and then averred that he was at the books on the day named, *et paratus fuit et obtulit ad transferendum* to the defendant, who then and there refused to accept or pay.

The declaration was demurred to on the ground that *for it* made it a condition precedent and that the plaintiff should have shewn an actual transfer of the stock; but the Court held, that *in consideratione præmissorum* was in consideration of the covenant to transfer and not of an actual transferring, for which the defendant had his remedy; or if it were, a tender and refusal would amount to a performance.

Judgment was given for the plaintiff, and afterwards affirmed in the Exchequer Chamber.

In cases of this description the great question is, who is to do the first act? but when the transfer is to be made upon payment there is no colour to make the transfer a condition precedent.

Lord Kenyon held in *Goodisson* v. *Nunn*[a], that the principles of law had been misapplied in the preceding case; that the decision was erroneous and that the covenants were dependent and reciprocal.

Where in an action on a deed-poll made by the defendant, whereby he covenanted to accept so much stock and to pay for the same, the plaintiff

[a] 4 T. R. 761.

did not aver a delivery or tender of the stock, the declaration was held bad; Pratt, C. J., observing "that the intent of the parties appeared to be that the one should have the money and the other the stock, and not that either should perform his part of the agreement and lay himself at the mercy of the other for the equivalent: this is not a covenant entered into by both parties upon which each will have his mutual remedy, but it is the deed-poll of the defendant only; and therefore, though upon delivery or tender of stock the plaintiff will have his remedy for the money, yet the defendant, on the other side, upon payment of the money will have no remedy to compel the delivery of the stock; and having no such remedy, he shall not be obliged to pay the money till the consideration for which it is payable is performed."

"The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties. In this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect." . . . . . "The contract here is executory—where one is to do the act, and for the doing thereof the other is to pay."[a]

In *Wyvil* v. *Stapleton*[b], which was an action in debt, wherein the plaintiff declared that by writing between him and the defendant it was agreed that

[a] Lock *v.* Wright, 1 Str. 569; see 7 Co. 10; and 1 Inst 204.

[b] 1 Str. 615.

the plaintiff should, upon payment or tender of a certain sum by the defendant on or before the shutting of the books, transfer to him so much South Sea stock, in consideration whereof the defendant agreed that he would, on or before the shutting of the books, accept the stock and would then pay for the same, with a proviso to enable the plaintiff to sell it out if the defendant did not accept it; and the plaintiff averred that he was at the South Sea House the day of shutting the books, and then offered to transfer, but the defendant did not appear, whereupon he sold out the stock, and sued for the deficiency; it was held by the Court of King's Bench, reversing the judgment of the Common Pleas, that here the covenants were mutual, and that though there was no tender sufficiently alleged, yet that the declaration was sufficient. This judgment was afterwards reversed in the House of Lords, and the judgment of the Court of Common Pleas set up again.

In *Dawson and others* v. *Meyer*[a] the plaintiff declared in an action of covenant, that in consideration of a certain sum to be paid by the defendant he (the plaintiff) covenanted, on or before a certain day, to transfer the produce of certain lottery annuities subscribed by the plaintiff, and that the defendant covenanted to accept and pay; and the plaintiff set forth that the Company allowed

[a] 1 Str. 712.

so much stock upon the said annuities, that he made a tender thereof to the defendant upon the day, and that the defendant refused to accept. The defendant pleaded (*inter alia*) that there was no tender. To this plea the plaintiff demurred.

The Court gave judgment for the plaintiff, holding that there were mutual covenants—an express covenant from the defendant to pay the plaintiff so much, and a distinct covenant from the plaintiff to transfer the produce of the annuities to the defendant; and the covenants therefore being mutual, the tender was out of the case and the plaintiff was not obliged to answer it; for if the plaintiff did not tender, the defendant had his remedy against him for not doing it.

An action cannot be maintained for the non-acceptance of stock agreed to be transferred on request, unless the plaintiff shew a tender of stock and a refusal, or that which is in law tantamount to a tender and refusal; and that must be by shewing an actual tender and refusal, or that the plaintiff staid at the Bank to the last time of that day when a tender could have been made, which was so long as the transfer-books remain open; and that he was there ready to have transferred had the defendant been there willing to have accepted the stock.

So, in an action for breach of contract, proof was given that the stock was contracted to be transferred on a *certain* day: the averment in the decla-

ration being that it was to be transferred *on request*, the Court said, that if the objection had been taken at the trial there must have been a nonsuit.[a]

In the early case of the *Duke of Rutland* v. *Hodgson*[b], it was decided that the tender of an act must be made at the last point at which the act itself can be done; so that if the time for transferring East India stock be continued after the usual hours, averment of a tender to transfer stock during the *usual* hours will be bad in an action for the non-acceptance of stock.

So upon issue whether stock was tendered at the day appointed, the plaintiff proved, that though the books were not open to make transfers in the common form, yet they were ready at the office, and, upon leave from a director, there might have been a transfer, it not being usual to deny it on such occasions; but the defendant not attending to accept the stock, the plaintiff contented himself with staying there all day, and did not actually get leave from a director to have the books opened if the defendant should come. And for this omission Pratt, C.J., ruled it not to be a sufficient tender; for there was a possibility that leave might not have been given, and the plaintiff had not done every thing in his power. He ought to have prepared matters so, that if the defendant had appeared there might have been a transfer immediately.[c]

[a] Bordenave *v.* Bartlett, 5 East, 111.
[b] 1 Barnardiston, 95.
[c] Clark *v.* Tyson, 1 Str. 504.

An action cannot be maintained against the East India Company for refusing to enter a transfer of stock, unless the name of the transferee be given to them previously to the transfer.[a]

If *A* covenant to pay so much for stock on *B*'s transferring such stock to him on or before a certain day and at a certain place at *A*'s request, the declaration in an action in covenant brought by *B* must aver a request to transfer, the hours for making such transfer and that he was at the proper place at the last instant of the time appointed for making the transfer, ready to effect such transfer.[b]

In an action brought to recover the price of Railway shares, the declaration averred that the plaintiffs were ready and willing to transfer the shares: this the defendants denied by their plea.

It appeared that on the 14th of October 1845 the defendants had instructed a sharebroker to purchase for them certain shares. On the 15th the shares were bought by a broker at Manchester of the plaintiffs, to be paid for on the 31st. By the custom of the Manchester Share-market the deed of transfer of the shares requisite under 8 Vict., c. 16, s. 14, was to be prepared by the seller; and on the 1st of November the Manchester broker applied by letter to the defendants' broker for the name of the buyer: this letter was sent to the defendants, who on the 7th November refused to give

[a] Gregory *v.* East India Company, 7 Q. B. 199.
[b] Mordant *v.* Small, 8 Mod. Rep. 218; and see Warren *v.* Consett, *ibid.* 107; Lock *v.* Wright, *ibid.* 40.

such name or take the shares. They had fallen much in value during the interval. On the 15th November a formal tender of the shares was made on the plaintiff's behalf to the defendants, who refused to accept them, and on these grounds: that on the 14th November (the day upon which the order was given) a resolution was passed at a Board of Directors of the Company for making a call of 10*l.* a share, payable on or before the 11th November, and notice of such call was the same day given by letter to each shareholder, but the plaintiffs did not pay the calls due on the shares in question. The Companies' Clauses Consolidation Act, 8 Vict., c. 16, enacts, by clause 16, that no shareholder shall be entitled to transfer any shares after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him. Upon this enactment it was contended that the plaintiffs had not enabled themselves to transfer the shares; but it was held that they were perfectly ready to do all that they could be required to do or could do at the time that they asked for the name of the purchaser, viz. on the 1st November 1845, and that they then were as ready to perform what they had contracted for as they could be; and that it was not necessary that they should be in an actual situation to perform their contract, if they were able, at the proper time, to place themselves in that situation.[a]

[a] Shaw *v.* Rowley, 16 M. & W. 810.

In an action for breach of contract to transfer South Sea stock, the statute requires that it should appear by the register itself to whose use the contract was made.[a]

There was a clause in the statute relating to brokers and stock-jobbers passed in the 8 & 9 Will. 3, c. 32, s. 10, long since expired, rendering void all contracts for the sale of stock which by the tenor of the agreement ought to have been performed after the 1st day of May 1697, unless they are performable within three days.

Where an agreement was made in February between *A* and *B* that *A* should transfer to *B* at his request Bank stock at any time before the 10th of May, Holt, C.J., held that this agreement was within the meaning of the Act; for that if the request had been before the 1st of May and the contract performed, it had been good; but if no request was made before the 1st of May (and it appeared that, in fact, no such request had been made), the contract being performable afterwards was within the intent of the Act.[b]

By the 8th section of 7 Geo. 1, c. 2, every contract for the sale or purchase of subscriptions or stock which shall be unperformed and not compounded for before such a time, or an abstract or memorial thereof signed by the party interested therein, and who shall be minded to take advantage

[a] Rogers *v.* Wilson, Com. 365.
[b] Smith *v.* Westall, 1 Ld. Raym. 316; Mitchell *v.* Broughton, *ibid.* 673.

of the same, shall be entered and registered in books which the respective companies are required to prepare for that purpose; and in default of such entry or register, every such contract, as to so much as shall remain unperformed or uncompounded, shall be void; and such entries shall express the names of the parties or persons for whose use or benefit such contracts were made.

In an action of covenant on a South Sea contract the defendant pleaded that the contract was not duly registered according to the Act.

The contract was by indenture, setting forth that the plaintiff, in consideration of 1436*l.* 10*s.* to be paid by the defendant, covenanted to transfer to him all such stock, bonds and money as the South Sea Company shall allow on the account of 1227*l.* 1*s.* 6*d.* Lottery Annuities then lately subscribed into the stock by and in the name of the plaintiff, in consideration of which the defendant covenanted to accept the produce of such annuities, and to pay for the same 1436*l.* 10*s.* at the same time, and that this contract was entered in the books of the South Sea Company *in hæc verba*, under which the plaintiff subscribed these words, "This is for my proper use and benefit," and then signed his name. No evidence was offered that the contract was made for the use and benefit of any person besides the plaintiff, nor that the contract was made for the use and benefit of the plaintiff only.

The Court held that they were bound to give a reasonable construction to the Act; and that

although the registry in question was not within the words prescribed, it was still sufficient.[a]

The statute 11 Geo. 4 and 1 Will. 4, c. 13, "for transferring certain annuities of 4*l.* per cent. in annuities of 3*l.* 10*s.* or 5*l.* per cent.," enacts (s. 13), "That such capital or joint stock, or any share or interest therein, and the proportional annuity attending the same respectively, shall be assignable and transferable as this Act directs, and not otherwise; and that there shall constantly be kept in the office of the Accountant-General for the time being of the Banks of England and Ireland respectively a book or books wherein all assignments or transfers of such capital or joint stock, or any part thereof, and the proportional annuity attending the same at the rates aforesaid, shall be respectively entered and registered, which entries shall be conceived in proper words for that purpose, and shall be signed by the parties making such assignments or transfers, or if any such party or parties be absent, by his, her, or their attorney or attorneys thereunto lawfully authorized by writing under his, her, or their hands and seals, to be attested by two or more credible witnesses; and that any person or persons to whom such transfer or transfers shall be made shall respectively underwrite his, her, or their acceptance thereof; and that no other method of assigning or transferring any such stock and the annuities attending the same or any part thereof, or

[a] Wilkinson *v.* Myer, 1 Str. 585.

any interest therein, shall be good and available in law."

At the foot of a transfer effected of stock couched in the proper terms and entered in the transfer book were these words: "I do freely and voluntarily accept the above interest or share transferred to me."

This was not signed by the transferee, and it was objected that the want of such signature rendered the transfer invalid; but Lord Denman, C.J., held the transfer valid, and that the words "that no other method of assigning or transferring any such stock shall be good and available in law" are not applied to the acceptance, but that their effect is really confined to the act of transferring, and that the words requiring the acceptance to be underwritten are merely directory.[a]

To prove the transfer of stock, a copy of the transfer taken from the Bank books is sufficient evidence, on the ground of the public inconvenience that might result from the removal of the books themselves[b]; but should the question arise whether a transfer, purporting to be in the handwriting of an individual, be genuine or not, the books themselves must be produced.[c]

Where in an action against the Bank of England for refusal to pay the dividends due on certain stock the defendants pleaded that before such divi-

[a] Foster *v.* Bank of England, 8 Q. B. 689.
[b] Marsh *v.* Collnett, 2 Esp. N. P. R. 665.
[c] Auriol *v.* Smith, 18 Ves. 197.

dends became payable the plaintiff had effected a transfer of such stock, the Court of Queen's Bench held, that the plaintiff was entitled to inspect that particular entry in the transfer book which transferred the stock in question, but not in any other part of the Bank books.[a]

An action will lie against the Bank of England if they make unreasonable delay in the passing of a power of attorney to transfer stock.[b]

By the 7 Geo. 2, c. 8, s. 6, it is provided, "That no person or persons who shall sell any public or joint stock or other public securities, to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person or persons to sell such stock or other securities, which shall be so refused or neglected to be paid for, to any other person or persons, for the best price which can be obtained; and after such sale to receive (if the parties can agree) or to recover as aforesaid from the person or persons who first contracted for the same all the damage which shall be sustained thereby." And by the 7th section it is provided, "That it shall and may be lawful to and for any person or persons who shall buy any public or joint stock or other public securities, to be accepted and paid for on a future day, and which shall be refused or neglected to be transferred, to

[a] Foster *v.* Bank of England, 8 Q. B. 689.
[b] Sutton, Bart. *v.* Bank of England, 1 Car. & P. 193.

buy the like quantity of such stock or other public securities, or any other person or persons, at the current market price, and to recover and receive after such purchase and acceptance (if the parties can agree) from the person or persons who first contracted to sell or deliver the same the damage which shall be sustained by reason of the not delivering or not transferring such stock or other securities, any thing in this Act, or any law, usage, or custom to the contrary notwithstanding."

Now it may be inferred from the words of the Act that it did not require as a condition precedent to maintaining an action for damages for not performing a contract to purchase and accept stock, that the proprietor should, on the defendant's neglect or refusal to accept the stock, have sold it to another on or before the *next* transfer day after such default; but it merely says that it shall be lawful for him to sell such stock, not saying when: it will be sufficient if the stock were sold and transferred at any time prior to the commencement of the action against the defendant who had so made default, especially where due diligence had been used by the proprietor.

Should the stock have risen in value in the intermediate time between the default of the defendant and the time when the stock was actually sold and transferred, so that the plaintiff might have obtained a higher price than that for which it was actually sold, but less than the price contracted for by the defendant, it would be a material point for the con-

sideration of a jury in assessing damages; because the 6th section directs that the party injured shall recover from the person who first contracted for the purchase of the stock "all the damage which shall be sustained thereby," that is, by his default; and *the damage to be sustained thereby* does not necessarily mean the difference of the price on the day of the actual sale and that for which it was contracted to be sold: for if he might have obtained more at any intermediate time, he may not be said to have *thereby sustained* (that is, by the default of the defendant) the damage which he incurred by waiting but by his own default. It is for the jury to inquire whether the plaintiff might not have sold sooner than he did, and thereby saved part of the loss.[a]

There is an early case reported in 2 Vernon, 394, where one bound by bond to transfer East India stock by a certain day, on which day the stock had much risen in value, was decreed to transfer it *in specie*, and to account for all the dividends from the time that it ought to have been transferred.

In assessing damages on a writ of inquiry on a bond to replace stock, the fair rule is to take the price of the stock on the day of the trial or the day previous.[b]

The true measure of damages in such cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defen-

[a] Bordenave *v.* Gregory, 5 East, 107.
[b] Harrison *v.* Harrison, 1 C. & P. 412.

dant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. It is no answer for the defendant to say that he may be prejudiced by the plaintiff's delay in bringing his action, for it is his own fault if he does not perform his engagement at the time, or he may replace it at any time afterwards, so as to avail himself of a rising market.[a]

If a bill were filed in equity to compel specific performance of an agreement to replace stock on a given day, the Court would compel the party to replace it at the then price of the stock should the market have risen in the mean time.[b]

But in *M'Arthur* v. *Lord Seaforth*[c] the Court would not allow the plaintiff to recover an advantage that he might have made of his stock if he had had it between the day on which it ought to have been replaced and the trial, as it appeared from the evidence that the plaintiff would not have made the advantage if he had had the stock.

It was laid down by Lord Eldon, C., that in an

[a] See Borrman *v.* Nash, 9 B. & C. 145, which was an action for not accepting and paying for oil at a certain price, to be delivered at a certain day. It was there held that the proper measure of damages was the difference between the price contracted for and the market price at the time when the contract ought to have been completed: and see 2 Selw. N. P. 154, 10th edit.

[b] Shepherd *v.* Johnson, 2 East, 211; Downes *v.* Back, 1 Stark, 318.

[c] 2 Taunt. 257, Sanders *v.* Hawksley, 8 T. R. 162.

action recently after the breach of an agreement to transfer stock, the rise, if any, would be given in damages[a]; and where the courts of equity direct a sale or transfer of stock, the broad principle is, that no attention whatever is paid to its rise or fall; and upon this ground it is considered equal whether the appropriation is on one day or another: the party takes the rise or fall as it happens.[b]

A plaintiff purchased certain stock, which was agreed to be transferred on a certain day. On the day of delivery the stock had risen and there was consequently a loss upon the sale. The defendant refused to pay the loss or to transfer the stock; whereupon the plaintiff employed another broker to purchase the stock and paid him the difference. It was held that he could not recover the difference in an action for money paid but that he should have declared on the special agreement, and that his claim was in the nature of unliquidated damages.[c]

Where a bankrupt previous to his bankruptcy had borrowed stock, to be replaced as stock, without any particular day being named for such replacement, it was held that the creditor had a right to come in under the commission, and that the price of the stock ought to be computed on the day of the bankruptcy.[d]

[a] Forrest *v.* Elwes, 4 Ves. 492.
[b] *Ex parte*, Pye, *Ex parte* Dubost, 18 Ves. 140.
[c] Lightfoot *v.* Creed, 2 Moore, 255.
[d] Utterson *v.* Vernon, 3 T. R. 539.

Upon a contract to replace stock and pay dividends in the mean time, though the jury give damages for the value of the stock and the amount of the dividends, yet the measure of increase is not the further dividends that may have accrued, but interest on the damages given as the value of the capital stock.[a]

Where a deposit has been paid upon the sale of an estate and invested in the funds, it must be considered as a payment for so much of the purchase-money, and the vendor must abide by the rise or fall in the funds.[b]

Where stock is sold by a trustee contrary to the trust, the *cestui que trust* has a right to elect to have the stock restored or the produce of it paid, as the trustee shall never make the advantage when he could replace the stock at a less price than that at which he sold it.[c]

In the case of *Small* v. *Attwood*[d], which some years' since was so frequently before the public, the Lord Chief Baron gave his judgment in favour of the plaintiffs. Under that judgment, stock which, by an order of the court, had been left to accumulate, was sold out and paid to the plaintiffs. The judgment of Lord Lyndhurst was, as is well known, reversed in the House of Lords; and upon

[a] Dwyer *v.* Gurry, 7 Taunt. 14.
[b] Poole *v.* Rudd, 3 Brown, 49.
[c] D'Oyley *v.* Countess of Powis, 2 *ibid.* 32; Bostock *v.* Blakeney, *ibid.* 653.
[d] 3 You. & C. 105.

the cause being remitted back to the Court of Exchequer, in order to give effect to the reversal, it was decreed (*inter alia*) that the defendant was entitled to the value of the accumulated stock sold out at the hearing; that if the stock had been merely transferred to the plaintiffs and not sold out, they would have been accountable to the defendant for the dividends since received upon it; and that, where money is paid out of court through the erroneous act of the court, the party who receives it and is called upon to refund is not liable to pay interest.

A, a loan contractor, in October 1822 delivered to *B* certain scrip receipts, stating that *B* had paid him 10 per cent. deposit in respect of a certain quantity of Neapolitan stock, and that on payment of the balance before the 1st of February 1823 the bearer would be entitled to certificates for that amount of stock. *B* transferred the receipts to *C* for a valuable consideration. *A*, by advertisement, offered the holders of the receipts, upon certain conditions, an extension of time for payment of the balance due on them, requiring also that the receipts should be left at his office for the purpose of being marked as holden under the new conditions. The receipts transferred by *B* to *C* were by him sent to *A*'s office, where they were indorsed by *A* with *C*'s name. The latter having failed to comply with the new conditions, *A* refused to deliver the certificates or to return the deposit.

C claimed a return of the deposit, as being retained by *A* without consideration. Held, that *C* was not entitled to recover the same, because *B* had full consideration for the deposit in the option which the scrip receipt gave him to become the proprietor of so much stock by payment of the balance of the price on the day named.[a]

The courts of equity will not, as has been above stated, compel performance of contracts relating to stock; and a bill for specific performance of a contract for 1000*l.* York-Buildings' Stock at 105*l.* per cent. was dismissed, for a court of equity will not enforce such contracts, but leave the parties to their remedy at law for the difference.[b]

But a bill will lie to compel a defendant to deliver up possession of certificates constituting the plaintiff proprietor of a certain quantity of stock, because a court of law could not give the property, but only a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party; and the Court will regard time as of the essence of the contract, where the subject of the contract is of such a nature as to be exposed to daily fluctuation in value.[c]

Legatees of stock are entitled to have the value of the stock estimated according to its market price

[a] Rothschild *v.* Hennings (in error), 9 B. & C. 470.
[b] Dorison *v.* Westbrooke, 5 Vin. Abr. 540; Cudd *v.* Rutter, *ibid.* 1 P. Wms. 538.
[c] Doloret *v.* Rothschild, 1 Sim. & Stu. 590; and see Chapter VI. *infra.*

at the end of a year from the testator's death, when it ought to have been transferred.[a]

In all contracts relating to the delivery of stock the computation must be made by lunar months, and that notwithstanding evidence adduced of a custom of reckoning according to calendar months.[b]

By the 11 Geo. 4, and 1 Will. 4, c. 60, s. 10, it is enacted, "That where any person in whose name as a trustee or executor (either alone or together with the name of any other person), or in the name of whose testator (whether as a trustee or beneficially entitled), any stock shall be standing, or any other person who shall otherwise have power to transfer, or join with any other person in transferring, any stock to which some other person shall be beneficially entitled, shall be out of the jurisdiction of, or not amenable to, the process of the Court of Chancery, or it shall be uncertain whether such person be living or dead; or if any such trustee or executor, or other person, shall neglect or refuse to transfer such stock, or receive and pay over the dividends thereof to the person entitled thereto, or to any part thereof respectively, or as he shall direct, for the space of thirty-one days next after a request in writing for that purpose shall have been made to any such trustee or executor, or other person, by the person entitled as aforesaid;

[a] Morley *v.* Bird, 3 Ves. Jun. 628.

[b] Joscelyn *v.* Hawkins, 1 Str. 446; Barksdale *v.* Morgan, 4 Leach, M.R. 185.

then and in every or any such case it shall be lawful for the Court of Chancery to direct such person as the said Court shall think proper to appoint for that purpose, in the place of such trustee or executor, or other person, to transfer or join in transferring such stock to or into the name of such person and in such manner as such Court shall direct; and every such transfer, receipt, and payment shall be as effectual as if the said trustee or executor, or other person, had transferred or joined in transferring such stock, or had received and paid, or joined in receiving and paying, the said dividends."

By the Act 10 & 11 Vict., c. 96, s. 1, trustees may pay trust-moneys, or transfer stocks and securities, into the Court of Chancery.

By section 2 the Court of Chancery is empowered to make orders on petitions without bill, for application of trust-moneys and administration of trusts.

The Court will make no order on petition until the fact on which the petitioner's title depends has been found by the Master.[a]

[a] *In re* Trustees of Wood's settlement, 15 Sim. 469. As to practice under this Act, see Order of Court, 10th June 1848, 10 Beav.

The following are the transfer days of the public funds:—

STOCK.	DIVIDENDS PAYABLE.	TRANSFER DAYS.
At the Bank.		
3-per-cent. Consols . . New 5-per-cent. Ann. . 3-per-cent., 1726 . . . Ann. to Jan. 7, 1860 .	Jan. 8 and July 8, from 9 to 3	Tuesday, Wed., Thurs., and Fri. Long Annuities Monday also.
Bank Stock, 7-per-cent. 3-per-cent. Reduced . 3¼-per-cent. Ann.* . . Long Ann. to Jan. 1860	April 8 and Oct. 13, from 9 to 3	Private transfer for 2*s.* 6*d.* on Monday & Saturday.
At South Sea House.		
3-per-cent. Old Ann. . .	April and October	Mon., Wed., Fri.
3-per-cent. New Ann . .	January and July	Tues., Thurs., Sat.
3-per-cent., 1751	January and July	Tues., Thurs.
At East India House.		
East India Stock	Jan. & June, 9 to 3	Tues., Thurs., Sat.
East India Bonds	Int. due March 31	and September 30

* This stock is 3¼-per-cent. till October 1854, then New 3-per-cents., not redeemable till October 1874.

Tickets for preparing the transfer of stock must be given in at each office before one o'clock at the India House before two.

Private transfers may be made at other times than as above, the books not being shut, by paying

At the Bank and India House, 2*s.* 6*d.* for each transfer.
At the South Sea House, 3*s.* 6*d.* „

Transfers at the Bank and South Sea House must be made by half-past two o'clock; at the India House by three. Expenses of transfer in

B. stock for 25*l.* and under, 9*s.* above that sum . . 12*s.*
I. stock for 10*l.* „ 1*l.* 10*s.* „ „ „ 1*l.* 14*s.*
S. S. stock, if under 100*l.*, 9*s.* 6*d.* „ „ „ 12*s.*

Letters or powers of attorney relating to stock are obtained by application at the Letter of Attorney Office at the Bank. The applicant fills up a printed ticket with his name, description and address, and states for what purpose he requires

the power, and the name, description and address of the person by whom it is granted. Upon being satisfied as to the accuracy of the statements, the clerk at the office will prepare the requisite power.

Letters of attorney are either for selling stock, or merely to enable the holder to receive dividends. There are, however, general letters for selling, buying and accepting stock, and for receiving dividends.

Letters or powers of attorney relating to Government funds are, by the Stamp Act, 55 Geo. 3, c. 184, schedule 1, made liable to a stamp duty of 1*l.*

The Bank will not suffer stock to be transferred under any other than a power of attorney prepared by their own officers[a]; and, as has been already observed, an action will lie against the Bank of England if they make unreasonable delay in the passing of a power of attorney to transfer stock.[b]

Where one of two trustees of a sum of stock sold it out under a power of attorney to which he had forged the signature of his co-trustee (the co-trustee not being privy to such fraud), and some time afterwards absconded, it was decreed by Shadwell, V.C., that the Bank should replace the sum so sold out and pay the dividends due from the time of the sale under the forged power, the Bank being parliamentary book-keepers of funds

[a] Nicholas *v.* Hayter, 2 Ad. & E. 348.
[b] Sutton *v.* Bank of England, 1 Car. & P. 193.

invested in such or such securities; and that it is their duty towards persons interested in such securities so to keep the account as that it may distinctly appear at all times what transfers and assignments have been made; and that the Bank account ought to be kept, with regard to every individual who ever appeared as a stock proprietor, in such a manner as to shew what the account really is. Moreover, that the Bank having authorized a transfer which they ought not to have sanctioned, were liable in a court of equity to restore to the parties complainant the stock as it stood immediately before the transfer.[a]

A plea of bankruptcy is no bar to a declaration framed in *tort*, charging the defendant, a stock-broker, with having sold the plaintiff's stock under a general power of attorney to sell the stock as well as to receive the dividends, but directing him not to sell or transfer the stock without the plaintiff's permission; which, however, he did sell, and concealed the fact of such sale from the plaintiff.

Secus had the plaintiff declared *in assumpsit* and the defendant pleaded his certificate.[b]

It would seem that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney authorizing a party to receive dividends, notwithstanding fluctuations in the number and identity of the members of the corporation.[c]

[a] Sloman *v.* Bank of England, 14 Sim. 475.
[b] Parker *v.* Crole, 2 M. & P. 150.
[c] *Ex parte* Annesley *re* Stratford Bridge Improvement Act; 2 Y. & C. Exch. 350.

A power of attorney given to a creditor to receive money, though made irrevocable, is not effectual against the general creditors after the death of the debtor.[a]

As to the receipt of dividends or transfer of stock under forged powers of attorney, see *supra*, p. 92, *et seq.*

It is obvious that the greatest caution should be exercised in entrusting parties with such important powers. Gaselee, J., thus expressed himself on the subject in the case of *Parker* v. *Crole*:— "It is most indiscreet to entrust a broker with a power to sell; for if, after a sale, he regularly pay the dividends as they become due, he lulls all suspicion, and the party remains ignorant of the sale."[b]

Powers of attorney for the sale or transfer of stock must be left at the Bank &c. for examination before two o'clock the day previous to being acted upon. If for receiving dividends, they should be presented at the time the first dividend is payable.

The expense of a power of attorney is 1*l.* 1*s.* 6*d.* for each stock; but for the Bank, India, and South Sea stocks, 1*l.* 11*s.* 6*d.* If wanted for the same day, half-past twelve o'clock is the latest time for receiving orders; but instructions should be given as early in the morning as possible. The boxes for receiving powers of attorney for sale close at two.

[a] Lepard *v.* Vernon, 2 Ves. & Bea. 51.
[b] 2 M. & P. 164.

CHAPTER V.

SIR JOHN BARNARD'S ACT — CONSTRUCTION OF PENAL STATUTES — SECURITIES GIVEN FOR PAYMENT OF MONEY DUE FOR TRANSACTIONS PROHIBITED BY — HOW FAR VALID — CONTRACTS EXECUTED AND EXECUTORY — BILLS OF DISCOVERY RELATING TO TRANSACTIONS PROHIBITED BY ACT — GAMBLING IN FOREIGN FUNDS NOT WITHIN THE ACT.

It is now proposed to consider the cases arising out of the construction to be placed on the various clauses of that most important measure passed by the legislature in the 7 Geo. 2, c. 8, A.D. 1734, and to review the doctrines and principles established by those cases.

