CHAPTER-TWO
DEFINITIONS, NATURE AND PARTIES TO THE NEGOTIABLE INSTRUMENTS

I. DEFINITIONS OF A PROMISSORY NOTE

(A) Statutory Definition-

Section 4 of the Negotiable Instruments Act, 1881 defines the ‘Promissory Note’ as under:

“Promissory note” is an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.”

(B) Dictionary Meaning -

Venkataramaiya’s law Lexicon Dictionary defines promissory note as under:

“The court is bound to start with the presumption that a promissory note, the genuineness of which is admitted or proved, was made for consideration. But it is a rebuttable presumption and the recitals in the instrument are only prima facie evidence against the parties thereto, the weight to be attached to them varying with the circumstances.”

Jowitt’s Dictionary of English law defines Promissory note as under:

“Promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable further time, a sum certain in money to, or to the order of, a specified person or to bearer. It may contain also a pledge of collateral security but it may not contain any thing else. It may be made by two or more

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1 2nd Ed. 1982, Vol. 111
2 2nd Ed. 1977 by John Burke at p. 1445
persons, who may make them selves liable Jointly or Jointly and severally. The note can require payment at a particular place.”

Mitra’s legal and commercial Dictionary defines Promissory note as under:-

“Promissory note ‘means any instrument where by the maker engages absolutely to pay a specified sum of money to another at a time there in limited, or on demand or at sight.”

Black’s law Dictionary defines Promissory note as under:-

“A promise or engagement in writing to pay a specified sum at a time there in limited, or on demand, or at sight, to a person there in named, or to his order or bearer. A written promise made by one or more to pay another or order, or bearer, at a specified time, a specific amount of money, or other articles of value.”

Wharton’s law lexicon dictionary defines Promissory note as under:-

“An unconditional promise in writing, made by one person to another, signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to or the order of specified person or to bearer.”

K.J Aiyer’s Judicial Dictionary defines Promissory note as under :

“It is an instrument in writing (not being a bank note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money, only to or to the order of a certain person, or to the bearer of the instrument. The person signing the instrument is called the maker, the person in whose favour it is made or to whom it is made payable is called the payee, when the instrument is transferred by endorsement, the party transferring is called the endorser. While the party to whom it is transferred is called the endorsee.”

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3 Josolyne v. Roberts (1908) 2 K.B 349
4 2nd Ed 1976 by AR.Biswas at pp. 561-562
6 14th Ed Re-print 2006, p. 809.
John burke’s concise law Dictionary defines Promissory note as under :-

"An unconditional promise in writing, made by one person to another signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer."

P.G.Osborn’s The concise commercial Dictionary defines Promissory notes as under :

“An unconditional promise in writing, made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer. By making the note, the maker engages that he will pay it according to its tenor, and he precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.”

Stroud’s Judicial Dictionary defines Promissory note as under :-

“The expression ‘Promissory note, includes any document or writing (except a bank note) containing a promise to pay any sum of money “(Stamp Act 1939 (c39), s 33(1) replacing stamp Act 1870 (c 97), s 49(1). A document is not within that definition unless it contains, a promise to pay a definite and ascertained sum of money, which promise is substantially the whole contents of the document Mortgage

Insturance v. In Inland Revenue Commissioners9; Brown v inland Revenue Commissioners,10 cited marketable security.”

“ A promissory note by two or more that time may be given to either without the other’s consent, does not necessitate an agreement stamp nor present the document from being a good promissory note. But semble, the exact opposite was

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76th Ed 1976 by John Burke at p 267.
8 1st Indian Reprint Ed 1997 pp. 170-171
9 21 Q.B.D. 165.
10 (1895) Q.B 598.
11 4th Ed 1947 by John S. James, p 2145.
held in Kirkwood v. Smith, but Kurkwood v. Smith is now over ruled, and Yates v. Evans is approved by CA Kirkwood v. Carioll.

II. DEFINITION OF BILL OF EXCHANGE

A. Statutory Definition –

Section 5 of the Negotiable Instruments Act, 1881 defines the “Bill of Exchange” as under:

“A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.”

A promise or order to pay is not “conditional”, within the meaning of this section and section 4, by reason of the time for payment of the amount or any installment there of being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be “certain” within the meaning of this section and section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an installment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made may be a “certain person” within the meaning of this section and section 4, although he is misnamed or designated by description only.

B. Dictionary Meaning –

T.P Mukherjee law Dictionary with pronunciation defines Bill of Exchange as under:

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12 (1896) 1Q.B 582
13 612 JQB 446.
14 1903, K.B 531.
“A bill of exchange is an uncondition order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or the order of a specified person or to bearer.”

A document otherwise in the form of a Bill of exchange, but having no drawers name to it, is not a bill of exchange within ss 22,24 & 25.

Sen AC. Legal and commercial dictionary defines Bill of Exchange as under :

“Bill of Exchange includes a hundi and a cheque. A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of certain. Person or to the bearer of the instrument.”

Black ‘s law Dictionary defines Bill of Exchange as under :

“Bill of Exchange. A three party instrument in which first party draws an order for the payment of a sum certain on a second party for payment to a third party at a definite future time.”

Wharton ‘s law lexicon Dictionary defines Bill of exchange as under :

“As an unconditional order in writing, addressed by one parson to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.”

K.J. Aiyers judicial Dictionary defines Bill of Exchange as under :

“It is a written order or request by one person to another for the payment of money at a specified time absolutely and at all events. A bill of exchange is only a transfer of a chose in action according to the custom of merchants, it is

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16 R V. Harper.50 L. J.M.C 90 : 7 Q.B.D.78 F.
an authority to one person to pay to another the sum which is due to the first.”

P.G. Osborn’s. The concise commercial Dictionary defines Bill of Exchange as under:

“An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of, a specified person, or to bearer. A bill of exchange is a negotiable instrument.”

A bill is given by drawer, and addressed to the drawee’s who becomes the acceptor by writing his name across the face of the bill. The bill is payable to the payee, who must be named or indicated with reasonable certainty. If the payee is a fictitious or non-existent person the bill may be treated as payable to bearer. The law was codified in the bill of exchange Act 1882.

Mitra’s legal and commercial Dictionary defines Bill of Exchange as under:

“A bill of exchange means a bill of exchange as defined in the Negotiable Instruments Act 1881, and includes also a hundi, and any other document entitling or purporting to entitle any person whether named there in or not, to payment by any other person of, or to draw upon any other person for, any sum of money.”

Stroud’s Judicial Dictionary defines Bill of Exchange as under:

“An order to pay out of a particular fund is not unconditional within the meaning of this section, but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional.”

22 2nd Ed 1976 by A.R Biswas, p. 290
23 4th Ed Vol-1 by John S.James, p. 290
Jowitt’s Dictionary of English law defines Bill of Exchange as under:

“An unconditional order in writing, addressed by one person (A) to another (B) signed by the person giving it, requiring the person to whom it is addressed to pay, on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of a specified person (c), or to bearer (Bill of Exchange Act 1882, s3) A is called the drawee, B the drawer and C the payee. Sometimes, A the drawer is himself the payee. The holder of a bill may treat it as a promissory note (q.v) if the drawer and drawee are the same person s5(2), when B, the drawee, has, by accepting the bill, under taken to pay it, he is called the acceptor.”^24

A payee is not a holder in due course. An instrument drawn to “cash or order” is not a bill of exchange, within s3 of the bill of Exchange Act 1882 or a cheque with him s73.^26

Sir John Comyns, Digest in the early part of the 18th century defined Bill of Exchange as A bill of exchange is when a man takes money in one country or city upon exchange, and drawer a bill where by he directs another person in another country or city to pay so much to A, or order for value received of B, and subscribes it.

III. DEFINITION OF A CHEQUE

A. Statutory Definition –

Section 6 of the Negotiable Instruments Act, 1881 defines the ‘Cheque’ as under:

A ‘cheque’ is a bill of exchange drawn on a specified Banker and not expressed to be payable otherwise than on demand.”

Substitution of new section for section 6 by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act 2002:

^25 Johnes v. Waring (1926) A.C 670
For section 6 of the Negotiable Instruments Act 1881(26 of 1881) (hereinafter referred to as the principal Act), the following section shall be substituted, namely:

“s 6. Cheque.- A ‘cheque’ is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it Includes the electronic image of a truncated cheque and a cheque in the electronic form.

“A ‘bill of exchange’ is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument.”

A promise to pay is not ‘conditional’ within the meaning of this section and Section 4, by reason of time for payment of the amount or any instalment thereof being expressed to be on the lapse of certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain. The sum payable may be certain, within the meaning of this section and Section 4, although it includes future interest or is payable at an indicated rate of exchange, or is according to the course of exchange and although the instrument provides that in default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given or that payment is to be made, be a ‘certain person’, within the meaning of this section and Section 4, although he is misnamed or designated by description only.

It will be thus seen that cheque is a special kind of bill of exchange in the sense that it is drawn in the name of a specified Banker.

B. Dictionary Meaning –

Black’s Law Dictionary with pronunciation defines cheque as under:

“Check n. - A draft drawn upon a bank and payable on demand signed by the maker or drawer, containing an unconditional promise to pay a sum certain in money to the order of the payee.”

The Federal Reserve Board defines a check as:
“A draft or order upon a deposit of funds for the payment at all events of a certain sum of money to a certain person therein named or to him or his order or to bearer and payable instantly on demand.” It must contain the phrase “pay to the order of”

Venkataramaiya’s law lexicon Dictionary defines cheque as under:\(^{29}\):
“Cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise then on demand.”

Mitra’s legal and commercial Dictionary defines cheque as under :-
“A cheque is a bill of exchange drawn on a banker, payable on demand A bearer cheque is one expressed to be payable to a particular person or bearer, an order cheque is one which is expressed to be so payable, or which is expressed to be payable to a particular person or body and does not contain words prohibiting transfer or indicating an Intention that it should not be transferable.\(^{30}\)

A cheque which bears across its face an addition of the name of a banker, either with or without the words not negotiable is crossed specially to that banker.\(^{31}\)

Jowitt’s Dictionary of English Law\(^{32}\) defines Cheque as –
“ Cheque [ Persian Shah-mat, the king is dead, chemate; hence check meaning to stop, control, verify; check or cheque was applied to slips of paper of which a piece was torn off to serve as a counterfoil or tally] A cheque is a bill of Exchange (q.v.) drawn on a bank, payable.

Wharton’s Law Lexicon\(^{33}\) defines it as –
“Cheque- An order addressed to a banker requesting him to pay to (a) the person therein mentioned, or his order, or (b) the person therein mentioned, or the bearer of the cheque, the sum of money therein mentioned; defined in the Bill of Exchange Act, 1882, Sec. 73 by which such provisions of that Act as are applicable to a bill of exchange payable on demand apply also to a cheque as a bill of exchange drawn on a banker payable on demand.

A warrant for the payment of half a year’s interest on 5 %. War Stock, 1929-47, made out in the usual form of the Bank of England, signed by the Bank’s Chief accountant, to the order of a specified person was held to be a cheque within the meaning of that word in the Bills of Exchange Act, 1882. *(Slongsby v. Westminster Co. Bank Ltd)*34 Section 82 of the Act affords the banker protection when ‘in good faith and without negligence he receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title or a defective title thereto as has been held in *(Underwood Ltd. v. Bank of Liverpool)*35 and *(Lloyds Bank Ltd. v. Savory and Co.)*36

*K. J. Aiyer’s Judicial Dictionary*37 defines cheque as under:

“A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand (section 6 Negotiable Instruments Act, XXVI of 1881).”