The Act is intituled "An Act to prevent the infamous practice of Stock-jobbing;" and after reciting that,

"Whereas great inconveniences have arisen and do daily arise by the wicked, pernicious, and destructive practice of Stock-jobbing, whereby many of His Majesty's good subjects have been and are diverted from pursuing and exercising their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce," enacts, "That all contracts and agreements

whatsoever, which shall, from and after the first day of June one thousand seven hundred and thirty-four, be made or entered into by or between any person or persons whatsoever, upon which any premium, or consideration in the nature of a premium, shall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, and also all wagers and contracts in the nature of wagers, and all contracts in the nature of puts and refusals, relating to the then present or future price or value of any such stock or securities as aforesaid, shall be null and void to all intents and purposes whatsoever; and all premiums, sum or sums of money whatsoever, which shall be given, received, paid, or delivered, upon all such contracts or agreements, or upon any such wagers, or contracts in the nature of wagers, as aforesaid, shall be restored and repaid to the person or persons who shall give, pay, or deliver the same, who shall be at liberty, within six months from and after the making such contract or agreement, or laying any such wager, to sue for and recover the same from the person or persons to whom the same is or shall be paid or delivered, with double costs of suit, by action of debt founded on this Act, to be prosecuted in any of His Majesty's Courts of Record, in which action no essoin, protection, wager of law, or more than one imparlance shall be allowed; and it shall be sufficient therein for the plaintiff to

alledge that the defendant is indebted to the plaintiff, or has received to the plaintiff's use, the money or premium so paid or received, whereby the plaintiff's action accrued to him, according to the form of this statute, without setting forth the special matter.

And by sec. 2, "for the better discovery of the monies or premium which shall be given, paid, or delivered, and to be sued for and recovered as aforesaid; it is hereby further enacted by the authority aforesaid, that all and every the person or persons who, by virtue of this present Act, shall or may be liable to be sued for the same, shall be obliged and compellable to answer upon oath such bill as shall be preferred against him or them in any court of equity for discovering any such contract or wager, and the sum of money or premium so given, paid, or delivered as aforesaid.

And by sec. 3 it is provided, "that the plaintiffs, relators, or informers in such bill shall and do (at the time of bringing or filing such bill) give good and sufficient security to answer and pay to the defendants in such bill full costs of suit, in case such costs shall be adjudged to the defendants, and that no person shall be obliged to appear to or answer such bill until such security is given.

And by sec. 4 it is "further enacted by the authority aforesaid, that all and every person or persons whatsoever, who shall enter into, make, or execute any such contract, bargain, or agreement, upon which any premium, or consideration in the

nature of a premium, shall be given or paid for liberty to put upon or to deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or any contract or bargain in the nature of puts and refusals as aforesaid, or shall lay any such wager, or make any such contract in the nature of a wager as aforesaid (except such person or persons who shall actually and *bonâ fide*, without covin or collusion, sue and with effect prosecute for the recovery of the money or premium given, delivered, or paid by him, her, or them as aforesaid; and also except such person or persons who shall voluntarily, before any action or suit commenced, actually and *bonâ fide*, without covin or collusion, repay or tender, before one or more witness or witnesses, such monies or premium as he, she, or they shall have had, taken, received, or been paid as aforesaid; and also except such persons who shall discover such transactions in any court of equity) shall forfeit and pay the sum of five hundred pounds; and also all and every brokers, agents, scriveners, or other persons negotiating, transacting, or writing any such contract, bargain, or agreement as aforesaid, shall likewise forfeit and pay the sum of five hundred pounds; which said penalties shall and may be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed;

one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them, who shall sue for the same.

And by sec. 5, "for preventing the evil practice of compounding or making up differences for stocks or other securities bought, sold, or at any time hereafter to be agreed so to be, be it further enacted by the authority aforesaid, that no money or other consideration whatsoever (except as hereinafter is provided) shall, from and after the said first day of June one thousand seven hundred and thirty-four, be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for the not delivering, transferring, having, or receiving any public or joint stock, or other public securities, or for the not performing of any contract or agreement so stipulated and agreed to be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered, shall be actually so done, and the money, or other consideration thereby agreed to be given and paid for the same, shall also be actually and really given and paid; and all and every person and persons whatsoever, who shall, from and after the said first day of June one thousand seven hundred and thirty-four, voluntarily compound, make up, pay, satisfy, take, or receive such difference money, or other consideration whatsoever,

for the not delivering, transferring, assigning, having, or receiving such stock, or other security so to be agreed to be delivered, transferred, assigned, had, or received, as aforesaid (except in the manner herein-after provided), shall forfeit and pay the sum of one hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same.

By sec. 6 it is provided nevertheless, "that no person or persons, who shall sell any public or joint stock, or other public securities, to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same, but it shall and may be lawful for such person or persons to sell such stock or other securities, which shall be so refused or neglected to be paid for, to any other person or persons for the best price which can be obtained, and after such sale to receive (if the parties can agree) or to recover as aforesaid, from the person or persons who first contracted for the same, all the damage which shall be sustained thereby.

By sec. 7 it is provided also, "that it shall and may be lawful to and for any person or persons, who

shall buy any public or joint stock, or other public securities, to be accepted and paid for on a future day, and which shall be refused or neglected to be transferred, to buy the like quantity of such stock, or other public securities, of any other person or persons at the current market price, and to recover and receive, after such purchase and acceptance (if the parties can agree) from the person or persons who first contracted to sell or deliver the same, the damage which shall be sustained by reason of the not delivering or not transferring such stock or other securities; any thing in this Act, or any law, usage, or custom to the contrary notwithstanding.

By s. 8, "And whereas it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed; be it therefore further enacted by the authority aforesaid, that all contracts and agreements whatsoever, which shall, from and after the said 1st day of June 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made to sell, assign, or transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or

trustees to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and persons whatsoever, contracting or agreeing, or on whose behalf and with whose consent any contract or agreement shall be made to sell, assign, or transfer any public or joint stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use or their own right as aforesaid, shall forfeit and pay the sum of five hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same; and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making or procuring to be made any such contract or agreement as aforesaid, and shall know that the person or persons by whom or on whose behalf such contract or agreement shall be made is or are not possessed of or entitled unto the stock or security, concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for

their use or right, shall for every such offence forfeit and pay the sum of one hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same.

By s. 9 it is further enacted, "That from and after the 1st day of June 1734 all and every broker or brokers, or other person or persons, who shall negotiate or act as a broker, receiving brokerage in the buying, selling, or otherwise disposing of any of the said public or joint stocks, or other public securities, shall respectively keep a book or register, which shall be called the Brokers' book, in which said book he and they shall fairly, justly, and truly enter all contracts, agreements, and bargains that he or they shall from time to time make between any person or persons whatsoever, on the day of the making such contract or agreement, together with the names of the principal parties, as well buyers as sellers, and also the day of making such contract or agreement, to the intent and purpose that such broker or brokers, and other person or persons acting or negotiating as such, as aforesaid, shall from time to time produce such book or register when thereunto lawfully required; and in case such broker or brokers, or any other who

shall negotiate or act as a broker as aforesaid, in relation to any the said matters, shall not keep such book or register, or shall wilfully omit to enter therein fairly, justly, and truly, any such contract, bargain, or agreement as aforesaid, he or they shall, for every such offence or omission, forfeit and pay the sum of fifty pounds, to be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same.

Section 10 provides, "That nothing in this Act contained shall extend, or be construed to extend, to any contracts or agreements for the purchase or sale of any stock, annuities, or other public securities, to be made with the privity of the Accountant-General of the Court of Chancery, in pursuance of any decree or order of the said Court; but that all such contracts and agreements may be made and performed in the same manner as they might have been if this Act had never been made.

Section 11 provides and enacts by the authority aforesaid, "That nothing in this Act contained shall extend, or be construed to extend, to hinder or prevent any person or persons from lending any sum or sums of money on any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder

any defeazance, contract, or agreement being made and entered into for the re-delivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the repayment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest."

Section 12 provides and enacts by the authority aforesaid, "That this present Act shall continue and be in force from the said 1st day of June 1734 for the term of three years, and from thence to the end of the then next Session of Parliament, and no longer."

This Act was made perpetual by the 10 Geo. 2, c. 8. This is the only Act now in force to restrain and regulate dealings in stock. The legislature has not passed any subsequent measure calculated to repeal or modify the provisions of that statute: it must therefore be considered as the sole existing enactment tending to affect and endeavouring to restrain the method of transacting business on the Stock Exchange. A slight outline has been given of the history of stock-jobbing; and it has been shewn how, after repeated interference on the part of the legislature to repress its alleged pernicious effects, such object was supposed to have been effectually obtained by the passing of the Act in

question, commonly known as Sir John Barnard's Act, the bill having been brought in by that gentleman, then one of the City members.

Now prior to the passing this Act the legislature, as has been shewn in a previous Chapter*, had on more than one occasion endeavoured by the stringency of their restrictive measures to check the progress, which appeared to them fraught with so much public evil, of entering into contracts for the sale or purchase of stock without the intention of carrying such contracts into effect: the clauses already set out in the statutes 8 & 9 Will. 3, c. 20, and 8 & 9 Will. 3, c. 32, sufficiently attest the anxiety of Government in this respect. Moreover, amongst the numerous remedies suggested by the host of pamphleteers, each ready with his panacea for repairing the mischief and ruin occasioned by the mania of 1720, many were identical, or nearly so, with the provisions of this Act, and all unanimous in attributing the national distress to the practices of the much-abused stock-jobbers.

The objects sought to be effected by the Act are most plain and unequivocal—to prevent any contracts between persons not actually possessed of such stock for the sale or purchase of stock at a future period, without the execution of such contract by an actual transfer of the stock, and thus to suppress the practice of merely paying or receiving the difference in the market value of stock on the

* See *supra*, pp. 7, 14.

day named for the completion of the fictitious bargain; such transaction amounting in fact to a mere wager on the future price of stock.

That this Act has utterly failed to effect its object is well known, for it is alike anomalous as notorious that a numerous and highly-respectable body of men earn their livelihood by the daily and hourly violation of the clauses of the statute.

Penal statutes would appear to be but little congenial to the national spirit and constitution [a], and our Judges have ever evinced a disposition to narrow, as far as possible, their application, when such disposition can be exercised in favour of those parties to a suit who appear to have acted an honest and *bonâ fide* part.

This will be manifest on a review of the cases and judgments cited in the following pages.

As may be imagined, numerous have been the questions arising out of the construction to be placed on the various restrictive clauses of the Act. Those questions and their solution will prove sufficiently explicit upon consideration of the various occasions when they have been mooted.

The principles to be deduced from the cases, especially those decided in our own days, appear so clearly from the cases themselves as to render it superfluous to recapitulate them.

[a] Lord Holt, C.J., observes, in Mitchell *v.* Broughton, *infra* p. 162, of the stat. 8 & 9 W. 3, c. 32, that it must be taken strictly: it destroys bargains. Certainly the 7 Geo. 2, c. 8, is entitled to at least an equally rigid construction; and in Bullock *v.* Richardson, *infra* Lord Eldon, C., most happily terms the Act to be really penal, although in form remedial.

The two great points that have arisen upon the construction of the Act is, as to what species of contract it is intended to apply, and whether securities given to ensure the payment of differences arising out of stock-jobbing transactions are or not available in the hands of an innocent holder for value.

As will presently be seen, it appears to be at length established that no action can be maintained for breach of a contract that is merely executory, and that, to enable a party to recover, the contract must have been specifically executed.

Before proceeding to the consideration of the cases involving the second point, it may be observed, that, whilst framing his bill, Sir John Barnard appears to have been in some degree guided by the Act passed in the 9th year of Anne, c. 14, to prevent gaming. His Act, however, differs from the Gaming Act in this material particular, that it contains no clause rendering void securities &c. the consideration for which is made illegal by the statute.

It is proposed to consider, in the first instance, how far instruments given for the purpose of secur ing payments arising out of transactions prohibited by the Act are valid or otherwise.

The celebrated case of *Collins* v. *Blantern*[a] established the principle that illegality may be pleaded to an action on a deed; and where any of

[a] 2 Wils. 341.

the covenants of a bond are void under a prohibitory statute, such bond is void *in toto;* and to render a bond or contract void for infringement of a statute it is not necessary that the statute should contain words of positive prohibition.[a]

The principle that should guide the courts in the construction to be placed on pleas of illegality was thus clearly laid down by Holt, C.J., in *Bartlett* v. *Vinor*[b]:—

"Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute."[c]

The principle laid down in this case was recognised and affirmed by the Court of Exchequer in the case of *Cope* v. *Rowlands*[d], which was an action brought by a stock-broker to recover commission for work performed by him in that capacity, he not being duly licensed to act as such broker pursuant to the provisions of 6 Anne, c. 16; and the

[a] See Tindal's, C.J., judgment in De Begnis *v.* Armistead. 10 Bing. 110.

[b] Carth. 252; and Cope *v.* Rowlands, 2 M. & W. 149.

[c] This principle has been acted upon in a multitude of cases where illegality was pleaded to an action on a bill, bond, deed, or breach of contract. See *inter alia*, Ferguson *v.* Norman, 5 Bing. N. C. 80; Cundell *v.* Dawson, 4 C. B. 376; Gaslight Company *v.* Turner, 6 Bing. N. C. 324; and 5 *ibid.* 666. And see notes to Collins *v.* Blantern in 1 Smith's Leading Cases, 167, 168, 3d edit.

[d] 2 M. &W. 149.

Court held, as that statute imposes a penalty, it must be taken to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting. The sole question in these cases is, whether the statute means to prohibit the contract?

In *Langton* v. *Hughes*[a], which was an action by a druggist to recover the value of drugs sold to the defendant, a brewer, knowing they were to be used in the brewery, and in violation of the provisions in the Acts 42 Geo. 3, c. 38, and 51 Geo. 3, c. 87, Lord Ellenborough, C. J., in delivering judgment, laid it down as a received rule of law, that what is done in contravention of the provisions of an Act of Parliament cannot be made the subject-matter of an action. The Court will not give sanction to a contract entered into against the policy of the law.

So in *ex parte Mather*[b], where a bill had been indorsed to a broker in consideration of money paid by him in effecting insurances, one of which was illegal, the acceptor becoming bankrupt, the petition of the indorsee to prove was dismissed as to what arose upon the illegal insurance. In this case it was insisted, upon the authority of *Faikney* v. *Reynous* and *Petrie* v. *Hannay*[c], that the con-

[a] 1 Maule & Selw. 596; and see Hudson *v.* Moline, 3 Keble, 671; Forster *v.* Taylor, 5 B. & Ad. 887; and cases cited and reviewed in judgment.

[b] 3 Ves. 373.

[c] *Vide infra.*

sideration was good as between the drawer and the indorsee, and that there could be no objection because, between the drawer and some person not appearing on the bill, there had been illegal transactions; but Lord Rosslyn, C., stated in his judgment that he could not perfectly accede to the cases cited, and that what was called a consent in those cases was a confederacy to break a positive law.

It does not appear by the report of the case whether or no the indorsee was privy to the illegality.

But this decision is at variance with the doctrine laid down by Lord Loughborough, C., in the case of *Watts* v. *Brooks*[a], where a bill had been filed praying for a general account between the parties of transactions, some of which arose out of insurances void under the 6 Geo. 1, c. 18, s. 12. It was objected for the defendant that the Court cannot sit by and enforce what the law declares to be illegal[b]; but per Lord Loughborough, C.:—

"Though I am clearly of opinion that the judgment of the Court of King's Bench upon the Act is quite right, it goes no farther than that the Court will not execute these contracts; but where the parties have had dealings together upon a variety of transactions, and losses have been incurred and paid and a general account is sought, I do not execute the contract against law, but I should do injustice if I did not give the advantage, if any

[a] 3 Ves. 612.
[b] Booth *v.* Harrison, 6 T. R. 405.

advantage has arisen, or charge any loss which has happened. If it was a smuggling business, and they had been settling profit and loss upon a course of smuggling transactions, I should do great injustice if I did not bring that into the account. So upon stock transactions, though the Court would not execute the contract, yet where the parties have been settling stock dealings and paying differences I must bring those into the account."

As the Act now under consideration was passed on grounds of public policy, it would be foreign to our purpose were we to enter more at large into the *vexata quæstio* as to the intention of the statutes passed for the protection of the revenue, and prescribing under penalties the mode of carrying on certain trades, whether such statute be satisfied by enforcing a penalty against the trader who contravenes its provisions, or whether contracts entered into by such trader be *ipso facto* illegal.[a]

But a distinction has been drawn between contracts executed and those executory: a contract which could not have been enforced because such contract was prohibited by statute, may become available when executed, because the same policy which guided the Legislature in prohibiting its enforcement while executory went to secure its execution. This was the principle adopted by the Court of Exchequer in their judgment in the case

[a] See, on this point, Johnson *v.* Hudson, 11 East, 180; Smith *v.* Mawhood, 14 M. & W. 452; Eyre *v.* Shelley, 6 M. & W. 270.

of *Mortimer* v. *M'Callan* (see Lord Denman's judgment in error), which will be presently reverted to.

In the case of *Lowry* v. *Bourdieu*[a], which was an action to recover back the premium paid on a policy of insurance contrary to the provisions of 19 Geo. 2, c. 37, Buller, J., thus distinguishes between contracts executed and executory:—

"There is a sound distinction between contracts executed and executory; and if an action is brought with a view to rescind a contract, you must do it whilst the contract continues executory, and then it can only be done on the terms of restoring the other party to his original situation. There was a case of *Walker* v. *Chapman* some years ago in this Court, where a sum of money had been paid in order to procure a place in the Customs. The place had not been procured, and the party who had paid the money having brought his action to recover it back, it was held that he should recover, because the contract remained executory. So if the plaintiffs in the present case had brought their action before the risk was over and the voyage finished they might have had a ground for their demand; but they waited till the risk (such as it was, not indeed founded in law, but resting on the honour of the defendant) had been completely run. It makes no difference whether the premium was paid before the voyage or after it."

[a] 2 Doug. 468.

Considerable discussion has arisen as to the true construction to be placed on the prohibitory clauses of this Act, and to what description of transactions they were intended to apply; and (as has already been observed) on review of the several cases arising under the statute, it will appear that the courts have evinced a disposition not to rely upon the mere words of the Act so as to defeat a contract where, in substance, the transaction was legal.

Securities given for the payment of money arising out of transactions expressly prohibited by an Act of Parliament are void, although such securities are available in the hands of a third party, who gave a valuable consideration for them, and was ignorant that they were tainted by illegality. In some instances, however, arising under the Acts relating to Usury and Gaming, such securities have been held void, even as against an innocent holder for value. Thus in an action brought by the indorsees against the acceptor of a bill of exchange, the defendant pleaded that the bill was given upon an usurious contract entered into between the indorsors and himself: this was controverted by the plaintiffs, who insisted that the bill was indorsed to them for a valuable consideration and without notice of the supposed usury; and it was argued, that although it should appear that the original transaction was usurious, still that the defendant was liable to the innocent indorsees. The jury found the contract to be usurious, and the Court reserved the point of

law arising out of the plaintiffs' replication. After considerable argument, judgment was given in favour of the defendant. Lord Mansfield, C.J., in his comments upon the hardship of the case, declared that the words of the statute[a] were too strong, and that this was one of the instances in which private must give way to public convenience.[b]

The case of *Bowyer* v. *Bampton*[c], referred to in the preceding case, was decided on the same principle.

These cases of *Lowe* v. *Waller* and *Bowyer* v. *Bampton* were at direct variance with an opinion expressed by Holt, C.J., in *Hussey* v. *Jacob*[d]: there, a plea to an action on a bill of exchange, alleging it to have been given in payment of money lost at play, was held a good answer to the action; but the Court observed, "that if *A* wins money of *B*, and for a debt which *A* owes *C* he appoints *B* to give *C* a bond, it is good: *C* is an innocent person, and 'twill be the same thing if *A* be bound with him."

The Lord Chief Justice, Sir William Lee, speaking of this case in his judgment in *Bowyer* v. *Bampton*, observed that he had seen a Report wherein

[a] 9 Anne, c. 14, s. 1, "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever &c., where the whole or any part of the consideration shall be for money &c. won by gaming &c., shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever."

[b] Lowe *v.* Waller, 2 Doug. 736.

[c] Str. 1155.

[d] Carthew, 356; Salkeld, 343.

notice was taken that all the learned part of the bar wondered at it.

It was held in *Barjeau* v. *Walmsley*[a], that the borrowing money for the purposes of gaming, on a parol agreement to pay, is not a security within the meaning of the 9th Anne, c. 16.

Shortly after the passing of the Act relating to brokers, 8 & 9 Will. 3, c. 32, the following case was tried in the King's Bench. *A* agreed to transfer Bank stock to *B*, upon the request of *B*, at any time before the 10th of May. The agreement was made in February. The defendant pleaded the 10th section of the Act. By this section it is enacted that every policy, contract, bargain, or agreement made and entered into, upon which any premium already is, or at any time hereafter shall be given or paid for liberty to put upon, or deliver, receive, accept, or refuse any shares or interest in any joint stock, tallies, orders, Exchequer bills, or tickets, or Bank bills whatsoever, other than and except such policies, contracts, bargains, or agreements of the nature aforesaid as are to be performed within the space of three days (to be accounted from the time of making the same), is and shall be utterly void to all intents and purposes, as if the same had never been made; and every such premium and premiums shall be paid back and restored to such person or persons who did give or pay the same, his executors, administrators, or assigns.

[a] Str. 1249.

For the plaintiff it was contended, that as the contract might have been performed before the 1st day of May, therefore it was not within the words of the statute; but Holt, C.J., was of opinion, that if the request had been before the 1st of May and the contract performed, it had been good; but if no request was made before the 1st of May, the contract being performable afterwards was within the intent of the Act. No such request appeared to have been made, and the defendant had judgment.[a] And, in a similar case[b], the same Judge held that the Act was to be taken strictly, because it destroys bargains.

During the argument in *Lowry* v. *Bourdieu*[c] Lord Mansfield adverted to several cases where money, the payment of which could not have been compelled by law, having been actually and voluntarily paid, cannot be recovered back in an action, as, for instance, money paid by an infant, or on *time contracts* for the price of stocks.

To an action of debt upon a bond the defendant pleaded the statute 7 Geo. 2, c. 8, and that the plaintiff and one Richardson[d] were jointly concerned in certain contracts &c., and that the plaintiff, contrary to the statute, voluntarily paid a certain amount of money for compounding and making

[a] Smith *v.* Westall, 1 Ld. Raym. 316.
[b] Mitchell v. Broughton; *ibid.* 673; and see *supra*, p. 152.
[c] *Supra*, p. 158.
[d] It did not appear whether Richardson was not a co-obligor and co-defendant, but it is presumed that he must have been joined in the action.

up differences for not delivering stock &c. and for not performing contracts &c. (following the words of the Act), and that the bond was given for securing repayment of a moiety of the sum so paid.

Lord Mansfield, C. J., held that the matter contained in the plea was no defence against the action brought on the bond: that the offence relied upon as furnishing a ground of defence is not *malum in se*, but only prohibited by the Act. That here one of two persons had paid money for another and upon his account, and that the latter gave his bond to secure the repayment of such money: such a transaction is not prohibited. The person giving the bond is not concerned in the use which the other makes of the money: he may apply it as he thinks proper. Between these two this was certainly a fair honest transaction.

And the other Judges concurred that this bond was not within the statute, nor did it appear to have been given upon any illegal consideration, that the plea was no defence against the payment of it, and that therefore it remained a good bond on the face of it until the obligor could shew that it was bad.

And they observed that paying money to compound these differences was not *malum in se*, but only stood prohibited by the Act, which neither says nor means to invalidate all securities relating to it (as the Act against excessive gaming does): it only prohibits paying or receiving money for compounding differences.

That it was not a bond for payment of the composition to the persons with whom the plaintiff and *Richardson* had contracted, but a bond for the repayment to the plaintiff by *Richardson* of a debt of honour, and reimbursing to the plaintiff the money paid by him upon *Richardson's* account to compound the differences of contracts wherein they had been jointly concerned: that the bond was therefore good, and that the plaintiff was entitled to recover upon it.[a]

In the course of his judgment Lord Mansfield referred to a case tried before him, where a *res-counter* contract was held to be void under the Act.

The principle laid down in this case was acted upon by the Court of King's Bench in *Petrie* v. *Hannay*.[b] The following were the facts:—

The testator, *S* the plaintiff, and the defendant had been engaged in stock speculations on joint account to a considerable amount: on these speculations they incurred heavy losses. Upon coming to a settlement with their broker, who had paid the differences, the testator paid him the sum he had advanced *minus* the amount due from the defendant as his share of the losses, and to secure which the testator drew a bill on him in favour of the broker, which the defendant accepted, but did not pay when

[a] Faikney *v.* Reynous and another (*Query* Richardson), 4 Burr, 2069. And see Heath's, J., judgment in Alcinbrook *v.* Hall, 2 Wils. 309.

[b] 3 T. R. 418.

it became due. The broker sued the plaintiffs, the testator's executors, on the bill, and recovered the amount, no defence being set up on account of the illegality of the transaction. The plaintiffs declared against the defendant to obtain reimbursement in an action for money paid to his use, and obtained a verdict. A rule was granted to set aside the verdict on the ground that the bill was given in contravention of the statute 7 Geo. 2, c. 8; but the Court discharged the rule (Lord Kenyon *dubitante*) on the authority of *Faikney* v. *Reynous*, and on the ground that the money was paid with the knowledge, consent, and authority of the defendant, and that the action was not founded on a promise arising by implication of law out of the illegal transaction, but from an express one made subsequently, and which the defendant was under no necessity of making.[a]

Upon a petition to expunge the proof of a debt under a commission of bankruptcy, as arising by settling differences upon illegal transactions within the Act, Lord Eldon, C., expressed his disapprobation of the doctrine laid down in *Faikney* v. *Reynous* and *Petrie* v. *Hannay*, but the case was subsequently compromised.[b]

In *Cannan* v. *Bryce*[c] the Court held that money

[a] In his judgment herein, Grose, J., speaks of the 7 Geo. 2, c. 8, as "one of the most politic and beneficial statutes that was ever passed."

[b] *Ex parte* Daniels, 14 Ves. 190.

[c] 3 B. & Ald. 179.

lent, and applied by the borrower for the purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, although cognizant of the purposes to which such money so lent by him was devoted, could not be recovered by him; and that as the transaction had been prohibited by the 7 Geo. 2, c. 8, the contract whereby it was to be carried into effect was illegal. Per Abbott, C. J.: "The Act of paying or receiving is prohibited absolutely, and those who pay and those who receive are both placed *in pari delicto* . . . . As the statute in question has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object."

It has been sometimes considered that the last-cited case, *Cannan* v. *Bryce*, must be held as overruling the decisions in *Faikney* v. *Reynous* and *Petrie* v. *Hannay;* but it is submitted that on more rigid examination they may be found distinguishable. Lord Abinger, C. B., in his judgment in *M'Kinnell* v. *Robinson*[a], which was an action to recover money lent for the purposes of gaming, affirms

[a] 3 M. & W. 434; and see the cases therein cited on the Gaming Acts.

the principle that "the repayment of money lent for the *express purpose* of accomplishing an illegal object cannot be enforced." In that case the money was avowedly lent for the express purpose of satisfying an illegal contract, which required a certain payment to be made ere it could be fully *accomplished.* Now, in the cases of *Faikney* v. *Reynous* and *Petrie* v. *Hannay* the illegal contract had been fully accomplished: in the former case no illegal consideration appeared upon the face of the bond: it was simply given to secure repayment of money paid for and upon the account of the defendant. In the latter, a deceased partner had paid, with the full knowledge and consent of his co-partner, money arising out of a joint transaction, in which both had been equally interested; and the action was fairly brought by the executors of the partner who had made such payment, to recover the amount of a bill of exchange given to secure the *quota* due from the co-partner.

Again, these cases are distinguishable from *Cannan* v. *Bryce* and *M'Kinnell* v. *Robinson* on another point. The plaintiffs in these cases might be considered in the light of aiding and abetting others to violate the law: in the other cases the defendants were no further concerned in such violation than in giving their bond and bill to secure repayment of money disbursed with their consent and on their behalf, and such bond and bill were *ex post facto* transactions.[a]

[a] See the judgment in Steers *v.* Lashley, *infra.* p. 170.

It has been long an established fact that deeds may be impeached by matters *dehors*, as upon averments of legal and corrupt considerations[a], and the Court could not but see in the case of *Petrie* v. *Hannay* that the demand arose out of illegal transactions.

In *Aubert* v. *Maze*[b], where an arbitrator had awarded a balance due from one partner to another upon joint insurances, such insurances being made in derogation of the rights reserved to certain companies under stat. 6 Geo. 1, c. 18, s. 12, that part of the award was set aside by the Court of Common Pleas; and in delivering judgment, Lord Eldon, C.J., repudiated the doctrine laid down in the case of *Petrie* v. *Hannay*, that the consent of a partner in an illegal partnership can enable his co-partner to recover money paid by him on their joint account.

But the case of *Tenant* v. *Elliott*[c] would appear to be at variance with the decisions above cited. There the defendant, a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies on board an imperial ship. The ship being lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff, and

[a] Collins *v.* Blantern, 2 Wils. 341; per Lord Eldon in *ex parte* Bulmer, 13 Ves. 318.

[b] 2 Bos. & P. 371; and see Booth *v.* Hodgson, 6 T. R. 405; Sullivan *v.* Greaves, 1 Park on Inst. 8, 7th edit.

[c] 1 Bos. & P. 3.

relied on the stat. 7 Geo. 1, c. 21, s. 2, making void all contracts for loans by way of bottomry on any foreigners' ships bound for the East Indies; but *per* Buller, J.:—

"Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant, then, in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over? Who is entitled to it but the plaintiff?"

This case is distinguishable from that of *Sullivan* v. *Greaves*, as there the plaintiff could not make out his title without shewing the illegal contract.[a]

In an action on a bill of exchange by an indorsee against the acceptor, it appeared that the defendant had engaged in several stock-jobbing transactions with different persons, in which one *W* was employed as his broker and had paid the differences for the defendant. That a dispute arising between *W* and the defendant respecting the amount of those differences, the matter was referred to the plaintiff and three others, who awarded a certain sum to be due from the defendant to *W* for 100*l*., for part of which *W* drew the bill upon which the action was brought. The plaintiff relied on the authority of *Faikney* v. *Reynous* and *Petrie* v. *Hannay*.

Lord Kenyon, C.J.: "If the plaintiff had lent

[a] And see Farmer *v.* Russell, 1 Bos. & P. 296.

this money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, then according to the principle established in *Petrie* v. *Hannay* he might have recovered. But here the bill on which the action is brought was given for these very differences, and therefore *W* himself could not have enforced payment of it. Then the security was indorsed over to the plaintiff, he knowing of the illegality of the contract between *W* and the defendant, for he was the arbitrator to settle their accounts; and under such circumstances cannot be permitted to recover on the bill in a court of law."[a]

So where a bond was given in substitution of a note given to secure money paid for differences on stock-jobbing transactions, the bond was held void, the party taking it in lieu of the note, after such note had become due, being aware of the illegality of the transaction.[b]

In the case of *Edwards* v. *Dick*[c], which was an action brought by an indorsee for valuable consideration of a bill of exchange against the drawer and acceptor, the defendant relied in part on the fact that the bill was given for a gaming debt.

The plaintiff obtained a verdict; and on a motion to enter a nonsuit, Abbott, C. J., thus expressed

[a] Steers *v.* Lashley, 6 T. R. 61; Booth *v.* Hodgson, *ibid.* 405; Guichard *v.* Roberts, 2 Wils. 339; Smith's Mercantile Law, 4th edit. 249; and cases on the general question of illegal considerations.

[b] Amory *v.* Merryweather, 2 B. & C. 573.

[c] 4 B. & Ald. 212.

himself: "This is an action by the indorsee of a bill of exchange against the drawer and indorser. The indorsee received the bill for a good and valuable consideration. A second point has been made in the present case, founded on the provision contained in the statute 9 Anne, c. 14, s. 1, which enacts, 'that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming &c., shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever.' Now this provision is certainly expressed in very large terms. But the object of the statute, to which we must look in order to arrive at a clear construction of this clause, was to prevent excessive and deceitful gaming; and it was with that view that they enacted that the securities should be void to all intents and purposes. It is, however, argued, that if the plaintiff in the present case recover, this bill, the consideration for which was money won at play, will be valid to some purposes. But I think we must understand the language of the legislature with reference to the object which they then had in view, viz. the prevention of gaming; and that will be effectually accomplished by holding the securities to be void for any purposes of enforcing payment of the money won at play. The drawer,

therefore, of such a bill of exchange cannot maintain any action against the acceptor. Now if he could, by passing the bill to a third person, enable him to sue the acceptor, that would be within the mischief of the Act. It follows, therefore, that no person deriving title through the drawer can be in a different situation from him so as to sue the acceptor. The case of *Bowyer* v. *Bampton* falls within this rule; for there the action was brought against the loser to recover money lost at play, and the Court properly held that the action would not lie. The cases on the Statute of Usury follow the same principle. In the case of *Ackland* v. *Pearce*[a], the acceptor, who wanted to borrow money, applied to the drawer, who drew a bill for 386*l*., which was passed away by the acceptor for an usurious consideration, and afterwards fell into the hands of a third person, by whom the action was brought against the drawer; but in that case substantially the drawer and acceptor were the same persons, and the plaintiff claimed in effect, though not in form, through the persons affected by the usurious contract. But there is no case upon the Statute of Usury where a drawer, after having parted with a bill for a good consideration, can afterwards set up as a defence an antecedent usurious contract between himself and the acceptor; for if so, a court of justice would enable him to commit a gross fraud upon an innocent person. Upon the whole, I am

[a] 2 Camp. 599.

of opinion that we shall best effectuate the intention of the legislature by saying that this bill is void for every purpose which it was the object of the statute 9 Anne, c. 14, s. 1, to prevent. No person, therefore, who derives his title through the winner can make the loser pay. But for the purpose of preventing fraud, we cannot permit the defendant to set up his own gaming as a defence; and therefore I think that the words of the statute do not extend to the present case, and that this rule ought to be refused."

And in *Humphreys* v. *O'Connell*[a], an action by the indorsee against the acceptor of a bill of exchange, to which the defendant pleaded that the bill was accepted for a gaming debt, the Court held, that the plaintiff being a holder for value was *primâ facie* entitled to recover upon the bill, even where there had been want of consideration or illegality between the original parties to it.

A bill accepted for differences on time bargains in stock is valid in the hands of an indorsee without notice.[b]

Per Lord Tenterden, C. J.: "In the hands of the drawer the bill would have been void. The distinction between securities void by statute and contracts void by statute is well known. The contract upon which this action is brought is not the contract for doing the illegal act.

"The contract mentioned in the statute is that by

[a] 7 M. & W. 370.
[b] Greenland *v.* Dyer, 2 Man & Ry. 422.

which the parties agree to pay and receive differences. The contract on the bill of exchange is a contract to repay the broker. The broker himself who has made the illegal contract cannot recover; but when the bill passes into the hands of an innocent person no case has said, nor is there any principle to shew, that such a party cannot recover."

In an action by the indorsee against the drawer and indorser, the defendant set up as his defence that the bill sued upon was given for differences in Consols, and that the plaintiff, through his uncle, from whom he had taken the bill, was cognizant thereof: of this, however, there was no clear evidence. An entry for the amount of the bill in the acceptor's book was read in evidence, and was as follows: "To differences in Consols 311*l.* 17*s.* 6*d.*" A witness was called, who said *differences* might mean differences in point of time.

Tindal, C. J., told the jury that *differences* might have a legal meaning, and that they were to determine whether the parties meant differences in point of time or differences between stock bought and stock sold.

The jury found for the plaintiff; and on a motion to set aside the verdict on the ground that the entry in the acceptor's book was sufficient to shew that the bill was given for time differences, and if so was absolutely void, Tindal, C. J., held, that supposing the fact to have been so, it was not shewn that the defendant had any notice of it; and that *Edwards*

v. *Dick*[a] had decided that a bill void to all intents and purposes may be available in the hands of an indorsee without notice, and that it was going too far to say that differences must necessarily mean *illegal* differences. A rule to set aside the verdict was refused.[b]

In *Broughton* v. *Manchester Water Works Company*[c] Holroyd, J., thus expresses himself concerning the prohibitory clauses in statutes:—

"I take it to be clear, however, that where a statute prohibits a thing to be done and does not expressly avoid the securities which fall within the prohibition, there, if the violation of the law does not appear in the face of the instrument, and the party taking it is ignorant that it was made in contravention of the statute, it is an available security in the hands of such a person."

An agreement in consideration of forty guineas to pay 100*l.* in case Imperial Brazilian Mining shares should be done at a certain sum on a certain day was held void, as being a policy of insurance within the statute 14 Geo. 3, c. 48.[d]

In an action of *assumpsit* for not transferring 3000*l.* Four-per-Cents. into the plaintiff's name at the opening day, the defendant, a stock-broker, had applied to the plaintiff for a loan of 300*l.* stock on an undertaking to replace the same stock on a given

[a] See *supra*, p. 170.
[b] Day *v.* Stuart, 6 Bing. 109.
[c] 3 B. & Ald. 10.
[d] Paterson *v.* Powell, 9 Bing. 320.

day: the plaintiff was to derive no advantage from the transaction. The defendant at the time of making the agreement to transfer the stock was not possessed of any such stock. The plaintiff gave him a letter of attorney empowering him to sell the stock, which he accordingly did sell and retained the proceeds, and when the day of payment arrived refused to pay the plaintiff, insisting that the contract was void under the statute 7 Geo. 2, c. 8, s. 8.

In delivering judgment in favour of the plaintiff, Lord Kenyon observed:—

"If such were the positive provisions of that statute, the consequence must follow, however hard it might press upon the plaintiff. But before we assent to so monstrous a proposition, we would look with eagle's eyes into every part of the statute, to see that such was the intention of the legislature. Their intention is to be collected from the whole Act taken together. The Act is entitled, 'An Act to prevent the infamous practice of Stock-jobbing;' but if the defendant's objection were to prevail the title of the Act ought to be altered, and it should run thus: 'An Act to encourage the wickedness of Stock-brokers, and to give them the exclusive privilege of cheating the rest of mankind.' On considering the whole of the Act together, I am clearly of opinion that its object was only to prevent gambling in the funds, but the legislature did not mean to prohibit a loan of stock and an undertaking to replace it. I do not think that this case comes within

the meaning of the prohibitory clauses in the Act, but it is within the exception in the last section."[a]

This judgment merits the greater attention from the fact that it apears to be the first case in the reports where the Court seemed inclined to put a more equitable construction on the very stringent clause of the Act, and subsequent cases have contributed to shew a feeling in the Judges tending to relax its rigour. It would be out of place to discuss here the policy of retaining in the present day this Act in our statute book. That the object of the Act has been somewhat defeated by the severity of the penalty imposed by the 8th section is sufficiently evidenced by the fact, that although the dealings in bargains for time are notorious, yet the most minute search and rigid inquiry have failed to discover but one single instance in which, on a *qui tam* action under this statute, a verdict has ever been found for the plaintiff.*

This occurred in a case of *Cooper* v. *Bloxam*, tried beford Lord Denman, C. J., at the London Sittings after Trinity Term 1849. The plaintiff, a clergyman, brought an action against the defendant, a broker or jobber, for the penalty of 100*l.*, under the

[a] Sanders *v.* Kentish, 8 T. R. 162; Tate *v.* Wellings, 3 T. R. 531. This, however, was a case of a *loan* of stock, which is clearly not within the prohibitions of the Act.

* This statement is made on most unimpeachable authority. Although numerous actions for penalties under the Act have been brought against brokers, save in the one cited in the following pages, no verdict has as yet been returned for the plaintiff.

8th section of the Act. The declaration alleged that the defendant negotiated &c. (following the words of the Act), knowing that at the time the contract was to be executed the party with whom the defendant had entered into such contract was not possessed of the stock contracted for. The plaintiff, who had in fact employed the defendant to conduct such transaction, put in a letter from him, stating that he had made such and such a bargain: moreover, the vendor was called, who stated, in cross-examination, that at the time of his entering into the negotiation with him the defendant *must* have been aware that he was not possessed of the stock in question. Upon this evidence Lord Denman directed the Jury to find for the plaintiff.

In the following term the defendant's counsel obtained a rule *nisi* to set aside the verdict, on the ground, that although the declaration averred the defendant to have known that the vendor was not possessed of the stock at the time the contract was to be executed, yet that it was not alleged that he was aware of such fact at the time of his "negotiating" &c.

Judgment has not as yet been given herein.*

It is perhaps but just to admit that one of the

* The learned Judge before whom the cause was tried stated that it was the only case arising out of the Act that had ever come before him.

Since the trial the plaintiff has died; and it is surmised that whatever may be the judgment of the Court respecting the rule obtained by the counsel for the defendant, no steps will be taken to enforce payment of the penalty.

causes tending to this result, or, to speak more accurately, one mode of accounting for the failure of plaintiffs in *qui tam* actions brought for penalties under this Act, may be imputed to the difficulty experienced in adducing sufficient evidence to enable them to substantiate the allegations in the declaration; for instance, in cases where *qui tam* actions were brought to recover penalties under the Act against parties concerned in stock-jobbing transactions, the plaintiffs were nonsuited, as the broker who had been employed in such transactions refused to give evidence, on the ground that his testimony might subject him to the penalties imposed by the statute on brokers acting in the manner imputed to him. The defendants subsequently applied for judgment, as in case of a nonsuit; but this was refused, as there had been valid grounds for not proceeding to trial. I cannot ascertain whether the case was ever tried.[a]

These were actions brought by the assignees of of a bankrupt against the defendants, who had been concerned with the bankrupt in the transactions.

In an action upon the breach of an agreement to purchase certain railway shares, to be transferred and delivered on a certain day, the defendant pleaded (*inter alia*) that at the time of making the agreement the plaintiff was not possessed of or entitled to such shares; but the Court held the plea bad, on the grounds that no principle of

[a] Rayner and another *qui tam v.* Spicer; Same *v.* Solomons, 7 T. R. 178.

law is at all affected by such a contract; that such contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact that the goods are not in the vendor's possession; and even if it were, it is not illegal, because it has no necessary tendency to injure third parties. Such doctrine is clearly contrary to law.[a]

The law on this point was most lucidly defined by Lord Eldon, C., in *ex parte Bulmer*[b], and, as will be seen by his judgment, the various cases underwent a very elaborate review.

Thomas Pratt, a stock-broker, previously to his bankruptcy had received large sums of money from the petitioner, John Peter Bulmer, to be employed in stock transactions illegal within the Stock-jobbing Act. The bankrupt kept a debtor and creditor account with Bulmer, charging himself with the money advanced, and bringing the profits and losses as they occurred to the credit or debit of Bulmer; but it appeared also that the bankrupt, while he had a large sum of money in his hands belonging to Bulmer to be so applied, diverted it wholly to his own use, without employing it at all in those transactions; and becoming insolvent, and the balance being against him to the amount of 12,242*l.* 10*s.*, he gave to Bulmer twelve promissory-notes, which Bulmer attempted to prove under the commission; but the whole proof was

[a] See Parke, B.; judgment in Hibblewhite *v.* Morine, 5 M. &. W. 466; Lorimer *v.* Smith, 1 B. & C. 1.

[b] 13 Ves. 313.

rejected by the Commissoners, on the ground that the consideration of the notes was illegal. By an order pronounced in April 1805, upon the petition of Bulmer, the Commissioners were directed to admit the petitioner to prove such sum as he should be able to substantiate; and if they should not admit him to prove the whole, or any part of it, they were to state the grounds of the rejection and any thing special relative thereto.

The Commissioners, by their report under that order, stated that the bankrupt made an affidavit concerning the transaction, and had been examined by them them *vivâ voce*, but that Bulmer, though summoned, had not attended; and that it appeared to them, by the examination of the bankrupt, that the debt alleged to be due to Bulmer chiefly arose out of or was mixed with dealings and transactions which they conceived to be a violation of the Act of the 7 G. 2, against stock-jobbing.

The other petition was presented by the assignees, stating these facts, and praying that the order made in April 1805 might be discharged, and that Bulmer's claim to prove might be finally rejected.

On the petition coming on to be heard, it appeared by the bankrupt's examination that the bankrupt had received the money for the purposes above mentioned, and had kept the account of profits and losses; but that having applied the money to his own private use instead of applying it in the purchases of stock, he had given twelve promissory-notes, making together 12,242*l.* 10*s.*,

for the balance; but that such balance was in part made up of different balances of gains, brought to the credit of Bulmer, viz. 15*l.* 12*s.*, 22*l.* 10*s.*, 116*l.* 11*s.*, 75*l.*, and 26*l.* 5*s.*, making in all 255*l.* 18*s.* 2*d.*, which was the mixture alluded to by the Commissioners, and which, entering into the consideration of the promissory-notes, was the ground of rejecting the whole claim.

Per Eldon, C.: "The question is, whether a balance could have been recovered at law upon these twelve promissory-notes; or if not upon the notes, as in part tainted with the illegal gain arising from stock-jobbing, whether the petitioner Bulmer could nevertheless have recovered against Pratt, if he had continued solvent, as for money had and received to the use of Bulmer, all the funds in the hands of Pratt which he had diverted to his own private use; and there can be no doubt that he might. Some confusion has arisen upon this subject in our books, from stating too generally the principle upon which Courts refuse their assistance to persons who have been engaged in illegal contracts; although, as between the parties litigant, private justice is on the side of the plaintiff. It is said that if a plaintiff cannot open his case without shewing that he has broken the law the Court will not assist him, whatever his claim in justice may be upon the defendant. But this proposition is much too large and general, and is not at all supported by the authorities. The case may be so connected with illegal transactions that it may be impossible to

disconnect it from them; but if the illegality be *malum prohibitum* only, the plaintiff may recover, unless it be directly upon the contract precluded. This is clearly established by the case of *Faikney* v. *Reynous*, the principle of which, though doubted by a high authority, has stood its ground whenever it has been questioned, and must be taken to be law.

"It was an action of debt by Faikney upon a bond; and the defendant, after praying *oyer* of the condition, pleaded the Act of the 7th Geo. 2 against stock-jobbing, and averred that the plaintiff and one Richardson were jointly concerned in stock-jobbing; and that the plaintiff, contrary to the statute, voluntarily gave to several persons large sums of money, amounting to 3000*l*., for compounding and making up differences for the not delivering stock &c. (following the words of the Act); and that the bond was given to secure the repayment from Richardson of 1500*l*. (being the moiety of the 3000*l*.) which the plaintiff had paid on the joint account.

"The plea was demurred to; but the Court held, that although the persons to whom Faikney had paid the money for Richardson and himself could not have enforced such payment against them, or either of them, the contract being directly against the Act; and although if Faikney had paid what was due by both the law might perhaps not have raised an *assumpsit* by Richardson to pay his moiety if Faikney had paid it without his consent;

yet Richardson having given a bond to secure it, that circumstance was conclusive evidence that he had agreed to such voluntary payment; and therefore, though the obligation arose from an originally illegal transaction, the bond was a valid obligation.

"The law of this case was clearly recognised and confirmed by the case of *Petrie and another*, executors of *Keeble* v. *Hannay*. There Keeble, the testator, and Hannay and one Sadler, having been engaged in stock-jobbing, and having come to a settlement with Portis, their brother, who had paid all the differences, Keeble repaid him the whole except 811*l.*, part of Hannay's proportion, for which Keeble drew a bill in favour of Portis, which Hannay accepted. The bill not being paid when due by Hannay, Portis sued the plaintiffs, executors of Keeble, and recovered the money, no defence having been made, and the case reported was an action for their reimbursement as for money laid out and expended; and it was held by the Court, Lord Kenyon only dissenting, that the action was maintainable. The noble and learned lord, whose memory I cherish with affection, and who, in my opinion, was one of the greatest lawyers who ever flourished in England, did not venture to deny the law of *Faikney* v. *Reynous*, but said that it did not apply, as the Court was in that case stopped from entering into the illegal consideration, the action being on a bond. But it appears, not only from the judgments delivered by the other Judges, but by the case of *Faikney* v. *Reynous*

itself, that that was not so; for the Stock-jobbing Act was pleaded, and no law is better established than that deeds may be impeached by matter *dehors*, as upon averments of illegal and corrupt considerations, which happens every day in cases of usury. In this case, therefore, of *Petrie* v. *Hannay* the Court could not but see that there had been illegal transactions, which gave rise to the demand; but the money demanded not being directly upon the illegal contract, an acceptance being given for the debt, and being due in good faith and justice, it was recoverable at law.

"This very distinction was taken in the case of *Steers* v. *Lashley*, but how properly in this instance may be doubted. In that case the action was on a bill of exchange drawn by one Wilson on the defendant and accepted by him, and after acceptance endorsed by Wilson to the plaintiff. It appeared that the defendant had been engaged in stock-jobbing transactions with different persons, in which transactions Wilson was employed as his broker, and had paid the differences for him. Some dispute arising as to the amount so paid by the defendant, and the matter being referred to arbitration, the sum of 306*l.* 12*s.* 6*d.* was found to be due to Wilson from the defendant; on the footing of which debt, found due by the award, Wilson drew the bill in question, which was accepted by the defendant and endorsed to the plaintiff. Here, as far as illegality of consideration applied, the plaintiff could only be in the place of Wilson, the

drawer; and the plaintiff was therefore nonsuited by Lord Kenyon at the trial, on the ground that the consideration of the note was directly for a sum, the payment of which could not be enforced though found due under an award. On a motion for a new trial, Lord Kenyon said—and another Judge appears to have concurred with him—that if the plaintiff had lent the money to the defendant to pay the differences, and had afterwards received the bill in question for that sum, it would have been within the principle of *Faikney* v. *Reynous*, but that in the case before them it was an action for the very difference.

"This case shews that *Faikney* v. *Reynous* and *Petrie* v. *Hannay* were recognised as law; and, with great submission to Lord Kenyon, the case is absolutely the same with *Faikney* v. *Reynous*, because the reference of the amount and the acceptance of the defendant after the award was the same evidence as the bond was in *Faikney* v. *Reynous*, that Wilson had paid the defendant's differences by his direction: and if so, the cases cannot be distinguished. I thought so when I moved, as counsel, to set aside the nonsuit, and I think so still. If Wilson, by the defendant's consent, had not paid his differences, they could not have been recovered by those to whom they were paid; but having been paid by his desire, the person paying them was entitled to be reimbursed. The history of this case is plainly that Lord Kenyon kept up his objection to the case of *Faikney* v. *Reynous*;

and it appears by the reporter's note that Mr. Justice Grose and Mr. Justice Lawrence were at the Old Bailey: probably it passed on a sudden.

"The true distinction occurs again in *Booth* v. *Hodgson*[a], in which judgments I entirely concur; and the Judges who were absent on the other occasion were present in that instance. There the Browns, who became bankrupts, had been partners with one Hodgson, who was an insurance broker in the insurance of ships—a partnership illegal by statute. The name of Brown only was used in the policies; but all the premiums from the commencement of the partnership till Brown became bankrupt were received by the defendant, which amounted to upwards of 20,000*l.*, for which the action was brought by the assignees of the Browns. Here it was justly held that the plaintiff could not recover. There was, as Mr. Justice Grose observed, no express *assumpsit*, and the law would not imply one; the action being by one partner in an illegal partnership to recover the part of the illegal traffic from the other partner. But in that case the whole Court expressly recognised *Faikney* v. *Reynous* and *Petrie* v. *Hannay* to be law.

"The application of these principles and cases to the case now before us is obvious. I shall not permit Bulmer to prove the promissory-notes as binding obligations, as the consideration for them is made up, though a very small part, of the fruit of

[a] 6 T. R. 405.

the illegal use of the money lodged with the bankrupt; but I shall allow him to prove all that is admitted by the bankrupt to have been the money put into his hands and diverted to his own use; as, if he had continued solvent, he must have been responsible to Bulmer for that misapplication."

In *Olivierson* v. *Coles*[a], which was an action on a special undertaking in consideration that the plaintiff would sell out omnium to the amount of 2000*l.* to replace the same in stock, or to give the plaintiff the current price for it if he required it, it was objected at the trial that the contract was illegal, as amounting to an agreement to replace stock in consideration of selling out omnium, which was not stock, and might never eventually become stock; for if default were made in one payment the previous payments would become forfeited, and so whether it eventually became stock rested upon a contingency. But Lord Ellenborough, C. J., said, "A person who has omnium is potentially in possession of stock. The case certainly differs from that of a sale of actually existing stock, but it does not come within the mischief intended to be guarded against by Sir John Barnard's Act."

Thus considering the Act as exclusively directed against the sale of stock which was not actually existing.

And in *Brown* v. *Turner*[b], which was an action

[a] 1 Stark. 496.
[b] 2 Esp. N. P. C. 631; 7 T. R. 360.

by the indorsee of a bill of exchange against the drawer, it appeared that the bill was drawn for the amount of differences arising out of dealings in omnium, Lord Kenyon held that omnium was clearly stock within the meaning of the Act.

The 5th section of the Act enacts, that 'for preventing the evil practice of compounding or making up differences for stocks or other securities bought, sold, or at any time hereafter to be agreed so to be, be it further enacted by the authority aforesaid, that no money or other consideration whatsoever (except as herein-after is provided) shall, from and after the said 1st day of June 1734, be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for the not delivering, transferring, having, or receiving any public or joint stock, or other public securities, or for the not performing of any contract or agreement so stipulated and agreed to be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered, shall be actually so done, and the money or other consideration thereby agreed to be given and paid for the same shall also be actually and really given and paid; and all and every person and persons whatsoever, who shall, from and after the said 1st day of June 1734, voluntarily compound, make up, pay, satisfy, take, or receive such difference money, or other consideration whatsoever, for the

not delivering, transferring, assigning, having, or receiving such stock, or other security so to be agreed to be delivered, transferred, assigned, had, or received, as aforesaid (except in the manner herein-after provided), shall forfeit and pay the sum of one hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same.'

And the 6th section provides 'that no person or persons, who shall sell any public or joint stock or other public securities, to be delivered and paid for on a certain day, and which shall be refused or neglected to be paid for according to such agreement, shall be obliged to transfer the same; but it shall and may be lawful for such person or persons to sell such stock or other securities, which shall be so refused or neglected to be paid for, to any other person or persons for the best price which can be obtained, and after such sale to receive (if the parties can agree) or to recover as aforesaid, from the person or persons who first contracted for the same, all the damage which shall be sustained thereby.' So that, to enable a person to recover damages for the breach of a contract for the purchase of stock, he must either *specifically* carry that contract into effect by making an actual transfer

to the contracting party, or, according to the provision of the 6th section, by first making an actual transfer to a substituted purchaser; and then he may recover damages against the party who has committed a breach of contract, such damages to be estimated according to the difference between the purchase-money to be contracted for and that actually received. The words of the 6th section, 'after such sale,' clearly indicate the necessity of specific performance; but whilst the contract still remains executory, and until it has been specifically performed, it is manifest that no action for breach of contract can be maintained. This doctrine was upheld in an action brought to recover damages for the non-performance of an executory contract under these circumstances:—

The plaintiffs had instructed their agent to sell stock at a certain price: stocks having risen to such price, the broker employed by the agent contracted with the defendant for the sale of the stock, a transfer was directed to be made to him, and the necessary ticket given in at the Bank. Before the transfer could be effected the defendant refused to execute his bargain, although the stock was formally tendered to him. In consequence of such refusal the plaintiffs directed the stock to be sold. A contract for sale was made, but the stocks being shut no transfer was in fact made to the purchaser till after the commencement of the action. Lord Ellenborough, C.J., held, that an actual resale and transfer were necessary under the statute, and that

the mere contract of sale was not sufficient unless such contract was followed up by an actual transfer; or, as was observed by Lord Denman in the case about to be cited, that from being merely executory the contract had become executed.[a]

The 8th section of the Act is in these terms: 'And whereas it is a frequent and mischievous practice for persons to sell and dispose of stocks, or other securities, of which they are not possessed; be it therefore further enacted by the authority aforesaid, that all contracts and agreements whatsoever, which shall, from and after the said 1st day of June 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made to sell, assign, or transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and persons whatsoever, contracting or agreeing, or on whose behalf and with whose consent any contract or agreement shall be made to sell, assign, or transfer any public or joint

[a] Heckscher *v.* Gregory, 4 East, 607.

stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of or entitled unto in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use or their own right as aforesaid, shall forfeit and pay the sum of five hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same; and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making or procuring to be made any such contract or agreement as aforesaid, and shall know that the person or persons by whom or on whose behalf such contract or agreement shall be made is or are not possessed of or entitled unto the stock or security, concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for their use or right, shall for every such offence forfeit and pay the sum of one hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall

be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who shall sue for the same."

The proper construction to be placed upon this clause of the Act underwent considerable discussion in the case of *Mortimer* v. *M'Callan*[a], which may now be considered the leading case on the subject, and wherein the principle was established, that the Act did not contemplate a contract for a *bonâ fide* sale of stock coupled with an actual transfer; so that, admitting that at the time of the contract the seller was not actually possessed of the stock, but that he procured such stock to be transferred to him for the purpose of completing the contract, such contract does not fall within the prohibitory clauses of the Act. The law on the point is most lucidly and fully laid down in Lord Abinger's judgment in the case under consideration, as also in the judgment of Lord Denman when it came on for argument in the Exchequer Chamber. These judgments will be presently reverted to.

This case was most elaborately discussed before the courts on three occasions: the first on a motion for a nonsuit or new trial; again on demurrer to the defendant's second plea (he having pleaded the statute); and lastly, in error from the Court of Exchequer.

The facts were these: A person of the name of *T*, a stock-broker, applied to the plaintiff, a stock-

[a] 6 M. & W. 58; 7 *ibid.* 20; 9 *ibid.* 636.

jobber, for the purchase of stock to the amount of 5000*l.* for the defendant. The plaintiff not having any stock of his own, applied to one *W*, who agreed to transfer stock to the defendant to the amount required, and accordingly stock standing in *W*'s name was transferred by him to the defendant. Various other points arose in the case, which will be treated of under their respective heads: we will confine our attention for the present to the plea of the defendant, as it particularly bears upon the point under discussion.

The defendant (*inter alia*) set up the statute as a defence to the action brought against him for the price of the stock.

Lord Abinger, C.B.: "The next point is, that the stock was not the stock of the plaintiff, but of *W*; and it is said that the plaintiff could not enforce his contract for the sale of the stock, because he had none at the time of the contract. That general proposition is certainly not true. How many merchants are there who make contracts to sell things they are not in possession of? Can it be doubted that a man who has made a contract to sell that which he is not then possessed of, if he obtain means to perform that contract and to deliver the thing sold by his own hands, or by the agency of another, is entitled to recover the price of it? But it is said that by reason of the prohibition in the Act of Parliament he could not sell this stock. Now that Act was made for the purpose of preventing what is declared to be an illegal trafficking in

the funds by selling fictitious stock merely by way of differences; but it never was intended to affect *bonâ fide* sales of stock, or to say if a man undertakes to sell stock to another, and transfers the actual stock and delivers it to him, and he accepts the stock, that that is not a lawful transaction. That is not a case within the statute at all. True, the plaintiff had not the stock at the time it was purchased, but he had it before it was invested in the name of the defendant; and whether he transferred it to the defendant himself, or procured another person to transfer it for him, makes no difference. In point of fact he procured stock, and through his instrumentality the defendant became possessed of the stock; and therefore, whether he had it transferred into his own name first and then re-transferred it, makes no difference. I therefore think there is nothing in that objection."

The point again underwent considerable argument before the Court upon demurrer to the defendant's plea, and judgment was again given for the plaintiff, although it may be inferred from what fell from Mr. Baron Parke that the Court were not unanimous.