A banker’s cheque is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some respect entirely different. A cheque does not require acceptance in ordinary course, it is never accepted, it is never intended for

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34 (1931) 1 K.B. 173.
35 (1924) 1 K.B. 775.
36 (1933) 49 ILR 116.
circulation, it is given for immediate payment; it is not entitled to days of grace; and though, strictly, speaking, an order pay to a third person the whole or part of debt, yet in the ordinary understanding of person it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the position of a maker of a promissory note or the acceptor of a bill of exchange payable at a particular place and not elsewhere who has no right to insist on immediate presentation at that place. [Per Lord Wensleydale].

A cheque is clearly not an assignment of money in the hands of a banker, The banker is bound by the contract with his customer to honour the cheque when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer’s credit has been injured. “I do not understand the expression attributed to Byles, J. in Keane v. Beard38, but I am quite sure that the learned Judge never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder.

The New Encyclopaedia Britannica Micropaedia Ready Referencer –Ceara Deluc39 defines it as-

“Cheque, also spelled CHEQUE, bill of exchange drawn on a bank and payable on demand; it has become the chief form of money in the domestic commerce of developed countries. As a written order to pay money, it may be transferred from one person to another by endorsement and delivery or in certain cases, by delivery alone. Negotiability can be qualified by appropriate words, as with restrictive endorsements, or by the check form itself. Most checks are not paid in currency but by the debiting and crediting of

38 8 CB (NS). p. 381.
accomplished either by direct presentation, by correspondent banks, in the United States.

A cashier’s check is issued by a bank against itself and is signed by the cashier or some other bank officer. It has unquestioned acceptability as exchange. A certified check is a depositor’s check that has been guaranteed by the bank upon which it is drawn and is so stamped. Traveller’s checks are cashier’s checks sold to travellers that require two signatures is placed on the check in the presence of an issuing agent; the purpose of identification and is placed on the check when it is cashed. Purchasers of traveller’s checks are guaranteed reimbursement by the issuers of the Checks if the checks are lost or stolen.

*New Standard Encyclopaedia*\(^{40}\) defines it as –

“Check- a written order to a bank to pay money. It is a convenient and safe means of transferring money, and provides a permanent record and receipt for each transaction. Any person or firm having money on deposit in a checking account in a bank may write a check on that bank. In some cases, money may be transferred from one checking account to another without writing a check; the transactions accomplished by computer.”

To open a checking account, a person deposits a sum of money in a bank. The bank gives him a check-book with blank check forms, and provides him with a means of keeping a record of the checks he writes and the amount of money he still has on deposit. The bank gives him a receipt for each new deposit and sends him a statement (usually monthly) showing a complete record of all transactions. All concealed checks (checks that have been cashed by the bank) are returned with the statement, providing the depositor with proof that payment was received. The bank usually makes a small

\(^{40}\) Vol.-3 pp. C-234-236
service charge on every account, and perhaps also a charge for each check written. Ordinarily, no interest is paid on checking accounts.

To make out a check, the depositor writes the date, the name of the payee (the person or firm who is to receive the money), and the amount. He then signs his name. Before cashing the check the payee must endorse it by signing his name on the back. He then either deposits it in a bank or exchanges it for cash by giving the check to a bank, currency exchange, business firm, or individual. The new owner can endorse the check to someone else or can deposit it in a bank. When a check reaches a bank, it is forwarded through a clearing-house back to the bank on which it was drawn. After making sure the depositor’s signature is genuine, this bank in turn pays the cashing bank through the clearing-house.

The biggest danger in accepting a check is that the person writing it may not have enough money (or any money) in the bank to cover it. Forgery is another danger. The best defence against “bad checks” is to refuse to accept checks from strangers.

*Thomson’s Dictionary of Banking,*41 defines Cheque as –

CHEQUE (Formerly written “check”) “The word is derived from the French ‘Eches’, Chess. The Chequers placed at the doors of public houses are intended to represent Chessboards and originally denoted that the game of Chess was played in those houses. Similar tables were employed in reckoning money, and hence came the expression “to check an account”; and the Government office where the public accounts were kept was called the “Exchequer”.

Another explanation is that the word ‘Cheque’ arose from the consecutive numbers, which were placed upon the forms to act as a check or means of verification. In the United States the word “check” is used at the present day. Cheques first came into use about 1780.

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The use of cheques, except for the purchase of property, payment of wages, household and pocket expenses, has almost supplanted the legal currency of the country. From statistics taken at banks in London in 1922, the Clearing House report states that out of a million pounds paid into a bank only £4,260 consisted of bank notes and £2,640 of Treasury notes and coin.

Sir John Paget, in the Gilbert Lectures, 1916 (No.1), said “money on current account is just like any other debt, it is repayable on demand: if a customer comes and asks for his money, he is entitled to have it without the formality of drawing a cheque.” In such a case, however, the customer would have to give a receipt. But the regular and ordinary method of withdrawing money from a current account is by means of a cheque. A depositor may withdraw money from his deposit account by signing a form of receipt.

Part III of the Bills of Exchange Act, 1882, is devoted to provisions regarding each features of cheques as are not found in connection with a bill –

Section 73 defines a cheque –

“Cheque is a bill of exchange drawn on a banker, payable on demand”.

“Except as otherwise provided in this Part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.”

Section 3 defines a bill of exchange. These two sections, taken together, show that a cheque is an unconditional order in writing, drawn on a banker, signed by the drawer requiring the banker to pay on demand a sum certain in money to or to the order or a specified person or to bearer.

A cheque differs from a bill in several points: it does not require acceptance; it is drawn upon a banker; the banker may be protected if he pays it bearing a forged endorsement; the drawer is the person liable to pay it and the drawer, as a rule, is not discharged by delay in presenting it for payment. The intention of a cheque is that it
be paid at an early date. The drawee’s authority to pay is determined by notice of the
drawer’s death, and the drawer may stop payment of the cheque.

Indelible pencils are not desirable articles with which to draw cheques. A
cheque written in ordinary pencil should not be paid without personal reference to the
drawer, as the banker cannot possibly tell whether or not it has been altered. It is
much to be desired that all cheques should be written in ink. Typewritten cheques are
too easily altered, and their use should be discouraged as far as possible.

A cheque written upon a sheet of paper, provided it is in proper form, is
sufficient. Cheques of this description should, however, never be drawn except in
cases of extreme necessity.

“A customer’s cheque must be unambiguous and must be *ex facie* in such a
condition as not to arouse any reasonable suspicion. But it follows from that it is the
duty of the customer, should his own business or other requirements prevent him from
personally presenting it, to take care to frame and fill up his cheque in such a manner
that when it passes out of his (the customer’s) hands it will not be so left that before
presentation, alterations, interpolations, etc., can be readily made upon it without
giving reasonable ground for suspicion to the banker that they did not form part of the
original body of the cheque when signed. To neglect this duty of carefulness is a
negligence cognisable by law. The consequences of such negligence fall alone upon
the party guilty of it – namely, the customer.” Lord Shaw in *London Joint Stock
Bank Ltd. v. Macmillan and Arthur.*

As to the points to be observed when drawing a cheque-

At one time a cheque could not be issued for less than twenty shillings, but
now a cheque may be for any amount, from one penny upwards. If the amount of a
cheque includes a half penny, the half penny is ignored by bankers.

When a cheque is drawn in England on an English bank in foreign currency,
the method usually adopted between the collecting and paying bankers is for the

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cheque to be presented for payment converted into sterling at the current rate of exchange. If the paying banker is in agreement with the rate of cheque is paid in sterling. If the customer instructs his banker to debit the amount for which the cheque has been drawn to a currency account, the paying banker, having paid sterling, sells the currency at the current rate, thereby reimbursing himself for the amount paid to the collecting banker. If the paying banker is not in agreement with the rate of exchange claimed by the collecting banker, he offers a draft in currency on his foreign correspondent, and this draft is usually taken by the collecting banker in place of the sterling originally claimed, and the currency account of the customer is debited with the amount. If the customer wishes to pay in sterling, the equivalent at the rate agreed upon between the collecting and paying banker is debited to his sterling account, but should the paying banker refuse to pay at the rate demand, he will issue a cheque in currency on his foreign correspondent, debiting the sterling account of his customer at the selling rate for drafts on his foreign correspondent.

Section 72(4) of Bills of Exchange Act, 1882, under FOREIGN BILL with regard to a bill in foreign currency drawn out of but payable in the United Kingdom.

The members of the British Bankers Association agreed in June 1946, to standardise cheque forms. As regards size, the must not exceed 8 inches by 4 inches and must not be less than 6 inches by 3 inches.

Prior to this time, the amount was usually inserted in figures on the left-hand side; as from June 1946, the space for the amount in figures has been shown on the right hand side, immediately above the signature of the drawer.

The customary form of cheque should be adhered to as much as possible, though legally any form which fulfils the requirements of the Bills of Exchange Act would be sufficient as, for example, where the drawer instead of signing his name at the bottom signs it at the top, “I, John Brown, direct you to pay to John Jones the sum,” etc.
The Bank of England declines to pay cheques unless drawn upon the forms it supplies.

Some cheques have a notice upon them that they are payable only if presented within a certain period. Such a condition may possibly exclude the document from being considered a cheque under the Bills of Exchange Act. In *Thairlwall v. Great Northern Railway Company*[^43^] where a dividend warrant had a condition at the bottom of it that “it will not be honoured after three months from date of issue unless specially indorsed for payment by the secretary.” It was argued that the document was not a cheque because of this condition. Mr. Justice Bray said, “I have felt a great deal of doubt on this point because of this statement. But, on the whole, I am inclined to think that this document is a cheque, and is within the meaning of Section 73 and 3 of the Bills of Exchange Act, 1882, a cheque and an unconditional order in writing…. And I think it is none the less a cheque because of that statement at the bottom of the document. I do not consider that statement makes the order conditional.”

There are also forms of cheques, or rather document, which make the payment dependent upon a certain receipt being signed. Conditional documents of this kind are not cheques as defined by the Bills of Exchange Act. They may, however, be crossed like a cheque as mentioned in Receipt on Cheque.

The form of cheque (or, more correctly, order for payment) in use by some Local Authorities is a peculiar one as, being drawn upon the Treasurer, it does not conform with the requirement of the Bills of Exchange Act that it be drawn upon a banker. It is considered, however, that, although drawn upon an individual, the order is practically drawn upon the bank where the Treasurer’s account is kept, and the banker paying such order is entitled to the protection which is afforded by Section 60 of the Bills of Exchange Act, 1882, against forged endorsements. If such orders should be held not to come within the Bills of Exchange Act, then the benefit of

[^43^] (1910) 2 K.B. 509
Section 60 would not apply, and they would also be incapable of being validly crossed.

As far as the collecting banker is concerned, it would appear that local authority drafts now fall within Section 4(2)(b) of the Cheques Act, 1957.

Cheques paid to credit of a customer’s account should be carefully examined before being remitted for collection, and if not in order should be returned to the customer, or, if possible, sent out to him to be remedied.

Since the passing of the Cheques Act, 1957 (q.v.), endorsement is necessary for various reasons only in the following cases –

i) Where cheques are cashed or exchanged across counter;

ii) Where cheques have been negotiated;

iii) Where cheques payable to joint payees are tendered for the credit of an account to which all are not parties;

iv) Where a cheque acts as a combined cheque and receipt form (these cheques will bear a bold letter “R” on their face);

v) In the case of bills of exchange other than cheques, and promissory notes.

Some of the categories stem from the Clearing Bankers’ Circular rather than from the Act and it is not certain that in all cases the courts would insist on endorsement

**Westminster Bank Ltd. v. Zang.**

With regard to alterations in cheques and fraudulent alterations as mentioned in Alterations.

If there is a difference between the amount writing and the figures on a cheque, the cheque may be paid according to the amount in writing, but it is the usual custom, and a prudent course, to return the cheque unpaid marked “amounts differ.” If the figures have been omitted and the amount only appears in writing, a banker is justified in paying the cheque according to the words, though if the words have been omitted and the amount is given only in figures, the cheque should not be paid.

**44** (1966) All E.R. 114
A cheque payable to “John Brown only” or to “John Brown, not transferable,” must be paid to none other than John Brown.

If the payee himself presents a cheque for payment and declines to indorse it, he has probably a legal right to do so, and the banker paying the cheque will be protected under section 1(1) Cheques Act, 1957 (q.v.) if the cheque is otherwise in order. However, the circular dated 23rd September 1957, of the Committee of London Clearing Bankers included as cheques cashed or exchanged across the counter. It is considered that the public interest will best be served by continuing existing practice in regard to cheques cashed or exchanged. The Mocatta Committee set up by the Government to examine the whole question of endorsement attached importance to endorsement of such cheques as possibly affording some evidence of identity of the recipient and some measure of protection for the public.

If the balance of a customer’s account will not allow of the full payment of a cheque, which is presented, the cheque may be dishonoured. A cheque cannot be paid in part. In England, if such a cheque is dishonoured and another cheque is presented subsequently for a smaller amount, which the account will stand, it may be paid. In Scotland, however, when a cheque is presented for payment and there is not a sufficient balance to meet it, the cheque attaches such funds as there may be in the banker’s hands belonging to the drawer, and subsequent cheques, though for a less amount than the balance of the account, will be returned unpaid. The amount attached is transferred by the banker to a separate account as mentioned Section 53 under head Drawee.

A banker does not, as a rule, pay a cheque, which has been cut, or torn, into two or more portions, or torn sufficiently to suggest cancellation. But if a mutilated cheque bears a note upon it signed by a collecting banker, such as “accidentally torn,” it is customary to pay it.

A cheque is sometimes marked or certified by a banker as being good for the amount for which it is drawn. It may be marked by the banker on whom it is drawn
for another banker, as a matter of convenience for the purposes of clearing arrangements. Or, occasionally, it may be marked at the request of the drawer, or even at the request of the payee or holder,

English bankers do not encourage the marking of cheques as between themselves and the public, it being much the preferable way to pay the cheque, and, if necessary, give a draft in exchange. In America, the certification or acceptance of cheques is very common which may be seen in Certification of Cheque.

Marking a cheque by a banker is not equivalent to acceptance. If it was marked at the request of a payee or holder it could not be debited to the drawer’s account if, in the meantime, the drawer has died or has stopped payment of the cheque, or if a receiving order has been made or notice of the presentation of bankruptcy petition has been received.

A person is liable to be charged under the Theft Act, 1968, if he gives a cheque in payment of a purchase when he has no account with the baker on whom the cheque is drawn.

As to an overdue cheque, section 36, Bills of Exchange Act (under Negotiation of Bill of Exchange) and sections 45 and 74.

A cheque is not invalid solely by reason that it is post dated or antedated.

Similarly Derrick G. Hanson has defined it in his Dictionary of Banking and Finance.45

**IV ESSENTIALS OF A PROMISSORY NOTE**

To be a valid promissory note the following requirements are to be satisfied :-

A. It must be in writing and signed by the maker.
B. There must be an undertaking or a promise to pay.
C. Such a promise must be unconditional.
D. The promise must be in respect of payment of money only.

45 1st Ed. June, 1985
E. The amount payable must be certain.
F. The payee must be certain.

A. **In Writing and Signed by the Maker** -

One of the essential requirements of a Promissory note according to section 4, an oral promise to pay does not become a Promissory note. No particular form is prescribed, a promise contained in a letter will suffice. Writing includes printing or typing. It is also necessary that the Promissory note should be signed by the person who makes the promise.

B. **Promise to pay** -

For a valid Promissory note to be there it is essential that there must be a promise or an undertaking to pay. This promise should be express. When a person merely makes an acknowledgement of a debt without a promise to pay the same, it is not a valid Promissory note.

C. **The Promise to Pay must be Unconditional** -

It is also necessary that the Promise to pay should be unconditional. If the maker Promises to pay on fulfilment of some condition or the happening of some contingency. It would be conditional promise and it will not a valid Promissory note.

D. **The promise to pay must be in respect of money consideration only** -

The promise to pay has to be for a consideration, because an agreement without consideration is void. If there are several joint promisors of a promissory note and the consideration was received only by one of the promisors, it is sufficient consideration in so far as order promisors also, and all the promisors are bound by the Promissory note. It must be promise to pay money only. If there promise is not to pay money but to do some thing else, it would not be a valid Promissory note.\(^46\)

E. **Certain Sum** -

It is also necessary that the sum of money promised to be payable in a Promissory note must be certain or definite.

\(^46\) Andhra Bank, Suryapet v. Anantnath Goel, AIR 1991 AP 245.
F. **Payee should be certain**

It is also necessary that the payee must be certain. According to section 4 the promissory note may be payable to a certain person or to the order of a certain person or to the bearer of the instrument. The payee may be mentioned by name or by designation.

V. **ESSENTIALS OF A BILL OF EXCHANGE**

The definition of a Bill of Exchange under the act is fairly exhaustive and almost covers all the aspects related to it at one place. A Bill of Exchange requires three parties.

- The drawer, i.e. the person who is the maker of the bill and who gives the order.
- The drawee, i.e. the person who is directed to pay the bill and who on affixing his signature becomes the acceptor; and
- The payee, i.e. the person to whom or to whose order the amount of the instrument is payable, unless the bill is payable to bearer.

To analysis of the definition shows the following essential requisites of a bill of exchange.

A. **A Bill of Exchange must be in Writing**

A bill of exchange may be written in any language, and any form of words may be used, provided the requirements of this section are complied with.

B. **A Bill of Exchange must Contain an Order to Pay**

When a bill of exchange is drawn, the presumption is that there are funds in the hands of the person to whom the order is given, which are payable in any case to the person giving the order. The essence of a bill of exchange is that the drawer orders the drawee to pay money to the payee. As a bill of exchange is an order, it is necessary that it must, in its terms, be imperative and not perceptive.
C. The Order Contained in the Bill Should be Unconditional -

It is essence of a bill that it should be payable at all events, A bill of exchange cannot be drawn so as to be payable conditionally. The drawer’s order to the drawee must be unconditional and should not make the payment of the bill dependent on some contingency. Where an instrument is payable on a contingency, it does not cease to be invalid by the happening of the event before the expiry of the period fixed for the performance of the obligation, for the instrument must be valid ab initio, and carry its validity on its face.47 A conditional bill of exchange is invalid. The addition of the words as per agreement does not make a note conditional.48

D. Bills Payable Out of a Particular Fund

On the same principle, a bill expressed to be payable out of a particular fund is conditional and invalid, because it is uncertain whether the fund will be in existence or prove sufficient when the bill becomes payable. Thus a bill containing an order to pay ‘out of money due from A as soon as you receive it, or out of money remaining in your hands belonging to X company is invalid.49

E. A Bill of Exchange must be Signed by the Drawer –

A Bill is not valid unless the drawer signs it and if Drawer has not signed it no action can be maintained against the acceptor or any other party who has affixed his signature these to. If the drawer is unable to write his name, he can sign by a mark in lieu of a signature.50

F. The Drawee must be Certain -

The next requisite is that the instrument must order a person to pay the amount of the bill. The person to whom the bill is addressed is called the ‘drawee’ and he must be named or otherwise indicated in the bill with reasonable certainty. So that the payee knows the person to whom he should present the instrument for acceptance and

47 Colehan v. Cooke (1742). Willes 393.
49 Dankes v. Deloraine (1770). 3 Willes 207.
payment. A bill cannot be addressed to two or more drawees in the alternative because it would create difficulties as to recourse if the bill were dishonoured.

G. **The Sum Payable must be Certain**

The sum payable is certain even though it is required to be paid with interest, or at the indicated rate of exchange or by installment with the proviso that on the default in payment of instalment, the whole amount shall become due and payable.51

H. **The Instrument must Contain an Order to Pay Money and Money only**

The medium of payment should be the legal tender i.e. money and nothing else. An instrument containing order to pay money along with some other thing or merely some other thing is not a valid bill. An instrument ordering the delivery up of houses and a wharf in addition to the payment of a sum of money is not a valid bill.52

I. **The Payee must be Certain**

A bill must state with certainty the person to whom payment is to be made. A bill of exchange ought to specify to whom the same is payable, for in no other way can the drawee, if he accepts it, know to whom he may properly pay it so as to discharge himself from all further liability.53 Where a bill is payable to bearer, the payee is indicated with certainty. Bills are rarely drawn payable to bearer, but cheques are commonly so drawn. A bill cannot be drawn payable to bearer on demand.54

Where in a bill the drawee or payee is misnamed or misdescribed, extrinsic evidence is admissible to identify him.55

VI **ESSENTIALS OF A CHEQUE**

‘Cheque’ is one of the important negotiable instruments. It is frequently used by the people and business community in the course of their personal and business transactions. The definition of cheque has been given in Section 6 of Negotiable

51 Carlon v. Kenealy (1843) 12 M & W 139.
52 Martin v. Chayntry (1747) 2 Stra, 1271.
53 Storey on Bills, 514.
54 Reserve Bank of India Act 1934, s31.
Instrument Act in these words,” A cheque is a bill of exchange drawn on a specified banker and is expressed to the payable, otherwise than on demand.” The essential requisites of cheque are as: -

A)  **Must be in Writing** –

The cheque may be written in hand by using ink or ballpoint pen, typed or even it may be printed. But the customer should not use pencil to fill up the cheque form. Even though other columns may be permitted to be written in hand or printed or typed, the signatures should be made by ink pen or ballpoint pen by the maker.

B)  **Must be Unconditional** –

The order to pay the amount must be unconditional. If there is any condition imposed to pay the amount to the holder of the cheque then it will not be considered as a cheque. A cheque made payable on the happening of a contingent event is void *ab-initio*.

C.  **Must be Drawn on a Specified Banker** –

For the validity of a Cheque it must be drawn on a specified banker. If there is not mentioned in the cheque about the banker it would not be a valid cheque. In addition to it, it must contain all the three parties i.e. Drawer, Drawee and Payee.

D.  **Certain Sum of Money** –

It is one of the essential requirement of the Cheque that it must be payable in money and money only. If is not in term of money then it will be a valid one. The sum mentioned in it must be certain.

E.  **Certain Payee** –

The parties of the Cheque must be certain. There are three parties of the cheque i.e. Drawer, Drawer and Payee. In a valid Cheque the name of the must contain in other words they must be certain. It must contain an order, which must be unconditional. If any condition were imposed then it would not be a valid cheque.
F. Date –

In a valid cheque it must be signed by the drawer with date otherwise it would not be a valid cheque. It must be written in hand by using ink or ball point pen, typed or even it may be printed as it becomes conclusive proof i.e. presumption under Section 118(b) unless contrary is proved.

In accordance with Section 5 and 6 of the Indian Negotiable Instruments Act, 1881, cheques are regarded as negotiable. A study of the cheque, thus, requires a study of the negotiable instrument. A number of definitions have been given of the Negotiable Instrument, however, some of them are being discussed below:

J. M. Rosenbery in his Dictionary of Banking and Finance\textsuperscript{56} defines Negotiable Instrument as under:

“Negotiable Instrument, the Uniform Negotiable Instruments Act states: “An instrument, to be negotiable must conform to the following requirements:

(i) It must be in writing and signed by the maker or drawer;
(ii) It must contain an unconditional promise or order to pay certain sum in money;
(iii) It must be payable on demand; or at a fixed or determinable future time;
(iv) It must be payable to order or to bearer; and
(v) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.”