The judgment of the Court below was affirmed on error brought, and the whole of the cases turning upon the construction of prohibitory statutes will be found collected in the various arguments and judgments.[a]

[a] Mortimer *v.* M'Callan, 6 M. & W. 58; 7 *ibid.* 20; 9 *ibid.* (on error) 636.

In delivering judgment, Lord Denman, C. J., after adverting to the distinction between contracts executed and executory, and shewing the substantial difference between a contract to sell or to transfer and an actual sale or actual transfer, observes: "Now assuming, for the purpose of the argument, that the original contract between the plaintiff and the defendant was void, and that it would have been illegal for the defendant to have entered into it if he had been aware that the plaintiff was not possessed of the stock which he was contracting to transfer, yet here it does not appear that he was aware of it; and on these pleadings it must be taken that the defendant was not aware of the illegality of the contract he was entering into, for illegality is not to be presumed; and the party who seeks to avoid a contract on the score of any illegality must shew whatever is necessary to make out that illegality. What, then, is the situation in which a party stands who has contracted for the purchase of stock of which the seller is not possessed, the purchaser not being aware of that fact?

"If the stock is contracted to be paid for at a future day, and it is not transferred as agreed, he falls within the words, and is, we conceive, entitled to the remedy given by the 7th section of the Act. He is a person who has bought stock to be accepted and paid for on a future day, and which has been neglected to be transferred. In such case he may go into the market and purchase the stock from any other person, and, after such purchase, may

recover the difference from the person with whom the contract was made.

If instead of the purchaser going into the market to purchase from a third party, the parties contracting meet together and agree that, on transferring the stock to the defendant, the defendant will pay to the plaintiff the sum originally stipulated for, such an agreement does not fall within the prohibition of the statute: it is not a contract to sell, but an actual sale; it is not a contract to transfer, but an actual transfer. Such a contract is not prohibited by the words, nor does it, we think, fall within the mischief of the Act.

"If the contract were not for stock to be accepted and paid for on a future day, but on the very day on which the contract is made, the same reasoning would apply. There would be no illegality in the promise founded on a transfer then actually made to pay the agreed sum of money.

"The objection urged against this view of the subject was, that by this means effect is given to a contract, which, on the part of the seller at least, was illegal; but to this objection the answer is, that it is not the illegal contract to which effect is given, but the subsequent legal contract founded on a new and sufficient consideration.

"It is urged as being absurd and unreasonable, when the contract, originally made to do a certain act, is an illegal contract, that the thing itself, when done, should be held to be legal; that it should be legal to do what it is illegal to contract to do. But

this difficulty disappears if we consider the object of the Act of Parliament, the provisions of which are studiously framed with a view to secure, in every case, an actual transfer of all stock bargained to be sold; and it may well be, that an executory contract to transfer stock which the party is not possessed of may be void and illegal, and yet the actual transfer of the stock by such party, or by his procurement, may be deemed not to fall within the mischief, as it certainly does not within the express prohibitions, of the Act. Cases were cited to show that where an act is prohibited, either by the common or statute law, the doing of it cannot form a consideration to raise any debt or duty in favour of the party by whom it has been done; as (see cases cited page 641).[a] These cases are distinguishable from the case now in judgment, there being in this case a consideration, namely, the actual transfer, not prohibited by statute nor tainted by any illegality at common law." And after distinguishing the cases cited for the defendant, his Lordship concludes:—

"But the cases cited differ from the case now in judgment in a material point; for in those cases the transactions in which the parties were engaged at the time when the money was paid and the consideration arose, and indeed from first to last, were illegal: in the present case it is not so; for although the original contract of sale should be deemed to be illegal on the part of the seller, yet the transfer

[a] 9 M. & W.

is a legal act, and for a legal purpose. There is here, therefore, a dividing point: the transaction, if illegal in its inception, had ceased to be so; a promise to pay in consideration of a transfer actually made is neither prohibited by the words, nor is it, as we think, within the intent of the statute. At the time when the consideration arose on which the promise rests, the act out of which it arose was legal, and the parties were engaged in carrying into effect a lawful agreement.

"On these grounds we are of opinion that there should be judgment for the defendant in error."

Judgment affirmed.

The judgments herein have been given very much *in extenso*, owing to their extreme practical importance, and as evincing the disposition of our courts to put an equitable construction on the spirit of an act, albeit the words of its prohibitory clauses, taken in their plain grammatical sense, would, as in the case before us, be held sufficient warranty for arriving at an opposite conclusion, to the manifest injustice of an innocent party to a *bonâ fide* contract.

Our courts have, as it were, exercised an equitable jurisdiction in thus limiting the stringency of the general words in prohibitory statutes such as the present to those transactions the statutes were passed to repress; "A jurisdiction (says Lord Chief Justice Wilmot, speaking of the courts of equity, in his judgment in *Collins* v. *Blantern*[a]),

[a] *Supra*, p. 153.

which never would have swelled to that enormous bulk we now see if the judges of the courts of common law had been anciently as liberal as they had been in later times." And again, "It is said the statute is like a tyrant; where he comes he makes all void: but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest."

So it has been likewise held in an early case, that although a registry of South Sea stock, as required by the provisions of 7 Geo. 1, c. 2, s. 8, may not be within the precise words of the Act, yet the Court will give such a construction to the Act as is reasonable upon looking at the facts and circumstances of the case.[a]

In an action on a bill of exchange, it was held, that a stock-broker called to prove the consideration for which the bill was given, such consideration being in fact on account of stock-jobbing differences in time bargains for stock, was not bound to give such evidence as would prove the alleged fact; nor would the Court compel him to produce his pocket ledger, as such ledger might shew that he had rendered himself liable to a penalty under the 7 Geo. 2, c. 8.[b]

By the second section of the Act it is enacted, "that all and every the person or persons who, by virtue of this present Act, shall or may be liable to be sued for the same, shall be obliged and

[a] Wilkinson *v.* Myer, 1 Str. 585.
[b] Rawlings *v.* Hall, 1 Car. & P. 11.

compellable to answer upon oath such bill as shall be preferred against him or them in any court of equity, for discovering any such contract or wager, and the sum of money or premium so given, paid, or delivered as aforesaid." And therefore if a bill be filed for a discovery as to transactions prohibited by the Act, the defendant cannot protect himself from such discovery on the ground that he would be thereby rendered liable to the penalties imposed by the Act; but the defendant will not be protected from the discovery, unless his case come within the first section. It is otherwise if it come within the 5th and 8th sections.[a]

The principle upon which these cases were decided is thus laid down by Lord Eldon, C., in the case of *Bullock* v. *Richardson*[b] :—

"This is a bill for discovery in aid of an action. The 4th section of the Act protects the person making the discovery against penalties, but they are penalties imposed by the 4th section in relation to transactions prohibited by the 1st section, and no bill of discovery is given with respect to what is prohibited by the 5th section or by the 8th. It is very singular if the intention of the legislature was, that under those sections any thing should be recovered back by the action for money had and received, that they should not have said so, and have held out the protection they have with respect to

[a] Bancroft *v.* Wentworth, 3 Bro. C. C. ; 11 Billing *v.* Flight, 1 Mad. 230.
[b] 11 Ves. 373.

other subjects upon which a bill of discovery is given. I should therefore hold, upon a bill of discovery of transactions prohibited by the 5th and 8th sections of the Act, that the plaintiff would not be entitled to that discovery: and though it is impossible to deny that those transactions are in a sense in the nature of wagers, yet in the contemplation of the legislature they are not considered such wagers as are the subject of the first section. If one man agrees with another, not against the 8th section or the 5th, but neither having any stock, the one lays a wager that stock will upon a future day be at a particular price, and upon that day pays the money, that would be a wager, as to which, upon a bill of discovery for the purpose of bringing an action, the defendant must, under the second section, answer. One question in this case is, whether the words 'the price thereof' being in the Act, the bill is so framed as to allow the plaintiff to insert in the interrogating part the words 'or the price thereof,' though these words are not in the alleging part. The rule as to that is, that if a distinct fact is alleged, the plaintiff may inquire into every thing incidental, what, how, when, &c. But the proposition is different and doubtful where the Act has prohibited three separate and different things, especially an Act, though in form remedial, really penal, that a question may be put on the interrogating part of one of those substantive distinct facts, a wager, for instance, as to the future price of stock; the alleging part of the bill containing

nothing as to that, whether that can be considered an incidental matter to which the plaintiff may interrogate. I think, as this bill is framed in that respect, the plaintiff has no right to call upon the defendant to answer any thing but as to those very wagers which are stated in the alleging part.

"My present opinion is that the matters prohibited by the 5th and 8th sections are not those matters in respect of which a bill of discovery is given."

Where to a bill filed against stock-brokers to obtain a discovery of dealings in and sales of certain stock and shares, the defendants, by their answer, set forth (*inter alia*) that the discovery prayed for would subject them to the penalties imposed by the Act 7, Geo. 2, c. 8, and therefore refused to answer the interrogatories calling on them to set forth a full account of their dealings in respect of such sales, it was held that they were bound to answer, as it was they who stated the illegality of some of the transactions and asked for exoneration from discovery.[a]

The plaintiff filed his bill against the defendant, charging that the defendant had received several sums of money (enumerating them) to the amount of 5000*l.* and upwards from different persons for his (the plaintiff's) use, for which the plaintiff had no voucher, and that the defendant refused to come to an account, but pretended that the plaintiff was indebted to him in a sum of 2000*l.* and upwards for

[a] Fisher *v.* Price, 11 Beav. 194

a stock loss in consequence of purchases and sales of stock made by order of the plaintiff, charging on the contrary that he had never given the defendant any directions to purchase or to sell stock, praying an account, and that defendant do pay to plaintiff what shall appear due to him.

To this the defendant pleaded in bar the Act of 7 Geo. 2, c. 8, and that by making a discovery he might render himself liable to the penalties imposed by the Act.

The plea was overruled on the 2d section of the Act, by which the party is bound to answer any bill that may be filed in a court of equity.[a]

Gambling transactions in the foreign funds are not within the prohibitory enactments of 7 Geo. 2, c. 8; for foreign stocks are neither within the letter or meaning of the Act.

This was decided in the case of *Wells* v. *Porter*[b], overruling a *dictum* of Dallas, C. J., who held[c] that stock-jobbing was not the less gambling because it was in this or that stock.

[a] Bancroft *v.* Wentworth, 3 Bro. C. C. 11; Beames' Pleas in Equity, 261. In his note to that case the reporter remarks that "it is very observable that the generality of this position has been since confined by Lord Eldon to cases merely within the 1st section of the Act, and that defendants are at liberty to avoid discovery in cases within the 5th and 8th sections.

[b] 2 Bing. N. C. 722; 3 Scott, 141. And see also Oakley *v.* Rigby, 2 Bing. N. C. 732; 3 Scott, 194; Elsworth *v.* Cole, 2 M. & W. 31; Morgan *v.* Pebrer, 3 Bing. N. C. 457.

[c] Rossum *v.* Taylor, note to Chitty & Hulme's Statutes, 1022.

It had at one period been almost a generally received opinion that wagers, and consequently dealings in differences, were illegal at common law. It is somewhat difficult to imagine how such a doctrine could have prevailed, and it appears to have rested on the mere *dicta*, and in most cases *obiter dicta*, of Judges.

There can of course be no legal distinction drawn between wagers in general and wagers on the price of stock at a future day: if the former be not illegal at common law, it follows that the illegality of the latter can only arise from positive statutory enactment.

It was distinctly laid down by that most eminent Judge, Lord Mansfield, in the case of *Da Costa* v. *Jones*[a], that indifferent wagers upon indifferent matters without interest to either of the parties are allowed by the law of this country, so far as they have not been restrained by particular Acts of Parliament; and the restraints imposed in particular cases support the general rule.

As to what may be such particular cases not to be considered proper subjects for wagers, the reader is referred to the judgment in the case last cited, and to those in *Good* v. *Elliott*[b], where Buller, J., dissented from the rest of his learned brethren, and where all the authorities on the subject were elaborately reviewed.

Yet notwithstanding these authorities, Lord Ten-

[a] Cowp. 729.
[b] 3 T. R. 693.

terden, C.J, is reported to have said, in the case of *Josephs* v. *Pebrer*[a]: "There is another point which I shall notice very briefly, as it was not touched upon in the argument; that is, that trafficking in these shares (Equitable Loan Bank Company) may have possibly been illegal at common law, inasmuch as it was bargaining and wagering about an Act of Parliament to be obtained in future."

And the same learned Judge expressed a similar opinion in the case of *Bryan* v. *Lewis*[b]: but it is confidently submitted that this point is set at rest, not only by the judgments in the case just quoted of *Wells* v. *Porter*, but by the profound and lucid judgment of Lord Campbell in the case of *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull*[c], who thus expressed himself on this head:—

"I regret to say that we are bound to consider the common law of England to be, that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and evasions to which Judges in England long resorted in struggling against this rule, and I rejoice that it is at last

[a] 3 B. & C. 644.
[b] Ry. & M. 386.
[c] 4 Moore's Privy Council Cases, 339.

constitutionally abrogated by the legislature; an event which probably would have happened much sooner without the abortive attempts to accomplish the object by judicial decision."

A wager respecting the profits to be made by contractors for a lottery is not within the provisions of 7 Geo. 2, c. 8.[a]

Railway shares are not joint stock within the Act.[b]

A contract amounting to a wager upon the average price which opium would fetch at the next Government sale at Calcutta is not illegal, and may be enforced; such wager not interfering with the performance of any duty, nor contrary to public policy. The stat. 8 & 9 Vict., c. 109, does not extend to India.[c]

Illegality must always be pleaded, although the illegality appears on the plaintiff's pleadings or case.[d]

The term "six months" in the 1st section of the Act means *lunar* months; and no discovery lies where the cause of action arose prior to the expiration of six lunar months.[e]

We have now considered the principal cases

[a] Mortimer *v.* Salkeld, 4 Camp. 42.
[b] Hewitt *v.* Price, 4 Man. & Gr. 355.
[c] Ramloll Thackoorseydass *v.* Soojumnull Dhondmull, 4 Moore's Privy Council Cases, 339; and for the original judgments, 2 Morley's Digest of Indian Cases, 415. The elaborate judgment of Lord Campbell in the P. C. is well worthy of the greatest attention.
[d] Daintree *v.* Hutchison, 10 M. & W. 85.
[e] Windale *v.* Fall, 3 Br. C. C. 11.

bearing upon the construction to be placed upon the Act, which, as has been shewn, does not apply to contracts made *bonâ fide* and subsequently executed, although at the inception of the contract the parties might not have been in actual possession of the subject-matter of such contract.

Nor will securities given in violation of the penal clauses be void in the hands of an innocent holder for value.

Before dismissing any farther consideration on the Act under discussion, it must be observed, that albeit it may by possibility have imposed some check on the so-called infamous practice of stock-jobbing, it has on the other hand but too often served as a screen to those who, having infringed its provisions, avail themselves of those very provisions to shield themselves from the consequences entailed upon them by their desire for rapid gain. Should members of the Stock Exchange have dealt in bargains for time, they are compelled by their own regulations and under penalty of expulsion, to settle their differences with those with whom they were incurred. These regulations are of course powerless with respect to persons not belonging to that body; and it is but of too frequent and too notorious occurrence that such persons, having employed brokers to speculate or gamble for them in the price of stock, have, upon experiencing losses, declined to reimburse their brokers the amount expended by them to cover the differences. Conduct such as this requires no comment. An instance of

the practice alluded to will be found in the report of a case tried before Pollock, C. B., at Guildhall, on the 29th of June 1846.

The plaintiffs in that case were the Messrs. Whitmore, stock-brokers, and the defendant was the Rev. Mr. Radcliffe, Rector of the parish of St. Edmund's, Salisbury; and the action was brought to recover 1420*l.*, a small part for commission and the residue for a sum paid for differences upon the sale of 40,000*l.* Consols made for the plaintiff by the defendants.

The defendant put several pleas upon the record, pleading, *inter alia*, that the divers contracts and agreements were made by the plaintiffs as brokers and agents of the defendant in violation of the Act, and upon those pleas the defendant recovered a verdict; thus defeating the plaintiffs' claim for the repayment of the money paid by them on his account.

In the course of his lucid summing up to the Jury, the learned Chief Baron thus expressed himself concerning the Act:—

"Whether the Stock-jobbing Act is an Act that would be passed in modern times, or whether it ought to be repealed, we have nothing to do with at all: we must administer the law as we find it. And I think neither I, by any gloss given for the purpose of getting rid of a penal statute, nor you in respect of the facts—I must deal with the law, and you must deal with the facts conscientiously. If this is an Act that ought not to remain on the

statute-book, it should be removed: I am not here to deliver any opinion upon a general question, I think. I am frequently called upon to animadvert upon particular conduct that is before me. If a person in the witness-box perjures himself, if a plaintiff or defendant appears to have been guilty of fraud, I think when that comes before you I have to comment upon it in the language that belongs to me, and with the sentiments it may fairly excite in me. I do not think I am called upon, and I think I should be travelling quite out of my duty if I were to make any comment upon questions of general policy. I must administer the law as I find it. I take therefore this statute: there it is; it is the law of the land, and we must act accordingly."

CHAPTER VI.

EXCHEQUER BILLS—FOREIGN BONDS—INDIA BONDS —SHARES IN JOINT-STOCK COMPANIES—DIVIDENDS—WARRANTS.

EXCHEQUER bills form by far the largest portion of the Unfunded Debt. Their history has been given in a previous chapter. They are made negotiable by the 48 Geo. 3, c. 1, which directs them to be circulated; thus placing them upon the same footing as bills of exchange, which are *choses in action* assignable by the custom of merchants, and promissory-notes made so by statute.[a]

If a banker be a creditor on a general balance, and receive *bonâ fide* from his customer so indebted to him, as his own property, Exchequer bills not in fact the property of such customer, the banker is entitled to a lien on them.

Exchequer bills being negotiable instruments, the property in them passes by mere delivery.[b]

Such instruments are the representative of money which are made transferable by delivery only, and

[a] Wookey *v.* Pole, 4 B. & Ald. 1; Barnett *v.* Brandao, in error, 6 Man. & Gr. 630; and see Bank of Bengal *v.* M'Leod, 13 Jurist, 945; Lang *v.* Smith, 7 Bing. 284.

[b] See Parke's, B., judgments in Hibblewhite *v.* M'Morine, 6 M. & W. 216; Daly *v.* Thompson, 10; *ibid.* 318.

are therefore subject to the same rules as is that which they represent.

An Exchequer bill, the blank in which had been filled up, was placed for sale in the hands of *A*, who, instead of selling it, deposited it at his bankers', from whom he received its value. *A* subsequently became bankrupt, and the owner of the bill sued the bankers in trover for the amount. It was held that the action was not maintainable, as property in Exchequer bills passed by delivery like Bank notes and bills of exchange endorsed in blank.[a]

Bayley, J., differed from the rest of the Court in their judgment in this case, holding that Exchequer bills were not to be looked upon in the same light as bills of exchange, nor was it necessary for the purposes of trade that they should be placed on the same footing; that they are muniments of title, which muniments shew in whom the title is; that their sale is confined almost exclusively to the Stock Exchange, which is the market overt for such sale; so that their sale there gives the same security to the buyer which is given by other sales in market overt.

It was laid down by Alderson, B., in *ex parte Chaplin*[b], that Exchequer bills could not be considered as Government securities; but this decision was overruled in *ex parte South-Eastern Railway Company*[c], where it was held that they were Go-

[a] Wookey *v.* Pole, 4 B. & Ald. 1.
[b] 3 You. & C.
[c] 9 Jurist, 650.

vernment securities, and that moneys might be therein invested under the Act 1 & 2 Vict., c. 117, s. 3, providing for the custody of certain sums paid in in pursuance of the standing order of either House of Parliament by subscribers to works or undertakings to be effected under the authority of Parliament, and empowering the court, in the name of whose Accountant-General any sums of money may have been paid, to order that such sum shall be laid out in the Three-per-cent. Consols or the Three-per-cent. Reduced, or in any Government security or securities.

The vast amount of capital invested in foreign securities, or advanced by way of loan to other countries, has occasioned considerable traffic in the instruments which represent the holder's title to recover back the amount so invested or advanced by him. These instruments are commonly termed bonds.

Foreign stocks vary in their character according to the mode of transferring the property they represent, and the forms requisite to confer a good title to such property on those who become possessed of them. Some, such as French stock and some of the American stocks, can only be transferred in their respective countries: others pass like Bank notes by mere delivery, and thus assume the incidents attached to negotiable instruments in the hands of a *bonâ fide* holder.

Some foreign Governments have accredited agents in this country who pay the dividends due on the

stock issued by them in British sterling money; others are paid at a certain or current rate of exchange; whilst others are paid only in the country whence the bonds are issued.

The principle laid down by our courts in determining the nature of these instruments issued by foreign Governments will be collected from a review of the various cases that have arisen on the subject.

Instruments are termed negotiable when, like cash, they are transferable by mere delivery, and convey the right to the property they represent to a *bonâ fide* transferee for value. Such instruments are the bonds given by the Russian, Dutch, and Danish Governments; for these are clearly framed with a view to their becoming subjects of sale, and easily transmissible from hand to hand. They are marketable securities within this kingdom, transferred by delivery only; nor is it necessary to do any act out of the kingdom to render the transfer of the bonds valid. The Russian and Danish Governments have an agent in this country to pay the dividends due on such bonds, whilst the Dutch bonds are payable at Amsterdam only.

It follows, therefore, as an incident of negotiable instruments of this description, and which are saleable and valuable in this country, that probate duty is payable in respect of them under 55 Geo. 3, c. 184[a];

[a] Miller *v.* Race, 1 Burr. 452; 1 Smith's Leading Cases, 259; Attorney-General *v.* Bouvens, 4 M. & W. 171; Attorney-General *v.* Dimond, 1 C. & J. 356; Attorney-General *v.* Hope, 1 C. M. & R. 530; 8 Bligh, 44.

for stock in foreign funds locally situate abroad is personalty following the domicile of the owner: therefore a bequest of such stock by a party domiciled in England is liable to legacy duty.[a]

Of a similar nature are bonds given by the Prussian Government. They are made payable to the person who holds them for the time being, and, like Bank notes or Exchequer bills, pass by mere delivery.[b]

A foreign instrument, not negotiable in the country where it is made, would be held not to be negotiable here; but if it be shewn that it is transferable by delivery in this country, it will be presumed to be so abroad. The negotiability of such instrument is a question for the jury. Thus it has been held, that certain instruments termed *bordereaux* and *coupons*, purporting to entitle the bearer to portions of the public debt of the kingdom of Naples, were not negotiable instruments, a jury having found that they did not pass usually from hand to hand like money. This was decided in *Lang v. Smith*[c]; and Tindal, C.J., in his judgment in that case, observed, "that these are not English instruments recognised by the law of England, but Neapolitan securities brought to the notice of the Court for the first time; and as Judges we are not allowed to form an opinion on them unless supplied with evidence as to the law of the country whence

[a] *Re* Ewing, 1 Tyr. 91.
[b] Gorgier *v.* Mieville, 3 B. & C. 45.
[c] 7 Bing. 284.

they come. Judges have only taken upon themselves to decide the nature of instruments recognised by the law of this country, as, bills of exchange, which pass current by the law merchant, dividend-warrants, or Exchequer bills, the transfer of which is founded on statutes which a Judge in an English Court is bound to know. It has been urged, that in *Gorgier* v. *Miéville*, the case of the Prussian bonds, no evidence was given of the foreign law. But evidence was given that by the usage of merchants in this country those bonds passed from hand to hand, which usage could have scarcely existed unless they were negotiable in Prussia, so that evidence as to the law of Prussia was rendered unnecessary. And the question is, not so much what is the usage in the country whence the instrument comes, as in the country where it was passed."

French *rentes* and American stock, being part of the national debt of France and America respectively, are transferable in those countries only, and are therefore distinguishable from those stocks of which mention has been made.[a]

Prior to the passing of the statute 51 Geo. 3, c. 64, s. 4, (rendering them negotiable), an India bond was held not to be a negotiable instrument. This was so decided in the case of *Glynn* v. *Baker*[b], where the plaintiff and defendant had lodged their respective India bonds with the same bankers,

[a] See cases already cited.
[b] 13 East, 509.

who improperly sold the defendant's bonds, and, on his demand, delivered to him those of the plaintiff to the same amount, and payable to the same obligee. The defendant, in ignorance of the fact that the bonds handed to him were not his own, afterwards sold them and received the proceeds. It was held that the plaintiff might recover the amount from him in an action for money had and received.

Mala fides in the holder of a negotiable security, if relied on, must be distinctly alleged; and the only proper mode of implicating him in an alleged fraud, is by averring that he had *notice* of it; and an allegation that he was not a *bonâ fide* holder, is not equivalent to an averment of such notice.[a]

The Court of Chancery has jurisdiction to restrain the India Company from paying the money secured by their bonds to a person who has wrongfully obtained posession of them, or to any other than the lawful owner.[b]

As has been stated in a former chapter, time bargains in foreign funds are not within the prohibitory clauses of the Stock-jobbing Act.

In an action for the non-delivery of certain foreign stock, it appeared that one *W*, as agent of the defendant, sold to the plaintiff 28,000 Spanish Active Bonds at 26¼ per cent., to be delivered on the following day. The defendant refused to deliver the bonds, and the plaintiff, who, after his

[a] Uther *v.* Rich, 10 A. & E. 784; Goodman *v.* Harvey, 4 A. & E. 870; Arbouin *v.* Anderson, 1 Q. B. 498.
[b] Glasse *v.* Marshall, 15 Sim. 71.

purchase, had sold the stock to another person, was in consequence, obliged to purchase other bonds at a loss of 464*l.* 2*s.*, the market price having risen in the meantime. The plaintiff gave in evidence a stamped sold note signed by *W* as agent for the defendant, but there was no evidence of any bought note. It was objected on the part of the defendant, first, that the declaration being framed on an agreement to deliver bonds or certificates of stock sold, the plaintiff was bound to prove that the stock was actually sold, so that the property in the specific bonds passed to the plaintiff; and secondly, that this was a contract within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3. This objection was, however, abandoned on the argument. A verdict was found for the plaintiff, with leave reserved to move to enter a nonsuit. The Court held, after hearing the arguments on the rule, that with reference to such property as Exchequer bills, bonds, scrip, Spanish stock, and securities of that description, which pass by delivery merely, there is no difference between a contract to buy, and a contract of actual sale, inasmuch as the transfer rests not so much on contract as on delivery; and as the meaning of the expression in the declaration must be construed with reference to the subject matter, the objection taken could not prevail. That, moreover, a sale in such a case as the present means only a contract for sale, for such contract will be performed by the delivery of any goods of this description. That there is this distinction to

be observed between a contract to sell or for the sale of articles of this description, and contracts for a specific chattel as to which a bargain has been made, and where the property may pass without any reference to any delivery at all. Where there is a contract to sell particular and specific stock or bills, from the very nature of the thing it is a contract, not for an actual sale, but a contract to deliver; and that therefore the declaration was, as to the subject matter, correct and proper, and not open to the objection raised against it.[a]

There were but few transactions in shares upon the Stock Exchange prior to the year 1824. As is well known, there is published a daily list of the prices of stock and shares, and the first quotation of the latter species of property occurs in the list published on the 29th December 1824, under the head of "Iron Railways." There were at that time but very few railway shares in the market. This daily list has, since April 1839, been published under the control and with the sanction of the Committee of the Stock Exchange. The commission charged by the brokers dealing in shares was at first arbitary, or, if not entirely so, at least such as was only established by custom; but in the year 1838 the gentlemen engaged in such transactions thought proper to agree to the following scale of commissions chargeable upon shares, and this scale is generally adhered to.

[a] Heseltine *v.* Siggers, 1 Exch. Rep. 856; and see De Fries *v.* Littlewood, 9 Jurist, 988.

Shares under the value of £5, being of such various descriptions, the commission chargeable thereon depends upon the circumstances of the case.

Shares amounting in value to £5, and under £20, commission chargeable thereon 2*s*. 6*d*. per share.

Shares amounting in value to £20, and under £50, commission chargeable thereon 5*s*. per share.

Shares amounting in value to £50, and upwards, commission chargeable thereon 10*s*. per cent. upon the value.

EXCEPTIONS.

All stock of Dock Companies . .	Commission chargeable thereon 5*s*. per cent. upon the stock.
All stock of Royal Exchange Insurance	
All stock of Globe Insurance . .	
All stock of City Bonds, Debentures, Loan Notes, Bonds of Parishes, Turnpikes, Canals, Railroads, and of all Public Companies	Commission chargeable thereon 5*s*. per cent. per bond.
All shares of Literary Institutions.	Commission chargeable thereon 10*s*. per share.

A clause is usually inserted in the Acts incorporating Railway Companies, declaring that the shares in the undertaking, or the joint stock or fund of the Company, shall be deemed personal estate, transmissible as such, and shall not be held to be of the nature of real property; so that such shares may be sold by a verbal contract; and the contract for such sale does not require a note in writing to be made under the 4th section of the Statute of Frauds. It is presumed such would be the case, even supposing the Acts to contain no such clause; for although the Companies may be possessed of real as well as personal property, yet the shares of the proprietors, as individuals, are per-

sonalty, consisting of nothing more than a right to have a share of the net produce of the Company.[a]

Shares in a joint-stock company, are mere *choses in action*, incapable of delivery, and not within the scope of the 17th section of the Statute of Frauds; and therefore contracts regarding the sale or purchase of such shares are not required to be in writing.[b]

Scrip in a railway company is a mere equity, a mere right to something which may hereafter exist; but it cannot be considered as an article of general commerce. The sale of it is merely an assignment of a bargain, and cannot in any sense be placed in the same category with the sale of goods, wares, or merchandise, as it is nothing more than an agreement for the transfer, of the interest of which the transferor might have subsequently become possessed in the capital of the Company. Such agreement, therefore, does not fall within the exemption in the Stamp Act, 55 Geo. 3, c. 184, sched. pt. 3, title "Agreement;" and consequently a written memorandum relating to the purchase of shares requires an agreement stamp.[c]

A contract for the sale of shares in a projected railway is not within the Statute of Frauds, and such contract is sufficiently proved and satisfied by a tender of a letter of allotment, where, from the circumstances, it may be inferred that the par-

[a] Bradley *v.* Holdsworth, 3 M. & W. 422; Bligh *v.* Brent, 2 Y. & C. 268; Humble *v.* Mitchell, 11 A. & E. 205.