On the other hand Wills\textsuperscript{57} has defined a negotiable instrument as under:

“A negotiable instrument is one the property in which is acquired by any one who takes it \textit{bonafide} and for value, notwithstanding any defect of title in the person from whom he took it, from which it follows that an instrument cannot be negotiable unless it is such and in

\textsuperscript{56} Ed. 1982, p. 57
\textsuperscript{57} S.N.Gupta- Dishonour of Cheque, Liability Civil and Criminal, 3\textsuperscript{rd} Ed. p. 5
such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument.”

In order to ascertain the negotiability, whether it exists or not, certain tests can be applied. In other words negotiability means that a cheque is transferable. It may, therefore, be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a ‘negotiable instrument’, and the property in it passes to a bona-fide transferee for value, thought the transfer may not have taken place in ‘market overt’. But that if either of the above requisites be wanting, i.e. if it be either not accustomably transferable, or thought it be accustomably transferable, yet, if its nature be such as to render it incapable of being in suit by the party holding it pro tempore, it is not a negotiable instrument, not will delivery of it pass the property in it to a vendee, however, bona-fide if the transferor himself have not a good title to it and the transfer be made out of market overt.

Further, it has been held in Sukanraj Khimraja v. Raja Gopalan, that an important fact about negotiability is that by dishonour of a cheque the negotiability of the cheque is lost.

In this way, the first essential feature of a cheque is that it can be transferred. The transfer can either be by way of mere delivery or by an endorsement and delivery. Whenever, the procedure mentioned above is adopted, the ownership of the property in the instrument is transferred and further no other document is required for this purpose. Whereas on the other hand the other documents e.g. shares are not negotiable, as the property in the said shares is not transferred only by means of delivery.

The second important characteristic of a cheque is that a holder in the course gets a valid title to it despite of any defect in the transferor’s title. Such a bona-fide transferee for value gets a complete, independent and indefeasible title to the

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58 (1989) 1 LW 401.
instrument and such person is known as the ‘holder in due course’ and he gets a title against the whole world i.e. ad-rem. In case this characteristic is missing then the whole machinery of trade will be upset as nobody will accept a cheque if the transferee was made liable to make fishing enquiries about the titles of the transferor.

In law there is a general rule that *nemo dat quod non-habet* which means that no one can give what he does not have. However, so far as the Negotiable Instruments are concerned, they are an exception to this Rule. If I purchase stolen goods from a thief, then however, innocent I may be I shall have to return the goods to the original owner. This is however, not true in case of Negotiable Instruments and was very well pointed by Wills J. in *Whistler v. Forster*, as under:

“The general rule of law is undoubted that no one can transfer a better title than he himself possesses: *nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These being part of the currency, are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not a transfer which is valid (only) in equity according to the doctrine respecting the assignment of chose-in-action; and it is therefore clear that in order to acquire the benefit of this rule the holder must, if it be payable to order, obtain an endorsement, and that he is affected by notice of a fraud received before he does so. Until he does so he is

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59 (1863) 14 CB (NS) 248; (1863) 32 JCP 161.
merely in the position of the assignee of an ordinary chose-in-action, and has no better title than his assignor.”

There is, thus, a difference between the transfer of a negotiable instrument and that of ordinary goods and chattels, Lord Herschel said in London Joint Stock Bank v. Simmons, as under:

“The general rule of law is that, where a person has obtained the property of another from one who is dealing with it without the authority of the owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property has authority to do so. If this can be shown a good title is acquired by personal estoppels against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments any person in possession of these may convey a good title to them even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them.”

This characteristic of a cheque is in great variance with the legal position relating to the transfer of a chose-in-action, i.e. the property which a person has not got in his actual possession but which he has a right to demand by a legal action and which he can assign to another. Accordingly to Section 130 of the Transfer of Property Act, 1882 such transfer is complete only after the execution of an instrument. However, it is necessary that a notice of assignment be given to the debtor or to the person against whom such a right is claimed. In the case of a Negotiable

\(^{60}\) (1892) AC 201.
Instrument no notice of transfer is required and it is presumed that the negotiable instrument is always supported by consideration. This characteristic of a cheque also results in another difference which is more important and we can say that in case of transfer of a cheque, a holder in due course is protected against any claim whereas an assignee, though he may give full value, and act in good faith, takes the actionable claim subject to all the liability in terms of Section 132 of the Transfer of Property Act, 1882.

The third and the last characteristic of a cheque on account of its being a negotiable instrument is that is has an inherent mechanism built in itself and it has a right of action infused in itself. The holder of a cheque has therefore, a right to sue thereon in his own name and he is not dependent upon another title. According to the negotiable instrument, whenever a bona-fide holder for value without notice- or, in short a holder in due course – sues on the instrument, it is for the defendant to prove that the plaintiff is not entitled on the cheque on which the case is being filed. It should be remembered that a cheque, which is negotiable, can be made not negotiable if the negotiation is prohibited. In case a cheque is crossed “not negotiable” or made payable only to the payee named therein “and not to his order or to bearer” this cheque is not negotiable.

Cheque or a Bill marked “pay cash or order does not come within the meaning of the Act and is not a negotiable instrument. There is no provision in the Act that the drawee is as such liable on the instrument, the only exception being under section 31 in the case of a drawee of a cheque having sufficient funds of the customer in his hands and even then the liability is only towards the drawer and not the payee. Where there is no acceptance no cause of action can have arisen to the payee against the drawee.61

Generally speaking, the term Cheque is simply an ordinary slip of paper containing a written order, addressed to the banker by his customer, which is

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frequently used in connection with transactions of banking business i.e. in other words it is a negotiable instrument. The term ‘Cheque’ has been defined in Section 6 of the Negotiable Instruments Act, 1881 although there were certain principles of equity and usages of trade which general convenience and commonsense of justice had established to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.

As it has been stated above, a piece of paper, in the form of ‘cheque’, promissory note’ or ‘bill of exchange’ which authorises a person or party to get the sum of money mentioned therein, is known as Negotiable Instrument. The main categories of Negotiable Instruments are ‘Promissory Note’, ‘Bill of Exchange’ and ‘Cheques.’ Not only India but also all the countries of world make use of the negotiable instruments in some of other form in the course of personal as well as business transactions. The result is the law relating to Negotiable Instruments is mainly based on the common customs and usage of the business community of the world as a whole. The general outline of this law is, therefore, almost one and the same in all countries.

VII PARTIES TO THE PROMISSORY NOTE -

The necessary parties to a promissory note are (1) the person who makes the promise, and who is called the maker (2) the person to whom the promise is made, and who is called the payee. Where the same person fills the position of both parties, for example, where the instrument is expressed’ pay to my order, the instrument is not a note unless and until it is indorsed by the maker. In the application of the law relating to bills to a promissory note, the maker of a note is deemed to correspond with the acceptor of a bill and the first indorser of a note is deemed to correspend with the drawer of an accepted bill payable to drawer’s order.62

VIII  PARTIES TO THE BILL OF EXCHANGE

The necessary parties to Bill of Exchange are (1) the party giving the order, who must sign it, and who is called the drawer, (2) the party to whom the order is given, who is called the drawee, and who on assenting to the terms of the order and signing it is called the acceptor and (3) the party to whom the money is to be paid, who is called the payee, or if the bill be expressed to be payable to bearer, the bearer. The same person sometimes fills the position of two of these three necessary parties. Thus the drawer may also be the payee when the bill is expressed ‘pay to us’ pay to our order’, ‘pay to us or order, or ‘pay to ……………order’.

The drawee may also be the payee, where the bill is expressed, pay to your own order. Here thought the instruments is in form a bill, there is nothing to enforce until the bill has been negotiated, that is transferred for value by being endorsed by the drawee or payee to some other party lastly, the drawer may also be the drawee in this case, as also in the case of the drawee being a fictitious person or a person not having capacity to contract, the holder may treat the instrument at his option either as a bill of exchange or as a promissory note. A bank draft is a draft payable on demand by a banker on himself, whether payable at the head office or some other office of his bank, and may be treated either as a bill of exchange or a promissory note.63

IX  PARTIES TO THE CHEQUE –

The maker of a cheque is called the ‘Drawer’, the person thereby directed to pay is called ‘Drawee’ and the person named in the instruments, to whom or to whose order the money is by the instrument direct to be paid, is called the “Payee.”64

The person entitled in his own name to the possession of the cheque and to receive or recover the amount due is called the “Holder of the cheque.”65

64 Section 7 of the Negotiable Instruments Act, 1881
65 Section 8 of the Negotiable Instruments Act, 1881
The person who for consideration becomes the possessor of the cheque if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title is called the “Holder in due course.”

The maker or the holder of the cheque signs his name (endorse) on the back of the cheque for the purpose of negotiable and he is said to be the ‘Endorser.’

The endorser who signs his name and directs to pay the amount mentioned in the cheque to, or the order of, a specified person, and the person so specified is called the “Endorsee” of the cheque.

X. DIFFERENCE BETWEEN PROMISSORY NOTE AND BILL OF EXCHANGE

(A) The liability of the maker of a Promissory note is primary and absolute, but the liability of the drawer of a Bill of Exchange secondary and conditional.

(B) The position of the maker of a note, however, differs from the acceptor’s, in that a note cannot be made conditionally, while a Bill may be accepted conditionally. The reason for this distinction is that acceptor of a bill is not the originates of the Bill and his contract is supplementary, being superimposed on that of the drawer, while the maker of the note originator the Instrument.

(C) The maker of a Promissory note corresponds, generally, to the acceptor of a Bill of Exchange. Hence, unless a Promissory note is expressed to be payable at a certain place, presentment is not necessary to make him liable, and notice of dishonour is not required.

(D) A Promissory note indorsed by the payee corresponds with an accepted bill payable to the drawer’s order, the payee of the Promissory note having the same rights and responsibilities as the drawer of an accepted bill.

66 Section 9 of the Negotiable Instruments Act, 1881
67 Section 15 of the Negotiable Instruments Act, 1881
68 Section 16 of the Negotiable Instruments Act, 1881
The maker of a Promissory note stands in immediate relation with the payee, where as the drawer of an accepted Bill of Exchange stands in immediate relation with the acceptor and not the payee.

The following provision relating to bills do not apply to notes, namely; presentment for acceptance, acceptance, acceptance supra protest, and Bills in sets.

Foreign Bill must be protested for dishonour, when such protest is required by the law of the place where they are drawn.

XI. DIFFERENCE BETWEEN A CHEQUE AND A BILL OF EXCHANGE

A cheque is no doubt essentially a bill of exchange, but it has certain peculiarities, which distinguish it from a bill of exchange. Some of the peculiarities were clearly stated by PARKE B in Ram Churun Mullick v. Luckmee Chand. He said that a cheque “is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance, in the ordinary course it is never accepted; it is not intended for circulation, it is given for immediate payment; it is not entitled to days of grace…” A cheque has always to be made payable on demand, whereas an ordinary bill of exchange can be made payable after a fixed period. A future-dated cheque, being not payable on demand, may not be regarded as a cheque in the real sense of the word unless that date arrives and it becomes payable on demand.