[b] Humble *v.* Mitchell, 11 A. & E. 205.

[c] Knight *v.* Barber, 16 M. & W. 66; Humble *v.* Mitchell, 11 A. & E. 205.

ties dealt upon the footing of such document being equivalent to scrip; and consequently there may be a complete breach of such a contract before the actual existence of any scrip or shares properly so called.[a]

A contract for the sale of shares in a projected railway is not within the Statute of Frauds.

A letter of allotment of shares is admissible in evidence without a stamp.[b]

An acknowledgment by a banker of the receipt of money paid as deposit by an allottee of shares in a joint-stock company does not require a stamp.[c]

A scrip certificate in a railway company is not an "accountable receipt," nor "an acquittance or receipt" within the meaning of the 11 Geo. 4 and 1 Will. 4, c. 66, s. 10: therefore the forgery of such document is not a felony, but a misdemeanor only.[d]

The 26th section of the 7 & 8 Vict., c. 110, prohibits the transfer of shares in any joint-stock company within that Act, the formation of which shall be commenced after the 1st of November 1844, until such joint-stock company shall have obtained a certificate of complete registration.

It is not essential, in order to satisfy the words of

[a] Tempest *v.* Kilner, 3 C.B. 249; Bowlby *v.* Bell, *ibid.* 284.

[b] Moore *v.* Garwood, 19 L.J. N.S. Exch. Ch. p. 15; Vollans *v.* Fletcher, 1 Exch. 20; Duke *v.* Andrews, 2 *ibid.* 290; Willey *v.* Parratt, 3 *ibid.* 211.

[c] Clarke *v.* Chaplin, 1 Exch. R. 26.

[d] Regina *v.* West, 2 Car. & Kir. 496; Clarke *v.* Newsam, 1 Exch. 131.

the Act, that the formation of a company should have been completed before that day.[a]

The certificate of the registrar of joint-stock companies incorporates a company under the 25th section of this Act, although the deed registered be a defective deed.[b]

The stat. 8 & 9 Vict., c. 16, s. 16, provides, that until the transfer deed is registered the transferor shall be liable for calls and shall receive all profits, and that the transferee shall not be entitled to any profits, or to vote in the affairs of the company.

In the case of *Humble* v. *Langston*[c], which was an action in *assumpsit* for the non-indemnity of the plaintiff for the payment and liabilities respecting the calls on certain railway shares, it appeared that the plaintiff, being in possession of such shares, employed his brokers to dispose of them. The defendant, a share-broker at Manchester, desirous to purchase shares in the same company, instructed brokers in Liverpool to purchase them, and they accordingly applied to the plaintiff's brokers. At that time 10*l.* had been paid on these shares, but they were at a discount. Contract notes for the purchase of the shares passed between the brokers of the respective parties; and in pursuance of the contract the shares were sent by the plaintiff's brokers with a blank transfer, which, as it was

[a] Baker *v.* Plaskitt, 5 C. B. 262.
[b] Bamven Iron Company *v.* Barnett, 19 L. J. N. S. C. P. 17.
[c] 7 M. & W. 517.

alleged, was then the ordinary course of transacting business. The purchase money was paid by the defendant's brokers to those of the plaintiff, and was charged by the former in account with the defendant, who allowed it to them in his account. Subsequent calls were made on these shares; and the shares not having been registered in the defendant's name, and the plaintiff still remaining the apparent owner of them, he was compelled to pay the calls, and brought his action to recover their amount. The defence relied on by the defendant was, that in the absence of any express contract there was no implied undertaking on the part of the purchaser to indemnify the vendor against the calls, and that the averment in the declaration that the plaintiff was ready and willing to transfer was not proved. As to the latter point, the Court held, that if it had been necessary, in order to support the allegation in the declaration, to prove the tender of a valid transfer, such would not have been sufficient; but that it being only requisite to prove a readiness to transfer, there was sufficient evidence of such readiness. As to the first point, which was the more strongly insisted upon, the Court were of opinion, that, under the circumstances of the case, there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact.

The principle upon which this case was decided has been recently affirmed in the one following.

The plaintiff in that case[a] was registered owner of certain railway shares: the defendant, through his broker, purchased a number of shares in the same Company on the 5th of January. On the day following, the plaintiff, through his broker, sold his shares, but there was nothing in the evidence to prove any connection in dealings between the respective brokers; on the contrary, it was clearly to be inferred that the defendant did not purchase of the plaintiff, and that third persons intervened. The plaintiff, however, being the registered owner, was called upon to transfer to the defendant, and did so by deed regularly executed. It then became incumbent on the defendant to have procured that deed to be registered, as is laid down, not only by the ordinary course of dealing, but by the decision of Knight Bruce, V. C., in the case of *Wynne* v. *Price*.[b] The defendant omitted to procure the transfer to be registered, and sold the shares to some other party, the plaintiff still remaining their registered owner. Afterwards calls were made which the plaintiff was called upon to pay and did pay, having previously given notice to the defendant requiring him to pay.

The stat. 8 & 9 Vict., c. 16, s. 15, provides, that until the transfer-deed is registered the transferor shall be liable for calls and shall receive all profits, and that the transferee shall not be entitled to any

[a] Sayles *v.* Blane, 19 L. J. N. S. Q. B. p. 19.
[b] 13 Jurist, 295.

profits or to vote in the affairs of the Company. The action was brought in *assumpsit*, the first count of the declaration alleging, that in consideration of the plaintiff agreeing to sell and transfer &c. the defendant promised to register &c.; and there were also counts for money paid and upon an account stated.

Per Coleridge, J., in delivering judgment:—

"Now the count for money paid proceeds on one of two suppositions; either that the plaintiff has paid the money for the defendant at his request, or that he has been compelled to pay money for which the defendant was liable to the person receiving it, as in the case of a surety paying the debt of his principal, and similar cases. Here there is no ground for saying that the defendant directly or indirectly requested the plaintiff to pay the money; neither is there any ground for saying that the defendant was liable to any one for the money paid by the plaintiff, so as to create the relation of principal and surety, or any other relation of a like kind. The statute plainly continues the liability of the plaintiff, and gives him the interest in and profits of the concern until the transfer is registered, treating the defendant as an entire stranger to the company, and the payment of calls by the plaintiff did not in any way alter his, the defendant's, position. At most there was a failure in the performance of a duty on the part of the defendant in not getting the transfer deed registered, which the plaintiff might have called upon him to perform, although he does not appear to have done so. It is impossible to

treat this as the case of money paid to the use of the defendant."

In the case of *Wynne* v. *Price* (cited in the last case), a broker had sold one hundred shares in a railway company, for his principal, to a jobber, on condition that he should give the name of his (the jobber's) principal on a day named. On that day the broker's ticket was sent, requiring the shares to be transferred into the name of *P*. The vendor executed the transfer deed, but *P* refused to execute, as the certificates were not issued; but on a memorandum being indorsed that the certificates were in the office, he accepted the same and paid the money. *P* having refused to register himself as the owner of the shares, the vendor filed a bill against him, alleging that the jobber was his agent, and praying a decree that he might be ordered to register himself and pay the past calls, and indemnify the vendor against future calls.

It was contended for the defendant that there was no contract or privity between him and the plaintiff; that he was not a principal, but only agent for the principal, who had made default; and that it was the latter and not the defendant who was the person liable to register; but Knight Bruce, V.C., held that the plaintiff was entitled to the relief prayed, and decreed the defendant to execute the transfer deed.[a]

In the absence of any contract to the contrary, the purchaser of real property has to bear the expense

[a] Thus overruling the decision in Jackson *v.* Cocker, *infra*, p. 233.

of the conveyance; and, failing any special stipulation, it is incumbent on him to prepare and tender such conveyance. The same rule applies to purchases of railway shares; and in an action for the non-transfer of shares, it is not sufficient for the plaintiff to allege that he was always ready to pay the stipulated price and accept the transfer, that he has requested the defendant to make the transfer, and that a reasonable time has elapsed for making it: he must aver that he tendered to the defendant a conveyance for execution, such tender being a condition precedent to the maintenance of the action.[a]

Where the first count of a declaration stated that *A B* was possessed of certain railway shares, and that defendant promised the plaintiff that he was authorized by *A B* to sell them, not being so authorized; and the second count stated that a contract was entered into between the plaintiff and defendant for the sale of the shares, and that in consideration thereof the defendant promised to transfer the shares; it was held, on a motion for striking out one or other of the counts on the ground that they were substantially for the same cause of action, that the first count charged the defendant with making a false representation as agent, and the second was on a cause of action against him as principal, and that in either situation he might recover under the first count. The rule was discharged with costs.[b]

[a] Stephens *v.* Medina, 4 Q.B. 422; and see, as to the general point of a necessity of averment of tender, 1 Sugden's Vendors & Purch. 373, 10th edit.

[b] Roy *v.* Bristow, 5 Dowl. 452.

A transfer of shares from an original subscriber to the undertaking made before the formation of a register of proprietors pursuant to the Act, but after the passing of the Act of Parliament, is good, although the transferor be never registered as a proprietor.

And where the Act required such transfer to be by deed, and a transfer of shares was executed by the seller with a blank for the purchaser's name, and stating the consideration untruly, but the purchaser afterwards signed and transmitted to the company, in pursuance of the Act, a proxy paper, describing him as the proprietor of the shares; it was held, that in an action by the company against him for calls on such shares he was precluded from disputing the validity of the transfer.[a]

The proprietor of a scrip certificate, whether registered or not, such proprietor having performed the conditions incumbent on him, may sue on behalf of himself and all other proprietors of like certificates, and of the stock which they represent or into which they are convertible, where the proprietors of certificate and stock are very numerous.

Nor is there any such conflict of interests between the proprietors and holders of scrip certificates and the proprietors of registered certificates as to preclude a plaintiff from representing both parties. The holder of the scrip has an inchoate

[a] The Sheffield, Ashton-under-Lyne, and Manchester Railway Company *v.* Woodcock. 7 M. & W. 574.

right to become a registered holder of the perpetual stock, and it is the interest of both classes in that stock which entitles him to sue.

A party purchasing scrip from an original subscriber is entitled upon performance of the conditions of the certificate, to be admitted a registered shareholder. Upon such purchase the company, in conformity with the original contract with the scripholder, discharges him from his liability and accepts the purchaser as his assignee, thereby giving to such purchaser a right to sue as between himself and the company; nor is it requisite that the original subscriber should be a party to a suit against the company.[a]

Certain shares were deposited by *B* with *A*, for the latter to sell should *B* neglect to provide for bills accepted for his accommodation by *A*. Upon the failure of *B* to provide for the bills, *A* sold the shares, giving notice of the sale to *B*, who refused to execute a transfer to the purchaser. In an action for money had and received brought by *A* to recover the amount paid by him to take up one of the bills, *B* pleaded in bar the deposit and sale of the shares; and it was held that *B* was entitled to a verdict, notwithstanding his refusal to give effect to the sale by executing a transfer; the Court observing, that the pleadings in the case admitted the plaintiff's right to sell the shares, and that it was only the fact of a sale having actually taken

[a] Bagshaw *v.* Eastern Union Railway Company, 7 Hare, 114.

place that was disputed; that it appeared from the evidence and the correspondence between the parties that a sale had taken place, which the purchaser, who had retained the shares for five years, might have enforced; nor did it appear that there had been any agreement to rescind that sale; so that the issue on the third plea (the plea alluded to) was properly found for the defendant.[a]

An action in detinue will lie to recover scrip "lodged" (according to the defendant's own acknowledgment in writing) in his hands; and in such action the plaintiff is entitled to recover more than nominal damages.[b]

Although, as will be seen by reference to the cases on the point in the chapter relating to stock, a court of equity will not decree specific performance of a contract for the transfer of stock, which is a marketable commodity and always to be procured, yet a different principle obtains with regard to contracts relating to shares in a company; and this doctrine will be found established in the case of *Duncruft* v. *Albrecht*[c], where specific performance of a parol agreement for the sale of some railway shares was decreed by Sir L. Shadwell, V.C., who observed, in granting the decree, that "The only question is, whether there has been any decision from whence you can extract a conclusion that the Court will not decree a specific perform-

[a] Ross *v.* Moses, 1 C.B. 227.
[b] Archer *v.* Williams, 2 Car. & Kir. 26.
[c] 12 Sim. 189.

ance of an agreement for the sale of such shares. Now I agree that it has long since been decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is no analogy of any sort between a quantity of Three per Cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market) and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market." And this decision was subsequently (23d July 1841) confirmed by the Lord Chancellor.

The holder of scrip certificates for shares disposed of them prior to the passing of the Act of Parliament obtained by the Company, and filed a bill against the vendor, praying for the specific performance of his agreement to purchase the shares, that the defendant might indemnify the plaintiff against the calls on them, and might, if necessary, be decreed to take a transfer of them. It was held by Lord Langdale, M.R., that this transaction was called a purchase of shares, when it was but a purchase of mere certificates, and that there was no contract, either expressed or by implication, on the part of the defendant to become the proprietor of the shares. The bill was dismissed with costs.[a]

A bill in equity lies to recover deposits paid by a

[a] Jackson *v.* Cocker, 4 Beav. 59; Phené *v.* Gillan, 5 Hare, 1.

shareholder in a joint-stock company where the project is a bubble.[a]

And where a joint-stock company had been formed with the *bonâ fide* project of making a railway in Spain, but before *A* became a shareholder they knew their project to be impracticable, it was held by the Court that *A* was only entitled to the relief which he might have had if the scheme had been a bubble *ab initio*, namely, to be repaid his purchase-money, and that he had no equity to recover interest on such money.[b]

In the case of *Kempson* v. *Saunders*[c], tried before the repeal of the 6 Geo. 1, c. 18, or Bubble Act, it appeared that the defendant had sold to the plaintiff shares in a projected railway company. The provisional committee who issued the scrip agreed that nothing should be done till the sanction of the legislature was obtained: the project was afterwards abandoned, and no Act for incorporating the company obtained.

Upon the failure of the scheme the plaintiff sued the defendant for the amount he had paid for the shares, and a verdict was found for him. It was held, on a rule to set aside the verdict, that the transaction did not come within the statute; that the defendant who was not an original subscriber, but had purchased the shares, (which in fact were

[a] Green *v.* Barrett, 1 Sim. 45.
[b] Harvey *v.* Collett, 15 Sim. 332, and cases cited in argument.
[c] 4 Bing. 5.

not saleable till the company was formed) sold them to the plaintiff, but that he sold a nothing, an alleged title of no value; that he was entitled to sue him of whom he had purchased the shares; and that consequently the plaintiff must retain his verdict.

In an action brought for money had and received, it appeared that the defendant had been engaged by the plaintiff to act as agent for receiving subscriptions for the Poyais loan. Scrip certificates were produced for 30,000*l.*, which had been issued out by the defendant for a deposit of 15*l.* per cent. on a loan of 200,000*l.*; and on these certificates it was contended that the defendant had received money.

Abbott, C. J., held that there must be some evidence given that at the time of the transaction there existed a state of Poyais; and that if the parties were actively concerned in a bubble to raise money for a non-existent state, one of them could not maintain an action against another.[a]

In his judgment in *Duvergier* v. *Fellowes*[b], Best, C. J., observes, "That it concerns the public that bodies composed of a great number of persons with large disposable capitals should not be formed without the authority of the Crown, and subject to such regulations as the king in his wisdom may deem necessary for the public security. The acting as such a corporation without charter from the

[a] MacGregor *v.* Lowe, 1 Car. & P. 200.
[b] 2 M. & P. 414.

Crown is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee on the formation of any such pretended corporation."

A vendor by public auction of railway shares (at the request of the purchaser) executed a transfer to a third party, who did not accept the transfer or register himself as a shareholder. The vendor filed a bill against the purchaser for a specific performance, and the Court directed the usual reference to the Master as to title.[a]

In actions for non-acceptance of shares, the damages are to be calculated at the difference between the contract price and the price to be obtained within a reasonable time after the breach of contract: the jury are to decide as to what is such reasonable time.[b]

In an action of detinue for railway scrip delivered up to the plaintiff under a judge's order after action brought, the true measure of damage is the loss sustained by the plaintiff by not having the scrip certificates when demanded; and the jury are at liberty to measure that loss by the difference between the price at the time of the refusal and the price at the time when the certificates were delivered up.

And where scrip the subject-matter of the action had been delivered up, it was held that the

[a] Shaw *v.* Fisher, 2 De Gex and Sm. 11.
[b] Stewart *v.* Cauty, 8 M. & W. 160; Shaw *v.* Holland, 15 *ibid.* 136.

verdict and judgment were properly confined to an assessment of damages for the detention, by analogy to the case of the re-delivery of charters being rendered impossible by reason of their having been burnt.[a]

In an action for non-delivery of shares on a given day pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken.[b]

And it had been also previously established, in the case of *Stewart* v. *Cauty*[c], that damages for a breach of contract to transfer shares are to be calculated at the difference between the contract price and the price to be obtained within a reasonable time after the breach of contract.

Where a testator bequeathed certain railway shares and "all his right, title, and interest therein and thereto," it was held, that by such bequest a sum advanced by the testator in respect of the future calls belonged to the specific legatees of the shares.[d]

Dividend-warrants are, by the usage and custom of merchants and bankers of London, assignable and transferable by delivery only and without any indorsement.

A case of great importance as regards the con-

[a] Williams *v.* Archer, 5 C. B. 318.
[b] Shaw *v.* Holland, 15 M. & W. 136.
[c] 8 *ibid.* 160.
[d] Tanner *v.* Tanner, 11 Beav. 69.

struction placed by our courts upon dividend warrants came before the Court of Queen's Bench a few years ago, and was subsequently decided in a court of error.

The declaration was in case, and alleged the plaintiff to be proprietor of a share in the Three-and-a-half Reduced Annuities, in the management of the defendants, the Governor and Company of the Bank of England, for certain reward &c., and was entitled to receive certain dividends in respect of his stock, whereupon the defendants became liable, and it was their duty to pay plaintiff on request, when sufficient money had been received by them, all dividends due to him. That while plaintiff was so possessed of the stock a dividend became due to him, sufficient money had been received by the defendants &c., and they were requested by plaintiff to pay him his dividend, and a reasonable time had elapsed, but they had not paid.

The second count was for non-payment of a dividend due on other stock of the plaintiff; and the third was in trover for two pieces of paper called dividend warrants, &c. The defendants pleaded, first, not guilty; secondly, to the last count, not possessed; thirdly, to the first count, that by usage and custom of bankers and merchants in London for divers, to wit sixty, years past, the drafts of defendants upon their cashiers called dividend warrants are transferable and assignable by delivery only, and a *bonâ fide* holder thereof is entitled to payment from defendants on demand; that one *W* had

received from defendants such warrant for payment of the dividend in question, under a power of attorney authorising *W* to receive and give receipts for dividend, and had delivered the warrant to one *L* for good consideration then moving from *L* to *W*, and that *L*, while lawful holder of the warrant, had demanded payment from the defendants and required them to hold the money for his use.

The plaintiff in his replication traversed the above allegations, except those relating to the execution of the power and delivery to *W*.

The Court of Queen's Bench directed the verdict to be entered for the defendants upon all the issues except that upon not guilty, holding that the allegation of usage was satisfied by proof that dividend warrants with the receipt subscribed are passed from hand to hand like Bank notes, and are paid by the Bank cashiers to any one who presents them after a certain day; and that the alleged consideration was proved by shewing that before the dividend was due, *L*, a banker, had discounted a promissory-note of and for *W* his customer, payable on a day subsequent to the delivery of the warrant by *W* to *L*, and that the warrant was delivered to secure payment of the note when due, although at the time of delivery the cash balance in *L*'s bank was in favour of *W*, and the note was not due till after the day for payment on the warrant.

But this judgment was reversed in error as to the issues on the second and third pleas, and affirmed as to the rest; the Court holding the pleas substan-

tially defective in the essential particular of not shewing the defendants to have incurred any liability to *L;* and that even supposing the usage stated to be binding, and to have the effect of making the defendants liable to pay assignees of dividend warrants who come within its terms as pleaded, the pleas were defective, as not shewing that the case in question came within the usage. That usage was described as entitling the *bonâ fide* holder to payment, but *L* was not averred to be a *bonâ fide* holder; and that although the transfer to him by *W* was stated to be for valuable considerations moving *L* to him, still a holder for valuable consideration is not necessarily a *bonâ fide* holder, and that the statement that the demand by *L*, made whilst he was a lawful holder, must be understood to mean that he was holder in the manner before described, and not to supply the want of averment of his being a *bonâ fide* holder: that it was therefore quite consistent with the pleas that *L* was not a *bonâ fide* holder, and that the dividend warrants were not outstanding, but in the hands of the defendants themselves, who might consequently incur no danger of being called upon by any future holder, even if a *bonâ fide* holder could compel payment.[a]

Formerly, if a holder of stock died before the day on which the dividends became due, his personal representatives were not entitled at common law to any proportionate part of them unless the testator

[a] Partridge *v.* Bank of England, 9 Q. B. 396.

had particularly directed such apportionment[a]; nor would a court of equity decree apportionment of stock or of dividends where a party entitled for life died in the middle of a quarter.[b]

Where the residue of the testator's personal estate had been directed to be laid out in land, to be settled according to the directions of the will, the money to be invested in the mean time in Government or other securities, the interest to be paid to trustees to be accounted for by them to such persons as should be successively entitled to the rents of the lands when purchased, the Court decreed apportionment to the widow and administratrix of the tenant for life of the half-year's dividend payable next after her husband's death.[c]

But in the case of *Rashleigh* v. *Master* Lord Thurlow, C., said that the Court would not apportion dividends, and that parties consenting to lay out their money in stock must abide the consequences.[d]

And in *Sherrard* v. *Sherrard*[e] Fortescue, M. R., observed, that it had been a constant rule that where money was to be laid out in land upon any settlement, and in the meantime invested in Government securities, the entire half-year's dividend shall be paid to him in reversion, notwithstanding the

[a] See the argument in the case of the King *v.* Churchwardens of St. John, Madder Market, Norwich, 6 East, 182.

[b] Wilson *v.* Harman, 2 Ves. sen. 672.

[c] 13 Viner's Abr. 18.

[d] 3 Brown, 101; and this very point had been previously decided in the case of Poole *v.* Rudd, 3 *ibid.* 49.

[e] 3 Atk. 503.

tenant for life died in the middle of the half year and shall not be apportioned; *sed secus* in the case of a mortgage, for then interest accrues every day for the forbearance of the principal, although it is customary to make it payable half-yearly.

Again, in *Pearly* v. *Smith*[a], the purchaser of a life interest in new South Sea Annuities was held not entitled to the Christmas dividend where he who enjoyed the life interest died before the dividend payable at Christmas became due.

The principle that governed our courts as to non-apportionment, and the cases establishing that principle, will be found in a very copious note on the subject in the case of *Ex parte Smyth*[b]: that note collects all the learning on the point.

That the practical injustice of the doctrine established by the courts of equity as to the non-apportionment of dividends became apparent, is manifest from the passing of the Act 4 Will. 4, c. 22, amending the 11 Geo. 2, c. 19. By sec. 2 of the former statute it is enacted that all annuities, pensions, dividends, and all other payments of every description in Great Britain and Ireland, made payable or coming due at fixed periods under any instrument *executed after the Act*, or being a will or a testamentary instrument that shall come into operation after the Act, shall be apportioned; so that on the death of any person interested in any such annuities, pensions, dividends, or other payments, or in

[a] 3 Atk. 260.
[b] 1 Swans. 338.

the fund from or in respect of which the same shall be issuing or derived, or on the determination by any other means of the interest of any such person, he or his executors, administrators, or assigns shall be entitled to a proportion of such annuities, pensions, dividends, or other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, as the case may be, including the day of the death of such person, or of the determination of his interest, all just allowances and deductions in respect of charges on such annuities, pensions, dividends, and other payments, being made; and that every such person shall have such remedies at law and in equity for recovering such apportioned parts when the entire portion shall be due and payable, and not before, as he would have had for recovering such annuities, pensions, dividends and payments. And by sec. 3 the provisions are not to apply where it is stipulated that no apportionment shall take place.

This Act has no retrospective effect, and apportionment would not be decreed under any instrument executed prior to its date. Where a tenant for life of stock dies on the day on which a half-year's dividend became due, such dividend belongs to his personal estate.[a]

Unreceived dividend warrants can neither be considered as ready money or money in the funds;

[a] Paton *v.* Shephard, 10 Sim. 186.

so that unless specially named, or there be something in the contract to explain the words employed, a bequest of "all my ready money" or "money in the funds" will not entitle the legatee to such dividends.[a]

A testator directed the dividends of 10,000*l.* Consols to be enjoyed by *A B* and his wife during their joint lives and the life of the survivor. By a decree in equity the fund was ordered to be paid into court, and the dividends to be paid when due to *A B* and his wife or the survivor of them. *A B* died, leaving his wife surviving. At the time of his death four half-yearly dividends were due; and upon the widow presenting a petition for payment of these arrears, it was held, that having regard to the account to which the fund stood, she was entitled to receive them.[b]

An indefinite bequest of the dividends confers the absolute possession of the stock on which they are payable.[c]

Dividends of Bank stock, being *choses in action*, cannot be sequestered.[d]

Where money invested upon certain trusts was sold out before the dividends thereon had become payable, it was held that no allowance could be made in the price to the person for whom the stock

[a] May *v.* Grave, Shore *v.* Weekly, 18 L. J. N. S. *coram* K. Bruce, V. C. pp. 401. 403.
[b] Laprimaudaye *v.* Teissier, 13 Jurist, 1040; 19 L. J. N. S. M. R. p. 16.
[c] Page *v.* Leapingwell, 18 Ves. 463.
[d] M'Carthy *v.* Goold, 1 Ball & B. 387.

was held in trust, and who would have been entitled to the dividend.[a]

Tenant for life of Bank stock paying at the period of investment two-and-three-quarters half-yearly but subsequently increased to five per cent. besides *bonuses*, was held by Lord Eldon to be clearly entitled to receive such augmented dividends.[b]

So a tenant for life of Bank stock has been held to be entitled to a *bonus* directed to be made out of the interest and profits of the capital stock of the Bank.[c]

The following order relating to dividends on Bank stock was made by Cottenham, C., on the 4th of April 1838:—

"I do hereby order, that in all cases in which application shall be made by any of the suitors of this court entitled to half-yearly dividends of Bank stock, the Accountant-General do, until further order, draw for three-and-a-half per cent. part of the last declared dividend of four per cent. now due on Bank stock, save and except such causes wherein, by order of this court, the dividends of Bank stock are directed to be laid out, and also in the cases mentioned in the schedule hereunder written, and such as may hereafter be directed by order of this court to be inserted in the said schedule; in all which excepted cases the Accountant-General shall,

[a] Bostock *v.* Blakeney, 2 Brown, 653.
[b] Barclay *v.* Wainwright, 14 Ves. 66; and see cases hereon reviewed in judgment.
[c] Preston *v.* Melville, 16 Sim. 163.

until further order of the court, draw four per cent., the last declared dividend."

This order applies only to the Governor and Company of the Bank of England and not to any other company; so that where the Royal Exchange Assurance Company declared a *bonus* on their stock and passed a resolution, "that in addition to the ordinary dividend of 2*l.* 10*s.* per cent. on the capital stock of the corporation a distribution of 5*l.* per cent. out of the accumulated profits of the corporation be made to the proprietors on the sums standing in their names respectively on the shutting of the transfer-books, and that warrants for the said dividend and distribution be issued on &c.," it was held by Shadwell, V. C., that as the company had declared that the whole sum should be dividend, a tenant for life of their stock was entitled to receive the whole.[a]

The deed of settlement of a banking copartnership provided "that the directors should have a lien on the shares and stock of every shareholder for debts due from him to the company," and that "the directors might cancel and declare forfeited or sell the shares of such shareholder, or otherwise deal with the same as the case might require for obtaining payment of such debts;" and it was held that the concluding words of the clause sufficed to give a lien, not merely on the shares so as to transfer them at the market price, but that if the

[a] Price *v.* Anderson, 15 Sim. 473.

directors chose to work out the debt by means of the dividends it was competent for them to do so; and that in that case they had the power of retaining the dividends in order to satisfy the arrears due from the customer.[a]

Where bankers employed to receive dividends had in their own books credited their employers with the dividends as received, and had allowed them to draw without having any other funds of theirs in their hands, it was held that they were bound by such entries in their books, and could not set up as a defence that the entries had been fraudulently made by one of their partners, the money never having been received by the house.[b]

A deposit paid upon a bidding for an estate must be considered as part of the purchase money; and should such deposit have been invested in the funds, the vendor is entitled to the benefit of any rise in the market, should such occur between the time of the payment of the deposit and the completion of the purchase[c]; and the depositor is not entitled to the dividends accruing due during such period, but only to interest thereon at four per cent.[d]

An Act was passed in the 56 Geo. 3, (c. 60), to authorise the transfer of stock upon which the dividends should have remained unpaid for the

[a] Hague *v.* Dandeson, 2 Exch. R. 741.
[b] Hume *v.* Bolland, 1 Ry. & M. 371.
[c] Ambrose *v.* Ambrose, 1 Cox, 194.
[d] D'Oyley *v.* Countess of Powis, *ibid.* 216.

space of ten years to the account of the Commissioners for the Reduction of the National Debt. By the 1st section of this Act it is enacted, " That immediately and from time to time after the 5th of July one thousand eight hundred and sixteen, all the capital stock in respect of which any annuities constituting any part of the National Debt are payable at the Bank of England, and also the annuities for years, commonly called Long Annuities, and other terminable annuities, and upon which or in respect whereof no dividends shall have been demanded for the period of ten years or upwards preceding the last day upon which any dividend upon any such stock or annuities shall have become due and payable (except where the payment of any such dividends shall have been or shall be restrained by the order or injunction of a court of equity), shall be transferred, in manner herein-after mentioned, in the books of the Governor and Company of the Bank of England, from the account or accounts, name or names, in which the same is and stands in the books of the Governor and Company of the Bank of England, unto a new and separate account to be raised in the names of the Commissioners for the time being for the Reduction of the National Debt; and immediately after such transfer, the name or names in which such stock stood immediately previous to such transfer, and the residence and description of the parties, the amount transferred, and the dates of such transfers, shall be

entered upon a list to be kept at the Bank for that purpose, which list shall be open for inspection at the usual hours of transfer at the Bank.