A cheque is exempted from stamp-duty, but a promissory note as well as a bill of exchange attracts stamp duty under the Indian Stamp Act, 1899. There are many differences between cheque and a bill of exchange. Some of them are as under: -

A) The acceptance of drawee is not required for payment of cheques, whereas the bill of exchange requires the acceptance of drawee before it is made liable for payment;

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69 (1854) 9 Moore PC 64 or 14 ER 265 at p. 223
70 Kuruvilla v. Varkey, ILR, (1969) 2 Ker 630
B) A banker is only a drawee in case of payment by cheque, while any person including a Banker can be the drawee of a bill of exchange;

C) A cheque is payable immediately when the demand is made and without any days of grace but in a bill of exchange, the grace of three days is given for its payment;

D) In case of bill of exchange, if it is not duly presented for payment or otherwise, the drawer is discharged, while in case of cheque, the drawer is discharged if the holder of cheque causes delay in taking payment or present it to Banker for payment after the expiry of period by Banker from the date of its issue;

E) When a bill of exchange is dishonoured, due to non-payments, a notice to that effect should necessarily be given to all concerning parties, whereas it is not necessary in case of dishonour of a cheque;

F) A cheque has always to be made payable on demand whereas and ordinary bill of exchange can be made after a fixed period. A future dated cheque being not payable on demand may not be regarded as a cheque in the real sense of the word unless the date arrives and it becomes payable on demand.

XII DIFFERENCE BETWEEN DRAFT AND A CHEQUE

A draft is as much a bill of exchange as a cheque and there is hardly any difference between a dishonoured draft and a dishonoured cheque, which is issued by a bank on itself. The basic difference between the two consists in two aspects:

A) A draft can be drawn only by a bank on another bank and not by a private person as in the case of a cheque and;

B) A draft cannot be so easily counter-manded as a cheque either by the person purchasing it or by the bank to which it is presented.71

71 Mohanlal Jagami Rice Atta Mills v. Ramlal Omkarmal Firm, AIR 1957 Assam, 133
If a person requires money to be remitted from one place to another through a bank by way of a draft, it will be the relationship of not merely creditor and debtor as between the customer and the bank but also a relationship of *cestui que* trust and trustee. If the purchaser of the draft cancels it before it is delivered to the drawee and retain it in his own hands he can treat the bank which issued the draft as his debtor and a creditor demand the amount from the bank and the bank would, thereby, be liable to satisfy the demand.

### XIII  HOLDER AND HOLDER IN DUE COURSE

#### A.  Holder

Every instrument initially belongs to the payee and he is entitled to its possession. The payee can transfer it to any person in payment of his own debt. This transfer is known as ‘negotiation’. Negotiation takes place in two ways. A bearer instrument passes by simple delivery and the person to whom it is delivered becomes the holder. An order instrument, on the other hand, can be negotiated only by endorsement and delivery and the endorsee becomes the holder. Hence the holder means either the bearer or endorsee of an instrument. Accordingly Section 2 of the English Bills of Exchange Act, 1882, provides that “holder means the payee or endorsee of a bill or note who is in possession of it or the bearer thereof”. The definition contained in Section 8 of the Indian Act is to the same effect, although expressed in different words. It says that holder “means any person entitled in his own name to the possession” of an instrument “and to receive and recover the amount”. Now, no one can be entitled to the possession of a bill or note unless he becomes either the bearer or endorsee thereof.  

Section 8 says:

“The ‘holder’ of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.”

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72 Dr. Avtar Singh’s Negotiable Instruments, 3rd Ed. p. 39
“The property in a Promissory note including the right to recover the amount due thereon is vested by statute in the holder of the note. The negotiable instrument Act was enacted for the benefit of trade and commerce and the principle underlying it is that Promissory note, Bills of Exchange and Cheques should be negotiable as apparent on their face without reference to secret title to them.

The holder must be entitled in his own name to the possession of the instrument. A person may be entitled to possession of the Instrument although he does not have actual possession. The definition seems to suggest that the term holder means only adejure holder and does not necessarily apply to a defacto holder. A person may be operation of law become the holder of a negotiable Instrument although he is not the bearer, payee or indorsee there of, the heir or legal representative of a deceased payee can claim as the holder.

A holder must have the right to receiver or recover the amount due on the instrument from the parties there to. To qualify as a holder, a person should have derived title to the instrument in a lawful manner. A plaintiff who is a benamidar or a trustee or guardian and has taken the instrument in is on name, is entitled to sue upon it. The beneficial owner of an instrument cannot bring a suit on it, if he is not the holder. A minor cannot sue on a Promissory note, taken in the name of his adoptive mother.

Some Judges have expressed the view that s78 of the act does not preclude any one other then the holder from suing on a negotiable instrument and that a suit by the real owner is maintainable, if he is in a position to obtain a good discharged of liability for the person liable thereon. This view was indorsed in Bhagirath v. Gulab Kanwar, where it was held that a true owner could maintain a suit on a

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74 Ramanuja v. Sadagopa (1905) 28 Mad 205.
75 Lachmichand v Modanlal AIR 1947 ALL 52.
76 A.I.R 1956 Raj 174.
negotiable instrument if the holder is impleaded in the suit as a co-plaintiff or a defendant.

Negotiable instruments can be assigned under s 130 of the Transfer of Property Act 1882, i.e. transfer of actionable claims. The assignee of a promissory note can, sue the maker for recovering the amount due on the note by virtue of his right under that Act. The assignee, however, takes the instrument, subject to the liabilities and equities to which the assignor was subject at the time of the assignment. An assignment of a promissory note at a partition to a member of a joint family does not amount to a transfer by act of parties but by operation of law, no document in support of the assignment is, therefore required under s130, the Transfer of Property Act 1882. Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

In Section 139 the words used are the ‘holder of a cheque received the cheque.’ The word ‘Holder’ has been defined in Section of the 8 of the Negotiable Instruments Act as well as in Section 2 of English Bills of Exchange Act, 1882 as mentioned above. Reading these definitions with section 78 of the Negotiable Instruments Act it means that a person to whom the payment should be made in order to discharge the maker or acceptor from all liabilities under the instrument is the holder of the instrument or he is accredited agent such as Banker, acting as an agent for collection. A person who cannot claim and does not have right to recover the amount due on the instrument, is not the holder. Thus, a person who can sue in his name is a holder. He may be the payee or one who becomes entitled to it as endorsee or becomes the bearer of an instrument payable to the bearer. The most significant words in the section are ‘entitled in his own name’. Thus, the term ‘holder does not include a person who, though in possession of the instrument, has no right to recover

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77 Muthuveeran v. Govindan AIR 1961 Mad 518 (FB).
the amount due thereon from the parties thereto. However, the assignee of such person is entitled to sue in his own name.78

**B. Holder in Due Course –**

Section 9 of the Negotiable Instruments Act, 1881 defines ‘Holder in Due Course’ which reads as under:

“‘Holder in due course’ means any person who for consideration became the possessor of the a promissory note, bill of exchange or cheque if payable to bearer, or the payee of endorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.”

In order that a person can be called a holder in due course, he must show: (a) that he is the holder of the negotiable instrument, (b) he has obtained it for consideration, (c) he has obtained it before the maturity of the negotiable instrument, and (d) that he has obtained the negotiable instrument in good faith. Until contrary is proved the holder of a negotiable instrument is presumed to be a holder in due course.79

In India it has been seen above the payee can also be a holder in due course but in England the payee of a negotiable instrument cannot be holder in due course as was decided by the house of **Lords in Jones v. Waring and Gillow**.80 If a person gets an instrument under a forged endorsement, he cannot be called a holder in due course. A transferee under a forged endorsement gets no title to the instrument and if such a transferee has been able to get the amount of the instrument, he is bound to account for the same to the owner of the instrument.

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78 S.N.Gupta’s Dishonour of Cheque, 3rd Ed. 1996
79 Section 118(g).
80 1926 AC 670; Lewis v. Clay, 14 T.L.R. 149.
A holder in due course must have obtained the instrument for consideration. The consideration must also be lawful. If a person takes a negotiable instrument without consideration or where the consideration is unlawful he cannot be called a holder in due course.

Section 9 requires that to be a holder in due course a person must take the negotiable instrument before the amount due thereon became payable.” Section 59 of the Negotiable Instruments Act also provides that a person taking a negotiable instrument after its maturity has the rights thereon of a transferor. It means that a person taking an instrument after maturity will not be a holder in due course and will not be capable of having a better title than that of the transferor.

Holder in due course must take the negotiable instrument “without having sufficient cause to believe that any defect existed in the title of the person from whom he delivers his title.” The condition requires that he should act in good faith and with reasonable caution.

According to section 42, “An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer’s order is not by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an endorsement by the same hand as the drawer’s signature, and purporting to be made by the drawer.” A payee is a fictitious person when he is not intended as a person to whom the payment is to be made. He may be either an existing person, or one who has no existence. In Bank of England v. Vagliono Brothers, Lord Hershell81 explained the position.

Although the rights in a negotiable instrument may be transferred from one person to another by delivery thereof with an intention to constitute the transferee the holder thereof, no such rights are transferred when the delivery was conditional or for special purpose only.

According to section 58 when a negotiable instrument has been lost or has been obtained by a person by means of an offence, say theft, or by fraud, or for an unlawful consideration, a person having such a possession of the instrument cannot claim any right in respect of any amount due on the negotiable instrument. But if such an instrument is transferred to a person as a holder in due course, he will get a good title. A transferee from holder in due course also gets as clean title as that of the holder in due course himself.

Section 120 says that no maker of a promissory note and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn. Section 120 is subject to the general rule contained in section 26, which disentitles a minor to make a promissory note.

Section 121 provides that no maker of a promissory note and no acceptor of a bill of exchange payable to order shall in a suit thereon by a holder in due course, be permitted to deny the payee’s capacity at the date of the note or bill, to endorse the same. Against a holder in due course the maker of a promissory note and the acceptor of a bill of exchange are stopped from denying the payee’s capacity to endorse the negotiable instrument.

A combined reading of sections 8, 9, 14 and 15 clearly shows that a promissory note, bill of exchange or a cheque can be negotiated or transferred by making an endorsement either on the instrument or on a separate paper annexed thereto. The transferee of such instrument becomes the holder if that person is entitled in his own name to the possession thereof when it is transferred in his favour by making the necessary endorsement. The holder of a cheque becomes holder in due course only when he has become the possessor thereof for consideration without knowing any defect existed in the title of the person from whom he derived the title. No one can sue
on a negotiable instrument as a holder unless he is named therein as the payee or unless he becomes entitled to it as endorsee or bearer.\(^{82}\)

The Hon’ble Karnataka High Court in case of **Praveen Metal Agencies, Bangalore v. M. Balasubramanayam**\(^{83}\) held that wherein the cheque endorsed in favour of the possessor, merely because some part was written by somebody other than the signatory, it could not be said that the party in whose favour it was endorsed should have been put on guard against accepting it when he had no reason to suspect the genuineness of the signature. There is a presumption under section 118 that every such instrument was made or drawn for consideration and that a holder of a Negotiable instrument is a holder in due course, subject to the proviso stated in clause (g) section 118. In the language of section 92 of the Negotiable Instruments Act, a cheque is dishonoured only when the drawer of the cheque makes default in payment ‘on being duly required to pay the sum’.

In the case of **Mathew George v. Jacob**\(^{84}\) the Kerala High Court held that complainant need not prove identity of accused: A reading of section 138 would clearly indicate that as and when cheque signed in discharge of a legally enforceable debt is dishonoured, the offence under section 138 of the Act comes into existence. Further, as per section 139 of the act, there is a presumption in favour of the holder of the cheque. It is the burden of the complainant to prove that the cheque was signed by the drawer in discharge of a legally enforceable debt. If such burden is proved, the presumption under section 139 of the Act comes into force in favour of the complainant. In such circumstances, the identity of the signatory of a negotiable instrument does not arise. Further, as per section 9 of the Act, a complaint can be filed by a person who is holder in due course of a negotiable instrument like the cheque.