Section 2 enacts, "That all transfers to be made in pursuance of this Act shall be made and signed by the Accountant-General or the Secretary of the Governor and Company of the Bank of England for the time being, and shall be as good, valid, and effectual, to all intents and purposes, as if signed by the party or parties in whose name or names the stock or annuities so transferred shall stand at the time of such transfer; and the said Governor and Company of the Bank of England, and the said Accountant-General and Secretary of the said Governor and Company, shall be and they are hereby indemnified and saved harmless for making and executing all such transfers under and by virtue of this Act, and shall not be in any manner responsible or accountable to the person or persons entitled or claiming to be entitled to the stock or annuities which shall be so transferred, or to his, her, or their executors or administrators, or to any other person claiming by, from, or under him, her, them, or any of them, or to any other person or persons whatsoever having or claiming any interest whatsoever therein.

Section 3 enacts, "That a duplicate register of the list so made and kept at the Bank of England, of all such transfers as aforesaid, shall be kept in the Office of the Commissioners for the Reduction of the National Debt, in which an entry shall be

made of every such transfer immediately after the same shall have been made.

By section 4 it is enacted, " That all the dividends upon the capital stock or annuities so transferred shall, from the respective times of the transfer thereof, and all lottery prizes or benefits which shall have remained unclaimed ten years and upwards, and all balances of sums issued for paying the principals of stocks and annuities which shall not have been demanded for the same period, be paid to the account of the Commissioners for the Reduction of the National Debt for the time being, and shall be from time to time invested by the said Commissioners in the purchase of other like capital stock, to be placed to a separate account, which shall be called 'The Account of Unclaimed Dividends,' and so from time to time as such dividends, lottery prizes or benefits, principals of stocks and annuities become due and can be so invested; and all such dividends, and the capital stock arising from the investment thereof as aforesaid, shall be held by the said Commissioners for the public, subject nevertheless to such claims as may thereafter be made by the respective parties entitled thereto of such stock and of the dividends due thereon.

Section 5 enacts, " That it shall be lawful for the Governor or Deputy-Governor of the Bank of England for the time being to authorise and direct the Accountant-General or Secretary of the said Governor and Company for the time being to re-

transfer any such capital stock to any person or persons who shall shew, to the satisfaction of such Governor or Deputy-Governor, his, her, or their right or title thereto, and to pay the dividends due thereon; and also to pay any such lottery prizes or benefits, and principals of stock and annuities as aforesaid, as if the same had not been transferred or paid to the Commissioners for the Reduction of the National Debt; but in case the said Governor or Deputy-Governor shall not be satisfied of the justice or legality of any claim or claims which shall be made to any stock, lottery prizes or benefits, and principals of stock or annuities, so transferred or paid to the account of the Commissioners for the Reduction of the National Debt, then and in every such case the claimant or claimants shall and may, by petition in a summary way, state and verify his, her, or their claim to such stock, lottery prizes or benefits, and principals of stock or annuities, to the High Court of Chancery or to the Court of Exchequer, and a copy of every such petition shall be served upon His Majesty's Attorney-General for the time being, and also upon the Commissioners for the Reduction of the National Debt; and the court to which such petition shall be presented shall and they are hereby authorised and empowered to make such order thereon, either for the transfer of the stock or annuities to which such petition shall relate or refer, and for payment of the dividends which shall have accrued or become due and payable thereon, or for payment of such lottery prizes

or benefits, and principals of stock and annuities as aforesaid, or otherwise relating thereto, and to the costs of such application, as to such court respectively shall appear to be just; and all costs and expenses which shall be incurred by or on behalf of His Majesty's Attorney-General or the said Commissioners for the Reduction of the National Debt, in resisting or appearing upon every such petition (if not ordered by the court to whom the application shall be made to be paid out of the stock or annuities and the dividends thereby claimed), shall be paid by the said Commissioners for the Reduction of the National Debt, out of the dividends or annuities to be received by them under or by virtue of this Act, and which shall not be claimed; and in case where any transfer or payment shall be made to any such claimant or claimants as aforesaid, either with or without the authority of either of the said courts, the said Governor and Company shall cause notice to be given to the Commissioners for the Reduction of the National Debt, at their office, of every such transfer or payment, within three days from the time of making the same.

Section 6 enacts, "That the said Governor and Deputy-Governor of the Bank of England, and the Accountant-General and Secretary of the said Governor and Company, shall be and they are hereby indemnified and saved harmless for and in respect of any transfer or transfers which shall be made from the account of the Commissioners for the Reduction of the National Debt for the time being of

any such stock or annuities as aforesaid, and also for payment of the dividends due thereon, and also for payment of any such lottery prizes or benefits, and principals of stock and annuities as aforesaid, to any person or persons claiming such stock, annuities, and dividends, lottery prizes or benefits, and principals of stock and annuities respectively; and that in case any such stock, annuities, dividends, lottery prizes or benefits, and principals of stock and annuities, or the accumulations thereof, or any part or parts thereof respectively shall, after the transfer or payment thereof, be claimed by any other person or persons, the said Governor and Company, or the said Governor or Deputy Governor, or the said Accountant-General or Secretary respectively for the time being, acting in making such transfer or transfers, and in paying the dividends on the stock or annuities thereby transferred, or any such lottery prizes or benefits, and principals of stocks or annuities as aforesaid, or the accumulations thereof respectively, shall not be answerable or responsible for the same to any such new or other claimant or claimants, but such new or other claimant or claimants shall have their recourse against the person or persons to whom such transfer or transfers of the said stock or annuities shall have been made, and the dividends, lottery prizes or benefits, and principals of stock and annuities, and accumulations thereon respectively paid.

Section 7 further provides for the rights of claim-

ants by enacting, " That if in any case where such new or other claimant or claimants as aforesaid shall have established his, her, or their right and title to any such stock, annuities, dividends, or lottery prizes or benefits, or balances as aforesaid, as shall have been transferred and paid to a first claimant or claimants, and shall not be able to obtain the transfer and payment thereof from such first claimant or claimants to whom the same shall or may have been erroneously transferred and paid, then and in every such case the said Court of Chancery or Court of Exchequer shall, and they are hereby respectively authorised and empowered, upon application by petition of such new or other claimant or claimants, verified as such Court shall direct or require, to order the Commissioners for the Reduction of the National Debt to transfer to such new or other claimant or claimants such sum or sums in stock, and to pay him, her, or them such sum or sums in money as and for the dividends, annuities, lottery prizes or benefits, or balances as aforesaid, as to such Court shall appear to be just; which transfers shall be made from stock transferred into the names of the said Commissioners under or by virtue of this Act; and the payment of dividends, annuities, lottery prizes or benefits, or balances as aforesaid, shall be made from dividends received by such Commissioners upon such stock transferred into their names as aforesaid, or the accumulations thereof, or from the sale of stock purchased with such dividends or accumula-

tions, or any other monies at the disposition of the said Commissioners."

The proper form of proceeding to recover stock and dividends unclaimed for ten years and carried over to the account of the Commissioners for the Reduction of the National Debt under the statute, is by petition to be served upon the Attorney-General and the Commissioners, and not by bill in the first instance; and if there be conflicting claims to the fund, the Court will then give directions for the trial of the rights of the parties between themselves, either by suit or otherwise.[a]

In order to obtain a re-transfer of stock under the Act, it is not necessary for the petitioners to show that they are beneficially entitled to it: it is sufficient if they establish the legality of their claim.[b]

The Court, upon petition under the statute, will direct stock which has been transferred to the sinking fund to be re-transferred to the petitioners where their title is clear, without any reference to the master to ascertain who is beneficially entitled to the stock.[c]

The costs of the petition must in general be paid out of the stock claimed. It is only in special cases that they are to be paid out of the general fund.[d]

[a] Hunt *v.* Peacock, 6 Hare, 361.
[b] In re Bigg, 1 You. & C. 245.
[c] *Ex parte* Sir John and Lady Nichol, 1 Turn. & Rus. 119. *Re* Avery, I Russ. & Myl. 356.
[d] *Ex parte* Martin, 1 Jac. 55.

Pending a question as to which party is entitled to a re-transfer of unclaimed stock, the Court will direct the stock to be transferred into the name of the Accountant-General.[a]

The Court will not order on petition a re-transfer of unclaimed stock when the title is disputed.[b]

In actions brought against the Bank for non-payment of dividends on stock standing in their books in the plaintiff's name, it has been held that it is essential to allege in the declaration that the dividends had been issued by Government to the Bank; for unless it appear that they were so issued, it is not incumbent on the Bank to pay them. In the absence of averment or evidence to that effect, the Court will not presume such dividends to have issued.[c]

But this decision has not escaped animadversion. In his judgment in the case of *Sloman* v. *The Bank of England*[d], Shadwell, V. C., observes:—

"I notice the clause in the Act 11 Geo. 4, & 1 W. 4, c. 13, by which the 4 per cents. were converted into $3\frac{1}{2}$ per cents., and providing for the payment of dividends at the Bank, and that the sums for the payment of them should be issued and paid out of the Consolidated Fund, with reference only to that singular ground on which the Court of Queen's Bench rested their judgment in the case

[a] *Ex parte* Gillett, *ex parte* Bacon, 3 Madd. 28.
[b] *Ex parte* Lavell, 2 J. & W. 397
[c] Davis *v.* Bank of England (in error), 5 B. & C. 185.
[d] 14 Sim. 485.

of *Davis* v. *The Bank of England* when it was heard in error. (His Honour then stated the grounds on which the judgment was given.) Now it seems to me that every court of law ought to take it for granted that that which the legislature says shall be done, has been done; but, however, the court of error was satisfied to get rid of any difficulty in that case by making that objection."

The days on which the dividends due on the various Government securities become payable will be found set out *supra* page 136.

CHAPTER VII.

BROKERS, THEIR DUTIES AND LIABILITIES.

BEFORE proceeding to consider the particular duties and liabilities attached to those following the calling of stock-brokers, reference must be made to the general signification and definition of the term "broker;" and it will appear, on review of the various Acts and authorities thereto relating, that the full and precise meaning of the word has not in all cases been as yet established with sufficient certainty.

By the stat. 1 Jac. 1, c. 21, they are described as "persons employed by merchants English and merchants strangers in contriving, making, and concluding bargains and contracts between them concerning their wares and merchandizes, and monies to be taken up by exchange between such merchant and merchants, and tradesmen." Chief Baron Comyn[a] defines them as "persons employed among merchants to make contracts between them, and to fix the exchange for payment of wares sold or bought." And in the case of *Wilkes* v. *Ellis*[b], a distinction was taken between a person employed to make public bargains and one whose business it was to make private bargains only; and it was stated in the argument for the defendant in that

[a] Digest, Title "Merchant," C.
[b] 2 H. Bl. 555.

case, on the authority of Cowel's interpreter, that the latter was the true definition of a broker.

Mr. Russell, in his valuable treatise on the laws relating to Factors and Brokers, observes that each of these definitions must at the present day be regarded as somewhat too limited. That by the two former the employment of brokers is confined entirely to dealings between merchant and merchant, (a description which would appear to exclude stock-brokers, a class most extensively engaged on behalf of persons not merchants); and by the last they are described to be persons engaged in making private bargains only, a limitation which would equally exclude those of them who are in the habit of attending public sales, such as the sales of the East India Company; and who, whilst acting in that capacity, can scarcely be said to enter into none but private contracts. He then defines a broker to be an agent employed among merchants and others to make contracts between them in matters of trade, commerce or navigation, for a commission commonly called brokerage.

A very clear and simple definition of the term "broker," and one in accordance with the early decisions, is to be found in the case of *Pott* v. *Turner*.[a] Tindal, C.J., there defines a broker to be "one who makes bargains for another, and receives a commission for so doing; as for instance a stock-broker."

Spelman calls *abrocamentum* (*i. e.* brokerage) *vox forensis*, or of the market, a mercantile word signi-

[a] 6 Bing. 706.

fying the buying of goods by wholesale, in whole bags or packages, before they are delivered or conveyed to the mart or market, and afterwards the separating (*distractio*) of the same into portions or allotments. It is literally the *disruptio*, or breaking into such portions.

It has been suggested that *broker* has received such denomination from the Anglo-Saxon word *brytan* or *brittian*, to break, *in exiguas partes desecare*. *Brytta* was the name given to the persons who distributed or divided into small parts; but it would rather seem to signify the dispenser of that which is his own property, and not that of another.[a]

Brokers or middlemen employed to negotiate contracts or conduct transactions between other parties were recognised by the civil law; and as appears by the following definition extracted from the Pandects, their functions extended over a wider sphere of action than that accorded to them in more modern days.

Proxeneta[b] *est qui inquirit voluntates aliquorum, vel ad munera, vel ad contractus, vel ad amicitias faciendas, vel similia, et constituitur ei salarium extraordinarium.*

Proxenetæ erant quibus parentes mandabunt ut filiabus suis quærerent maritos.

Proxenetica, id est, salaria quæ præstantur proxenetis quæ et pilotrophia dicuntur.[c]

[a] *Vide* Bosworth's Anglo-Saxon Dict. *voc.* Brytta.
[b] Προξενητης, *conciliator.*
[c] Pand. Lib. 50, Tit. 14, De Proxenet. in Gloss.

Est enim proxenetarum modus qui emptionibus venditionibus commerciis contractibus licitis utiles non adeo improbabili more se exhibent.[a]

Proxenetæ testes esse non possunt inter eos inter quos operam navant.[b]

And this interpretation of the term has been recognised and adopted by the Scotch law.[c]

In a case recently argued before the Court of Exchequer the definition to be attached to the term *broker* and his functions, underwent a most elaborate and learned argument, in the course of which the whole of the authorities on the point were cited and discussed.[d]

The declaration alleged the defendant to be indebted to the plaintiff for work, labour &c., and for commission and reward. The defendant pleaded such work, labour &c. to have been performed by the plaintiff as broker within the city of London in and about the procuring and hiring on account of the defendant, divers persons to be employed by the defendant in laying out and surveying a certain line of railway; and that the said commission and reward were claimed by the plaintiff in respect of such work &c., and that the plaintiff was not at the time of performing such work &c. duly licensed &c. to act as a broker.

[a] L. 2. ff. De Proxenet.

[b] Tom. 7. Col. 1150. Num. 8; Huyon Donell. Comm. ad Coll. Tit. 22. de Testibus. And see Brissonius de verb. sig. voc. *Proxeneta.*

[c] Skene *de signif. verb.* And see the work *Regiam Magistatem Scotiæ* p. 158 a, and *Statuta Gildæ*, c. 27.

[d] Milford *v.* Hughes, 16 M. and W. 174.

This plea was demurred to, and the learned counsel for the defendant contended, in the course of his most able argument, that the plaintiff should be considered as falling within the true acceptation of the term "broker" as laid down by the civil law.

But Alderson, B., held the plea bad, adhering to the definition given of brokers in the Law Dictionary as "those that contrive, make, and conclude bargains and contracts *between merchants and tradesmen* for which they have a fee or reward;" and Rolfe, B., observed, that to make it a case of brokerage, it must relate to goods and money, and not merely to personal contracts for work and labour.

Alderson, B., held the definition given by the Law Dictionary to be supported by *Andrew de Vyne's* case[a], which had been cited by the learned counsel, and says that the word "mediator" there spoken of must be understood to mean a mediator "inter mercatorem et mercatorem." It is submitted with great deference, that, upon reference to the record in that case, the learned baron does not seem to be borne out in such conclusion. The words are: "*Salubriter provisum et ordinatum fuit, ab antiquo, quod nullus cujuscumqne statûs, gradûs, sexûs, seu condicionis fuerit, tunc in futurum, officium sive occupacionem communis correctarii seu abrocatoris in civitate predictâ (Londini) aliquo modo exerceret neque super se assumeret, nec de*

[a] The record in that case is to be found at the end of the case now under consideration: it was extracted from the City Register Book entitled *Liber Dunthorn* (24 H. 6.)

correctagio seu abrocagio hujusmodi, aut de contractu seu barganeo quocunque inter mercatorem et mercatorem faciendo, in civitate predictâ tanquam communis abrocator, seu mediator hujusmodi, &c. &c. A distinction seems to be clearly made by the above words between the art of brokage between ordinary persons, and the making a bargain between merchants.

If this were not so, it would be difficult to say how a stock-broker was ever held to be within the statutes; for the reason given by Baron Alderson in *Milford* v. *Hughes*, that "stock is a merchandize, and the parties are merchants *pro hâc vice*," can hardly be deemed to be in accordance with the more comprehensive powers and functions ascribed to brokers, or persons hired to mediate between party and party for fee and reward, by the various authorities already cited,

The term "broker," used in its common acceptation, is of extreme antiquity in our statute books; for we find by *statuta civitatis Londini*, given in the 13th year of the reign of Edward I., that no brokers were to be in London but those admitted and sworn by the mayor and aldermen. This statute was probably passed at the time that very stringent measures were adopted with respect to foreign merchants and the importation of certain foreign goods.*

* The reader, curious to mark the early progress of commerce, fettered and limited as it was by the various fiscal regulations imposed by the City of London, is referred to the *Liber de antiquis legibus*.

The next statute in our books relating to brokers is that passed in 1 James 1, c. 21, and which has been already referred to. Section 8 of that Act makes mention of brokers in London using and exercising the ancient trade of brokers between merchant and merchant; so that the subsequent Acts relating to brokers would seem not to confer any new privilege on the city of London, but simply to give to their ancient usage the power of legislative enactment.

The first mention of brokers that occurs in our statute books, as applied to those transacting business in the Public Funds, is in the 8 & 9 Will. 3, c. 20, s. 6, passed in the year 1697, three years after the incorporation of the Governor and Company of the Bank of England.

At that period (1696) the affairs of the Bank were in a most depressed condition: they lacked specie wherewith to meet their creditors' demands; their notes were advertised at 20 per cent. discount; and guineas were at a premium of 50 per cent. The system of jobbing in the funds had attained an alarming height, until Government endeavoured to check the growing evil by legislative enactments. An Act was accordingly passed in the 8 & 9 Will. 3, c. 32, intituled "An Act to restrain the number and ill practice of Brokers and Stock-jobbers."

The words in the preamble of the Act will best serve to shew the fearful pitch attained by the practices it was passed to suppress.

The Act recites that of late brokers had carried

on most unjust practices in selling and discounting tallies, Bank stock, Bank bills, shares and interests in joint stocks and other matters and things, and had and did wilfully combined and confederated themselves together to raise or fall from time to time, as might most suit their own private interest and advantage, which is a very great abuse of the said ancient trade (of a broker generally) and employment, and is extremely prejudicial to the public credit of this kingdom and to the trade and commerce thereof; and if not timely prevented may ruin the credit of the nation and endanger the Government itself. And then, after reciting the daily increase in the number of those engaged in such practices, the Act proceeds to pass several most salutary enactments. None were to act as brokers without a licence from the Lord Mayor and Court of Aldermen; they were compelled to take certain oaths and to give bonds for their good behaviour; their number was limited to one hundred; their names and places of abode were to be affixed to the Guildhall and Royal Exchange; they were subjected to heavy penalties if they dealt for themselves in any merchandize, or in those tallies, stocks &c.; their charges for brokerage were limited to 2*s.* 6*d.* per cent. on all public funds, and to 1*s.* per cent. on Exchequer bills; they were to keep books, which were to be produced when reasonably required. The following section is, on account of its importance, transcribed *verbatim* :—

"Every policy*, contract, bargain, or agreement entered into by any person and persons whatsoever, and which by the tenor thereof is to be performed after the first day of May 1697, upon which any premium already is or at any time hereafter shall be given or paid for liberty to put upon, or deliver, receive, accept, or refuse any share or interest in any joint stock, tallies, orders, Exchequer bills, Exchequer tickets, or Bank bills whatsoever, other than and except such policies, contracts, bargains, or agreements of the nature aforesaid as are to be performed within the space of three days (to be accounted from the making the same), is and shall be utterly void to all intents and purposes as if the same had never been made; and every such premium and premiums shall be paid back and restored to such person or persons, his executors, administrators, or assigns."

The duration of this Act was limited to the period of three years, at the expiration of which it was, by the 11 & 12 Will. 3, c. 13, extended to a further period of seven years.

That this Act was deemed effectual to check the prevalent mischief may be inferred from the remark of a contemporary writer, that by it "Exchequer

* The term *policy* is derived from the Italian *polizza*, meaning a ticket for the payment of certain money to the holder.

The first Bank was established at Venice A.D. 1171, and the next of importance at Genoa A.D. 1407; and it is presumed that the term *polizza* then received the above acceptation.

tallies and orders were rescued from the stock-jobbing harpies."

By the 6 Anne, c. 16, repealing 1 Jac. 1, the office of garbler of spices is abolished; and to indemnify the city of London for the loss their revenues would thereby sustain, it was enacted by s. 4, that "all persons that shall act as brokers within the city of London and the privileges thereof shall from time to time be admitted so to do by the Court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as the Court shall think fit and reasonable; and shall upon such their admission pay to the chamberlain of the said city for the time being, for the uses thereinafter mentioned, the sum of 40*s.*, and shall also yearly pay to the said uses the sum of 40*s.* upon the 29th day of December in every year."

The 5th section provides, that "if any person shall take upon him to act as a broker within the city and liberties, not being admitted as aforesaid, he shall forfeit and pay the sum of 25*l.*, to be recovered by the chamberlain of the city."

By the 10 Anne, c. 19, s. 121, a penalty is imposed upon every person who shall be employed as a broker on behalf of any other person to make any bargain or contract for the buying or selling of any tallies, orders, Exchequer bills, Exchequer tickets, Bank bills, or any share or interest in any joint stock erected by Act of Parliament &c., who shall

take or receive directly or indirectly any sum of money or other reward exceeding the sum of *2s. 9d.* per cent.

By the 57 Geo. 3, c. 60, the fee upon admission and the annual payment of admitted brokers were raised to *5l.*, and the penalty upon a person "for taking upon him to act as a broker" was increased to *100l.*

In the year 1708, the year after the passing of the statute of Anne, the Court of the Mayor and Aldermen of the City of London made certain rules and regulations concerning brokers which have ever since continued in force, and by virtue whereof every person, before being admitted a broker, is required to enter into a bond to the mayor, commonalty, and citizens of London in a penalty of *500l.*, and also to take an oath, the forms of which are prescribed by the same rules and regulations. The condition provides, *inter alia*, "That the broker shall, upon every contract by him made, declare and make known to such person or persons with whom such agreement is made the name or names of his principal or principals, either buyer or seller, if thereunto required; and that he shall not directly or indirectly, by himself or any other, deal for himself in buying any goods, wares, or merchandizes to barter or sell again upon his own account or for his own benefit or advantage, or make any gain or profit in buying or selling any goods over and above the usual brokerage."

It has been held that it is no infringement of this

condition for a broker, by his principal's authority, to make a purchase for him in his, the broker's, own name, the contract note being made out in the broker's name without inserting that of his principal, especially where the broker entered the name of his principal as being the buyer in the book kept by him for the purpose.[a]

In the case of *Lisset* v. *Reave*[b], where a bill had been filed by a principal to discover what goods the defendant bought of his agent, Lord Hardwicke, C., held, that where a principal transmits goods to an agent or factor he may maintain an action against the person who buys of that factor for what remains due to the factor; and he observed, that "in the case of transferring stock it is very often done by brokers without the principal's being so much as mentioned, and yet he may maintain an action against the person to whom the stock was transferred."

A broker is prohibited by this condition from employing any one under him to act as a broker who has not been duly admitted; but this would not extend to the case of a person engaged with the broker in entering into contracts.[c]

By the 9th section of the 7 Geo. 2, c. 8, it is enacted, that "all and every broker or brokers, or other person or persons who shall negotiate or act as a broker, receiving brokerage in the buying,

[a] Kemble *v.* Atkins, 7 Taunt. 260, B. Moore's Rep. 6 S. C.
[b] 2 Atk. 394.
[c] Mayor of London *v.* Brandon, 2 Stark. N. P. C. 14.

selling, or otherwise disposing of any of the said public or joint stocks, or other public securities, shall respectively keep a book or register, which shall be called the brokers' book, in which said book he and they shall fairly, justly, and truly enter all contracts, agreements, and bargains that he or they shall from time to time make between any person or persons whatsoever, on the day of the making such contract or agreement, together with the names of the principal parties, as well buyers as sellers, and also the day of making such contract or agreement, to the intent and purpose that such broker or brokers, and other person or persons acting or negotiating as such as aforesaid, shall from time to time produce such book or register when thereunto lawfully required; and in case such broker or brokers, or any other who shall negotiate or act as a broker as aforesaid in relation to any the said matters, shall not keep such book or register, or shall wilfully omit to enter therein fairly, justly, and truly any such contract, bargain, or agreement as aforesaid, he or they shall, for every such offence or omission, forfeit and pay the sum of fifty pounds, to be recovered by action of debt, bill, plaint, or information in any of His Majesty's Courts of Record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance shall be allowed; one moiety thereof to the use of His Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them who

shall sue for the same." And this enactment must be rigidly enforced, as may be seen by reference to a case where, on appeal to the House of Lords in a question relative to the purchase of stock, the broker appeared to have been guilty of professional negligence and misconduct by not keeping books as prescribed by the statute, the Court ordered that it should be recommended to the Court of the Lord Mayor and Aldermen to sue him upon the bond given for the performance of his duty as a broker.[a]

The chamberlain of the city of London is the proper officer to sue for penalties for the benefit of the corporation upon their own bye-laws in their own courts; and a *mandamus* will lie to compel the commissioners of the London Court of Requests to hear and determine a suit instituted in their court for the recovery of penalties from a person acting as a broker without being duly admitted.[b]

In a very early case reported by Sir Edward Coke[c], and known as the Case of the City of London, the right of the chamberlain to sue for penal-

[a] Dunbar *v.* Wilson, 6 Bro. P. C. 6 edit. 1784.

The following is the law regulating stock-brokers in France:—"Tout commerce quel qu'il soit est interdit aux agents de change pour leur propre compte sous peine de destitution et de 3000 livres d'amende. Cette défense leur a été faite par l'art. 34 du réglèment de 1724, pour prévenir les abus de confiance qui pourraient dériver de la connoissance qu'ils ont des affaires de tous les negociants et banquiers de la ville où ils font le change." 1 Merlin, Répertoire 230.

[b] Rex *v.* Commissioners of London Court of Requests, 7 East, 292.

[c] Vol. 4, part 8, 121 b. p. 383.

ties imposed by the corporation was recognised; and it was there held that the custom of London that no person whatsoever, not being free of the city of London, should anywise directly or indirectly use any trade &c., or keep any shop &c. for hire, gain, or sale within the city, was a good custom, and an ordinance made to enforce it upon pain of forfeiture is good.*

The right of the chamberlain as the proper officer to sue for penalties against a person exercising the calling of a stock-broker was fully recognized in the following case, where a writ of *mandamus* issued commanding the commissioners of the Court of Requests in the city of London to hear and determine a suit instituted by the city chamberlain to recover the annual sum due from a stock-broker under the 6 Anne, c. 16, s. 4. The writ was applied for in consequence of the refusal of the Court to make any order or judgment in the cause, on the ground that the Judges being freemen of the city were interested, and therefore had no jurisdiction; and moreover, that as the broker had given a bond in the penal sum of 10*l.* conditioned for the payment of the annual duty of 40*s.*, the simple contract, if any, was merged in the specialty; and that the specialty debt amounting to 10*l.* could not be sued for in the Court of Requests. But the

* This case merits the greatest attention alike from historian and lawyer, as it evidences the antiquity of the various charters and valuable privileges granted from the oldest times to the city, and enumerates their customary rights.

Court held, that it would be going too far to oust the corporation of their ordinary remedy and benefit which the legislature intended for them of suing in the name of the chamberlain in their own court because of the collateral security of a bond to themselves; nor could such remedy and benefit be affected by the very trifling interest which the Judges might have in the result of the suit.[a]

It has been laid down that where a man does work in expectation of a legacy, in which he is disappointed, he cannot sue the executors for commission upon such work.[b]

By his bond given on admission a broker is prohibited from carrying on business on his own account; so that a person who is an agent to sell, and accepts such agency, is bound to sell, and is not at liberty to take to himself the stock and give credit for the amount of the price; therefore where a person *bonâ fide* employed a broker to sell such and such stock for him, and the broker purchased them for himself at the current price of the day, such transactions will be set aside, as will be seen by the following case:—

The plaintiff, a holder of 20,000 francs French *rentes*, applied to the defendant, a foreign loan contractor and dealer in foreign securities, to dispose of them: the defendant purchased the *rentes* for himself and partners, and agreeably to the

[a] The King *v.* the Commissioners of the London Court of Requests, 7 East, 292.

[b] Osborn *v.* Governors of Guy's Hospital, Str. 728.

plaintiff's instructions invested the proceeds in Prussian bonds, which he, the contractor for the loan, supplied out of his own stock, but no particular bonds were appropriated for plaintiff. The plaintiff's brokers were employed in this transaction, and signed the usual brokers' notes and received one-fourth per cent. commission as a single commission on one transaction. The plaintiff afterwards directed the defendant to sell the bonds, and the defendant subsequently informed the plaintiff that he had sold them accordingly, and gave plaintiff credit for the alleged price. The plaintiff then purchased 115,000 *rentes* of the defendant, which he was to pay for on a future day, and the *rentes* were then to be transferred to him, but no *rentes* were set apart for the plaintiff or identified as belonging to him. Before the day of payment arrived, the defendant, by the plaintiff's desire, sent an order to his partners to sell the *rentes*, and they subsequently informed the plaintiff that they had sold them accordingly, and gave the plaintiff credit for the alleged proceeds. The accounts between the plaintiff and the defendant were afterwards settled, and the plaintiff paid the balance which appeared due from him to defendant. Four years afterwards the plaintiff having discovered that the 20,000 *rentes* had been purchased by defendant and his partners, and that there was no appropriation on the two other purchases, filed his bill to have all the transactions set aside, and the Court decreed accordingly.