That apart, in the decision reported in **Venugopalan v. Prakasan**, the Kerala High Court had taken the view that when a private complaint is filed before the court,

\(^{82}\) Munaluri Narayanamoorthi v. Dwadasi Vumamaheswaran AIR 1930 Mad 197.
the court is expected to make an enquiry under section 202, Cr.P.C. only with regard to the offence alleged and not with regard to the identity of the accused who committed the offence. In the above circumstances, identity of the signatory of a cheque is not a question to be considered by the Trial Court.

In case of Sardar Jasvir Singh v. State of Uttar Pradesh in the Hon’ble Allahabad High Court held that a person in possession of cheque and cheque is payable to bearer would be deemed to be holder in due course of cheque and would have locus to file complaint of dishonour of cheque.\(^\text{85}\)

In a case of Noor Mohammad v. Haridas, the Patna High Court held that where a loan is advanced on a hand note by an unregistered money-lender, a suit for recovery of the loan by an endorsee of the hand note would be barred by the provisions of section 4, even if the endorsee was a registered money – lender on the date when the loan was advanced. The mere fact that the endorsee of the note is a holder in due course within the meaning of section 9, Negotiable Instruments Act, will not affect the position.\(^\text{86}\)

XIV  NEGOTIATION OF NEGOTIABLE INSTRUMENTS

When the holder of a negotiable instrument is entitled to receive its payable, transfers the negotiable instrument to another person so that the transferee now becomes entitled to receive the payment, the instrument is said to have been negotiated. When a promissory note, bill of exchange or a cheque is transferred to any person, so as to constitute that person the holder there of, the instrument is said to be negotiated. In other words negotiation implies, a transfer of negotiable instrument from one person to another in accordance with the provisions of the negotiable instrument act. So that the rights in a negotiable instrument are transferred from one person to another. It is necessary that the transferee of the instrument must have been

\(^{85}\) AIR 2007 (NOC) 1617 (All): 2007 (3) ALJ 553.

\(^{86}\) AIR 1953 Pat (DB): ILR 1952 Pat 484.
made with an intention to transfer the rights. If that intention is not there, the rights would not be transferred. In the case of a bearer instrument, the rights can be transferred by mere delivery. If such a delivery is made with an intention to transfer the rights the transferee will be entitled to receive the payment of the same. On the other hand, if that intention is missing, the transferee will not get such a right. The rights in a negotiable instrument can be transferred from one person to another in two ways:-

(a) By negotiation under the negotiable instruments Act.

(b) By assignment under section 130 of the transfer of property act.

XV HOW IS NEGOTIABLE INSTRUMENT NEGOTIATED?

A negotiable instrument can be negotiated in two ways: (i) if the instrument is bearer instrument, the rights in it can be transferred by mere delivery from one person to another. It is however, necessary that the delivery of the negotiable instrument must have been made with an intention to transfer ownership, i.e. constitute the transferee as the holder of the instrument, as required by section 14, (ii) If the instrument is an order one the rights in it can be transferred by endorsement and delivery.

It has been noted above that an order instrument can be negotiated by endorsement of the same and then delivery thereof. The rights in the instrument are not transferred to the endorsee unless after the endorsement the same has been delivered. If a person makes the endorsement of an instrument but before the same could be delivered to the endorsee the endorser dies, the legal representatives of the deceased person can not negotiate the same by mere delivery thereof. Since the legal representative is not the agent of the deceased. He cannot complete the process of negotiation left incomplete by the deceased.

XVI WHO MAY ENDORSE AND NEGOTIATE THE INSTRUMENT?

Every sole maker, drawer, payee or endorsee or all of several joint makers, drawers, payees or endorsees, of a negotiable instrument may endorse and negotiate
the same unless the negotiability of such instrument has been restricted or excluded as mentioned in section 50. It is necessary that such maker or drawer who wants to endorse the instrument is in lawful possession of the instrument, or the payee or endorsee who wants to endorse is the holder of this instrument.

XVII ENDORSEMENT AND ITS KINDS

When the maker or holder of a negotiable instruments signs the same otherwise than as such maker, for the purpose of negotiation, on the back or face thereof, or on a slip of paper annexed there to or so signs for the same purpose a stamped paper intended to be completed as negotiable instrument, he is said to endorse the same, and is called the “endorser.” The endorsement therefore means signatures of the person which are generally made at the back of the instrument, for the purpose of transfer of rights to another person. An endorsement is completed by the delivery of the instrument to the endorsee. Indeed every contract on a bill whether it be the drawer’s, the acceptor’s or and endorser’s is incomplete and revocable until delivery of the instrument in order to give effect there to. An endorsement means an endorsement completed by delivery. Thus where a person endorser on instrument to another and keeps it in his papers where it is found after his death and delivered to the endorsee, the latter gets no right on the instrument. This is further reinforced by the provisions in section 57 which says that a legal representative can not buy delivery only negotiate an instrument endorsed by the deceased.

Similarly, where a person finds or, takes away an instrument duly endorsed to him, he gets no right on the instruments. But the holder of a note cut it into two pieces and posted one half to a person whom he wanted to remit money, he was entitled to with hold delivery of the other half, because a partial delivery does not make a complete endorsement. Where the endorser is authorized to send the instrument by post, it is deemed to have been delivered to the endorsee as soon as it is posted an it is immaterial that the cheque was stolen in the post by the thief who got it cashed where
the bank did not pay a cheque because of doubt about signature and before the doubt could be removed, the drawer of the cheque died, the gift was held to be incomplete. The bank’s authority to pay was determined. There are following types of endorsement:

A. **Endorsement in Blank:**

   Section 16- Endorsement “In blank” and “in full” “endorsee” (i) if the endorser signs his name only, the endorsement is said to be “in blank”, and if he adds a direction to pay the amount mentioned in the instrument to, or the order of, a specified person, the endorsement is said to be “in full “and the person so specified is called the “endorsee” of the instrument.

   The provisions of this act relating to a payee shall apply with the necessary modifications to an endorsee section 54, instrument endorsed in blank subject to the provisions here in after contained as the cross check, a negotiable instrument endorsed in blank is payable to the bearer thereof even though originally payable to order.

   Where the endorser signs only his name on the back of the instrument for the purpose of negotiating it that is an endorsement “in blank”. The effect of a blank endorsement is to convert the order instrument into bearer. For all purposes of negotiation it becomes a bearer instrument. It may be negotiated by simple delivery and the bearer is entitled to its payment. It remains so until the endorsement in blank is converted by the holder into endorsement in full a subsequent endorsement in full will not have the effect of converting the instrument into “order”. All subsequent endorsements will be needless and forgery of a redundant endorsement will not affect the title of any subsequent party. Where a cheque is originally payable to bearer, any endorsement in blank or in full or of restrictive nature will not destroy. Its bearer character and the banker will be discharged from his liability by payment to the

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bearer. Section 13 provides that a bearer instrument means one which is expressed to
be payable to bearer or on which the only or the last endorsement is in blank.

Where an endorsement in blank is subsequently followed by an endorsement
in full, the endorser in full will be liable to his immediate endorsee and parties
deriving title from him but not to others. When an endorsement in blank is followed
by an endorsement in full, it is called conversion of endorsement in blank into
endorsement in full.

An instrument which is once endorsed in blank becomes payable to bearer and
transferable by simple delivery. No further endorsement is necessary. If any such
endorsement in blank or in full is inserted, it remains redundant and has no effect.
When the payee of a bill of exchange has made an endorsement in blank, no
subsequent endorsee can restrain its negotiability by a special endorsement. The
endorser could have transferred the instrument by delivery and, therefore, his liability
is reckoned as that of a transferor by delivery. That is why the section says that the
amount cannot be claimed from the endorser in full. But his endorsement makes this
difference to his position that he becomes liable to the person to whom he endorsed
the instrument in full and also to such other persons who derive title from such
endorsee in full.

An endorsement may be on any part of the instrument. The writing of his
name by endorser on the face of a bill of exchange is a good endorsement.\(^{88}\)

An endorsement written with a pencil is valid endorsement within the custom
of merchants.\(^{89}\) Money was lent to a person who, in order to secure its payment, gave
a joint and several promissory note signed by himself and two others. The lender
required payment, but upon the makers procuring a new name to the note, he forbore
payment. The new name was written on the face of the note, but not under the former
name and had its date appended.\(^{90}\) It was held that the third name, though on the face

\(^{88}\) Young v Glover & Glover, (1857) Jur NS 637
\(^{89}\) Geary v Physics (1826) 5 B & C 234:108 ER 87
\(^{90}\) Re, Smith, Exp Yates, (1857) 2DeG & J 191:44 RR 1961
of the note, was added as an endorsement and for the purpose of adding a person with fresh liability and not as a new maker. “The signature, although it was written upon the face of the note, was intended to have the sense and effect of an endorsement, and it was as effectual as an endorsement as if it had been written upon the back. It is of course necessary that the name of the payee and that of the endorser should be the same, but mere misspelling of the name will not prevent the endorsee from recovering.91

B. **Endorsement in Full:**

Section 16, Endorsement “in blank” and “in full”, “endorsee” - (1) if the endorser signs his name only, the endorsement is said to be “in blank”, and if he adds a direction to pay the amount mentioned in the instrument to, or the order of, a specified person, the endorsement is said to be “in full” and the person so specified is called the “endorsee” of the instrument. (2) The provisions of this act relating to a payee shall apply with the necessary modifications to an endorsee. Where the endorser adds to his signature the name of a person whom or to whose order he wants the instrument to be paid, that is an endorsement in full. The usual form of course, is to add the words “or order” after the name of the endorsee, but, since no form is prescribed, any words will do so long as they clearly show the endorser’s intention.92 Where neutral words like “made over” or “assign” are used, the intention of the parties would have to be looked into to see whether endorsement or assignment was intended. If the words used are equivalent to a direction to pay, it would amount to an endorsement within the meaning of section 16. In a Madras case93, a note was endorsed thus: “As written above the promissory note has been assigned to the Shri. M without recourse.” This was held to be an endorsement and not an assignment. The court relied upon its earlier decision where the words used were: “assigned to you this note with power to recover the amount due under it, by showing the name”, it was

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93 P.K. Murgan v. V. Kartan. AIR 1955 Mad 53
held that since section 16 did not lay down any specific form of words, the words “assigned” in the above terms amounted to an endorsement in full\textsuperscript{94}. In another earlier case the remark was. This note has been made over to on 31\textsuperscript{st} March.” This was also held to be endorsement.

The combined effect of section 8, 16 and 51 seems to be that an instrument can be endorsed either by the maker or holder. The drawer of a bill can also, of course, endorse it as he is both the ‘maker’ as well as ‘holder’. Thus the chances of a stranger incurring the liability of an endorser by putting his signature upon an instrument seems to be ruled out though he may be held liable as a surety or backer. In an English case, a person procured a loan for his two sons and, having received a bill of exchange duly accepted by them for the amount, he signed his own name across the back and forwarded it to the lender. The sons became bankrupt and the father and the lender having died, there was no exact evidence why the father put his name of the bill. His representatives were held to be not liable, for he was not an acceptor. The court said that the character in which the father did become a party to the bill was both in fact and law that of an endorsement.\textsuperscript{95} The effect of an endorsement in full is that the instrument can be paid only to the endorsee and can be further negotiated only by his endorsement. The instrument retains its order character.

The holder of an instrument endorsed in blank may, by adding the name of a person before the endorser’s signature, convert the endorsement into full. The holder does not thereby incur any liability as an endorser. This right is given to the holder by the provision in section 49. The holder does not himself sign, but only adds the name of a person before an endorsement in blank. The holder may then transfer the instrument to the person whose name he so specified but will not incur the liability of an endorser where A, the payee of a bill of exchange, endorsed it in blank and

\textsuperscript{94} Sivarama Krishan v. M. Kunthu I.L.R. Kunthu I.L.R 33 Mad 134

\textsuperscript{95} Gwinnel v. Herbert, (1836) 5 Ad & E1436:111 ER 1231:5LJ KB 250.
delivered it to B, and B wrote above A’s endorsement, “Pay the contents to C’, but did not sign the bill, he was held not liable to C as an endorser of the bill.\textsuperscript{96}

C. **Effect of Endorsement and Restrictive Endorsement:**

The endorsement of a negotiable instrument followed by delivery transfers to the endorsee the property therein with right of further negotiation; but the endorsement may, by express words, restrict or include such right, or may merely constitute the endorsee an agent to endorse the instrument or to receive its contents for the endorser, or for some other specified person.

One of the effects of an endorsement which has been completed by delivery is that the property in the instrument passes to the endorsee and he gets the right of further endorsement. But when this right of further negotiation is, by express words in the endorsement restricted or taken, away, that is called “restrictive” endorsement. The endorser may altogether exclude the right of further negotiation or only restrict it or “may merely constitute the endorsee an agent to endorse the instrument, or to receive its contents for the endorser or for some other specified person”.

The effect of a restrictive endorsement is that the endorsee gets the right to receive the payment when due and sue the parties for it, but he cannot further negotiate the instrument except as authorized by the endorser. The endorsee is constituted merely as an agent for collection and the endorser remains the real owner of the instrument. An endorsement for collection does not as between the endorser and endorsee, pass the property in the bill to the endorsee, though it puts him in a position to make a title for a subsequent holder in due course.\textsuperscript{97} Where a bill endorsed only for collection was dishonored by non-payment and was returned by the endorsee to his endorser, it was held that the endorser regains holder ship and the endorsee remains no longer the holder.\textsuperscript{98}

\textsuperscript{96} Vincent v. Horlock (1808) 1 comp 442.
\textsuperscript{97} Liayd v. Howard 15 QB 995; 20 LJQB 1:117 ER 735
\textsuperscript{98} Subramaniam Chetty v. Algappa, ILR (1907) 30 Mad 441
A restrictive endorsement has to be distinguished from conditional delivery. Where the endorsement is without any restriction, but while delivering the instrument to the endorsee an agreement is obtained from him that he will not cash or transfer it unless a condition is fulfilled, there, if the endorsee transfers further without fulfilling the condition, the transferee may get a good right if he acts in good faith. In the case of a restrictive endorsement, the restriction upon transfer being apparent upon the endorsement, any further transferee will take the instrument subject to the restriction. Where an instrument was payable to “P or order, for the use of C”, and it was transferred by the payee to another person, the latter could not sue the acceptor of the bill. The payee did not have the owner ship of the bill. He was only an agent to hold the money for the used of C and therefore, had no right to transfer the bill. An endorsee of a cheque who obtained it in good faith for value by conditional delivery became a holder in due course on satisfaction of the condition.

Though an endorsee for collection only has no right of further transfer, he does have the right to collect the amount when due. His authority to collect the amount will not be affected by the death of the transferor. A promissory note was drawn by one R in favor of M or to his order. M endorsed it and handed it over to V for collection. After M’s death V sued on the note. It was contended in defence that as the note did not pass to V for consideration and V’s authority ceased on ‘M’s death, he could not recover the money without having obtained letters of administration or succession certificate the court repelled the contention and held that the note, being negotiable, its endorsement followed by delivery passed the property in it to V and he became a holder of it and payment had to be made to him.

101 Ramzan Ali v. Vallas Wami Pillai (1910) 8 Ind Cas-967
D. **Endorsement Sans Recourse**

Endorser who excludes his own liability or makes it conditional. The endorser of a negotiable instrument may, by express words in the endorsement, exclude his own liability there on or make such liability or the right of the endorsee to receive the amount due there on depend upon the happening of a specified event, although such event may never happen. Where an endorser so excludes his liability and after words become the holder of the instrument, all intermediate endorsers are liable to him.

If the endorser does not want to incur any liability as endorser, he can insert a stipulation in his endorsement negative or limiting his liability. A person who was not a party to a cheque, at the request of the payee wrote his name on the back thereof, adding the words “sans recourse” it was held that an endorser has a right to negative his liability by suitable words.\(^{102}\) When an endorser of this kind becomes the holder of the instrument in his own right, all intermediate endorsers are liable to him.

E. **Conditional Endorsement:**

The endorser can also insert a condition in his endorsement. He may, say that “Pay B or order on his marriage” or on the arrival of a ship”. A condition of this kind does not affect the position of the party who has to pay the instrument on its maturity. He may pay to the endorsee and will be discharged from liability whether the condition has been fulfilled or not. But as between the endorser and endorsee the condition is operative. If the endorsee obtains the payment without the condition being fulfilled he will hold the same in trust for the endorser.

A conditional endorsement should be distinguished from a conditional delivery. In conditional delivery no mention of the condition is made in the endorsement or any where else on the instrument. The condition is separately stipulated upon. In a case before the Guwahati High court an instrument was executed showing the consideration as paid, but the evidence adduced showed that the same

\(^{102}\) Wakefield v. Alexander & Co. (1901) 17TLR 217
was delivered subject to the condition that it would be enforced only on possession of a certain land being delivered. The whole of the land was not delivered and, therefore, the payee was not allowed to enforce payment.\textsuperscript{103}

\textbf{F. Partial Endorsement:}

Endorsement for part of sum due- No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid, a note to that effect may be endorsed on the instrument, which may then be negotiated for the balance.

An instrument cannot be endorsed for a part of its amount only.\textsuperscript{104} If the instrument is for Rs 100 it can not be endorsed for Rs 50 only. But if the amount due has already been partly paid, a note to that effect may be endorsed on the instrument and it may then be negotiated for the balance where an instrument has been partly paid but the fact of part payment is not entered on it, and, if it is endorsed to a bona fide holder, it will be an instrument of full value in his hand.\textsuperscript{105}

The transfer of an instrument to two different persons will mean part transfer in favour of one and part in favour of the other. It will also be in operative under section 56. Such persons, however, become Joint owners of the instrument and may recover as joint payees whatever may be their mutual rights.

The Act recognize only two modes of transfer, namely, delivery and endorsement. But the act is not exhaustive and, therefore, an instrument can also pass either by operation of law or assignment. An assignment takes place by the act of the holder by which he confers his right to receive payment upon another. It may require the formalities of an assignment, but it does not require the formalities of an endorsement. An endorsement includes assignment thus where an endorsement failed

\textsuperscript{104} Hawkings v. Cardy (1699) 1 Ld Raym 360:91 ER1137
\textsuperscript{105} Shaik Md. Hussain v. M. Reddaiah (1979) 1 Andh RLT 25.
to effective as such, the Madras High Court held that it could still be relied upon as an assignment, entitling the assignee to sue on the note. There are, no doubt certain decision to the effect that an assignee of negotiable instrument can not sue unless it is endorsed to him. But the preponderance of authority is in favor of the view that an assignment is an effective method of transferring the owner ship of a negotiable instrument in a Madras case. It was contended that the act did not permit any kind of transfer other then be endorsement and the court should not go beyond the four corners of the act. Dealing with this, the court said: The fact that the note is negotiable does not make any difference except that it carries with it certain peculiar incidents attached to it by the law merchant. The rules in regard to these chose in action prior to the act do not cease to be any the less applicable to them by the passing of the act. The observations of the Mr. Chalmers with regard to the (English) Bill of exchange act, 1882 may very well be applied to the negotiable instruments act. He says: the acts deals only with transfer by negotiation, that is, transfer according to the law merchant. It leaves untouched the rules of general law, which regulate the transmission of bills by act of law and there transfer as chose in action or chattels according to the general law. The practice of allowing legal representatives in this country to sue on notes executed to their predecessors is apparently founded on the principle that the act does not abrogate the rules of devolution of rights in the properties of the deceased. The Calcutta high court allowed a receiver in a partition suit to enforce the payment of notes executed in favor of the family. English law also recognizes this mode of transfer. It was observed in an early case that an assignment in general terms of personal estate will pass promissory notes in possession of the settler, although not endorsed to the donee.

35 Muhammad Khurmarali v. Rangarao, ILR 24 Mad 654.
108 Asuram v. Nirjan Das ILR (1963) 13 Raj 963
110 Kalicharan Prasad v. Mohd Abrahim, 41 cal WN 697
XVIII INSTRUMENT OBTAINED BY UNLAWFUL MEANS OR FOR UNLAWFUL CONSIDERATION

When a negotiable instrument has been lost, or, has been obtained from any maker, acceptor, holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or endorsee who claims though the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder or from any party prior to such holder, unless such possessor or endorsee is, or some person though whom he claims was, a holder thereof in due course.

The section states in essence five principles one of them is about the position of a person who take san instrument with knowledge that there was something wrong. Such person does not get a perfect title. His title will be as defective as the instrument itself, is or as defective as the title of the transferor. In short, he takes the instrument subject to all equities.

The section is designed to recognize and give effect to, the real characteristics of a negotiable instrument, namely, the acquisition of property in favor of any person who has received the instrument in good faith. In examining the title of a person to a negotiable instrument, regard should be had to the recipient’s conduct and not that of the transferor. For, even where the transferor has no title, the person who receives the instrument from him in good faith and for value, may acquire a valid title. According section 58 provides that as against a holder in due course and the persons deriving their title from him, the party liable on an instrument can not say that the instrument was lost, or was obtained by means of an offence, or fraud, or for an unlawful consideration. Such defence may be taken against a bare holder or those receiving the instrument from him, but are not available against a holder in due course and those who receive the instrument from him. One of the best known illustrations affecting loss of an instrument is the decision of the House of Lords in Raphael V. bank of
England. A money changer at Paris, 12 months after he had received notice of the robbery of bank notes at Liverpool, took one of the stolen notes at Paris, giving cash for it. Less than the current rate of exchange, from a stranger, whom he merely by required to produce his passport and write his name on the back of the note. The court found as a fact that the circumstance of his forgetting or omitting to look for the notice was no evidence of male fides. Accordingly he was allowed to recover the payment of the note from the Bank of England “One who takes a negotiable security bona fide, i.e. giving value for it and having no notice at the time that the party from whom he takes has no title, is entitled to recover upon it, although he may at the time have had the means of knowledge of that fact, of which means he neglected to avail himself.” The same holds good when an instrument is stolen.

Where the loss or theft has been advertised through newspapers or other media, even there a bona fide recipient would be entitled to recover the amount, unless it could be shown that he did get knowledge of the fact of theft or loss. “where a bill of exchange with a blank endorsement was stolen and negotiated, an innocent endorsee was allowed to recover upon it against the drawer. The fact that the person who stole and passed the instrument to a bona fide recipient, has been prosecuted to conviction, would make no difference to the title of the bona fide possessor.

Where an instrument is obtained by fraud, the party committing the fraud can not enforce it, for, as against him the instrument is voidable, but if he passes it to a holder in due course, the defence of fraud will not be available against the latter. In determining which of the two innocent parties had to bear the loss, the issuing bank had to be the loss bearer. The delivery of the draft, though under a fraud, established a voidable contract under which the title passed to the receiving bank.