If a person make false representations to those dealing with him he will be bound by such representations. The decision in this case was affirmed[a] by the House of Lords. And again, Lord Eldon observed in *Dyster's* case[b], that if a broker has introduced himself as broker and principal in the same transaction, a contract arising out of such conduct would, without reference to any Act of Parliament or other regulation, but upon principles of common law, be good for nothing: no action could be sustained upon a transaction so fraudulent.

An agent has no authority under a general power of attorney to sell, assign, or transfer stock or shares to pledge them: if he do so pledge them, those to whom they are pledged must make restitution to the proprietor; for it is a principle, as well of our own as the civil law, that if a person is acting *ex mandato*, those dealing with him must look to his mandate.[c] But an agent duly authorized may make a contract in his own name, and the principal may afterwards sue upon it. And where the general issue was pleaded to an action for the non-fulfilment of a contract by the defendant to transfer certain shares to the plaintiff, the rules of the Liverpool Stock Exchange were held inadmissible to prove that according to such rules the contract in question was a contract between the brokers only, and that the plaintiff, although not a member,

[a] Brookman *v.* Rothschild, 3 Sim. 153.
[b] 2 Rose, 349, S. C. 1 Mer. 155.
[c] De Bouchot *v.* Goldsmid, 5 Ves. 210.

was cognisant of such rules. *Per* Cresswell, J., "The rules of the Liverpool Stock Exchange cannot alter the general law of the land."[a]

Although the words employed in the various Acts relating to brokers dealing in public stock as to what the legislature meant by the term *broker* appear devoid of ambiguity, yet the question has been raised as to whether a person acting as a stock-broker within the city of London or its liberties is such a person as is required by the statute 6 Anne, c. 16, to be admitted to the office of broker by the Court of the Mayor and Aldermen of the city of London.

This point seems to have been first mooted in the case of *Bosworth* v. *Machado*[b]; and it was there decided, that one who for hire concludes bargains in South Sea stock is a broker within the 6 Anne, c. 16, s. 5. And again it underwent discussion in the case of *Jansen, Chamberlain of London*, v. *Green*[c], which was an action brought to recover the penalty imposed by 6 Anne, c. 16, s. 5, on those acting as brokers without being duly admitted by the Court of Mayor and Aldermen. It was urged on behalf of the defendant, that he being a stock-broker did not come within the description in the statute; but the Court were unanimous in their opinion that stock-brokers were clearly within the words and meaning of the Acts.

[a] Humphrey *v.* Lucas, 2 Car. & Kir. 152.
[b] 2 Hy. Bl. 556.
[c] 4 Burr. 2103.

The point was again argued in the case of *Clarke* v. *Powell*[a], which was an action in debt to recover penalties from the defendant for acting as a broker without due admission by the Court of Mayor and Aldermen. The Court affirmed the decision in *Jansen* v. *Green*, holding it to be obvious, that when a new subject of dealing was created in Government securities, those who dealt in the same way respecting such securities might fall under the same denomination (of brokers), and that the class of men who dealt either partially or exclusively in this new description of security might equally fall within the description of brokers as those who dealt partially or exclusively in some new description of merchandize.

Brokers, as appears by an early case, formerly carried on their business in the Royal Exchange, for mention is made, as far back as 1714, of Exchequer Annuities being sold there by sworn brokers.[b]

It was held by the Court of King's Bench, in a case before it as far back as the 9th year of George 1, that if a broker in the city of London incur a penalty under an Act regulating the dealings of brokers, the king cannot by his pardon discharge such broker from the payment of such

[a] 4 B. & Ad. 846.

[b] Tucker *v.* Wilson, 1 P. Wms. 261; and in the case of Crull *v.* Dodson, Sel. Cases in Chan. 41, argued in 1720, the broker is reported to have besought his principal to transfer the stock (subject matter of the action), affirming that if it were not done his credit would be blown up in Exchange Alley, and he should be ruined.

penalty, for the interest of it vests in the city from the time the offence was committed.[a]

A broker cannot maintain an action for work and labour done and commission due for buying and selling stock, unless duly licensed to practice as a broker pursuant to the provisions of 6 Anne, c. 16.[b] And in an action for work and labour, and money paid by the plaintiff as a broker upon the purchase and sale of shares, the defendant was allowed by the Court, after notice of trial given and countermanded, to add a plea that the plaintiff was not a broker duly licensed under 6 Anne, c. 16, the trial not being thereby delayed and the defendant paying the costs of such plea.[c]

It is not, however, the case in practice, that all brokers transacting business on the Stock Exchange are duly admitted and sworn according to the Act. Such are precluded from suing their principal for the amount of commission due upon contracts in which they may have been engaged for him, and are moreover liable to the penalties imposed by the mayor and corporation on those who act in the capacity of brokers without due qualification.

A broker of the city of London, regularly admitted in pursuance of the provisions of the 6 Anne, c. 16, may maintain an action on a contract or prove a debt incurred for commission, although the transactions which are the ground of his claim may have

[a] Ludlam *v.* Lopez, 8 Mod. Rep. 103.
[b] Cope *v.* Rowlands, 2 M. & W. 149.
[c] Field *v.* Sawyer, 5 Man. Gr. & Scott, 844.

been carried on in direct violation of his oath and condition of bond as broker according to the regulations of the Court of Aldermen, for such regulations are purely municipal and have not the force of a general law: the only consequences attending their violation are such as the regulations themselves prescribe, but the prohibition to act without admission is statutory.[a]

The nature of the transactions between stock-brokers and those persons termed on the Stock Exchange *jobbers* has already been explained. It would seem that their calling was neither rightly understood or held in very high repute by our courts; for Lord Eldon, whilst presiding in the Court of Common Pleas, thus expressed himself concerning them:—

"We do not consider a jobber or dealer in the funds as a known trader, having a character as such. My brother Heath has indeed removed from my mind the impression which it had at first received, namely, that a jobber or dealer in the funds was always to be considered a culpable person, by showing the necessity of such persons for the accommodation of the market; yet that circumstance will not obviate the objection, that all the Acts of Parliament consider stock-jobbers as of two species, viz. that which is called the infamous practice of stock-jobbing and that which is honest.

[a] See Lord Eldon's judgment in *Ex parte* Dyster, 2 Rose's Bankrupt Cases, 349, 1 Meriv. 155; Smith *v.* Mawhood, 14 M. & W. 452.

The infamous practice is that in which a man enters into those engagements respecting the public funds which are prohibited by the Act of Parliament. The honest practice is that in which a man engages for the purchase or sale of stock whereof the vendor is possessed at the time."[a] And in his judgment in *Pit* v. *Cholmondeley*[b] (a suit arising out of transactions in South Sea stock in the year 1720), Lord Hardwicke remarked that the courts of justice had formerly given way to transactions established in 'Change Alley, although Holt, C. J., observed that he would not suffer 'Change Alley to give law to Westminster Hall: a singular instance of the all-engrossing mania of the day.

It was formerly laid down that the bankruptcy laws did not extend to persons buying, selling, or dealing in stock[c]; but by the 5 Geo. 2, c. 30, s. 39, brokers are made liable to the bankrupt laws; and it has been held that this clause extends to stock-brokers.[d]

It has long been an established rule that brokers employed by their principals in transacting business have no power to bind them by departing from the ordinary mode of conducting such transactions; so that, as stock is usually sold for ready money, a broker employed to sell stock cannot do so upon

[a] Morris *v.* Langdale, 2 Bos. & P. 284.
[b] 2 Ves. Sen. 567.
[c] Colt *v.* Nettervill, 2 P. Wms. 308.
[d] Cullen, 48. Brokers are enumerated among traders liable to become bankrupts by the Bankrupt Law Consolidation Act, 12 & 13 Vict., c. 106, s. 65.

credit without he be specially authorised so to do, although by giving credit he may be acting *bonâ fide* and with a view to benefit his principal.[a]

In the case of *Crull* v. *Dodson*[b], the defendant, a broker, had in his hands 5000*l.* of South Sea stock belonging to the plaintiff, who instructed him to sell when the stock rose to 200*l.* The defendant, when the stock had risen beyond that price, told him he had sold 1000*l.* to one person, at 200*l.* per cent. and 500*l.* to another who was his partner, and the rest he had taken himself at that price; and entries were made in his books, but in such a manner that it seemed as though done after the rise of the stock, and only designed as evidence in case of a dispute. The plaintiff insisted that at the time of the pretended sale stock was at 300*l.*

The Court was of opinion that the transaction was fraudulent, and that on the sale, if such there were, the plaintiff should have taken earnest, such a bargain being within the Statute of Frauds.

Where a broker by the direction of his principal entered into a contract with a third party for the sale of stock, which contract the principal refused to ratify, and upon such refusal the broker settled the difference himself with the third party, it was held that he could not recover the sum so paid from the principal in an action on assumpsit for money paid, but must bring a special action to recover

[a] Wiltshire *v.* Sims, 1 Camp. 258; Brown *v.* Boorman, 11 Cl. & Fin. 1.

[b] Sel. Ch. C. 41.

damages incurred by his principal's refusal to transfer the stock; but he is entitled, under this form of action, to recover his commission as broker.[a]

A person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though such principal may himself be ignorant of those rules. Many cases have established this doctrine; and although some few may, as will be seen in the following pages, appear at first blush inconsistent with the general principle, yet it is submitted that such inconsistency will be found to arise from circumstances that take the case out of the usual rule.

A stock-broker[b] sold for his employer Guatemala bonds and handed him over the proceeds. After they had been a short time in the purchaser's possession they were found to be unmarketable, owing to the want of stamps. Upon this being disclosed to the broker, he, without communicating with his principal or returning the bonds, refunded the sum paid for them. Both parties were ignorant at the time of the transaction that a stamp was necessary.

The broker brought an action against the principal for money paid to his use.

It was proved at the trial that brokers on the Stock Exchange do business as principals in dealing with foreign stock, and are liable to be expelled if they do not make good their differences. The

[a] Child *v.* Morley, 8 T. R. 610.
[b] Child *v.* Morley, 8 T. R. 610.

plaintiff had a verdict; and on a motion to enter a nonsuit, it was held that the plaintiff was entitled to retain his verdict; and that, even considering the plaintiff only as agent when he received authority from the defendant to sell the bonds, he received an implied authority to act as all brokers do upon similar occasions, that is to say, to rescind the contract if the article delivered turns out not to be the article sold.[a]

In *Bullock* v. *Noke*[b], Pratt, C. J., refused to admit evidence to shew the custom of "the Alley;" but now the courts will take notice of the rules and regulations affecting the mode of transacting business on the Stock Exchange; and it has been laid down as clear law, that if there be at a particular place an established usage in the manner of making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way, nor would it seem requisite that the employer should be cognisant of the particular usage; so that persons employing members of the Stock Exchange to transact business for them must be bound by its rules; and a principal cannot, in an action brought against him by his broker, avail himself of his supposed ignorance of the mode of business as there transacted. And where a broker was employed to purchase certain shares in a foreign railway company, and it appeared that no shares were at the time in the market, the foreign Govern-

[a] Young *v.* Cole, 3 Bing. N. C. 724; 4 Scott, 489.
[b] Str. 579.

ment not having authorised them, but that letters of allotment for shares were then, according to the evidence of the Secretary of the Stock Exchange, commonly bought and sold as shares in the company, it was held that the broker had, by purchasing such letters, properly executed his order.[a]

So where *A*, a stock-broker, applied to the plaintiff, a jobber, for the purchase of stock for the defendant, the plaintiff having no stock of his own requested one *W* to transfer stock standing in his name to the name of the defendant: the transfer was effected and the price of the stock paid by the plaintiff. The plaintiff, during a conversation with the defendant, requested him to give him the cheque of his principal. Evidence of the practice of the Stock Exchange was adduced to prove that the general usage was to give credit to the broker, even although the name of the principal were disclosed; but that sometimes, however, when the broker was not deemed sufficiently responsible and the seller unwilling to give him credit, the usage was either to demand actual payment in money or to take the cheque of his principal. There is also a printed rule of the Stock Exchange, declaring the broker to be the person responsible for the stock, notwithstanding any reference made by him to a third party. The learned Judge who tried the cause (Gurney, B.,) left it to the Jury to say whether, although by the regulations of the Stock Exchange

[a] Mitchell *v.* Newhall, 15 M. & W. 308.

the broker was the party considered liable, it did not follow that the principal might not be liable also; and whether the plaintiff had ever given credit to or taken the responsibility of *A*, or ever consented to release the defendant as the principal. The Jury found for the plaintiff, and the Court refused to grant a rule for a new trial, holding that the rules of the Stock Exchange would not make any difference as to the right of a party who sells stock to choose to what party credit shall be given if he thinks proper; and it was proved that it was in fact sometimes the case to look to the principal.[a]

A principal employed his broker to sell for him two hundred and fifty shares in the South Australian Company. The latter accordingly effected such sale with another broker on the day following that on which they had received their instructions. On the same day the principal called on his brokers to inform them that there had been a mistake, that he had intended only to sell fifty shares, and that he had not the number sold by the broker. The broker endeavoured to cancel the sale, but to that the purchasing broker declined to accede. By a rule of the Stock Exchange (which rule was admitted in evidence), if the selling broker be not prepared to fulfil his contract the purchaser may buy in shares to make up the deficiency, and charge the selling broker with any loss by deficiency of price. The selling broker being unable to complete his

[a] Mortimer *v.* M'Callan, 6 M. & W. 58.

contract, the broker bought in shares according to the rule; and there being a loss on the transaction, the selling brokers repaid him such loss and broker's commission for the purchase, and brought an action against their principal to recover the amount of the sums disbursed by them; and it was held that they were entitled to recover such amount in assumpsit for money paid[a]; and per Littledale J., "A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed."

The rules of the Liverpool Stock Exchange were held admissible in evidence to prove that the completion of a contract to transfer shares was proffered within a reasonable time, such rules being acted upon by the brokers there, although neither of the parties to the contract were themselves brokers.[b]

So where stock and share-brokers at Liverpool were employed to purchase certain railway shares and contracted for such purchase with another broker without disclosing the name of their principal, to whom they forwarded what is termed a bought note, stating that they had bought so many shares at such a price and charging for commission; evidence was adduced to prove, that, according to the practice of the Stock Exchange at Man-

[a] Sutton *v.* Tatham, 10 A. & E. 27; and see Johnstone *v.* Usborne, 11 *ibid* 549.

[b] Stewart *v.* Cauty, 8 M. & W. 160.

chester, there were two days in each month on which all accounts between brokers and between brokers and their customers were to be settled; in pursuance of which all sales made after a certain day were understood to be for the next settling day, although in some instances settlement is not enforced by brokers on the days prescribed. The broker of whom the shares were purchased did not perform his contract with the purchasing brokers by the next settling day, upon which their principal demanded either the scrip or the money advanced to them for its purchase; and on their refusing to refund it, alleging that things of the nature required could not always be procured when required, their principal sued them for money had and received. It was held that the plaintiff was entitled to recover the sum advanced; that the defendants were employed by him to make a bargain for shares to be delivered to him within a reasonable time; and that such time, according to the usage of brokers at Manchester, was understood to refer to the next settling day. After that day the plaintiff, finding that they had not procured the scrip, was quite justified in countermanding his order and demanding back his money.[a]

This case is of practical importance to brokers in so far as it establisbes the point that they must, in order to acquire a legal claim upon their principal, adhere to the strict rules of their calling; and

[a] Fletcher *v.* Marshall, 15 M. & W. 755.

that by granting an indulgence, however consonant to custom it may be, they depart from those rules, and do so on their own personal responsibility.

The last case was relied on in the one following, but, as will be seen from the facts, it was clearly distinguishable.

A person employed share-brokers at Liverpool to purchase for him for the 29th of August, being the account day, shares in a railway company. The purchase was made by the brokers in their own names, according to the practice of the Liverpool share market, and a contract note transmitted by them to their principal, who forwarded to them the amount due for the shares. The brokers were unable to deliver the shares on the 29th in consequence of the scrip having been called in by the directors on the 22d of August, for the purpose of registration and re-issuing sealed share certificates in lieu thereof. Upon registration the scrip is turned into shares, and re-issues in the form only of sealed certificates, which are transferable only by deed. The registration and re-issuing were not completed till the middle of December; and in the mean time the company had made a call of 5*l.* per share, which was necessarily paid by the party selling to the brokers, and he presented the shares to them with the additional demand for the call. The principal repudiating the transaction, they declined to accept, and the shares were resold at a loss of 226*l.*, which the brokers paid to the general seller.

The principal brought an action against the

brokers to recover back the sum he had transmitted them for the purchase of the shares.

A verdict was found for the plaintiff, and leave reserved to the defendants to move to enter a non-suit.

Lord Denman, C. J., held, that it appeared from the correspondence that the plaintiff was apprised in due time of the scrip having been called in and the call made, and also that the call must be repaid to the seller before the certificates would be delivered; and that from the correspondence and evidence it should be taken that the defendants purchased in their own names, and were themselves personally responsible to the sellers. That the money transmitted by the plaintiff to the defendants was to enable them to meet the liability which they had incurred at the request of the plaintiff and on his account, and was therefore not received in the first instance to his use. That there was no foundation for alleging that the defendants had by their own misconduct produced a failure of the original consideration for which the money was sent; nor was there sufficient foundation for contending that such misconduct consisted in their having of their own wrong given time to the seller for the delivery of this scrip. That the non-delivery on the 29th of August, and all the consequences which followed, were owing to circumstances over which neither party had any control. That there was abundant evidence to prove that the plaintiff was aware of those circumstances, and understood the contract

made to be subject to them. The reasonable construction of the contract was, that it was for delivery of scrip on the 29th of August if not then called in, otherwise of share certificates as soon as they should be re-issued.

Accordingly, if the plaintiff would have enabled them to pay for the shares when re-issued by supplying funds to meet the call with which they had become saddled in the mean time, the defendants must have applied the money received for that purpose, and if they had neglected it would have become money in their hands to the plaintiff's use; but he had wrongfully neglected to do so, and they had been compelled to add their own money to his in order to fulfil their contract; for the re-selling of the shares on account by the original seller, and then payment of their loss, was only another mode of so doing. That the action was not maintainable, and the rule was made absolute.[a]

As appears by the case of *Mitchell* v. *Newhall*[b], the question to be considered in actions brought by a principal against his broker for reimbursement of money lodged in the hands of the latter for the purchase of shares, which prove either irregularly issued or equivocally termed is,—Did the principal employ his broker to contract for the purchase of shares known in the market under such or such denomination?

[a] M'Ewen *v.* Woods, 11 Q. B. 13.
[b] See *supra*, p. 284.

In the case of *Lamert* v. *Heath*[a], the plaintiff brought an action against his broker to recover back sums paid by the former for the purchase of scrip certificates of shares in the "Kentish Coast Railway Company." It appeared that the company was formed in the latter part of the year 1844. Letters of allotment were issued on which deposits were paid, and scrip certificates duly signed by the secretary to the company were issued from their office, and were in the market for sale and purchase until June 1845, when the scheme was abandoned. The directors then refused to return any of the deposits, on the ground that those deposits had been received and the scrip issued without their authority; and moreover they denied the genuineness of the scrip so issued. The plaintiff sought to recover on the ground that the scrip bought for him by the defendant was, as averred by the directors, issued without their authority, and therefore not genuine "Kentish Coast Railway scrip."

The cause came on for trial before Pollock, C.B., who left it to the jury to say whether the scrip bought by the defendant for the plaintiff was genuine scrip of the Kentish Coast Railway or not. The jury found that it was not, and gave their verdict in favour of the plaintiff.

A rule for a new trial was moved for on the ground of misdirection; and it was held that the question was simply this: Was what the parties bought in the market "Kentish Coast Railway

[a] 15 M. & W. 487.

scrip?" It appeared to have been the only scrip bearing that denomination, and was, as such, the object of sale and purchase; and if bought by one person and sold by another the former had that which he contracted to buy, and the rule was made absolute.[a]

Those going to the Stock Exchange, as the preceding cases have shewn, to buy shares, must be presumed to have a knowledge of the law applicable to such transaction.

A person instructed his broker to buy certain shares in a registered railway company: the purchase was effected and the broker repaid the amount, but no transfer of the shares was executed and registered. Prior to the purchase a call had been made of so much per share, which the seller, remaining the registered owner, paid subsequently to the purchase. The purchasing broker was afterwards required by the selling broker to repay the amount of such call, the rule of the London Stock Exchange authorising the seller of registered shares to pay any call which may be made, and to claim the name of the purchaser: the broker, in compliance with this rule, repaid the selling broker the amount of the call.

It was held, in an action brought by the broker against his principal, that he was entitled to recover the amount he had paid upon the call.[b]

[a] See Jones *v.* Downman, 4 Q. B. 235; Midland Great Western Railway *v.* Gordon (Judgment of Pollock, C.B.) 16 M. & W. 808.

[b] Bayley *v.* Wilkins, 13 Jurist, 883; 18 L J.N.S.C.P. 273.

In the case of *Bowlby* v. *Bell*[a], the plaintiff relied upon a rule of the Stock Exchange at Hull (of which the purchaser of the shares was likewise a member), providing that all brokers belonging to that association should be personally responsible for the fulfilment of their contracts to each other; but no evidence was given to prove, nor did it otherwise appear, that the defendant was a member of such association, or that he was cognisant of the rule in question. But in a subsequent case, under almost parallel circumstances, the fact of the defendant's cognisance of usage was held immaterial. The case was this:—

A person residing at some distance from Liverpool employed a broker there to sell for him twenty scrip shares in a certain railway at so much per share, which was accordingly done to persons likewise sharebrokers at Liverpool. The shares were to be paid for on the next settling-day. On the day when the shares should have been delivered the principal made default, whereupon the purchaser bought an equivalent number at the market price, and called upon the broker to pay him the difference between the contract and the market price. It was proved to be the usage on the Stock Exchange at Liverpool for brokers to be answerable to each other for engagements entered into between them for third parties, and that the broker paid the amount claimed in compliance with such usage.

[a] 3 C.B. 284; see on this point Lightfoot *v.* Creed, 8 Taunt. 268.

The broker brought an action against his principal to recover that amount, and it was held that he was entitled to recover on the principle above laid down, that it was clear law, that if there be at a particular place an established usage in the manner of making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way, and it would seem not requisite that the principal should be cognisant of the usage.[a]

In the case of *Brittain* v. *Lloyd*[b], the doctrine to govern cases of this nature was thus laid down by Pollock, C. B.: "That if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid, and it is wholly immaterial whether the money is paid in discharge of a debt due to the stranger or as a loan or gift to him; on which two latter suppositions the defendant is relieved from no liability by the payment. The request to pay and the payment according to it, constitute the debt; and whether the request be direct, as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay and does pay, makes no difference."

[a] Bayliffe *v.* Butterworth, 1 Exch. 425.
[b] 14 M. & W. 762.

A share-broker at Leeds bought for and by the orders of the defendant railway shares, to be paid for on delivery. The shares were delivered, but had fallen in price between the time of the sale and delivery. The plaintiff being unable to pay for them at the time of delivery, the vendor demanded the shares back from the broker, and having received them, sold them at the then market price and called upon the broker to pay the difference, in conformity with the usage of the Stock Exchange at Leeds. The broker accordingly paid such difference, and brought an action against his principal for money paid to his use. The Court held, in accordance with the principles that governed their decision in the cases before cited of *Bayliffe* v. *Butterworth* and *Sutton* v. *Tatham*, that the principal must be considered as dealing with his broker according to the usage of the market in which he deals, and that a contract according to such usage was equivalent to a request to the broker to pay the deficiency if the principal failed to do so himself.[a]

A share-broker was instructed by his client to sell certain railway shares, which was accordingly done at a certain price per share. At the time of the sale the shares had been sent in to the company for the purpose of registration, pursuant to their act of incorporation; and in consequence of the delay which took place at their office, the registered shares were not delivered out till some months

[a] Pollock *v.* Stables, 17 L. J. N. S. Q. B. 352.

subsequently. The broker, in consequence of such delay, was unable to deliver the shares to the purchaser, who purchased other shares at an advanced price and claimed the difference from the broker, who paid it to him, notwithstanding he had received a written caution from his client to abstain from making such payment. The broker brought an action against his client to recover the sum paid for the difference in the price of the shares.

It was held by Tindal, C. J., that to render the action maintainable it was necessary that the plaintiff should prove either an actual request on the part of the defendant, or that the money was paid in discharge of some liability which the plaintiff had taken upon himself by the defendant's authority.

It appeared, by the correspondence between the parties, that the plaintiff was not authorised to make a contract for unregistered shares; and as, supposing such contract to have related to shares that had been registered, the purchaser had tendered no transfer, and could therefore maintain no action against the plaintiff, the latter had made the payment in his own wrong, and was consequently precluded from recovering against the defendant in an action for money paid to his use.[a]

The extent of the authority entrusted by the party employing the broker is the real test whereby to deduce a principle in cases of this nature. In

[a] Bowlby *v.* Bell, 3 C. B. 384.

Child v. *Morley*[a], which was an action brought by a stock-broker to recover from his principal the difference paid by him on an agreement for the sale of stock, there was no evidence of any custom that the broker was surety for the principal, and the action was held not to be maintainable.

A case of great practical importance to brokers was decided during Michaelmas Term 1849 by the Court of Common Pleas. As the various cases noticed in the preceding pages were there reviewed, it may not be unadvisable to give the case itself *in extenso*[b]. As a portion of the judgment turned upon the pleadings, the latter are likewise given :—

Assumpsit.—The first count of the declaration stated that the plaintiffs carried on the business of share-brokers, and that in consideration that the plaintiffs, as such brokers, at the request of the defendant, would, for certain reasonable reward &c., sell for the defendant, and on his account, certain, to wit, 5000 scrip or certificates for shares, purporting to be scrip or certificates for shares in a certain company, to wit, the Buckinghamshire, Oxford, and Bletchley Junction Railway Company, at the best market price to be then obtained for the same, the defendant then promised the plaintiffs, as such brokers as aforesaid, that the said scrip or cer-

[a] 8 T. R. 610; and see as to this point Lightfoot *v.* Creed, 8 Taunt. 268.

[b] Westropp and others *v.* Solomon, Nov. 7, 13 Jurist, 1104. The case is taken from the report in the Jurist.

tificates for shares were genuine scrip or certificates for shares in that company, and issued by them, the said company. The count then averred that the plaintiffs received from the defendant the said scrip, and, as brokers, afterwards sold the same as genuine scrip in the said company for 492*l.* 10*s.* 6*d.*, and which money the plaintiffs then paid over to the defendant. Breach, that the said scrip or certificates for shares were not genuine scrip or certificates for shares in the said company, and issued by the said railway company; but, on the contrary, were forged scrip or certificates for shares, and of no use or value whatever to the purchasers of the same. The count then averred that the purchasers called on the plaintiffs, as such brokers, according to the law and usage in that behalf, to repay to them the said sum of 492*l.* 10*s.* 6*d.*, together with certain damages which they claimed from the plaintiffs, which the purchasers had lost, and would have gained on the rise of the market price of genuine scrip in the said company; and that the plaintiffs were forced and obliged to pay the same to the purchasers, by reason of the said scrip turning out false and spurious, according to the law and usage in that behalf. There were also the common money counts for money paid for the use of the defendant, and for money received by the defendant to the use of the plaintiffs. The defendant pleaded, *inter alia*, non-assumpsit to the first count, and to the money counts, a payment into Court of 492*l.* 10*s.* 6*d.* The plaintiffs replied that they had

sustained damages to a greater amount than the money so paid into court; and issue having been joined, the cause was tried before Wilde, C. J., at the London Sittings after Hilary Term 1847, when a verdict was entered for the plaintiffs for the sum of 1300*l.*, subject to the opinion of the Court upon the following case:—The plaintiffs are stock and share-brokers, and members of the Stock Exchange in London. The defendant is a bill discounter in London; he is not a member of the Stock Exchange. On the 9th March 1846 a person applied to the defendant, requesting him to make an advance of money, by way of loan, upon the security of certain instruments purporting to be certificates of certain shares issued by the Buckinghamshire, Oxford, and Bletchley Junction Railway Company, and which were in the form set out at the end of the case, each certificate purporting to relate to fifty shares. On the 10th March the defendant took one of the instruments which was offered as the security for the advance to the plaintiffs' office, and inquired of Mr. *M*, one of the plaintiffs, if the instrument was good; and Mr. *M* said it was good, but, to satisfy the defendant, he would go into the market and inquire if it was good. He did so, and returned, and said it was good, or, as the witness believed the words were, "It is all right." The defendant, after receiving the information, on the same day made the required advance upon the security of the said certificates, being the same as those sold by the plaintiffs for the defendant as

hereafter mentioned. On the 27th March 1846 the defendant employed the plaintiffs to sell for him the ten certificates upon which the defendant had made the advance of money under the circumstances before mentioned, and the defendant delivered the certificates to the plaintiffs for that purpose. The plaintiffs sold the ten certificates according to the defendant's orders, and paid him the balance of the proceeds of the sales. After deducting the commission payable in respect of the sales, the gross proceeds were £487 10 0

Commission deducted 15 12 6

Net proceeds paid by the plaintiffs to the defendant £471 17 6

The case then stated to whom the certificates were sold, part being sold to members of the Stock Exchange, and the rest to a person who was not a member. After the sales, suspicion arose in the share market that forged certificates, purporting to refer to shares issued by the before-mentioned company, were in circulation, and that suspicion was followed by an exhibition at the office of the company of numerous certificates, and the ten certificates sold by the plaintiffs as above stated, among many others, were found to be forgeries. In consequence of the discovery of the forgeries, a committee was appointed by the subscribers of the Stock Exchange to deliberate and determine what was proper to be done among the parties who had

had transactions and dealings in that establishment relating to such forged certificates, and that committee adopted and published the following resolution on the subject:—"That the holders of shares of the Buckinghamshire Railway Company which have been declared by the company to be spurious shall have the right to demand of the sellers thereof genuine shares in exchange, or, until such can be procured, to pay for the same at the rate of *2l.* 12*s.* per share (10*s.* premium), such amount to be retained until genuine shares are delivered." By the regulations and practice of the Stock Exchange, all brokers, although they may in fact be dealing for principals, are deemed to be principals, and liable as such, and are required to answer the responsibilities they so incur under pain of expulsion. The rules and resolutions of the Stock Exchange profess to apply only to members of the establishment, and to transactions taking place within such establishment. After the discovery of the forgeries the plaintiffs were called upon by the respective purchasers to refund the purchase-money and to indemnify them from loss; whereupon the plaintiffs called upon the defendant, as their principal, for instructions and indemnity. The case then set out the letters from the plaintiffs to the defendant asking for the indemnity. The defendant refused to give the plaintiffs any instructions or indemnify; and the plaintiffs, afterwards yielding to the demands made upon them by the respective purchasers of such forged certificates, paid certain sums of money,

by way of damage or compensation, to such respective purchasers, such payments being calculated and adjusted on the principle laid down in the resolution of the Stock Exchange committee, and which payments amounted in the whole to the sum of 1300*l.* It is to be taken as an undoubted fact, that both the plaintiffs and the defendant acted throughout, up to the time of the forgeries being discovered by inquiry at the office of the company long after the sales, in the belief that the certificates referred to were genuine available certificates, duly issued by the company mentioned in them. The forgeries were so well executed as to excite no suspicion, and passed currently in the market with genuine scrip. The defendant has paid the sum of 492*l.* 10*s.* 6*d.* into court. The Court is to adopt such inferences of fact from the statement of the case as it may think a jury ought or might properly have drawn. The question for the opinion of the Court is, whether the plaintiffs are entitled to recover against the defendant any, and if any, what, sum of money exceeding the amount paid into court. If the Court shall be of opinion that the plaintiffs are entitled to recover, then a verdict is to be entered for the plaintiffs for such sum on such counts and on such issues as the Court shall direct. If the Court shall think the plaintiffs are not entitled to recover any sum beyond the amount paid into court, then a nonsuit to be entered.