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111 (1855) 17 CB 161; 251 LJCP33:26LTOS 60: 4WR10: 139 ER 1030.
112 Lawson v. Webston, (1801)6 ESP 56 NP
Where an instrument is obtained for an unlawful consideration which sends the agreement unlawful under section 23 of the contract Act or which makes it void under section 25 to 30 of the same act, the instrument is not valid as between the immediate parties. Thus a promissory note given for illicit cohabitation, for stifling prosecution\textsuperscript{116} for payment of money lost in a wagering transaction, for inducing a person to give evidence, have been held to be not enforceable for illegality of consideration. A promissory note given to a lender of money, who did not know that the money would be used for a marriage in violation of the child marriage restraint Act, 1929 was allowed to be enforced.\textsuperscript{117}

An instrument of this kind which is afflicted with the blemish of illegality or want of consideration, and is not enforceable for that reason between the immediate parties, when once it comes to the hands of a holder in due course, it is purged of all its defect consequently, such holder gets a clean title he and those deriving title from him, can enforce the payment of the instrument. The party liable will not be heard to say that there was offence, illegality or lack of consideration in the making or endorsement of the instrument.\textsuperscript{118}

The great characteristic of a negotiable instrument and this unique privilege of its possessor, who is a holder in due course, is, however, subject to a few overriding qualifications. One of them is that the person who signed an instrument either as its maker or endorser can take the defence of non est factum, namely, that, although his signature was appended to a negotiable instrument, he did not in fact intend to sign any such document, or that he signed under the mistaken belief that he was signing some other document. The principle came to this point of evolution through the judgment of Byles J in Foster v. Mack inn on.\textsuperscript{119} A person was induced to sign the back of a paper, the face of which was not shown to him and he was told that it was

\textsuperscript{116} Longathan v. P.Naicker, AIR 1969 Mad 15.
\textsuperscript{117} Punnakotiah v. Kolikamba,A.I.R. (1967)A.P. 83
\textsuperscript{118} Shahbuddin v. Venkatachalam, AIR 1938 Mad 913.
\textsuperscript{119} (1869)LR 4 CP 704:38LJCP 310:20 LT 887.
an ordinary guarantee the like of which he had signed before and under which no liability came to him. When, in fact, the paper was a bill of exchange and he was sued by a holder in due course as an endorser. In such cases, though the signature is genuine, the instrument is forged and the consequence is as bad as that of forgery of signature. The defence of non est factum is not available when a person signs in circumstances implying negligence. In a case before the house of lords an old lady signed a document which she could not read because she had mislaid her spectacles. She was not allowed to be relieved of the consequences of her signature as against a person who in good faith acquired interest in the document.120

Section 58 of the negotiable instruments act, which protects a holder in due course where a negotiable instrument has been obtained by mean of an offence does not apply to a case of forgery. In a case of hundi was stolen while in transit to the payee. It came to the hands of a person through two forged endorsement. He obtained payment from the unsuspecting drawee of the hundi. It was held that neither the drawee was discharged by such payment, nor the person who obtained payment was entitled the holder it, as against the person, who was the real owner of the instrument during its transit. “The only exception to this is where the payee’s endorsement on a cheque payable to order is forged. In such a case it is provided by section 85 of the Negotiable instruments Act 1881, that the drawee is discharged if he pays the amount in due course. No holder of a negotiable instrument though he may be holder in due course, can acquire a title to the instrument through a forged endorsement.121

XIX  NEGOTIATION OF DISHONORED OR OVERDUE INSTRUMENTS:

An instrument remains negotiable in the real sense of the word with its characteristic of conferring title upon a bona fide holder for value only during the period of its currency. The currency of an instrument ends when it reaches its maturity or is dishonored earlier either by non-acceptance or by non- payment. There after it is

121 Brij Basi v. Motiram, AIR 1982 All 323 at p 328.
no more. Negotiable and a person acquiring it with knowledge of its dishonor or maturity gets no better rights than those of his transferor. The maturity of an instrument can be examined from its face particularly when it is payable after a fixed period of time so far as demand instruments are concerned. Maturity varies with the nature of the document. A promissory note payable on demand remains current until it is presented and dishonored. \(^{122}\)

A cheque is always payable on demand and remains current only for a short period after issue where an instrument has been dishonored before it reaches its maturity and the fact of dishonor is apparent on its face, no one can become its holder in due course there after. But if the fact of dishonor is not noted in the instrument and it is transferred to a person who did not know, he will acquire a good title to the instrument. Where an instrument is already overdue according to its own apparent tenor, a transferee of it will acquire no better title than that of the transferor not with standing that he may have taken the instrument bona fide and for a valuable consideration. \(^{123}\)

An overdue or dishonored instrument carries with it all its blemishes. In a case a note was issued without consideration and though it was given by the payee to his endorsee for consideration, it being already overdue at the time, it was held that the endorsee was also affected by the want of consideration. \(^{124}\) Where a person takes a note a long time after it is overdue, he takes it subject to all the equities by which it is affected. In another case a note was endorsed after it was due, and that is a suspicious circumstance, from which the law infers that the party taking the note had knowledge of some infirmity in the title of the holder, the endorsee then takes it subject to all the objections to which it was liable in the hands of the person from whom he took it \(^{125}\) where an instrument is delivered to a person for a special purpose only and not for

\(^{122}\) Borough v. White (1825) 4 B& C 325:107ER:107ER 1080

\(^{123}\) Ashurst v. Royal Bank of Australia (1856) 27 LT (OS) 168

\(^{124}\) Tinson v. Francis (1807) Comp 19 NP.

\(^{125}\) Holroyd Jim Amory v. Merry weather, (1824) 2 B & C 573:2LJ (05) K.B 111.
negotiation and he ignoring that restriction, transfers it to another while it was overdue, the transferee would be affected by the restriction.

Where a person takes an overdue instrument from the hands of a holder in due course, he gets the rights of such holder although he had knowledge of the fact where a bill was accepted for payment of smuggling debts and it was endorsed by the payee within time to a bona fide holder for value, who, when it was overdue, endorsed it to the last holder, it was held that the first endorsee was a holder in due course. He was not affected by the illegality and the endorsee from him got his rights. He was allowed to recover payment although he had taken bill after maturity.\(^{126}\)

Another exception is in favor of accommodation bills or notes. An accommodation instrument means one which has been made in order only to enable a person to raise money by endorsing or discounting the instrument. The person who makes a note or accepts a bill in order only to enable a needy person to raise a sum of money, has his remedy against the person whom he has thus accommodated. He is liable to the person who is for the time being the holder of the instrument and he can recover his indemnity from the accommodated party. The proviso to section 59 has this effect that where a person in good faith and for consideration becomes the holder of an accommodation bill or note. He can recover the amount from prior parties even if he took the instrument after its maturity. The holder of an accommodation bill or note need not be a holder in due course. It will be enough that he is a holder in good faith and for consideration.

Instruments remain negotiable till they are discharged by payment or by some other satisfaction. “A bill of exchange is negotiable and infinitum until it has been paid by, or discharged on behalf of the acceptor”\(^{127}\) section 60 provides that an instrument may be negotiated until payment or satisfaction at or after maturity, but not after such payment or satisfaction. The effect is that where an instrument has reached

\(^{126}\) Chalmers v. Lanton (1808) 1 comp 383 NP.
\(^{127}\) Lord Ellenborough in Callow v. Lawrence, (1814) 3 M & S 97.
its maturity, but has not been paid, it remains negotiable. It can still be transferred, though, of course the transferee being not a holder in due course, will be affected by any defects in the title of his transferor. Subject to this, the title of the transferee will be valid and he will be entitled to recover payment. Thus it is not the maturity, but the fact of actual payment at or after maturity, which puts an end to the negotiability of an instrument. Even payment will not end the life of an instrument if it is not a payment “at or after maturity”. Where payment is made before maturity, the instrument remains valid for further negotiation unless the fact of payment is noted on it or it is withdrawn, cancelled or destroyed. In a Madras case,\textsuperscript{128} it was pleaded as against the demand of an endorsee that the note which was endorsed to him was already discharged by the substitution of a new note. The court replied:

“\begin{quote}
It has not been clearly found that the discharge took place actually before the endorsement. Even assuming that the discharge was prior to the endorsement, there is no evidence whatever to show that the fact of discharge was known to the plaintiff when he took the endorsement or that he was aware that any demand has been made for payment of the debt due under the promissory note before he took the endorsement. The law is very clear that where an endorsee of a promissory note payable on demand is not aware that the note has been discharged or that any demand was made he must be deemed to be a holder in due course even if as a matter of fact the endorsement in his favour was made after the discharge\textsuperscript{129}
\end{quote}

Where, on the other hand, in another case before the Madras high court\textsuperscript{130}, the whole of the amount due on a promissory note, except the last instalment, had already been paid before the note was endorsed to the plaintiff and, in the circumstances of the case, the plaintiff was not a holder in due course, he was not allowed to recover under the instrument.

\textsuperscript{128} Venkataratnam v. Kenaksundra, AIR 1936 Mad 879.
\textsuperscript{129} Sivrama v. Manglaseri, ILR (1910) 38 Mad 34:31 C 428.
\textsuperscript{130} Ellappa chettiar v. Sesha Aiyer, AIR 1938-Mad 897.
CONCLUDING REMARKS

A negotiable instrument is one the property in which is acquired by any one who takes it *bonafide* and for value, notwithstanding any defect of title in the person from whom he took it, from which is follows that an instrument cannot be negotiable unless it is such and in such a state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument. In order to ascertain the negotiability, whether it exists or not, certain tests can be applied. In other words negotiability means that a cheque is transferable. It may, therefore, be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it *protempore*, then it is entitled to the name of a ‘negotiable instrument’, and the property in it passes to a *bona-fide* transferee for value, thought the transfer may not have taken place in ‘market overt’. But that if either of the above requisites be wanting, i.e. if it be either not accustomably transferable, or thought it be accustomably transferable, yet, if its nature be such as to render it incapable of being in suit by the party holding it *protempore*, it is not a negotiable instrument, not will delivery of it pass the property in it to a vendee, however, *bona-fide* if the transferor himself have not a good title to it and the transfer be made out of market overt.

The general rule of law is undoubted that no one can transfer a better title than he himself possesses: *nemo dat quod non habet*. To this there are some exceptions, one of which arises out of the rule of the law merchant as to negotiable instruments. These being part of the currency, are subject to the same rule as money, and if such an instrument be transferred in good faith for value before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner, whereby a title is acquired according to the law merchant, and not a transfer which is valid (only) in equity according to the doctrine respecting the assignment of chose-in-action; and it is
therefore clear that in order to acquire the benefit of this rule the holder must, if it be payable to order, obtain an endorsement, and that he is affected by notice of a fraud received before he does so. Until he does so he is merely in the position of the assignee of an ordinary chose-in-action, and has no better title than his assignor.

A negotiable instrument can be negotiated in two ways: (i) if the instrument is bearer instrument, the rights in it can be transferred by mere delivery from one person to another. It is however, necessary that the delivery of the negotiable instrument must have been made with an intention to transfer ownership, i.e. constitute the transferee as the holder of the instrument, as required by section 14, (ii) If the instrument is an order one the rights in it can be transferred by endorsement and delivery.

It has been noted above that an order instrument can be negotiated by endorsement of the same and then delivery there of. The rights in the instrument are not transferred to the endorsee unless after the endorsement the same has been delivered. If a person makes the endorsement of an instrument but before the same could be delivered to the endorsee the endorser dies, the legal representatives of the deceased person can not negotiate the same by mere delivery thereof. Since the legal representative is not the agent of the deceased. He cannot complete the process of negotiation left incomplete by the deceased.

When a negotiable instrument has been lost, or, has been obtained from any maker, acceptor, holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or endorsee who claims though the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder or from any party prior to such holder, unless such possessor or endorsee is, or some person though whom he claims was, a holder thereof in due course.

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