It was contended on the part of the plaintiffs

that they were entitled to be reimbursed the amount of the loss, on the general principle applicable to transactions between principal and agent; and the passage in Story on Agency (s. 339)[a] was quoted in support of that doctrine. The cases of *Betts* v. *Drewe*[b], *Sutton* v. *Tatham*[c], *Bayliffe* v. *Butterworth*[d], *Bayley* v. *Wilkins*[e], *Young* v. *Cole*[f], *Shaw* v. *Holland*[g], *Tempest* v. *Kilner*[h], and *Lamert* v. *Heath*[i], were cited in favour of the plaintiffs' argument. On the other side it was maintained that the sale was a sale of the specific scrip delivered to the plaintiffs by the defendant; nor could any warranty of genuineness be implied from the transaction; and that the rule of the Stock Exchange by which brokers are to be deemed principals only placed the plaintiffs in the same position as the defendant himself would have been in had he sold the scrip himself; that there was no other rule affecting the case; and that the cases referred to were distinguishable.

Per Maule, J.: "This is an action of assumpsit, and the declaration consists of a special and common counts. The special count is, in effect, that the plaintiffs were partners in the business of share-brokers, and that they were employed by the

[a] "If an agent has without his own default incurred losses or damages in the course of transacting the business of his agency, or in following the instructions of his principal, he will be entitled to full compensation therefor."

[b] 2 Ad. & E. 57.
[c] *Vide supra*, p. 286.
[d] *Vide supra*, p. 294.
[e] *Vide supra*, p. 292.
[f] *Vide supra*, p. 283.
[g] *Vide supra*, p. 236.
[h] *Vide supra*, p. 223.
[i] *Vide supra*, p. 291.

defendant, as such brokers, to sell for him certain scrip or certificates for shares, purporting to be scrip in a certain company, at the best market prices to be obtained for the same, and that in consideration thereof the defendant promised that the said scrip was genuine scrip in that company; that the plaintiffs sold the scrip accordingly, and that the same afterwards turned out to be not genuine; and that, according to the usage of brokers, the plaintiffs were forced and obliged to pay to the purchasers of the scrip the prices at which it was sold, together with certain damages for sums which the purchasers had lost on the genuine scrip. The common counts are for money paid and money had and received. It appears that there was in the market certain scrip purporting to be scrip of this company, and that some of it was in the possession of the defendant, who had been applied to to advance a sum of money on it. It appears that the defendant took one of these scrip certificates to one of the plaintiffs, and inquired if it was good, and that the plaintiff said it was good, but that, to satisfy the defendant, he would go into the market to inquire if it was; and that he accordingly did so, and returned and said it was good, or that it was all right. There may be something equivocal in what passed at this interview, whether the defendant inquired if the document were genuine scrip, and the answer of the plaintiff was that it was so; or whether the application by the defendant was not to know whether the scrip was a valuable security

in the market. But although there may, therefore, be some doubt in what sense the answer was given by the plaintiff, I do not think that this case is to be influenced by that, as it is certain that both parties were equally innocent of the fraud, and acted *bonâ fide* in the matter. The defendant, it appears, thereupon made the advance, and then comes this important part of the case. The case states that the defendant employed the plaintiffs to sell for him *the ten certificates* upon which the defendant had made the advance of money, that the defendant delivered *the certificates* for that purpose, and that the plaintiffs sold *the ten certificates* according to the defendant's orders. That is all that is stated in the case about the employment of the plaintiffs. The case goes on then to shew to whom the sales were made; that after the sales, a suspicion having arisen as to the genuineness of the certificates, they were examined into and found to be forgeries; and that a committee of the Stock Exchange appointed on the subject made certain resolutions, which are set out in the case, and in obedience to which resolutions the plaintiffs afterwards paid to the purchasers of the certificates certain compensation beyond the amount of their purchase-money. Now the question is, whether the plaintiffs are entitled to recover from the defendant that ulterior amount which they so paid. With respect to the general liability between a principal and agent there appears not to be much difference between the counsel on either side. It

seems to be agreed by both, that where a principal employs an agent he undertakes to indemnify such agent against the payment of any sum incurred by the latter whilst pursuing such employment. The amount in such case may be recovered by the agent under a special count; or where money has been paid by him it may be recovered under the common count for money paid. The judgment of the Court in *Brittain* v. *Lloyd*[a] shews that sufficiently; and the law on that point is correctly stated by Mr. Justice Story, in the passage from his book cited by Mr. Hoggins. In *Brittain* v. *Lloyd* the main question was, whether money could be recovered under the common count for money paid, when it has been paid under circumstances which did not relieve the defendant from a liability to a third person; and the Court held that it could, if the money was paid at the request, express or implied, of the defendant; and on that ground they distinguished it from *Spencer* v. *Parry* (3 Adol. & Ell. 331), which had been relied on by counsel for the defendant as an authority to the contrary. In the present case it cannot be doubted that the defendant would be liable to the extent to which the plaintiffs would necessarily be bound to pay in the course of the due performance of their employment. The question is, what, under the circumstances of the present case, is the extent of such liability. As to the special count, it appears to me that that is not sustained on the ground which has been suggested

[a] *Vide supra*, p. 294.

by Mr. Cowling, namely, that the contract there alleged has not been proved by the facts in this case. The contract stated in that count is, that, in consideration that the plaintiffs would sell the scrip, the defendant promised that the same was genuine. If that was the contract, it would follow, that if the scrip should be sold and paid for, though the genuineness of the scrip should never be questioned by the vendee, and though he might be satisfied notwithstanding the scrip was not genuine, yet the plaintiffs, by proving that it was not genuine scrip, would be entitled to a verdict against the defendant, at least for nominal damages. Now I cannot think that such a promise as that can be inferred from the facts in this case, but that the promise to be inferred is only a promise of indemnity. The first count is therefore, I think, out of the question. Now as to the count for money paid, the case is, that the defendant employed the plaintiffs to sell certain specific certificates of shares, and I cannot find in the case any statement shewing that the defendant authorised the plaintiffs making such a contract as a sale of a number of certificates generally. There is no statement in the case that such was the usual mode of transacting business on the Stock Exchange, or that such was what was, in fact, done in the present instance; but the case, on the contrary, states that the defendant delivered *the certificates* to be sold, and that the plaintiffs sold *the certificates* accordingly; and I cannot, therefore, proceed on the assumption that

there was any other sale than the sale of those particular certificates. What, then, is the consequence upon its turning out that the certificates were forgeries, and both parties being equally innocent and equally free from being guilty of any fraud? It cannot, I think, be doubted, that the vendee is at least entitled to get back his purchase-money. This he has received, and to this extent the plaintiffs have now been repaid by the defendant. Now what beyond this the plaintiffs have paid, and claim to be repaid by the defendant, appears to be a sum which they have paid under the orders of a committee of the Stock Exchange. The case, however, does not shew any course of dealing on the Stock Exchange with respect to shares sold there, or any thing which would make the rules of the committee binding on the plaintiffs. There are cases in which it has been said that a party employing a broker on the Stock Exchange employs him according to the course of dealing on such Stock Exchange; but here it is not shewn whether the plaintiffs were so employed, and it may, indeed, be doubted whether the resolution of the committee as to the sales in question falls within those cases. Besides, it is not shewn in this case whether, according to the course of dealing on the Stock Exchange, shares are commonly sold at that place; but supposing that it did appear that the Stock Exchange is the ordinary place for the sale of shares, is there any rule of the Stock Exchange shewn to be existing by which the resolution made

by this committee would be binding on the plaintiffs? There is nothing to shew that if disputes arise they are to be decided by a committee of the Stock Exchange, and that such decision is to be binding. Even if this resolution of the committee was binding, it is not shewn that the sale in question falls within it; for it may be that such resolution was intended to be applicable to the sale of shares generally, and not to the sale of specific scrip. Indeed, it seems to me that such resolution is no further binding than as a declaration of what is right and just in the matter, independently of any such decision of the committee. Now in the present case, what is right and just for the plaintiffs to recover is what the vendee paid for the scrip, and which has been refunded; and I do not think that the plaintiffs have made out that they are entitled to recover to a greater extent than that. It is like the case of a forged Bank-note which has been cashed; the party must give back the money he received on it, but that is all. So, when the plaintiffs sold this scrip, at that moment the right of the vendee accrued to ask back the money he had paid for it; but he had no right to ask to have given to him genuine scrip. The amount, therefore, which the plaintiffs are entitled to recover is what the plaintiffs were liable to pay to the vendee at the moment the scrip was sold, and that was the money which the vendee had paid for it; no more than was necessarily paid by the plaintiffs, and therefore no more can now be recovered from the defendant."

Williams, J.: I am of the same opinion. There seems to be nothing in the case to support the promise laid in the first count. Then, as to the common counts, I think that the employment of the plaintiffs in this case was to sell the scrip in the usual course of their dealing as brokers, and to sell it as being genuine scrip; and further, that the defendant undertook to indemnify the plaintiffs against any legal damnification consequent to their executing such authority. It seems, however, to me, that, under the circumstances of the sale, as stated in this case, the plaintiffs were not liable to the vendee, by reason of the scrip not being genuine, to an extent beyond that for which the scrip was sold. Had the sale been effected elsewhere than on the Stock Exchange, the plaintiffs would not have been liable beyond that extent; and I cannot see that in this case a greater liability has been incurred, nor do I see that there was any legal liability imposed on the plaintiffs to comply with the resolution of the committee of the Stock Exchange. The defendant having paid into court a sum of money sufficient to cover that sum originally paid on the sale of the scrip, I am of opinion, therefore, that a nonsuit must be entered."—*Judgment accordingly.*

Now, it is submitted that the judgment in this case is perfectly reconcileable with the doctrine laid down in the cases therein referred to, to the effect that the rules and regulations of the Stock Exchange are binding on those persons who, not

belonging to that body, employ brokers who are members of the Stock Exchange to conduct their transactions. It was under no *rule* of the house that the question arose, but merely from a special resolution adopted on account of the special circumstances of the case, which placed the transaction out of the ordinary course of conducting dealings of that nature.

There is another point arising out of this case which appears to merit attention. The contract was for the sale and purchase of certain scrip purporting to be scrip for shares in a certain company. Now the documents delivered to the brokers being forged were utterly valueless, and therefore not such property as formed the subject-matter of the contract: the broker having disposed of them to a third party was compelled to hand to such party the genuine article contracted to be bought by the latter, and that at an advance in price beyond what he received for the instruments that proved worthless, and not such as were contracted for. Now it is assumed, with great deference, that he had a right to demand of the defendant, either to be put in possession of the scrip actually contracted for, or, failing to receive such scrip, to be reimbursed the amount he was compelled to advance, in order to give effect to the contract into which he had entered with a third party. Supposing that there had been a depreciation in the value of the scrip subsequent to the discovery of the forgery, might not the defendant have been justified in saying,

"No, you shall not have your money returned; but as you tell me that instead of handing to you the scrip you contracted to sell for me I have given you mere waste paper, I will at once put you in possession of those documents which formed the subject-matter of the contract between us." [a] And he would have gone into the market and purchased and delivered genuine scrip, being of course a gainer by the transaction. As this point does not appear to have been mooted during the arguments, these observations are offered with the greatest deference.

By the 19th section of the 6 Geo. 1, c. 18, passed to suppress certain gambling undertakings and bubble companies, all such are deemed nuisances. This, and the 18th and 20th clauses, were repealed by 6 Geo. 4, c. 91; thus leaving such undertakings to the operation of the common law. To an action for money lent &c., defendant pleaded that himself, the plaintiff, and others did illegally associate in a certain undertaking tending to the common nuisance of the subject &c. (following the language of the 18th section of the Act). The plea was held bad; for raising and transferring of stock in a company cannot be considered an offence at common law, such description of property being unknown to our law in ancient times. It was created an offence by a certain clause in a statute;

[a] See the judgment of Gibbs, C. J., in Jones *v.* Ryde, *supra*, p. 96.

and that being repealed, there is no authority for holding an allegation that the parties raised and transferred stock to be simply and *per se*, without any statement of the mode by which it injures or defrauds the public, an indictable offence at common law.[a]

In the case of *Wells* v. *Porter*[b], which was an action brought by brokers against their principal for work and labour done with respect to transactions in foreign funds, it was contended that contracts relating to such transactions were an offence at common law, and that work and labour bestowed thereon fall within the same condemnation; but per Tindal, C. J.: "It is not clear, however, that such dealing was an offence at common law; and it is to be observed that the language of the statute (7 Geo. 2, c. 8) is *enact*, not *declare*: there is no recognition that the dealing was an offence before. But at the most such a contract would be only void, and the work of the agent who effected it could scarcely be called illegal. I do not see my way with sufficient clearness to say that any part of the transaction would be illegal at common law."*

Before the passing of the 6 Geo. 4, c. 91, repealing certain clauses of 6 Geo. 1, c. 18, it was held that a company pretending and assuming to act as a corporate body, and having neither charter

[a] Garrard *v.* Hardey, 5 Man. & Gr. 471; Harrison *v.* Heathorn, 6 *ibid.* 81.

[b] 2 Bing. N. C. 729.

* *Vide supra*, p. 206.

nor Act of Parliament, was illegal; and that, being so, they had no right to issue transferable shares, and that all dealing in such shares was illegal, and therefore all contracts respecting them were null and void.[a]

The rule of the courts of equity is, that a man shall not be compelled to answer to any facts which may tend to criminate him or subject him to penalties or forfeitures; but a person may, by his own act, exclude himself from the benefit of such rule, or, as has been observed by a very great judge, he may contract himself out of the protection afforded by the principle of the Court.

Thus, where a bill of discovery was filed against a broker of the city of London in aid of an action brought against him by his principal for misconduct, it was held that he was bound to answer such bill, although he might thereby render himself liable to the penalties of a bond given by him to the corporation on his admission to act as broker.[b]

If a bill be filed against stock-brokers praying a discovery of certain sales of stocks and shares, the defendants cannot refuse such discovery on the ground that some of the sales would render them liable to the penalties imposed by the 7 Geo. 2, c. 8,

[a] Josephs *v.* Pebrer, 1 Car. & P. 507.

[b] Green *v.* Weaver, 1 Sim. 404. This case is particularly deserving of attention, as his Honour the Vice-Chancellor, Sir Anthony Hart, in his judgment reviewed the whole of the cases bearing on this important point.

if it be they who state and insist upon the illegality of the transactions.[a]

A bill was filed against a broker stating plaintiff to have transferred certain shares into the defendant's name, and that there had been various dealings and transactions between them. The bill contained interrogatories inquiring particularly as to the dealings and transactions between the parties. The bill prayed for a re-transfer of the shares. The defendant by his answer set out the 7 Geo. 2, c. 8, s. 8, and stated that he was a stock-broker, and that his answers would render him liable to the penalties of the Act. It was held that he was not bound to answer.[b]

If a sale of shares be illegal, the broker who negotiated such sale and received the proceeds cannot set up the illegality of the transaction in answer to an action for money had and received, the purchaser not having insisted on such illegality.[c]

A broker entering into a written contract in his own name for the sale of shares cannot afterwards, in an action against him for non-completion of the sale, set up as a defence that he was acting as broker merely; for although known to be a broker, he was liable if he signed the contract in his own name; and evidence of a custom in Liverpool for

[a] Fisher *v.* Price, 11 Beav. 194.
[b] Short *v.* Mercier, 18 L. J. N. S., 490 *coram* K. Bruce, V.C.
[c] Bousfield *v.* Wilson, 16 M. & W. 185.

brokers to send in notes without disclosing the name of their principal is inadmissible, as seeking to vary the written contract.[a]

A broker sold 100 shares in a railway company for his principal, to a jobber, on condition that he should give the name of his, the jobber's, principal on a day named. On that day the broker's ticket was sent, requiring the shares to be transferred into the name of *P.* The vendor executed the transfer-deed, but *P* refused to execute, as the certificates were not issued; but, on a memorandum being indorsed that the certificates were in the office, he accepted the same and paid the money. *P* having refused to register himself as the owner of the shares, the vendor filed a bill against him, alleging that the jobber was his agent, and praying a decree that he might be ordered to register himself and pay the past calls, and indemnify the vendor against future calls. The defendant contended that he was not a principal, but only an agent for a defaulting principal; and that as there was no bargain to register, and as the full price was given, he was not now bound to register. But it was held by Knight Bruce, V. C., that the facts of the case precluded the defendant from denying a privity between him and the plaintiff; that the defence was without apology or excuse. The defendant was bound to have himself registered, so as to relieve the plaintiff. That he must pay the calls that have

[a] Magee *v.* Atkinson, 2 M. & W. 440.

been made since the sale, and he must indemnify the plaintiff against all future calls in respect of the shares. That the defence was without truth or justice; and, if matters like this were to be always so conducted and brought before the Court of Chancery, the business of the Stock Exchange must cease That there must be a reference to the Master, if necessary, to inquire what calls have been made, when they were made, and what was due on them. That the defendant must execute the transfer-deed and deliver the same to the secretary, in conformity with the Act of Parliament; and the plaintiff must authorise the trustees of the company to deliver the certificates to the defendant, and the defendant must pay the costs of the suit.[a]

The notes and accounts forwarded by brokers to their principals after they have been checked by the jobber are admissible in evidence without being stamped. On an objection taken to the reception of such unstamped documents, Littledale, J., held that they did not require a stamp. The minutes or memorandum of agreements under the Stamp Act were between party and party; but papers of this nature were merely the broker's account to his principal of what he had done. If the broker were agent for both parties, and made a minute of such bargain, such minute must have been stamped; but as he is only agent for one party, and makes the minute for his own principal, it requires no stamp[b].

[a] Wynne *v.* Price, 13 Jurist, 295.
[b] Josephs *v.* Pebrer, 1 Carr. & P. 341.

And in a similar case the same decision was upheld, Lord Tenterden, C. J., saying that brokers' notes are not contracts nor evidence of contracts: they may be evidence that the broker has performed such a transaction.[a] In the last case the note produced related to the purchase of shares in the Continental Gas Company; and it was contended that the paper purported to be no more than an account furnished by the broker to his principal, similar to brokers' notes on the Stock Exchange.

A mere acknowledgment of a debt or duty does not require a stamp.[b]

Brokers may object to give evidence as to their dealings in time bargains, but they are compelled to produce their books if served with a *subpœna duces tecum*, although this seems to have been at one time doubted.[c]

Where a person complains of a libel written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to such complaint, but fraud *ultra* that transaction is not to be imputed to him: so that a party illegally negotiating a loan cannot maintain an action for a libel written concerning such illegal

[a] Tomkins *v.* Savory, 9 B. & C. 704.

[b] Mullet *v.* Hutchison, 7 B. & C. 639; Langden *v.* Wilson, *ibid.* 640.

[c] Rawlings *v.* Hall, 1 Carr. & P. 11, 335; and see notes. On the trial it appeared that the six months within which the penalty must be sued for under the 7 Geo. 2, c. 8, had expired; but Burroughs, J., who tried the case, was of opinion that the broker might be prosecuted at common law; *sed quære.* And see Clark *v.* Capps, 1 Carr. & P. 199.

transaction.[a] A foreigner has no right to negotiate in England a loan for the use of a state which has separated itself from, and is at war with, one of England's allies (such state not being at the time recognised by England as independent); so that the strongest animadversions upon the illegality of such transaction is no libel.

As the Act of 7 Geo. 2, c. 8, has prohibited all time bargains, an action for defamation will not lie against a party for applying the term "lame duck" to a stock-jobber, unless it be shewn that those words were spoken of him with reference to such contracts as are not forbidden by the Act, and this must be expressly averred in the declaration. It is not sufficient to allege that he, the plaintiff, was accustomed lawfully to contract; this allegation amounting to no more than saying that he had entered into some lawful contracts, *non constat* that, as such jobber and dealer, he may not have entered into some which were unlawful.[b]

One of two trustees cannot order a broker to purchase the trust stock unless with the authority and concurrence of his co-trustee; and on breach of contract by such trustee the broker could not maintain an action against him alone.[c]

Where a broker, entrusted with money to buy Exchequer bills for his principal, misapplied the

[a] Yrisarri *v.* Clement, 3 Bing. 432; 2 Carr. & P. 223; Langton *v.* Hughes, 1 M. & S. 596.
[b] Morris *v.* Langdale, 2 Bos. & Pul. 284.
[c] Leyton *v.* Sneyd, 2 Moore, 583.

money by purchasing American stock and bullion, and was captured whilst about to abscond, whereupon he surrendered the stock and bullion to his principal, who sold the whole and received the amount, it was held that the principal was entitled to retain such amount against the assignees of the broker, who became bankrupt on the day on which he so reeived and misapplied the money; for an abuse of trust can confer no rights on the party abusing it, or on those who claim in privity with him[a]. So where a trader in London, having money of his principal in his hands, bought South-Sea stock as broker for his principal, and took the stock in his own name but entered it in his account book as bought for his principal, and then became bankrupt, it was determined that the trust stock was not liable to the bankruptcy, Lord Parker saying that it would lessen the credit of the nation to make such a construction.[b]

There is a remedy in equity as well as at law by a principal against his broker or agent to recover a sum of money paid to the broker on his untrue representation that he had entered into a contract for his principal, which alleged contract had in fact no existence.[c]

In the case of *Lopes* v. *De Tastet*, the Court of Common Pleas, without laying down any general rule on the subject, refused to allow any thing to

[a] Taylor *v.* Plumer, 3 M. & S. 562.
[b] *Ex parte* Chion, 3 P. Wms. 187.
[c] Wilson *v.* Short, 6 Hare, 366.

brokers for their loss of time in attending to give evidence.[a]

It was formerly held[b] that a broker might be called to prove a contract, but not whether that contract had been properly executed or no; but such evidence would be now admissible under 3 & 4 Will. 4, c. 42, and 6 & 7 Vict., c. 85.

In order to prove that scrip has been called in by a joint-stock company to be registered under the 8 Vict., c. 16, s. 9, some one should be called from the company's office; the evidence of the clerk of the brokers who sent them in for that purpose will not be admissible unless he produce the scrip itself.[c]

It would seem by the case of *Colt* v. *Nettervill*[d], that brokers dealing in stock were not liable to the bankrupt laws; but by the 5 Geo. 2, c. 30, s. 39, and in all subsequent Bankruptcy Acts, bankers, brokers, and factors are made subject to the bankrupt laws.

By the 5 & 6 Vict., c. 122, s. 38, it is enacted, *inter alia*, that no broker shall be entitled to his certificate under that Act, if he shall within one year next preceding his bankruptcy have lost 200*l.* by any contract for the purchase or sale of any Government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not

[a] 3 Brod. & Bing. 292.
[b] Gevers *v.* Mainwaring, 1 Holt, 138.
[c] M'Ewen *v.* Woods, 2 Car. & Kir. 330.
[d] *Vide supra*, p. 54.

actually transferred and delivered in pursuance of such contract.

Where an executor transferred stock to a legatee, and paid the broker who effected the transfer and attended at the Bank to identify him as the proper person to make such transfer, the usual commission of one-sixteenth per cent., Lord Langdale, M. R., allowed the payment in passing the executor's accounts. The master, in his report, had disallowed the amount claimed (96*l.* 12*s.*) except as to sixteen guineas. It was urged against the broker's claim that the intervention or assistance of any broker or member of the Stock Exchange was not a matter of necessity. But Lord Langdale, after inquiring into the usual practice, set the question to rest as to a broker's claims by allowing the exceptions to the master's report.[a]

And this same point received a similar decision in the case of *Davenport* v. *Powell.*[b]

[a] Jones v. Powell, 6 Beav. 448.
[b] 14 Sim. 275.

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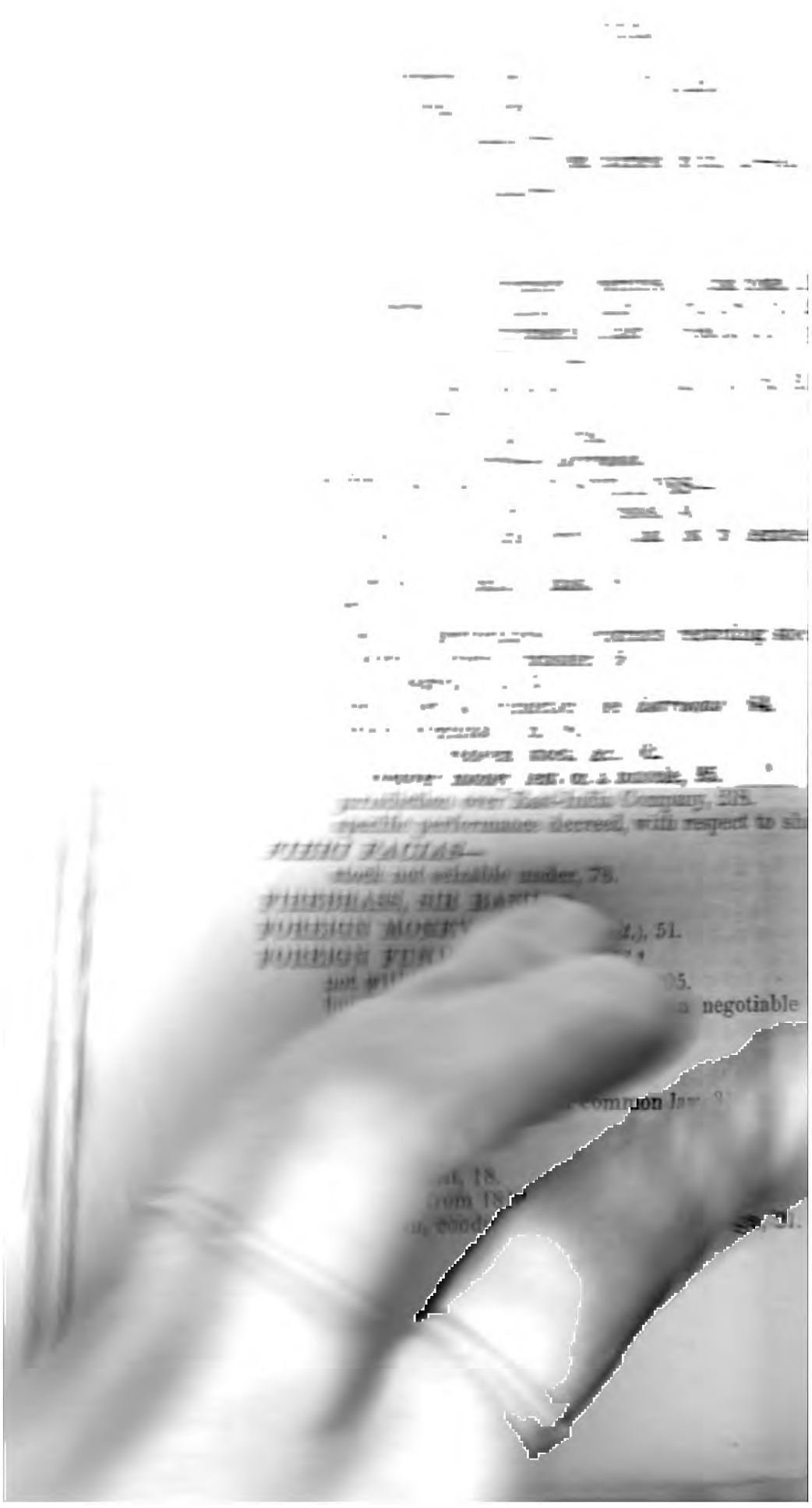

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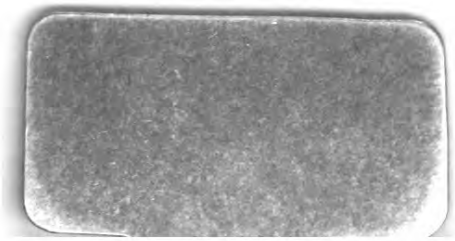
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